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REGULATION IV OF 1109.

TRAVANCORE (MATCHES) EXCISE DUTY REGULATION.

CONTENTS

Preamble

Sections

1	Short title and extent	1
2	Definitions	2
3	Imposition of duty on matches	3
4.	Rates of duty	4
5	Recovery of duty with penalty	5
6.	Issue of matches from manufactory	6
7	Power of Government to prohibit import of matches	7
8	Power of Government to direct use of banderols	8
9	Prohibition of manufacture of matches and manufacture and import of splints and veneers	9
10	Penalty for issue of matches from manufactory in contravention of Section 6.	10
11	Penalty for import of matches in contravention of Regulation	11
12	Penalty for issue or sale of matches without banderol.	12
13.	Penalty for manufacture of matches and manufacture and import of splints and veneers without licence	13
14.	Penalty for evasion of duty or failure to supply information	14
15	Power of Courts to order forfeiture of matches, splints or veneers.	15
16.	Application of Regulation V of 1088 to the importation of matches, splints or veneers.	16
17	Application of the provisions of Regulation V of 1088 to the duty on matches.	17
18	Power of Government to make Rules	18
19	Power of Government to provide for rebate of duty	19

The figures on the right side refer to the corresponding Sections of the Indian Act, No. XVI of 1934.

A Regulation to provide for the imposition and collection of an excise duty on matches

Passed by His Highness the Maha Raja of Travancore under date the 20th June 1934, corresponding to the 6th Mithunam 1109, under Section 23 of Regulation II of 1108

Preamble

Whereas it is expedient to impose an excise duty on matches and to provide for the collection thereof; It is hereby enacted as follows —

Regn IV of 1108 I *Objects and Reasons* —(i) "The main purpose of this Bill is to impose an excise duty on matches made in Travancore A similar duty has just now been imposed in British India by the Matches (Excise duty) Act, 1934. It is necessary and expedient that Travancore should do likewise

2 A general power is also taken, by the Bill, to impose excise duties on such articles as Government may find it necessary to do so from time to time' —*S O & R*

(2) In introducing the Bill in the Sri Mulam Assembly, the Official Member in charge said—"The main purpose of the Bill is to levy an excise duty on matches manufactured in Travancore The rate of duty is specified in Clause 4 of the Bill, and the proposal is to levy a duty *per* gross of boxes having regard to the contents of each box As the honourable members may see from Clause 4 of the Bill, Sub-clauses (ii) and (iii) lay down that the duty is Br Re 1 per gross of boxes where the average number of matches in a box is 40 or less and that it is Re. 1 as. 8 per gross of boxes where the content of each is more than 40 matches but less than 60 and Rs 2 per gross of boxes where the number in a box is more than 60 but not more than 80 This rate of duty works out at about 3 cash per match box where a box contains 40 matches and it will be proportionately larger where the content of the box is larger For instance, if the content is 80 matches, the duty will be about 6 cash per box The main principle involved in this Bill is the imposition of the duty

Clauses 7 to 9 provide for the procedure and machinery for the efficient collection of the duty Clauses 5 and 10 to 16 provide for penalties for the evasion of the payment of duty and for contraventions of the rules of procedure, &c Clause 18 provides for the rule-making power In Clause 20, the power is proposed to be taken by Government for the imposition of duty on such other articles as Government may think it necessary to do so from time to time Honourable members will see that the principle involved in the Bill is very brief and simple.

The immediate occasion for the introduction of this Bill is the imposition of a similar duty in British India by an Act passed there very recently, *viz* the Match Duty Act passed by the Indian Legislative Assembly for the whole of British India The rate of duty proposed by this Bill is exactly the same as that proposed by the British Indian Legislature And, in fact, the procedure and the machinery for the collection of the duty and the other provisions of the proposed Bill are practically the same as those laid down by the Indian enactment In fact, the Bill is but an adaptation of that Act. Honourable members who have been following the proceedings of the Indian Legislature would have noticed that the British Government have invited the co-operation of the Indian States in the matter of the efficient collection of this duty and that

1 (1) This Regulation may be called the "Travancore (Matches) Excise Duty Regulation."

Short title and extent

(2) It extends to the whole of Travancore

for a very good reason The Indian States and British India lie interspersed and where such matters have to be regulated it is very necessary in some cases that the States should act in union with British India In this particular case, in regard to the imposition of the match duty, it will be realised that co-operation has become very necessary for some special reasons. If there is no co-operation and if the States do dot impose a like duty for their territories, there will be an unfair competition between the industry in British India on the one hand and the States on the other More than this, if there is no equivalent duty in the States, there is likely to be undue transference of the match industry from British India to the States, because the machinery required for making matches is very small and light and can be easily moved Furthermore, there is also the fact that in the nature of the matches it is very easy to smuggle matches from the States into British India and such smuggling will happen if there is no equivalent duty in the States. Therefore the British Government invited the co-operation of the States and requested them to impose similar duty in their States, and as I said before, the honourable members who have been following the Government of India Finance Member s speech must have noticed that most of the States have agreed to co-operate. It is accordingly necessary that Travancore also should agree to co-operate It is in the light of this important fact that this Bill has been introduced '

The following are extracts from the observations made by the Member in charge in the course of the debate –"Considerations of revenue need not be left out of account even here. But I may say frankly that the immediate cause is not any such consideration, but it is the necessity for the co-operation of Travancore with British India We are all members of the same Indian Empire and it is necessary that, when the major partner of British India is trying to regulate matters in their territories, we should not take a hostile attitude or any attitude which in the result is hostile "

* * *

"The arrangement is that the proceeds of the duty levied here and in British India will be pooled together and distributed among the States and British India in proportion to their population, and it is expected that we will get about 4 or 5 lakhs of rupees annually in the division or some such figure. That is why I submitted that revenue need not be kept entirely out of consideration "

* * *

"It will be seen from the British Indian Enactment that no special concession is made in regard to the so-called cottage industry in match making. Those who have followed the debate on this measure in the British Indian Legislative Assembly will have noticed also the special reason that was urged by the Honourable the Finance Member for not giving any concession for the cottage industry Perhaps I may read the relevant portion from the speech of the Honourable the Finance Member – "The Bill will provide for no concession in favour of the so called cottage industry which really means nothing more than the dipping in chemical mixtures of splints made in factories and the pasting of paper wrappers and of strips carrying other chemical mixtures on boxes made from veneers made in factories. Any such concession would make evasion of the duty and an artificial attack on the position of regular match factories materially easy, and we

are justified in allowing the consideration to prevail by the fact that the Tariff Board, in paragraph 134 of their Report regarding the grant of protection to the match industry, definitely advised against any special measures which would have the effect of encouraging match-making as a cottage industry, because it was not suitable for such operations both on economic grounds and because of the dangerously inflammable nature of the materials used" In this view, this Bill too does not make provision for any special concession to the cottage industry

(3) Extracts from the speech of the Chief Secretary to the Government are also appended in further explanation of the proposed measure —"In considering this Bill, the House has to make up its mind on two questions, *viz*, whether it is advantageous or not to follow the example of the Government of India and introduce an excise duty on matches, and if it is advantageous, whether or not the Travancore Government should agree to join the pool as suggested by the Government of India and get a share of the revenue on the population basis. Regarding the first question, Sir, to me it seems that the proper thing to do is that we should follow the example of the Government of India and impose an excise duty on matches. The reasons I have in my mind are various. * * The main object of the Government of India was to increase their revenue and they have decided upon the imposition of these excise duties. And the Honourable the Finance Member also said in his speech that the Government of India would look up to the States to cooperate with them to enable them to realise the revenue which they hoped to realise, and he also said that if any State did not agree to the imposition of the duty on matches manufactured within its borders, he would prohibit the import of such matches into British India. Sir, when the Government of India have introduced this duty with a view to raise revenue to get over their financial difficulties, is it not desirable that Travancore, which looks up to the Government of India for various concessions in important matters, should agree to co-operate with them? By doing so, do we not also stand to gain? Have we not been promised a share of this revenue? Further, if any State did not agree to levy duty, the chances are that some of the match manufacturing companies in British India will shift their scene of operations to the State * * The Finance Member hopes to collect three and a half crores of revenue, and if the States refuse to join in this business, most of the match manufacturing companies will transfer their activities to the various States and the Finance Member can never hope to get the revenue he has estimated Apart from the revenue that we may get, is it not advisable for us to extend our hand of co operation to the Government of India * * *

"From the consumer's point of view, it has been pointed out by some member that once you levy this duty the consumer has likely to pay a considerably higher price for matches than what he now pays That may be so Even if we do not levy the duty and if the rest of India does it, I am afraid, the consumer here will have to pay the same price which the consumer outside Travancore pays. * When persons beyond the frontiers of Travancore have to pay, say, eight cash for a box of matches, is it likely that manufacturers and merchants within the State will sell their matches at a lower price? The merchants and manufacturers would certainly try to make as much profit as they can unless the Government interfere and prohibit the raising of the price They will charge the same price in Travancore as that prevailing outside, so that the consumer is not going to be benefited by our refusing to levy duty on our matches After all, there are only two match manufacturing concerns in this State, of which one, I am

afraid, is in a moribund condition, I mean the one at Tenmalai which is having a precarious existence At present, there is only one factory working satisfactorily * * Even if you do not pass this Bill, their (producers') condition is not going to improve Well, Sir, those who have used matches and especially those who are smokers know the superiority of the imported matches. Nobody here cares to buy the matches made in Travancore In this humid climate, they do not keep for more than a day or two It may be due to the defect in the process of manufacture. The people here generally buy only the imported matches * * * We are talking of Federation and other constitutional changes. There exist our Interportal Trade Convention and our commitments in the Cochin Harbour Scheme. We should certainly retain the good will and sympathy of the Government of India, and from this point of view, it is very essential that we should follow the example of that Government * *

Regarding the revenue, * * If we ourselves keep all the duty we may collect, our revenue will depend on the production here, and that varies from year to year In 1106, we would have got probably about Rs. 4,90,000, in 1107 about 7 lakhs, and in 1108 only Rs. 2,93,000 Revenue varies according to production, and production is in proportion to demand. In 1106, 1107 and 1108, there have been wide variations in production If we take our share from the common pool, we may get about 2 8 lakhs, if we do not join the pool, we may probably get 2·9 lakhs on the output of matches in Travancore in 1108 But, in British India, the match industry may develop considerably and their receipts from duty may increase. There is not much chance for the development of the industry here because we have no big capitalists. Even the two factories we now have have been financed mostly by British Indian capitalists. The industry is likely to develop more rapidly in British India than here and, in that case, it is more advantageous for us to join the pool * * *

Legis Assembly Pro, dated 21-5-1934

(4) The Official Member in charge moved in the State Council that the Bill, as passed by the Assembly, be taken into consideration, and spoke in support of the acceptance of the motion A non official member moved that the Bill be referred to a Select Committee In putting the motion, (which was lost), to the vote of the House, the Dewan-President made the following observations "for elucidating the matter so that the House may know what it is really voting for" He said — "It seems to me that there are only three parties to be kept in mind before we decide whether this particular measure before the House is good or bad The three parties are the consumers, the manufacturers and the Government It has been tried to be shown that the consumer will be hit hard if this excise duty is levied On the side of Government it was tried to be shown that the consumer will, on no circumstances, be benefited even if we do not levy any excise duty on the matches manufactured in Travancore. The manufacturers know how to regulate their prices according to the prices ruling in other markets. It is rather difficult to believe that the manufacturers in Travancore will be guided merely by a spirit of patriotism to sell matches to the people within Travancore at prices far less than the prices that may be ruling outside Travancore. * So, with every sympathy for the consumer, the position is that he cannot escape an increase in price whether we levy this duty or whether we do not levy it

Then there is the *manufacturer* to be kept in mind I heard some observations that by the levy of the excise duty this industry will be killed On the other hand it seems to me that the industry will thrive better If the excise duty is levied, it will induce the manufacturer to pull

himself up to the level of efficiency and perfection in British India and that will enable him to compete with the manufacturers outside Honourable members who have watched the working of the match factories in Travancore do know that even those that exist are struggling for existence Assuming that they are exempted from the payment of the duty will they again, as I said, issue a self-denying ordinance on themselves and keep the price low compared with the prices outside Travancore? We will be putting more money into the pockets of the manufacturer although the quality may not improve and the Government will get nothing

Then there is the question of the *Government.* If all other Governments outside British India, including Indian States, have decided to levy this excise duty, should Travancore, of all States, stand aside? It seems to me, at any rate, that it would be a fiscal policy which the whole of India has to adopt, for, although we, Native States, might manage our own affairs, all the same, we form part and parcel of the whole federation of India We are a unit fiscally, politically and otherwise as well If that is so, why should we stand aloof in this matter alone, and for whose benefit? That is the question that we have to ask to ourselves. We do not benefit the manufacturer, we do not benefit the consumer Is the *Government* benefited? No

Then, another aspect which I want the honourable members to bear in mind is that, assuming that we do not levy the duty, assuming we give the freedom to the manufacturers here to continue on their old lines and not to pay any duty, will not others engaged in similar trade find Travancore a heaven on earth, into which they can transfer their business And, what would be the result? The result will be that they will come and settle themselves down in Travancore, foreigners, of course, outside manufacturers They will come and settle themselves for cut-throat competition What will practically begin and go on is that people from outside Travancore will come into Travancore for the reason that there is no excise duty here while there is excise duty everywhere else outside the barrier Will our manufacturers be able to stand such a warfare? Inevitably the result will be that even the one good match factory which exists in the country at present may be killed, prices may go on increasing and others, who do not belong to Travancore, may come and settle down here I do not think that that is the intention of the House" "—*State Council Pro, dated 29-5-1934*

II. (A) The Bill was published in the Gazette dated 8-5 1934 It was introduced in the Sri Mulam Assembly at the meeting held on 21-5-1934 At the same meeting, the Bill was taken for consideration, and the Bill as amended was passed —*Assembly Pro Vol II, Pp 539-576*

(B) The Bill as passed by the Assembly was taken up for consideration by the Sri Chitra State Council at the meeting held on 29 5 1934, considered and passed-*Council Pro, Vol, II, Pp 876-893*

(C) The Regulation was published in the Gazette dated 26th June 1934.

Preamble In the original Bill, the Preamble read as follows —"Whereas it is expedient to impose an excise duty on matches *and other articles* and to provide for the collection thereof," The words 'and other articles' were put in the title of the Bill, so that the " Government may take, under this Bill, power to impose similar excise duty on other articles also These words occurred in several other Sections of the Bill There was also a separate Section 20 –empowering Government to impose excise duty on other

Definitions

2 In this Regulation, unless there is anything repugnant in the subject or context,—

(a) "Manufactory" means any premises wherein matches are manufactured or which are declared by Our Government by Notification in Our Government Gazette to be a manufactory for the purposes of this Regulation

(b) "Match" includes a firework in the form of a match, and, where a match-stick contains more heads than one capable of being ignited by striking, each such head shall be deemed to be a match:

(c) "Owner' includes any person expressly or impliedly authorised by an owner of a manufactory to be his agent in respect of the manufactory

(d) "Splints" means undipped splints, such as are ordinarily used for making matches

(e) "Veneers" means veneers such as are ordinarily used for making match-boxes, and

(f) "Prescribed" means prescribed by Rules made by Our Government under this Regulation

Imposition of duty on matches

3 A duty of excise at the rates specified in Section 4 shall be levied on all matches manufactured in any manufactory in Travancore and issued out of such manufactory on or after the 1st day of April, 1934, and shall be payable by the owner of the manufactory

Rates of duty

4 The duty payable under Section 3 shall be levied at the following rates, namely —

(a) on matches in boxes or booklets containing on an average not more than eighty—

(i) if the average number is forty or less, at the rate of one British rupee per gross of boxes or booklets,

(ii) if the average number is more than forty, but not more than sixty, at the rate of one British rupee and eight annas per gross of boxes or booklets, and

articles. They were all deleted when the Bill was considered by the Sri Mulam Assembly, as several members did not favour the retention.

Sec 2. *Clause* (a).—The definition of "manufactory" in the Indian Act does not contain the words "or which are declared for the purposes of this Regulation."

(iii) if the average number is more than sixty, at the rate of two British rupees per gross of boxes or booklets; and

(b) on all other matches, at such rate as Our Government may prescribe

Recovery of duty with penalty

5 (1) If any duty payable under the provisions of this Regulation or any Rules made thereunder is not paid within the time fixed by Rules made in that behalf under this Regulation, it shall be deemed to be an arrear, and the authority to which such duty is payable may, in lieu thereof, recover any sum not exceeding four times the amount of duty unpaid which such authority may in its discretion think it reasonable to require

(2) An arrear of duty, or any sum recoverable in lieu thereof under this Section, shall be recoverable as an arrear of land revenue and shall be recoverable in addition to, and not in substitution for, any other penalty incurred under this Regulation

Issue of matches from manufactory

6. No person shall issue any matches out of a manufactory, except in accordance with the provisions of Rules made in that behalf under this Regulation; or, until such Rules are made, in accordance with the general or special orders of such authority as Our Government may appoint in that behalf

Power of Government to prohibit import of matches.

7 Our Government may, by Notification in Our Government Gazette, prohibit absolutely, or with such exceptions as they think fit, the bringing of matches into Travancore from the territory of any specified Prince or Chief in India.

Power of Government to direct use of banderols.

8 (1) Our Government may, by Notification in Our Government Gazette, direct that after a date to be specified in the Notification no matches manufactured after the date of the issue of the Notification shall be issued from a manufactory in Travancore except

Sec. 5 *Sub-Section (1)*—The wording in the Indian Act is — "(1) If any duty payable under Section 3 is not paid . . .

Sec. 6: The wording in the Indian Act at the end of the Section is —"6. No person with the general or special orders of the Local Government"

Secs 8 & 9 After the word "prescribed" at the end of Sub-section (1) of Section 8 and of Clause (c) of Section 9, the Indian Act has the words "by rules made under this Act"

in packets, boxes or booklets bearing a banderol or stamp of such nature and affixed in such manner as may be prescribed

(2) Our Government may, by a like Notification direct, that, after a date to be specified in the Notification, no matches shall be sold or offered or kept for sale in Travancore except in packets, boxes or booklets bearing such a banderol or stamp so affixed.

(3) Our Government may exempt from the operation of any Notification made under Sub-section (1) matches intended for export from Travancore,

(4) Our Government may exempt from the operation of any Notification made under Sub-section (2) matches of a particular kind or packed in a particular manner.

Prohibition of manufacture of matches and manufacture and import of splints and veneers.

9 From such date as may be fixed by Our Government by Notification in Our Government Gazette in this behalf,

(*a*) no person shall manufacture matches or splints or veneers in Travancore except under and in accordance with a licence to manufacture issued under this Regulation,

(*b*) no person shall import splints or veneers into Travancore except under and in accordance with a licence to import; and

(*c*) no person shall supply splints or veneers to any person who does not possess a licence to manufacture matches issued under this Regulation, or otherwise than in such manner as may be prescribed

Penalty for issue of matches from manufactory in contravention of Section 6

10. Whoever contravenes the provisions of Section 6 shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Penalty for import of matches in contravention of Regulation

11 (1) Whoever, in contravention of any Notification made under Section 7, imports or attempts to import, matches into Travancore shall be punishable with imprisonment which may extend to six months, or with fine which may extend to four times the amount of the duty which would be payable on the matches if they

were liable to excise duty in Travancore or to one thousand rupees, whichever is greater or with both imprisonment and fine

(2) Whoever abets an offence punishable under Sub-section (1) shall, whether such offence is or is not committed in consequence of such abetment, and notwithstanding anything contained in Section 106 of the Travancore Penal Code, be punishable with the punishment provided for the offence

Penalty for issue or sale of matches without banderol

12 (1) Whoever, in contravention of any direction made under Sub section (1) of Section 8, issues any matches from any manufactory shall be punishable with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or to one rupee for every packet, box or booklet of matches in respect of which an offence has been committed, whichever is greater, or with both imprisonment and fine

(2) Whoever, in contravention of any direction made under Sub-section (2) of Section 8, sells or offers or keeps for sale any matches shall be punishable with fine which may extend to one thousand rupees or to one rupee for every packet, box or booklet of matches in respect of which an offence has been committed, whichever is greater

Penaly for manufacture of matches and manufacture and import of splints and veneers without licence

13 Whoever, in contravention of the provisions of Section 9, manufactures matches, splints or veneers or imports splints or veneers into Travancore or supplies splints or veneers to any person shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both

Penalty for evasion of duty or failure to supply information

14, Whoever evades, or attempts to evade, the payment of any duty payable by him under this Regulation, or fails to supply any information which he is required under this Regulation or any Rules made thereunder to supply, or knowingly supplies false information, shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both,

15 Any Court trying an offence under this Regulation may order that any matches, splints or veneers together with the boxes, packing or wrappings thereof, in respect of which the Court is satisfied that an offence under this Regulation has been committed, shall be forfeited to Our Government

Power of Courts to order forfeiture of matches, splints or veneers

16 The law for the time being in force relating to Sea Customs and to goods, the importation of which is prohibited by Section 17 of the Travancore Sea Customs Regulation of 1088, shall apply in respect of matches, splints or veneers, the importation of which is prohibited by or under this Regulation, and the officers of Customs and the officers empowered under the Travancore Sea Customs Regulation of 1088 to perform the duties imposed by that Regulation on a Customs Inspector and other officers of Customs shall have the same powers in respect of such matches, splints or veneers, as they have for the time being in respect of goods the importation of which is prohibited by Section 17 of the Travancore Sea Customs Regulation of 1088.

Application of Regulation V of 1088 to the importation of matches, splints or veneers.

Provided that the penalty for the offence specified in Section 149, No 8, of the Travancore Sea Customs Regulation of 1088 shall, where the offence is committed in relation to matches, splints or veneers, the importation of which is prohibited by, or under this Regulation, be a penalty of confiscation only, and such penalty of confiscation shall not be inflicted under Section 149, No 8, of the Travancore Sea Customs Regulation of 1088, in any case where the person concerned in the offence is sent for trial under Section 11 or Section 13 of this Regulation

17 Our Government may, by Notification in Our Government Gazette, declare that any of the provisions of the Travancore Sea Customs Regulation of 1088, relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation, and procedure relating to offences and appeals shall, with such modifications and alterations as they may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of

Application of the provisions of Regulation V of 1088 to the duty on matches.

the duty on matches imposed under the provisions of this Regulation

Power of Government to make Rules

18. (1) Our Government may, by Notification in Our Government Gazette, make Rules to carry into effect the purposes and objects of this Regulation

(2) In particular, and without prejudice to the generality of the foregoing power, such Rules may—

(a) prescribe the rate of duty referred to in clause (b) of Section 4;

(b) provide for the assessment and collection of the duty and the authorities by whom functions under this Regulation are to be discharged, the issue of notices requiring payment, the manner in which the duty shall be payable, and the recovery of arrears;

(c) provide for the distinguishing of matches, splints or veneers, which have been manufactured under licence, of splints or veneers which have been imported under licence and of matches on which duty has been paid, or which are exempt from duty under this Regulation;

(d) regulate the issue of matches out of any manufactory; and limit the number of matches which may be contained in a box or booklet;

(e) impose on the owners of manufactories and on persons engaged in the sale of matches the duty of furnishing information, keeping records and making returns, and prescribe the nature of such information and the form of such records and returns, the particulars to be contained therein, and manner in which they shall be verified,

(f) provide for the issuing of licences the form and the conditions of licences and the fees to be charged therefor,

(g) regulate the sale of splints and veneers;

Sec 18· Clauses (l) and (m) of Sub-section (2) are not found in the Indian Act.

(*h*) provide for the detention of matches for the purpose of exacting the duty, the confiscation, otherwise than under Section 15, of matches, splints and veneers in respect of which breaches of the Regulation or the Rules thereunder have been committed, and the disposal of matches, splints or veneers so detained or confiscated;

(*i*) authorise and regulate the inspection or search of any place or conveyance used for the manufacture, storage or carriage of matches, splints or veneers,

(*j*) authorise and regulate the composition of offences against, or liabilities incurred under, the Regulation and the Rules thereunder including composite payments in lieu of duty,

(*k*) prescribe the nature of and the manner of affixing banderols or stamps,

(*l*) provide for anything that may be prescribed under this Regulation; and

(*m*) prescribe the procedure for the collection of any duty (leviable under this Regulation) in such respects as are not expressly provided for by this Regulation

(3) In making any Rule under this Section, Our Government may provide that a breach of the Rules shall, where no other penalty is provided by this Regulation, be punishable with imprisonment for any term not exceeding six months, or with fine not exceeding one thousand rupees, or with both imprisonment and fine

Power of Government to provide for rebate of duty

19. Our Government may, by Notification in Our Government Gazette, make Rules to provide for the grant of a rebate of the duty payable under the provisions of the Regulation on matches manufactured in any manufactory whose daily output does not exceed one hundred gross of boxes to the following extent, namely:—

(1) where the average number of matches in a box or booklet is forty or less, a rebate of ten pies per gross of boxes or booklets,

(ii) where the average number of matches in a box or booklet is more than forty but not more than sixty, a rebate of one anna and three pies per gross of boxes or booklets; and

(iii) where the average number of matches in a box or booklet is more than sixty, a rebate of one anna and eight pies per gross of boxes or booklets

RULES AND NOTIFICATIONS.

I. RULES

(A)

TRAVANCORE MATCHES (EXCISE DUTY) ORDER, 1109

(R O C No. 1068-3/32/Devp., dated 2nd July 1934). *

In exercise of the powers conferred by Sections 17 and 18 of the Travancore (Matches) Excise Duty Regulation IV of 1109, the Government of His Highness the Maha Raja are pleased to apply in the adapted form set out below certain provisions of the Travancore Sea Customs Regulation V of 1088, and to make certain Rules for the purpose of providing for the assessment and collection of the duty imposed by the first mentioned Regulation and for control over the manufacture, importation and supply of veneers and splints

CHAPTER I

Short title and definitions

1 This Order may be called "The Travancore Matches (Excise Duty) Order, 1109"

2. In this Order unless there is anything repugnant in the subject or context —

(i) "The Regulation" means the Travancore (Matches) Excise Duty Regulation,

(ii) "Excise Commissioner" includes any officer specially authorised to exercise throughout Travancore or any specified area therein all or any of the powers of the Excise Commissioner under this Order,

(iii) "Inspecting Officer" means any officer of Government authorised by the Excise Commissioner to inspect any premises in which

* *T G G dated 3 7-1934, Pt I, P 1263*

matches liable to duty or splints or veneers are possessed or manufactured; and includes any officer permanently stationed at any such premises,

(iv) "Duty" means the duty payable under the Regulation,

(v) "India" means India as defined in the Act X of 1897 of the Indian Legislature, entitled the General Clauses Act, 1897

CHAPTER II

Special appointments and delegations.

3 The power of specially authorising any officer to exercise throughout Travancore or any specified area therein all or any of the powers of the Excise Commissioner under this Order shall be exercisable by Government

CHAPTER III.

Manufacture of Matches.

4. The Excise Commissioner may issue to any person, firm or company, being the owner of a manufactory, a licence in Form A appended to this Order to manufacture matches.

Provided that the holder of such a licence shall not, without the sanction of Government, be given a licence in respect of any other manufactory within Travancore.

5. The holder of a licence in Form A may manufacture matches subject to the conditions of his licence

6. The position of the premises covered by a licence to manufacture matches shall be clearly described in the licence and the licensee shall manufacture matches within the premises therein described and not elsewhere

7. Every holder of a licence in Form A shall keep a correct daily account in the form prescribed in the licence.

8 Within five days after the close of each month, every holder of a licence in Form A shall submit to the Excise Commissioner a monthly return in Form B appended to this Order showing the number of boxes of matches removed from the manufactory during that month

9. On receipt of the return referred to in clause 8, the Excise Commissioner shall, after verification of the return of exports, if any, to places outside India, and such other enquiry as he may deem fit, assess the duty payable on matches removed from the manufactory If the licensee fails to submit a return the Excise Commissioner may make a summary assessment on such information as may be available The amount assessed shall

be communicated to the licensee who shall pay it into the Treasury by the end of the month following that for which the return was required to be made

10 The Excise Commissioner or Inspecting Officer may enter the premises of any holder of a licence in Form A and inspect the licence, the building, the machinery, the stocks of matches and of materials for use in manufacturing matches and the accounts

11 A licensee shall not transfer his licence or sublet the licensed premises to any other person without the permission in writing of the Excise Commissioner

12 Any licensee who fails to keep a correct daily account or refuses to permit any authorised officer to enter the licensed premises and inspect the licence, building, machinery, stocks and accounts or transfers the licence or sublets the licensed premises to any other person without the permission of the Excise Commissioner shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both

CHAPTER IV
Refunds and Remissions

13 Any person who exports from Travancore to any place outside India matches on which duty has been paid under the Regulation, shall, on production of satisfactory evidence before the Excise Commissioner that the matches have been so exported and that the duty has been paid in respect of these matches, receive a refund of that duty If the exporter is the owner of the manufactory in which the matches were made, such refund may be paid, at the discretion of the Excise Commissioner, either in cash or by set off against duty due from such exporter

14 Government may, by Notification in the Government Gazette, exempt any matches from the whole or any part of the duty leviable thereon.

CHAPTER V
Manufacture and Importation of splints and veneers

15. A licence in Form A shall be deemed to authorize the holder thereof to manufacture splints and veneers to be used in the manufacture within his own manufactory of matches and match boxes

16 The Excise Commissioner may issue to any holder of a licence in Form A a licence in Form C appended to these Rules to manufacture splints and veneers for use in the manufacture of matches in another manufactory

and may likewise issue to any other person, firm or company a licence in the same Form to manufacture splints and veneers

17 Any holder of a licence in Form C may manufacture splints and veneers subject to the conditions of his licence

18 The position of the premises covered by a licence to manufacture splints and veneers shall be clearly described in the licence and the holder of the licence shall manufacture splints and veneers within the premises described therein and not elsewhere

19. Every holder of a licence in Form C shall keep a correct daily account in the form prescribed in the licence

20 The Excise Commissioner or Inspecting Officer may enter the premises of any holder of a licence in Form C and inspect the licence, the building, the machinery, the stocks and the accounts

21. The holder of a licence in Form C shall not transfer his licence or sublet the licensed premises to any other person without the permission in writing of the Excise Commissioner

22. Any holder of a licence in Form C who fails to keep a correct daily account or refuses to permit any authorized officer to enter the licensed premises and inspect the licence, building, machinery, stocks and accounts or transfers the licence or sublets the licensed premises to any other person without the permission of the Excise Commissioner shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees or with both.

23 The Excise Commissioner may issue to any person, firm or company a licence in Form D appended to these Rules to import splints and veneers through any Customs port

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CHAPTER VI
Miscellaneous.

24 The duty on matches to which Clause (*b*) of Section 4 of the Regulation applies shall be at the rate of four annas for every 1,440 matches or fraction thereof.

25. Every holder of a licence in Form A or Form C shall furnish such security as may be demanded by the Excise Commissioner for the observance of the conditions of his licence and for the payment of duty.

26. The period of a licence to manufacture matches or to manufacture splints and veneers or to import splints and veneers shall be from 1st April in any year or any later date on which the licence may be issued to the 31st March following.

27 There shall be a counterpart for each licence and the counterpart shall be in the same form as the licence itself The licensee shall, at the time his licence is delivered to him, be required to sign the counterpart of his licence in token of his acceptance of the conditions specified in the licence.

28 A fee of British Rupees one hundred shall be payable for every licence to manufacture matches or to manufacture splints and veneers or to import splints and veneers for each year or part of a year

Provided that (1) a licence to manufacture splints and veneers shall be issued free on application to any holder of a licence in Form A, and

(2) a licence to import splints and veneers at a Customs port shall be issued free to any holder of a similar licence available at any other Customs port

29 The Excise Commissioner who grants a licence under this Order may cancel it in case of a breach of any of the conditions thereof or of the Regulation or of the provisions of this Order

30 The Excise Commissioner may permit the surrender of a licence issued under this Order on one month's written notice, and shall grant such refund, if any, of part of the fee paid for the year during which the licence is surrendered as Government may in each case determine.

31 Every holder of a licence in Form A shall, before the expiry, cancellation or surrender of his licence, pay all the duty payable by him under the Regulation

Provided that if the licence is renewed on expiry the date on which payment is due shall be determined under Clause 9.

32. An appeal shall lie from any order of the Excise Commissioner to Government and any order of the Excise Commissioner may be revised by Government

Provided that no order in revision shall be passed having an effect more prejudicial to the person concerned than the order under revision without such person being given an opportunity of stating his case

33 No appeal under clause 32 shall be admitted unless received by Government within three months of the date of the Excise Commissioner's order.

34 Government may empower any officers of any Department to search any place, vessel, cart or means of conveyance for matches liable to duty and to seize and remove or detain any matches which may appear to them to have been illegally imported or manufactured

35. The Excise Commissioner may accept from any person whose property is liable to confiscation under the Regulation or who is reasonably suspected of having committed an offence under the Regulation or under the provisions of this Order a sum of money not exceeding one thousand rupees in lieu of confiscation of goods or of punishment for breach of any provision of this Order

36 If there is any doubt as to the average number of matches per box, the Excise Commissioner may, after giving notice of his intention to the owner of the manufactory, determine this number by causing samples to be taken, of at least one box in every ten gross of boxes and causing the number in each sample so taken to be counted and the duty payable shall be assessed on the results of this sampling

37 When duty has been short levied through inadvertence, error, or misconstruction on the part of the Excise Commissioner, or through misstatement as to quantity on the part of the owner of the manufactory,

or, when any such duty after having been levied has been, owing to any such cause, erroneously refunded,

the person chargeable with the duty so short levied or to whom such refund has erroneously been made, shall pay the deficiency or repay the amount paid to him in excess, on demand being made within three months from the close of the month in respect of which the duty shall have been levied or from the date of making the refund

Provided that a person chargeable with duty short-levied as the result of an offence under the Regulation of which he has been convicted in Court shall pay the deficiency on demand being made at any time

38 No duty which has been paid and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconstruction shall be returned unless such claim is made within three months from the date of such payment

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FORM A.

LICENCE FOR THE MANUFACTURE OF MATCHES.

(Vide Clause 4).

Serial No of Licence

Name of Licensee

Be it known that resident of is hereby authorised by the undersigned Excise Commissioner, to manufacture matches on the premises described in the Schedule attached from the date of this licence to the 31st day of March 18 , after which this licence will cease to have effect.

It is required of the holder of this licence, as a condition of its remaining in force, that he duly and faithfully perform and abide by the following conditions;—

I That he produce this licence on demand by any Excise Officer not below the rank of Inspector or by any Revenue Officer duly authorised by the Government in this behalf

II That he permit inspection of the licensed premises, the machinery, the stocks and the accounts by any Excise Officer not below the rank of Inspector, or by any Revenue Officer duly authorised by the Government in this behalf

III That he do not transfer, or purport to transfer, this licence, or sublet the licensed premises to any other person without the permission in writing of the Excise Commissioner

IV That he keep correct daily accounts in the following form, separate accounts being maintained for—

(1) matches to which item (i) of Clause (a) of Section 4 of the Travancore (Matches) Excise Duty Regulation applies,

(2) matches to which item (ii) of the Clause applies,

(3) matches to which item (iii) of the said Clause applies, and

(4) matches to which Clause (b) of the said Section applies —

Matches Manufacture Account

Date,	Opening Balance	Quantity manufactured	Quantity removed from factory for consumption in India.	Quantity removed for export out of India,	Quantity destroyed by accident	Closing Balance
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Total						

V* That he furnish to the Excise Commissioner within five days after the end of each month a monthly return in Form B appended to the Travancore Matches (Excise Duty) Order, 1109 showing the quantity of matches removed from the licensed premises, during the month.

VI That he make payment into the Treasury by the due date of the amount of duty to which he is assessed by the Excise Commissioner

VII That he observe all the provisions of the Travancore (Matches) Excise Duty Regulation and of the Travancore Matches (Excise Duty) Order, 1109, made thereunder

This licence may be cancelled by the Excise Commissioner if any breach of the Travancore (Matches) Excise Duty Regulation or of the Travancore Matches (Excise Duty) Order, 1109, made thereunder, or of any of the above-mentioned conditions is committed by the licensee or his partner or agent or any other person employed in the premises for which this licence is granted

Excise Commissioner

Licensee.

Dated the

The Schedule above referred to.

Taluk
Pakuthy
Muri
Boundaries of Manufactory—
North
South
East
West

FORM B

MONTHLY RETURN TO BE SUBMITTED BY HOLDER OF LICENCE TO MANUFACTURE MATCHES.

(*Vide Clause 8*)

Month

(All figures to be in gross of boxes or booklets (if matches so packed) *

Opening Balance (1)	Matches manufactured during the month. (2)	Quantity removed from Factory for consumption in India. (3)	Quantity removed from Factory for export † (4)	Quantity destroyed in Factory (5)	Closing Balance. (6)

*Separate entries to be made for each class of matches specified in items (i), (ii) and (iii) of Clause (*a*) and in Clause (*b*) of Section 4 of the Travancore (Matches) Excise Duty Regulation

†Details regarding exports shown in column 4.

1 gross of boxes exported to per on
2 gross of boxes exported to per . on
3 gross of boxes exported to per on
4 gross of boxes exported to per on

Signature
Licensee

Dated the

Orders of Excise Commissioner.

Duty of Rs on gross of boxes, is hereby assessed, and must be paid on or before Inform assessee and enter in the Registers.

Signature
Excise Commissioner

Dated the ...

FORM C

(Vide Clause 16)

LICENCE FOR THE MANUFACTURE OF SPLINTS AND VENEERS.

Serial No of Licence

Name of Licence-holder

Be it known that resident of is hereby authorized by the undersigned, Excise Commissioner, to manufacture splints and veneers on the premises described in the Schedule attached from the date of this licence to the 31st day of March , after which the licence will cease to have effect

It is required of the holder of this licence, as a condition of its remaining in force, that he duly and faithfully perform and abide by the following conditions —

I That he produce this licence on demand by any Excise Officer not below the rank of Inspector, or by any Revenue Officer duly authorized by the Government in this behalf

II. That he permit inspection of the licensed premises, the machinery, the stocks and the accounts by any Excise Officer not below the rank of Inspector or by any Revenue Officer duly authorized by the Government in this behalf

III. That he do not transfer, or purport to transfer, this licence or sublet the licensed premises to any other person without the permission in writing of the Excise Commissioner

IV That he keep correct daily accounts in the following forms, the entries in all columns except column (1) being in hundredweights, quarters and pounds avoirdupois.—

Splints Manufacture Account

Date (1)	Opening Balance (2)	Quantity manufactured (3)	Quantity supplied to licensed match manufacturers (4)	Closing Balance (5)

Veneers Manufacture Account.

Date. (1)	Opening Balance. (2)	Quantity manufactured (3)	Quantity supplied to licensed match manufacturers. (4)	Closing Balance. (5)

V That he issue no splints or veneers out of the licensed premises except to the holder of a licence to manufacture matches.

VI. That he observe all the provisions of the Travancore (Matches) Excise Duty Regulation, and of the Travancore Matches (Excise Duty) Order, 1109, made thereunder.

This licence may be cancelled by the Excise Commissioner if any breach of the Travancore (Matches) Excise Duty Regulation or of the Travancore Matches (Excise Duty) Order, 1109, made thereunder, or of any of the above-mentioned conditions is committed by the holder of the licence or his partner or agent or any other person employed in the premises for which the licence is granted

Excise Commissioner
Licence-holder

Dated the

The Schedule above referred to.

Taluk
Pakuthy
Muri
Boundaries of Factory—
North
South
East
West

FORM D

(*Vide Clause 88*)

LICENCE FOR THE IMPORTATION OF SPLINTS AND VENEERS

Customs-port
Serial No of Licence
Name of Licence-holder .

Be it known that of is hereby authorized by the undersigned, Excise Commissioner, to import matches by sea into Travancore at the above-mentioned port from the date of this licence to the 31st day of March 19 , after which this licence will cease to have effect.

It is required of the holder of this licence as a condition of its remaining in force that he duly and faithfully perform and abide by the following conditions :—

I That he produce this licence when presenting any bill-of-entry for splints or veneers.

II. That he do not transfer, or purport to transfer this licence.

III That he keep all splints and veneers imported under this licence within his own custody or control until they are supplied to a licensed manufacturer of matches.

IV. That he observe all the provisions of the Travancore (Matches) Excise Duty Regulation and of the Travancore Matches (Excise Duty) Order, 1109, made thereunder

This licence may be cancelled by the Excise Commissioner if any breach of the Travancore (Matches) Excise Duty Regulation or of the Travancore Matches (Excise Duty) Order, 1109, made thereunder or of any of the above-mentioned conditions is committed by the holder of the licence or his agent.

Excise Commissioner
Licence-holder

Dated the

(B)

(R O C No 1068 6/32/Devpt, dated 21st July 1934)[*]

In exercise of the powers conferred by Section 18 of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased to direct that the following amend ment shall be made in the Travancore Matches (Excise Duty) Order 1109, namely —

1 In Clause 9 of the said Order after the word 'matches' the brackets and words '(other than matches in boxes or booklets bearing a banderol)" shall be inserted

2 In Clause 13 of the said Order the last sentence shall be omitted.

3 After Chapter VI of the said Order, the following Chapter shall be inserted namely :—

CHAPTER VII.

39 The provisions of this Chapter apply to matches (other than matches intended for export by sea to foreign countries from Travancore) manufactured after the 30th June 1934 and issued out of a manufactory after the 1st August 1934.

40 (1) All matches issued from a manufactory shall be contained in boxes or booklets and the number of matches contained in a box or book let shall not exceed eighty

(2) Any owner of a manufactory who issues matches in contraven tion of this Rule shall be punishable with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

41. The duty on matches shall be collected through the sale to owners of manufactories of the banderols required to be affixed to boxes or booklets of matches by Government Notification R. O C No 1068 4/32/Devpt, dated the 21st July 1934

42 (1) The banderols to be affixed to boxes or booklets of matches shall be banderols manufactured in and issued from the Government Secu rity Press, Nasik

(2) Such banderols shall be of the following classes and shall be on sale at Government treasuries at the following rates, namely :—

Class of banderol.	*Price of banderol.*
1. Banderols for boxes or booklets containing on an average not more than 40 matches.	Per gross of banderols one rupee

[*] *T G G., dated 24-7-1934, Pt. I, P 1395.*

Class of banderol.	*Price of banderol.*
2. Banderols for boxes or booklets containing on an average more than 40 but not more than 60 matches	Per gross of banderols, one rupee and eight annas
3 Banderols for boxes or booklets containing on an average more than 60 but not more than 80 matches	Per gross of banderols, two rupees

(3) Special banderols of the above classes but of distinctive colour shall be provided for use exclusively on boxes or booklets of matches in respect of which a rebate of duty has been granted by Rules made under Section 19 of the Act.

43. (1) Every box or booklet of matches, and where such boxes or booklets are issued in packets, each box or booklet of a packet, shall bear a banderol of Class 1, Class 2 or Class 3, according as the average number of matches contained in the box or booklets is 40 or less, more than 40 but not more than 60, or more than 60.

(2) The special banderols referred to in Sub-clause (3) of Clause 42 shall not be affixed to boxes or booklets of matches other than those in respect of which a rebate of duty has been granted by Rules made under Section 19 of the Regulation

44. Every banderol shall be so affixed to the box or booklet that :—

(*a*) the words and figures on the banderol specifying the maximum number of matches covered by the banderol are legible,

(*b*) the box or booklet cannot be opened without tearing the banderol ; and

(*c*) in the case of a box, the ends of the banderol are covered by the manufactory's label

45. (1) An owner of a manufactory shall receive a refund of the purchase price of any banderol not employed by him on a box or booklet issued from his manufactory on returning the banderol to the Excise Commissioner.

(2) An owner of a manufactory shall receive a refund of the purchase price of any banderol accidently rendered unfit for use on a box or booklet on returning the damaged banderol to the Excise Commissioner and satisfying the Excise Commissioner that the banderol has not been used on a box or booklet issued from a manufactory.

46. The Excise Commissioner may, subject to any conditions he may see fit to impose, authorize the supply without payment to any owner of a

manufactory of banderols for use on boxes or booklets of matches in the manufactory, on such owners executing a bond or furnishing adequate security to the satisfaction of the Excise Commissioner for the price of the banderols so supplied, but no boxes or booklets bearing banderols so supplied shall be issued from the manufactory until payment has actually been made to the treasury for the banderols affixed to such boxes or booklets

(C)

(R O. C No. 1068—7/32/Devpt., dated 21st July 1934)

In exercise of the powers conferred by Sections 17 and 18 of the Travancore (Matches) Excise Duty Regulation IV of 1109, the Government of His Highness the Maha Raja are pleased to direct that the following amendment shall be made in the Matches (Excise Duty) Order, 1109, namely —

In Form D of the Forms appended to the said Order, for the words "to import matches by sea", the words "to import splints and veneers by sea" shall be substituted

(D)

(R O. C No 1068—8/32/Devpt, dated 21st July 1934).

In exercise of the powers conferred by Sections 17 and 18 of the Travancore (Matches) Excise Duty Regulation IV of 1109, the Government of His Highness the Maha Raja are pleased to direct that the following amendments shall be made in the Travancore Matches (Excise Duty) Order, 1109

I. In Rule 23 of the said Order, the existing Rule shall be numbered as Rule 23 (*a*) and the following added as Clause (*b*)

"(*b*) The Excise Commissioner may likewise issue a licence in Form E (appended) to the holders of licences in Form A for the import of splints and veneers through any Land Customs House"

II. In Rule 28 of the said Order the following shall be added as Clause (iii) under the proviso —

"(iii) A license to import splints and veneers in Form E shall be issued free of any fee"

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[1] *T. G G dated 24-7-1934, Pt. I, P. 1096.*

FORM E.

(Vide Clause 23)

LICENSE FOR THE IMPORTATION OF SPLINTS AND VENEERS.

Land Customs House

Serial No of Licence

Name of Licence holder

Be it known that of is hereby authorised by the undersigned, Excise Commissioner, to import splints and veneers into Travancore at the above-mentioned Land Customs House from the date of this licence to the 31st day of March 19 , after which this licence will cease to have effect

It is required of the holder of this licence as a condition of its remaining in force that he duly and faithfully perform and abide by the following conditions :—

I That he produce this license before the officer in charge of the Land Customs House, at the time of import

II. That he do not transfer, or purport to transfer this licence.

III That he keep all splints and veneers imported under this licence within his own custody or control until they are supplied to a licensed manufacturer of matches

IV That he observe all the provisions of the Travancore (Matches) Excise Duty Regulation and of the Travancore Matches (Excise Duty) Order, 1109, made thereunder

This licence may be cancelled by the Excise Commissioner if any breach of the Travancore (Matches) Excise Duty Regulation or of the Travancore Matches (Excise Duty) Order, 1109, made thereunder or of any of the above-mentioned conditions is committed by the holder of the licence or his agent.—

Excise Commissioner
Licence-holder

Date

II. NOTIFICATIONS

(1)

(R. O C No 1068—1/32/Devpt, dated 2nd July 1934)

In pursuance of Section 9 of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased to appoint the 2nd day of July 1934 as the date on and after which the prohibitions set forth in the said Section of the said Regulation shall have effect—*T. G G, dated 3 7 1934, Pt I, P. 1262*

(2)

(R. O C. No. 1068—2/32/Devpt, dated 2nd July 1934)

In pursuance of Clause 14 of the Travancore Matches (Excise Duty) Order, 1109, the Government of His Highness the Maha Raja are pleased

to exempt from the payment of the duty leviable under the Travancore (Matches) Excise Duty Regulation, IV of 1109, matches exported after the 1st April 1934 by sea to any country outside India.

Explanation —The term "India" means India as defined in the Act X of 1897 of the Indian Legislature, entitled the General Clauses Act 1897—*T. G G, dated 3-7-1934, Pt I, P 1262*

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(3)

(R O C. No. 1068—4/32/Devpt, dated 21st July 1934)

In exercise of the powers conferred by Sub sections (1) and (3) of Section 8 of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased

(1) to direct that after August 1st, 1934, no matches manufactured after June 30th, 1934, shall be issued from a manufactory in Travancore except in boxes or booklets bearing a banderol of the nature and affixed in the manner prescribed in Chapter VII of the Matches (Excise Duty) Order, 1109

(2) to exempt from the operation of this Notification any matches intended for export from Travancore by sea to foreign countries

T. G. G, dated 24-7 1934, Pt. I, P 1394.

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(4)

(R O C No 1068—5/32/Devpt, dated 21st July 1934)

In exercise of the powers conferred by Sub section (2) of Section 8 of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased to direct that, after October 1st, 1934, no matches shall be sold or offered or kept for sale in Travancore, except in packets, boxes or booklets, bearing a banderol of the nature and affixed in the manner prescribed in Chapter VII of the Travancore Matches (Excise Duty) Order, 1109—*T G G, dated 24 7 1934, Pt I, P 1394*

REGULATION V OF 1109.

The Travancore Importation of Live-Stock Regulation

Passed by His Highness the Maha Raja of Travancore under date the 20th June 1934, corresponding to the 6th Mithunam 1109, under Section 23 of Regulation II of 1108

Preamble

Whereas it is expedient to provide for the regulation of the importation of live-stock affected or suspected or liable to be affected by infectious or contagious diseases; It is hereby enacted as follows—

Short title, extent and commencement

1 (i) This Regulation may be called "The Travancore Importation of Live-stock Regulation"

(ii) It extends to the whole of Travancore

Regn. V of 1109: I. *Objects and Reasons* —"Contagious and infectious diseases such as rinderpest and foot and mouth disease, which often break out among cattle in this country can invariably be traced to the importation of cattle suffering from such diseases from outside the State. The most effective method of preventing the outbreak of these diseases is not to allow infected cattle to come into this country With this object in view the Bill has been drafted.

Section 3 which is the most important Section in the Bill is divided into two sub-divisions. Under Sub-section (1) Government take power to regulate, restrict or prohibit the importation of livestock affected or suspected or liable to be affected by contagious or infectious diseases, and of fodder, dung, etc., appertaining to such livestock Sub-section (2) describes the method by which Sub-section (1) is to be brought into operation.

Section 4 gives Government power to make Rules. Such Rules will have *inter alia* to provide for posting veterinary officers at the frontier stations through which cattle are ordinarily imported, *viz.*, Aramboly, Puliyara, Kumili and Karukutti for the inspection of imported cattle by such officers, for the detention of such of them as may be affected or liable to be affected by contagious or infectious diseases, for making necessary arrangements to take care of the cattle detained and for doing such other things as may be necessary to enforce the Regulation.

The Bill is drawn on the lines of the British Indian enactment, the Livestock Importation Act, 1898 (IX of 1898)— *S O & R*

II (A) The Bill was published in the Gazette dated 24-5-1932. It was introduced in the Sri Mulam Assembly and referred to a Select Committee at the meeting held on 30-11-1933 (*Assembly Pro Vol II, P 319*) The Committee's Report was published in the Gazette dated 24-4-1934. The Report was presented to the Assembly and considered, and the Bill was passed at the meeting held on 23-5-1934 (*Ibid Vol. II, 705*).

(B) The Bill, as passed by the Assembly was taken up for consideration by the Sri Chitra State Council, considered and passed at the meeting held on 29-5-1934 (*Council Pro. Vol. II Pp. 308-309*).

(III) It shall come into force at once.

2 In this Regulation, unless there is anything repugnant in the subject or context,—

Definitions.

(*a*) the expression "infectious or contagious diseases" includes anthrax, rinderpest, foot and mouth disease, glanders and farcy and any other disease or diseases which may, as occasion arises, be specified as such by Our Government by a Notification published in Our Government Gazette; and

(*b*) "live-stock" includes horses, cows, bulls, bullocks, buffaloes, sheep and any other animal or animals which may, as occasion arises, be specified as such by Our Government by a Notification published in Our Government Gazette

3 (1) Our Government may, by a Notification published in Our Government Gazette, regulate, restrict or prohibit in such manner and to such extent as they may think fit, the bringing or taking by sea, backwater or land or in any other manner into Travancore or any specified place therein, of any live-stock affected or suspected or liable to be affected by infectious or contagious diseases and of any fodder, dung, stable-litter, clothing, harness or fittings appertaining to such live-stock or that may have been in contact therewith

Power to regulate importation of live-stock

(2) A Notification published under Sub-section (1) shall operate as if it had been issued under Section 18 of the Travancore Sea Customs Regulation of 1088 (V of 1088) and the officers of Sea

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(C) The Regulation was published in the Gazette dated 26th June 1934

The five Sections of the Regulation correspond respectively to the five Sections of the British Indian Act IX of 1898 (The Live-stock Importation Act) to regulate the importation of live-stock which is liable to be affected by infectious or contagious disorders.

The expression defined in the Indian Act, Section 2 (*a*), is 'infectious or contagious disorders.

The corresponding Clause (2) of Section 3, of the Indian Act does not contain the words "or other officers appointed by Our Government in this behalf"

Under Section 4 (3) of the Indian Act, the fine may extend to one thousand rupees.

Customs or other officers appointed by Our Government in this behalf shall have the same powers in respect of any live-stock or thing, with regard to the importation of which such a Notification has been issued, and the vessel containing the same, as they have for the time being in respect of any article the importation of which is regulated, restricted or prohibited by law relating to the Sea Customs and the vessel containing the same and the enactments for the time being in force relating to Sea Customs or any such article or vessel shall apply accordingly

Power to make Rules.

4. (1) Our Government may make Rules for the detention, inspection, disinfection or destruction of imported live-stock, and of fodder, dung, stable-litter, clothing, harness or fittings appertaining to imported live-stock, or that may have been in contact therewith, and for regulating the powers and duties of the officers who may be appointed in this behalf.

(2) In making any Rule under this Section, Our Government may direct that a breach thereof shall be punishable with fine which may extend to five hundred rupees.

Protection to persons acting under this Regulation.

5. No suit, prosecution or other legal proceeding shall lie against any person for anything done or intended to be done in good faith under this Regulation

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REGULATION VI OF 1109.

The Travancore Markets (Amendment) Regulation, 1109.

Passed by His Highness the Maha Raja of Travancore, under date the 21st June 1934, corresponding to the 7th Mithunam 1109, under Section 23 of Regulation II of 1108

Preamble

Whereas it is expedient to amend the Travancore Markets Regulation of 1092 (VII of 1092) for the purpose hereinafter appearing; It is hereby enacted as follows —

Short title and commencement.

1 (1) This Regulation may be called the Travancore Markets (Amendment) Regulation, 1109.

(2) It shall come into force at once

Addition of a clause to Section 3

2 In the Travancore Markets Regulation of 1092 (VII of 1092) hereinafter referred to as the said Regulation, in Section 3, after clause (3), the following clause shall be added, namely .—

"(4) 'Market' means any place set apart, or ordinarily or periodically used, for the assembling of persons for the sale or purchase of grain, fruit, vegetables, meat, fish or other perishable articles of food or for the sale or purchase of live-stock or poultry, or of any agricultural or industrial produce or any raw or manufactured products or any other articles or commodity necessary for the convenience of life.

Provided that a single shop or a group of shops not being more than six in number shall not be deemed a market.

Explanation—A declaration by Our Government that any place used for the sale of any articles is a market shall be conclusive proof of the place being a market for the purposes of this Regulation.

Provided that no such declaration shall be made in respect of any single shop or of any group of shops not being more than six in number and that any such declaration may at any time be cancelled by Our Government"

Deletion of Section

3 Section 4 of the said Regulation shall be deleted

Regn. VI of 1109. I. *Objects and Reasons*—"The Travancore Markets Regulation, as it stands, has no definition of the term 'market" Further, Section 4 of the Regulation which enables Government to declare a place to be a market has been interpreted to mean that there can be no "markets" unless there be such a Government declaration relating thereto. These have given rise to practical difficulties in the working of the Regulation It is proposed by this Bill, therefore, to enact a definition of the term "market" and also to provide that a declaration by the Government that a place is a market shall be conclusive of the fact that the place is a market."—*S O & R*

II. (A) The Bill was published in the Gazette dated 31-5-1933 It was introduced in the Sri Mulam Assembly and referred to a Select Committee at the meeting held on 20-11-1933 (*Assembly Pro., Vol II, P 321*). The Committee's Report was published in the Gazette dated 24-4-1934. It was presented to the Assembly and considered, and the Bill wee passed at the meeting held on 23-5-1934 (*Ibid Vol. II, Pp 705-707*)

(B) The Bill, as passed by the Assembly, was taken up for consideration by the State Council, considered and passed at the meeting held on 29-5-1934 (*Council Pro, Vol II Pp. 309-310*)

(C) The Regulation was published in the Gazette dated 26th June 1934.

REGULATION VIII OF 1100.

THE CIVIL PROCEDURE CODE

AMENDMENT

OF

Order IX, Rule 5 (1)

In exercise of the powers vested under Section 95 (2) of the Civil Procedure Code, Regulation VIII of 1100, Rule 5 (1) of Order No IX in the First Schedule thereto is amended as follows :—

Regn. VIII of 1100 I. Section 91 of the Civil Procedure Code gives power to the High Court to make, after previous publication, Rules regulating its own procedure and the procedure of the Civil Courts subject to its superintendence, and may by such Rules annul, alter or add to all or any of the Rules in the First Schedule Sections 92 and 93 provide for the constitution of a Rule Committee and for reference to it proposals to annul, alter or add to the Rules in the First Schedule or to make new Rules. Under Section 94, the Rules made have to be laid before the Legislative Council which shall consider and deal with the Rules in the same manner as a Bill presented with the Report of a Select Committee. Section 95 provides for the previous sanction of the Government to the Rules so made and for the publication in the Government Gazette of the Rules so made and sanctioned

Order IX, Rule 5 (1) I. In exercise of the powers vested in the High Court, as above stated, Rule 5 (1) of Order IX was proposed to be amended, and the proposed Rule was published in the Gazette, inviting objections or suggestions to the same. —*T G, G dated 15-7-1930, Pt IV, Judl. Dept*

II Under Standing Order No. 35 of the Legislative Council, the Rule as amended by the High Court was published for general information, and it was also stated that the amended Rule was to be laid before the Legislative Council under Section 94 of the Civil Procedure Code

III At the meeting of the Council held on 16-12-1930, the amended Rule was laid before the Council, considered and approved. At the meeting held on 15-4-1931, the Rule was passed by the Council (*L C P Vol XVIII, Pp 68 & 379*).

IV The Rule was published in the Gazette dated 8-11-1932, Pt. IV, Judicial Dept.

V. The Rule as amended reproduces the corresponding Rule of the British Indian Code—See Note on page 509 of Volume VI.

"5 (1) Where, after a summons has been issued to the defendant or to one of the several defendants and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

(*a*) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(*b*) such defendant is avoiding service of process or

(*c*) there is any other sufficient cause for extending the time,

in which case the Court may extend the time for making such application for such period as it thinks fit"

APPENDIX A.

REGULATION V OF 1071
AS AMENDED BY REGULATION XII OF 1108.

THE JENMI AND KUDIYAN REGULATION

CONTENTS

Preamble

CHAPTER I
Preliminary.

Section
1 (1) Short title
(2) Commencement
2 No right between Jenmi and Kudiyan unless expressly provided for
3 Interpretation clause
(1) "Jenmom land"
(2) "Jenmi"
(3) "Kudiyan"
(4) "Kanapattom"
(5) "Kanom"
(6) "To hold land"
(7) "Holding."
(8) "Sub-tenant"
(9) "Pattom"
(10) "Michavaram"
(11) "Renewal fees. Fractional fee."
(12) "Customary dues. Commuted cess"
(13) "Duly registered"
(14) "Jenmivaram"
(15) "Settlement Pattom"
(16) "Settlement Pattamcham"
(17) "Jenmikaram"
(18) "Prescribed"
(19) "Amending Regulation"

Sections

CHAPTER II

Of the rights and liabilities of Jenmis and Kudiyans.

4 Tax on Jenmom lands transferred by sale, &c, to be borne by transferee
5. Kudiyan owner of land subject only to payment of Jenmikaram
6. Apportionment of Jenmikaram as amongst various lands
7. Jenmikaram how fixed on land being divided
8. Renewal fees not to exceed 30 per cent of Kanom
9 Jenmikaram first charge on land
10. Kudiyan's liability on Jenmi's right being transferred
11. Kudiyan's liability on holding being transferred
12. Kudiyan's liability on Jenmi's right in land being divided
13. Renewals not obligatory
14. Revision of Jenmikaram

CHAPTER III

Part A —Jenmikaram and its recovery.

15 Particulars of Kanapattom contract
16 When summary suit will not lie
17 Jenmikaram alone payable to Jenmi with interest, if in arrears
Renewal fees for expired period, how payable
18 Jenmikaram payable only in money
19 Contents of receipt for Jenmikaram

Part B —Summary recovery and deposit of Jenmikaram

26 A Jenmi may apply to Tahsildar to recover Jenmikaram under Revenue Recovery processes
27. Jenmikaram may be deposited by Kudiyan.
28 Contents of the application
29. Jenmikaram due up to date of application to be paid into Court
30. Procedure on deposit of Jenmikaram
31 Further procedure on deposit.
32. Application under Part B to be exempt from Court fees

Part C.—Of the Jurisdiction of Courts over petty claims for Jenmikaram

33. Summary jurisdiction of Courts
34. Procedure for trial of non-appealable cases to be followed in summary suits under this Regulation
35. Where cause of action arises

Sections
36. Plaint when exempt from Court fees.
37 Agent of Jenmi.
38. Power of Court to decide question of title to immovable property or status.
39. Procedure where Kudiyan admits the money due but pleads title of third person
40. Decision of Munsiffs and Zillah Judges to be final.

CHAPTER IV

Collection and Payment of Jenmikaram by Government.

40 A. Power of Government to assume collection of Jenmikarams
40 B Settlement of Jenmikaram and Register of Jenmikarams.
40 C Jenmikaram Settlement Officer
40 D Preliminary Notification for settlement of Jenmikaram
40 E Final Notification notifying completion of Register of Jenmikarams
40 F (1) Jenmikaram to be paid to Government and recoverable as arrears of land revenue
(2) Jenmikaram to be paid in money only
40 G Jenmikaram to be paid to Jenmi deducting cost of collection
40 H Jenmikaram to be paid only to Government
40 I Jenmikaram must be collected according to the Register of Jenmikarams.
40 J Revision of Register of Jenmikarams
40 K Subsequent changes *re* Jenmikaram, &c., may be recorded.
40 L. When suits against Government will lie and when not
40 M Power to make Rules
40 N What land can be sold for Jenmikaram

CHAPTER V

Miscellaneous

41 Power of High Court to make Rules.
42 Saving of Kanapattoms executed since 25th Karkatakom 1042
43 Terminable nature of tenancy to be determined from terms of contract
44 Saving of rights of Kudiyans of more than fifty years' standing And of established rights
45 Apportionment of compensation money on land acquisition
46 Government to fix commutation rates on advice of Committees.
47 Limitation period for Jenmikaram

A Regulation to define clearly the relative rights of Jenmis and Kudiyans and to make provision for the speedy realisation of [the Jenmis'] dues from the Tenants

Preamble

Whereas it is expedient for better carrying out the intention of the Royal Proclamation of the 25th Karkatakom 1042, to define clearly the relative rights of Jenmis and Kudiyans in Travancore, to make further provision for the speedy realisation of [Jenmis'] dues, and to invest the District Munsiffs and Zillah Judges with summary jurisdiction in petty claims for [Jenmis'] dues;

Regn. XII of 1108: I. *Objects and Reasons* (1)—' The question of amending the Jenmi and Kudiyan Regulation of 1071 (V of 1071) has been engaging the consideration of Government for some considerable time, and an Amending Bill was in fact published in the Gazette dated the 25th March 1924 with a view to its introduction in the Legislative Council But it was soon noticed that the Bill did not satisfy either the Jenmies or the Kudiyans and that at all events sharp differences existed between the two parties The Government therefore took time to devise means to compose the differences if possible A free and informal discussion at a Round Table Conference in which all interests would be represented was considered the most expedient course to adopt and such a conference was accordingly decided upon, and it was held under the presidency of the Dewan. Government are glad to say that it has been possible to reach unanimous conclusions at the Conference. With a view to give effect to those conclusions this Amending Bill has been prepared The substantial changes proposed by the Bill are noted below :—

(1) The right which in certain circumstances a Jenmi has to evict a Kudiyan from the Kanom holding and the right of a Kudiyan to surrender the holding to the Jenmi are proposed to be taken away, and there is to be no eviction and no surrender hereafter for any reason or in any circumstances. (See new Section 5 proposed by Clause IV of the Bill)

(2) The Jenmi's right to evict is however one weapon to enforce payment of his dues. As that is now taken away, the Jenmi is proposed to be given, as a *quid pro quo*, the right to claim, besides the lawful interest, a penalty also if any of his dues is left in arrears for more than three years. The penalty proposed is a payment of 12½ per cent of the arrears to the Jenmi for each year that they remain unpaid after the first three years, (See new Section 17 (7) (*b*) proposed by Clause VII) The maximum penalty that a Kudiyan may have to pay is 37½ per cent as it is proposed to reduce the period of limitation to six years as regards suits for Jenmi dues.

(3) The Kudiyan's right to use the Kanom holding, and whatever is on the holding in any manner that pleases him is expressly laid down, and, as part of this right, he is given also the right to cut down and appropriate all trees (including timber trees) standing or growing on the holdings. This is made subject only to one exception, namely, in the case of timber trees of not less than 36 inches' girth standing on holdings at the commencement of this proposed Amendment Regulation. In regard to such trees, it is provided that though the Kudiyan may cut them, he has to do so with the consent of the Jenmi or after

giving him notice and that when the trees are cut down the Jenmi must be given three-fourths of their value the Kudiyan taking the balance one-fourth (See new Sections 7 and 8 proposed by Clause IV) As the right of the Jenmi in regard to other timber trees is entirely taken away, it is proposed to give him, as *quid pro quo*, a right to impose a fixed Pattom assessment on each of such tress if and when they attain a girth of not less than 36 inches, in the same manner as fruit bearing trees are assessed to Pattom. (See new Section 22 (2) (*b*) proposed by Clause IX)

(4) It is proposed that, on the Jenmi's interests or the Kudiyan's interests in any Kanom holding becoming split up by partition, alienation or otherwise, it should be the right of the Jenmi or the Kudiyan to apportion his rights or liabilities in a fair and equitable manner (See new Section 12 proposed by Clause IV)

(5) The periodical renewal (ordinarily once in 12 years) which every Kanom holding is subject to is proposed to be abolished (New Section 13 proposed by Clause IV), and the renewal fees which are payable, in a lump, at the renewal are proposed to be spread over and converted into annual payments at their present worth. The same is proposed also in regard to the customary dues payable by a Kudiyan. (See new Section 17 (3) proposed by Clause VII)

(6) It is also proposed to enact that renewal fees shall on no account be liable to enhancement and that wherever it is at present more than 25 per cent of the Kanom money it should be reduced to 25 per cent. of the Kanom money (See new Section 17 (2) proposed by Clause VII).

(7) As regards the payment of the Jenmi dues payable in paddy, it is proposed to enact that the Jenmi should provide a place of payment in the Pakuthi in which the holding is situated In the absence of that, the value of the paddy may be remitted by money order, and so may other dues in every case. (See new Section 18 proposed by Clause VII)

(8) The revision of the terms of a Kanapattom, by enhancing or reducing the Michavaram payable is permitted every twelve years by the existing Regulation, (See Sections 11, 14, 20 and 24) It is proposed to lay down that such revisions should be allowed hereafter only once in twenty years. (See new Section 20 proposed by Clause IX)

(9) Detailed rules for enhancement and reduction of the Michavaram are laid down in the new Sections 21, 22, 23, 26 and 26-A proposed by Clauses IX and X. Some of the important changes effected by these rules are that the Jenmipattom is limited to one-third of the net produce in the case of paddy lands and one-fourth of the net produce in the case of other lands and that, as noted above, Jenmipattom is allowed to be charged in respect of timber trees that hereafter attain a girth of 36 inches. Also, no enhancement of Michavaram will be allowed if the productive powers of any land comprised in a holding increased by reason alone of the Kudiyan's labour or improvements or on the ground that the rate of the current Pattom is below the prevailing rate for similar lands in the same locality or, in any case, in such a manner as to reduce the Kudiyan's margin of profit (New Section 25), the Kudiyans' margin of profit being fixed at 55 per cent. of the average annual net produce in the case of paddy lands and 60 per cent. of such produce in the case of other lands. (See the definition of "margin of profit" proposed by Clause III).

(10) Tea and rubber lands are not now assessable to Jenmipattom, because tea plants and rubber trees are not assessable trees. It is therefore proposed to [illegible] a special Michavaram of [illegible] per acre of such lands payable by the [illegible] to the Jenmi. (See new Section proposed by Clause X)

(11) As an expeditious method of recovering Jenmi dues, it is proposed to allow such dues to be recovered through the Tahsildar by the Revenue Recovery processes if such dues are not more than a year old (See new Section 25-C proposed by Clause XII) a

(12) Provisions are proposed for allowing a tenant to deposit Jenmi dues in the Munsiff's Court to the credit of the Jenmi. If such deposit is *prima facie* justifiable, the deposit will be accepted and the Kudiyan given a full acquittance (See new Section 27 proposed by Clause XIII and new Sections 30 and 31 proposed by Clause XVI)

(13) Rules for apportioning as between the Jenmi and the Kudiyan, the compensation money awarded on the acquisition of any land comprised in a holding by Government under the Land Acquisition Regulation, are laid down by the new Section 45 proposed by Clause XXII According to these rules, the value due to any buildings or improvements not liable to be assessed to Jenmipattom will go entirely to the Kudiyan. From the balance, the Jenmi will be given the capitalised value of his dues chargeable on the land and the Kudiyan the amount of the Kanom money charged on the land If any is still left that also will go to the Kudiyan. If however the balance referred to is not sufficient to meet the payment of the capitalised value of the Jenmi dues and the Kanom money, it will be divided between the Jenmi and the Kudiyan in the proportion of the benefit derivable by each from the land The capitalised value is fixed at twenty five times the dues to be capitalised

(14) It is provided that when the interest of a Jenmi or Kudiyan is transferred to, or otherwise devolves on, the Government, the Government may, on paying compensation to the other party, convert the land into Pandaravaka tenure. (See new Section 46 proposed by Clause XXII)

(15) Power is proposed to be taken for Government to fix the commutation price of paddy, etc, payable by any Kudiyan to the Jenmi. (See new Section 47 proposed by Clause XXII)

(16) And lastly, the period of limitation for Jenmi suits, which at present is 12 years, is proposed to be reduced to 6 years. (See new Section 48 proposed by Clause XXII)—

S O & R

(2) In introducing the Bill, the Official Member in charge said —"* * The Regulation which is more than a quarter of a century old was standing in need of some amendments and the Government had the matter under consideration for some time As a matter of fact an amending Bill was prepared and published in the Gazette in 1924 with a view to its introduction in the Council But it was soon noticed that both the Jenmis and the Kudiyans had complaints against that Bill and the Government were taking some time to consider whether it was not possible to arrive at an agreement For the Government feel that it is very imperative that they should proceed with the co-operation of both the parties. Consequently Government thought of holding a Round Table Conference to settle the matter at which all interests will be represented * *

The constitution of the conference was finally settled upon and the non-official members of this House were asked to elect two members to the conference. The Jenmi constituency was also asked to elect two members to the conference The conference was held and sat for long hours over a period of seven days and has reached certain unanimous conclusions, copies of which, I believe, are in the hands of the members to-day. My attempt in preparing this Bill and placing it before the House has been to faithfully carry out the decision of the conference and I have introduced nothing in this Bill

lich is not borne out by the decisions ... ses it be for giving effect to certain ... sequential changes or some verbal ... adments This Bill, although it is an ... nding Bill, introduces various chan- ...

After some discussion as to the ... stitution of the conference, the Official ... mber in charge continued —"One of ... most important changes introduced ... the Bill is this. Under the existing ... w, it is open to a Jenmi to evict a Kudi- ... for certain reasons and it is open to ... Kudiyan to surrender his holding in ... rtain circumstances These two rights, ... right of eviction by the Jenmi and the ... it of surrender by the Kudiyan, are ... n away entirely This is one of the ... changes introduced by the Bill But ... 's been felt that the right of the ... d to evict a Kudiyan has been a ... ong weapon to enforce sure payment of ... dues. As a *quid pro quo*, therefore, ... Jenmi has been given the right to claim as damages a small percentage of the arrears of his dues as penalty

Another important change which has ... n introduced by this Bill is that the ... nt is given absolute freedom in the ... of his land He can convert garden ... d into paddy land and paddy land into ... den land and do anything that may ... see him on the land As part of this ... solute freedom to use the land, he is ... so given the right to cut the trees. In ... gard to the existing trees, the Kudiyans are allowed the right to cut the trees, but in regard to the value of the timber, which under the existing law belong to the Jenmies, the Jenmies are to be given ... of the timber value and the Kudiyan ..., which will represent the cost of rearing ... d looking after the trees.

In regard to the trees that may grow ... the land in future, the Kudiyan is given the right to cut them and appropriate them unconditionally But as, under the existing law, the Jenmis have got the right over the trees, it is proposed by this Bill to impose a small assessment on each timber tree in the same way as assessment is imposed on fruit bearing trees

These are the most important changes that have been proposed to be introduced by this Bill in regard to the user of the land In regard to the ... of ... ss, i. e, the dues that are payab ... the Jenmi, the most important cha... that has been introduced is in respe... the ... ment of the renewal fees and the custo... dues. Under the existing law, renew... are payable in a lump, once in 12 years. It is now proposed to spread out that payment into annual payments, and to apportion the renewal fees to each year payab along with the Michavaram Equally so with the customary fees which are proposed to be commuted into annual payments to be paid along with the Michavaram in the future The Kudiyan need pay only a fixed portion of his dues every year and he will not be called upon to make any lump payments either at the end of twelve years or at the end of any fixed periods.

Almost as a consequence of this, it has been necessary to consider the question of the period after which a revision of the terms of the tenant's holding may be allowed It used to be the rule and in fact, it is the law at present that the revision of the Michavaram either by enhancing it or by reducing it may be permitted once in twelve years. It is proposed by this Bill to extend the period and to enact that it shall be allowed only once in 20 years, so that the Jenmi can claim an enhancement and the Kudiyan a reduction only after a period of 20 years.

Another material change that has been introduced is in respect of tea and rubber lands. The tea plant and the rubber trees are not subject to any assessment under the existing law But as considerable portion of the land are now under tea and rubber, it has been proposed in this measure to give the Jenmi a small assessment in respect of each acre of such

lands. In regard to the method of collection, for facilitating speedy and prompt means of recovering dues, it has been proposed to allow the dues to be collected under the Revenue Recovery process, if the dues are not more than one year old, i e, to say practically, if the dues are current arrears In case of arrears, more than a year old, the Jenmi has to recover them by suit in a Court of Law It has also been proposed to reduce the period of limitation which has been till now 12 years to 6 years, so that there may be an incentive to the Jenmi to recover them soon and not allow them to accumulate

There are two points of procedure on which, again, some changes are proposed by this Bill When any holding is partitioned, as it often happens after the Navar and Ezhava Regulations, the question arises how the Michavaram and the Kana Arthom chargeable on the property has to be divided Under the existing law, it is not possible to compel the Jenmi or the Kudiyan to divide the Jenmi dues or the Kana Arthom It is proposed by the new measure that it should be possible, if necessary by a suit in a Court of Law, to compel a division or apportionment of the Michavaram as well as the Kana Arthom due on the holdings.

In regard to compensation money payable on the acquisition of land by the Government under the Land Acquisition Regulation, there is already some provision in a ruling of the High Court as to how the money should be apportioned The principle of that has been given a statutory basis in this amending Bill * * *—

L. C P dated 21-1-1930.

II. The Bill was referred to a Select Committee, and when the Committee's Report was presented to the Council, it was decided to recommit the Bill to another Select Committee. In view of the importance of the Second Committee s Report as explaining several provisions of the Bill, extracts therefrom are appended below

"We the undersigned, members of the Select Committee to which the Jenmi and Kudiyan (Amendment) Bill was recommitted for further consideration, beg report as follows.

II The reference made to the Committee by the Council is the following :—

'Whether in respect of Kanapattom lands, an arrangement can reasonably be made that the pattom of such lands be taken to be the same as the pattom fixed for Land Revenue purposes and out of that pattom, whatever is left after deducting the Sirkar tax, be taken to be the Jenmis due lieu of all and every one of the claims, and if any such arrangement can reasonably be made, to draft and submit the necessary legislative provisions for the same'

III The pattom fixed for Land Revenue purposes is the Settlement pattom which may be seen from the Settlement Registers of the last general Revenue Settlement The amount arrived at by deducting the Sirkar tax from the Settlement pattom may be designated the "Settlement pattamicham" and it is by this name that we refer to it hereinafter The annual michavaram payable to the Jenmi *plus* the fractional fee (i e the annual payment proposed by the Bill to be made in substitution of the renewal fees payable periodically) *plus* the commuted cess (i. e the commuted money value payable yearly in substitution of the customary dues) may for convenience sake be designated the "Jenmivaram", and what is fixed by law for actual yearly payment to the Jenmi may be designated the 'Jenmikaram" When the "Jenmivaram" referred to is also the annual payment fixed by law to be made to the Jenmi, that would be the Jenmikaram also. (Under the Bill, both the original Bill and the Bill as revised by the previous Select Committee, the Jenmivaram and the Jenmikaram would be the same.) The

meaning of the terms, Settlement Pattamicham, Jenmivaram and Jenmikaram being understood as above indicated, the reference made to the Select Committee is in brief whether the Settlement pattamicham can be fixed as the Jenmikaram, or some such arrangement made, in lieu of all and every one of the Jenmi's dues

IV The Committee felt that, in order to come to any satisfactory opinion on the point it was necessary to get some evidence of the variation, if any, as also of the extent of the variation, between the Jenmivaram and the Settlement pattamicham The members of the Committee therefore decided to examine as many kanom documents relating to kanapattom lands in different parts of the State as could conveniently be done and ascertain the Jenmivaram and compare it with the Settlement pattamicham For this purpose, the members of the Committee divided themselves into three parties, to tour round each of the three Revenue Divisions of Trivandrum, Quilon and Kottayam Each party camped at convenient centres and met the Jenmis and Kudiyans who appeared before them and examined the documents produced and compared the Jenmivaram with the Settlement pattamicham Statements made to the Committee by the three parties as to the result of their investigations are appended hereto, the statement of the Trivandrum party as Appendix A, that of the Quilon party as Appendix B and that of the Kottayam party as Appendix C

V In all, 1273 Kanom documents were examined and the Jenmivaram ascertained and the Settlement pattamicham as also certain other particulars in respect of the lands comprised in the documents noted It has been found that the Jenmivaram and the Settlement pattamicham vary in every case. Taking it that a variation, either way, to the extent of ten per cent. of the Jenmivaram or less is only an insignificant or negligible variation, and that larger variations are substantial variations, it has been found that only in a comparatively small number of cases, the variation is negligible and that in other cases (*i. e* in the bulk of the cases examined) the variation has been substantial As may be seen from Appendix B, only 12½ per cent of the documents examined in the Quilon Division exhibited negligible variations, and as may be seen from Appendix C, only 21 per cent of the documents examined in the Kottayam Division exhibited negligible variations Thus, if the Settlement pattamicham is fixed as the Jenmikaram, it would be seen that in most cases, either the Kudiyans would have to pay much more than what they have to pay now or the Jenmis would get only much less than what they get now In some cases the Kudiyan would have to pay more than double and in some cases the Jenmi would get only less than half, and in some even *nil* In the majority of the cases of substantial variations, as indeed in the majority of all the cases of variations, the Settlement pattamicham has been found to be larger than the Jenmivaram It would appear therefore that though the fixing of the Jenmikaram at the amount of Settlement pattamicham may be an easy solution in theory, such an arrangement would cause hardship to a very large number of individuals, in fact to the bulk of the individuals of the community of Jenmis and Kudiyans and that, as between the Jenmis and Kudiyans, the Kudiyans would suffer more. The Committee, therefore, have come to the conclusion that it is not right to fix the Settlement pattamicham as the Jenmikaram uniformly in all cases, and they feel that it is not advisable to make any large departures from the amount of the Jenmivaram or the Jenmikaram under the Amendment Bill After anxious consideration, they have arrived at the following formula as a rule of workable arrangement, namely :—

(a) That wherever the amount of the difference between the Jenmivaram

and the Settlement pattamicham is not larger than ten per cent of the Jenmivaram the Settlement pattamicham be fixed as the Jenmikaram

(*b*) That when the amount of the Settlement pattamicham is larger than the amount of the Jenmivaram by more than ten per cent of the latter, the Jenmivaram *plus* ten per cent thereof be fixed as the Jenmikaram, and

(*c*) That when the amount of the Settlement pattamicham is less than the amount of the Jenmivaram by more than ten per cent of the latter, the Jenmivaram *minus* ten per cent thereof be fixed as the Jenmikaram

(*d*) That the Jenmikaram so fixed should of course be, in every case, in lieu of all and every one of the rights of the Jenmi in respect of the land, and

(*e*) That the Jenmikaram so fixed should not be liable to any variation until a general Revenue Settlement by Government after which, however, the Jenmikaram may be enhanced or reduced in proportion as the Settlement pattamicham becomes larger or smaller by the fresh Revenue Settlement

It will be noticed that the characteristic feature of this formula is that in no case will the amount of the Jenmikaram arrived at be larger or smaller than the amount of the Jenmivaram, or the Jenmikaram under the Amendment Bill, by more than ten per cent and that, as in the majority of cases the Settlement pattamicham is larger in amount than the Jenmivaram, or the Jenmikaram under the Amendment Bill, the Jenmis' dues will straightway be enhanced in the majority of cases.

VI. In regard to the immediate acceptance and carrying out of the formula there has been a difference of opinion The minority (the Jenmi members) are of opinion that this formula can be accepted and carried out only if the Government would undertake to collect the Jenmikaram just like, and along with, the Sirkar tax and pay it to the Jenmi without any application being made by the Jenmi for the purpose in each and every case as is provided for in the Bill before the Council What they want is that the Government should undertake full responsibility for collecting the Jenmikaram and paying it over to the Jenmi In fact their position is that the formula itself can be deemed reasonable only if the Government would undertake the responsibility as indicated above The majority of the Committee are agreeable to the demand of the Jenmi members being accepted, and the Committee hereby make a recommendation to Government to accept the request of the Jenmi members and they entertain the hope that it will be acceptable to Government. But the majority cannot make it a condition precedent of the formula arrived at being accepted or carried out For one thing, to tack on a condition relating to the *collection* of the Jenmikaram to the formula relating to the fixing of the Jenmikaram is, the majority feel, beyond the scope of the reference to the Committee They feel also that it is primarily for the Government to say whether they could and would accept the responsibility involved in the collection of the Jenmikaram as desired by the Jenmi members. The majority are therefore of opinion that the formula referred to above may be accepted, and implemented at once, and that, as required by the reference made to the committee, the necessary legislative provisions may be drafted and submitted to the Council

VII The Committee feel that it is expedient to draft the legislative provisions as amendments to the Bill as introduced in the Council In the formula as well as in the legislative provisions, what the amount of the Jenmivaram should be is a material factor The Committee have accepted the provisions of the Government

We are, in supersession of the Royal Proclamation above referred to hereby pleased to enact as follows.—

CHAPTER I

Preliminary.

Short title

1 (1) This Regulation may be called the "Travancore Jenmi and Kudiyan Regulation of 1071 "

Commencement

(2) It shall come into force throughout Travancore on the first day of Makarom 1072

Provided that [* *] the 1st para of Section 44 shall come into force on the first day of Chingom 1074

Bill, and not of the Bill as revised by the previous Select Committee, for arriving at the amount of the Jenmivaram The former would yield a slightly larger amount than the latter

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III The Bill was published in the Gazette dated 14-1 1930 It was introduced into the Council at the meetings held on 21 and 22-1-1930 (*L C P Vol XVI Pp. 23 86 and 107 153*) At the latter meeting, the Bill was referred to a Select Committee The Committee s Report was published in the Gazette dated 14-4-1931 It was presented to the Council, and when it was moved that the Bill be taken up for consideration, discussion followed and the Bill was recommitted to a Select Committee, at the meetings held on 16 and 17 12 1931 (*L. C P , Vol XX, Pp 59-81 and 109 139*). The Second Committee s Report was published in the Gazette dated 13-4 1932. The Report was presented to the Council and it was moved that the Bill be taken up for consideration, and after discussion the debate was adjourned at the meeting held on 21-4-1932 (*L. C P Vol XX Pp. 351-395*). The Bill was considered at the meetings held on 27 to 30-7 1932, 13-8-1932 (*L. C P Vol XXI, Pp. 33-43 107-162, 203-263, 322-357, 1419-1450*), 9, 15 and 16-12-1932 (*L C P, Vol XXII, Pp. 5-62, 389-450 and 471-525*) The Bill was finally read and passed at the meeting held on 20-12-1932 (*L C P, Vol. XXII, Pp 692-707*) The Regulation was published in the Gazette dated 3-1 1933

Title· I The words within square brackets were substituted, by Section XXIII of Regulation XII of 1108, for the words "Michavaram and other proprietary" which occurred in the Title to Regulation V of 1071

II The above substitution was made at the final reading of the Bill, on the motion of the Official Member in charge.— *L C P, dated 20-12-1932*

Preamble· I. The word "Jenmis'" was substituted for the words "Michavarom and other customary proprietary' which occurred after the words "realisation of, ' and the word "Jenmis " was substituted for the words "Michavaram and other ' which occurred between the words "for " and "dues.

II These substitutions were made by Clauses" (*a*) and (*b*) of Section XXIV of Regulation XII of 1108.

The Official Member in charge moved the above amendments, at the final reading of the Bill— *L C P dated 20-12-1932*

Sec. 1· 1. Section II of Regulation XII of 1108 omitted the words and figures— "para 2 of Section 5 and " which occurred in the Proviso.

[2. No custom or customary right as between the Jenmi and the Kudiyan shall prevail unless provided for in this Regulation expressly or by necessary implication]

No right between Jenmi and Kudiyan unless expressly provided for

3 The following expressions shall have the meanings hereby assigned to them unless there is something repugnant in the subject or context —

Interpretation clause

(1) "Jenmom land" means land (other than Pandaravagay, Sreepandaravagay, Kandukrishi or Sirkar Devaswom land, recognised as such in the Sirkar accounts) which is either entirely exempt from Government tax or, if assessed to public revenue, is subject to Rajabhogam only, and the occupancy right in which is created for a money consideration (Kanom) and is also subject to the payment of Michavaram or customary dues and the [* * *] payment of renewal fees

"Jenmom land"

Explanation [(*1*)] —Rajabhogam includes Rajabhogam paid to a Chief within whose free-hold estate the land is situate

[*Explanation* (*2*) —For the purposes of this definition, the payment of Jenmikaram shall be deemed to be the payment of Michavaram or customary dues and the payment of renewal fees]

(2) "Jenmi" means a person in whom the [Jenmom] right over Jenmom lands is vested and includes, in the case of Devaswoms owning Jenmom [right], the managing Trustee or Trustees of the Institution for the time being

"Jenmi"

(3) "Kudiyan" means a person who holds lands on Kanapattom tenure

"Kudiyan"

(4) "Kanapattom" means a demise of Jenmom land made or renewed by the Jenmi by whatever name such demise is designated

"Kanapattom"

2. For the paras of Sections 5 and 44 referred to, see Notes under these Sections *Infra*

Sec. 2 I The new Section was substituted by Section II A of Regulation XII of 1108

II. Section 2 of Regulation V of 1071 was as follows —' 2 *Saving of custom and customary rights* —Nothing in this Regulation shall affect any custom or customary right not inconsistent with, or not expressly or by necessary implication, modified or abolished by its provisions.'

III. The Second Select Committee who made the amendment said —" Under the proposed scheme of things, the Jenmi is to get the Jenmikaram in lieu of all and every one of his rights. It should follow, therefore, that no right other than what is expressly provided for by this Regulation could enure in favour of the Jenmi or the Kudiyan.—*S C R— Para VIII, I*

(5) "Kanom" means the Arthom or consideration (in money or in kind) paid for the Kanapattom and shall also include the value of improvements made by Kudiyans and treated as Arthom or consideration

"Kanom"

(6) A person is said "to hold land" whether he retains it in his actual possession or whether he mortgages or sublets it, and a person shall be deemed to have held land if it has been held by himself or by a predecessor in interest or title through whom he claims

"To hold land"

(7) "Holding" means a parcel of land or parcels of land held under one Kanapattom instrument and one set of conditions

"Holding"

(8) 'Sub-tenant" means any person who holds land under a Kudiyan.

"Sub-tenant"

(9) "Pattom" means the assessed [annual] rent of the holding prior to the deduction of interest due to the Kudiyan on the Kanom in order to determine the Michavaram due to the Jenmi.

Pattom"

(10) "Michavaram" means the [annual] residual rent which is payable or deliverable [*] under a Kanapattom by the Kudiyan to the Jenmi, whether in money or in kind, and includes services due in lieu of rent.

"Michavaram"

Sec 3: The amendments made in the several clauses of this Section were all made by Section III of Regulation XII of 1108

Clause (1) *Jenmom land*—1. The words "periodical renewal of the right on' which occurred before the words "payment of renewal fees" have been omitted The original Bill made the omission

2. The existing Explanation was numbered as (1) and another Explanation added by the Second Select Committee. They said —"Under the proposed scheme of things, there will be no payment of Michavaram or customary dues or renewal fees as such, but there will be only the payment of Jenmikaram In order that the definition of Jenmom land may be operative even when Jenmikaram alone is paid, the Explanation referred to is proposed to be added'—

S C R., Para VIII 3

Clause (2) *Jenmi*—The word "Jenmom" was substituted for the word "proprietary" and the word 'right" for "lands"

The Second Select Committee who made the substitutions said —'Again, in the new scheme of things, the ownership of the land practically vests in the Kudiyan and what the Jenmi has is only the right to Jenmikaram, which we propose to call the Jenmom right. To bring about this idea in the definition of the word "Jenmi" the amendment is proposed".—

S. C R., Para VIII, 3

Clause (9) *Pattom*.—The word "annual" was inserted between the words "assessed" and "rent" The original Bill made the insertion.

Renewal fees Fractional fee

["(11) 'Renewal fees,' means such fees as Atukkuvatu, Sakshi, Opputusi or the like agreed to be paid by the Kudiyan to the Jenmi periodically on occasions when the Kanapattom is renewable, and includes the 'fractional fee'·

and 'Fractional fee' means the fee fixed as claimable (in substitution of the renewal fees) in annual instalments at the rate of seven per cent of the aggregate value or amount of the renewal fees due on the expiry of twelve years, or in annual instalments proportionately lower in percentage when renewal on the expiry of any longer period is provided for by the Kanapattom

Clause (10) *Michavaram* —The First Select Committee inserted the word "annual" before the word "residual",— a verbal change intended to make the meaning clear —*S C R Paras 4 & 5.*

The original Bill omitted the word "annually" which occurred after the word "deliverable"

Clause (11) *Renewal fees* —I The definition stood as follows in Regulation V of 1071

"(11) "Renewal fees" means the fee or fees payable on renewal of Kanapattom, under such denominations as Adukuvathu, Avakasom, Sakshi, Opputusi, Olappanom, Thirunal-kalcha, and the like'

II. 1. In the original Bill, the definition stood as follows —

"(11) "Renewal fees" means such fees as Adukkuvathu, Sakshi, Opputhusi or the like agreed to be paid by the Kudiyan to the Jenmi periodically on occasions when the Kanapattom is renewable and includes the "fractional fee' payable in annual instalments after the commencement of the Amendment Regulation at the rate of seven per cent of the aggregate value or amount of the renewal fees due on the expiry of every twelve years, or in annual instalments proportionately lower in percentage when renewal on the expiry of any longer period is provided for by the Kanapattom, such "fractional fee being always deemed to be a substitute for the renewal fees payable on the expiry of every twelve years, or at longer interval, as the case may be

Explanation —When a Kanapattom provides for Purushantra Polichezhutu (renewal on the death of the Jenmi or Kudiyan) or for renewal when a temple may be renovated, or when the language of the instrument raises a reasonable doubt as to the length of the period on the expiry of which renewal is enforceable, it shall be deemed that renewal on the expiry of every thirty-six years was intended and agreed upon by the parties."

2. The First Select Committee substituted the word "five" for the word "seven" before the words "per cent" The Committee said —

"The fractional fee is arrived at by distributing the total amount of the renewal fees into 12 annual equal instalments. The Renewal fees will fall due only at the end of 12 years. When fractional payments are made every year, interest has to be calculated thereon. If interest is calculated at the rate of 3½ per cent per annum, the fractional fee will be 7 per cent of the Renewal fees. If interest is calculated at the rate of 12 per cent, the fractional fee will be 5 per cent. of the Renewal fees. The majority of us are of opinion that 5 per cent. of the Renewal

Explanation —When a Kanapattom provides for Purushantra Polichezhuttu (renewal on the death of the Jenmi or Kudiyan) or for renewal when a temple may be renovated, or when the language of the instrument raises a reasonable doubt as to the length of the period on the expiry of which renewal is enforceable, it shall be deemed that renewal on the expiry of every thirty-six years was intended and agreed upon by the parties"]

["(12) 'Customary dues' means cesses or perquisites consisting of (i) Onakkazhcha, Panchapidalam, Utsava-Koppu or the like due annually or periodically on specific dates, and (ii) Arukazhcha, Kalasa-vari or the like due at periodical intervals, which though specific, are not previously ascertainable, whenever such cesses or perquisites are payable by the Kudiyan to the Jenmi in accordance with the terms of a Kanapattom; and

Customary dues. Commuted cess.

fees should meet the requirements of the situation and that there is no justification for capitalising the fractional fee at such a low rate as 3½ per cent per annum. Simple interest is adopted in both the calculations. Hence the proposed change." *S C R, Parts 6 & 7*

3. The Second Select Committee further amended the Clause as follows —

(11) "'Renewal fees' means such fees as Atukkuvatu, Sakshi, Opputusi or the like agreed to be paid by the Kudiyan to the Jenmi periodically on occasions when the Kanapattom is renewable, and includes the fractional fee

and, 'fractional fee' means the fee fixed as claimable (in substitution of the renewal fees) in annual instalments at the rate of *seven* per cent. of the aggregate value or amount of the renewal fees due on the expiry of twelve years, or in annual instalments proportionately lower in percentage when renewal on the expiry of any longer period is provided for by the Kanapattom

Explanation —When a Kanapattom provides for Purushantra Polichezhuttu (renewal on the death of the Jenmi or Kudiyan) or for renewal when a temple may be renovated, or when the language of the instrument raises a reasonable doubt as to the length of the period on the expiry of which renewal is enforceable, it shall be deemed that renewal on the expiry of every thirty-six years was intended and agreed upon by the parties,"

4. When the Bill was considered by the Council, the words "five per cent" were substituted for the words "seven per cent." on the motion of a Non-official member who, in accepting the view of the first Select Committee, said that "the fractional fee would amount to only 3½ per cent ' In the majority of cases, the Kanapattom provides for renewals at the expiry of twelve years and therefore the Kudiyan cannot be said to have been benefited in any way by this. In the interests of the Kudiyans therefore it is necessary that the fractional fee should be as moderate as possible."—*L. C P., dated 23-7 1913*

5. At the final reading of the Bill, the word "seven" was substituted for the word "five" in the definition of the term "fractional fee," on the motion of the Official Member in charge who said in explanation of the amendment—" This percentage refers to the yearly value for

'Commuted cess' means the commuted money value of customary dues, if any, ascertained as claimable by the Jenmi every year after the commencement of the Amendment Regulation according to the calculation made in the manner specified hereunder; that is to say —

(i) when Kalasavari is claimable by a Jenmi, it shall be assumed that he is entitled to five per cent of one Kalasavari cess every year,

(ii) when Arukazhcha is claimable by a Jenmi, it shall be assumed that he is entitled to sixteen per cent of one Arukazhcha cess every year;

(iii) when other customary dues are claimable by a Jenmi, the annual value of such shall be ascertained by calculation;

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the renewal fees which according to the Bill as revised by the Select Committee was put at 7 per cent In the second reading of the Bill, this House reduced it to 5 per cent, but afterwards the Jenmis and the Non-jenmis came to an agreement and it was agreed amongst all the parties that the provision, which was reduced by the House at the second reading, may be restored at the third reading"—

L C P, dated 20-12 1958

Clause (12) *Customary dues* —

I. The definition stood as follows in Regulation V of 1071 —

"(12) "Customary dues" means the cesses or contributions such as Onakalcha, Allakkada, Thirunal-chumadu, Puranna!-chumadu, Vara-koppu, Oolsava-koppu and the like which are payable to the Jenmi by the Kudiyan on account of his holding according to contract or custom"

II. 1. The original Bill contained the following definition :—

"(12) "Customary dues" means cesses or perquisites consisting of (i) Onakkashcha, Panchaphalam, Utsavakoppu or the like due annually or periodically on specific dates, and (ii) "Arukazhcha, Kalasavari or the like due at periodical intervals, which, though specific, are not previously ascertainable, whenever such cesses or perquisites are payable by the Kudiyan to the Jenmi in accordance with the terms of a Kanapattom, and

"Commuted cess means the commuted money value of customary dues, if any, ascertained as claimable by the Jenmi every year after the commencement of the Amendment Regulation according to the calculation made in the manner specified hereunder, that is to say —

(i) when Kalasavari is claimable by a Jenmi, it shall be assumed that he is entitled to five per cent of one Kalasavari cess every year,

(ii) when Arukazhcha is claimable by a Jenmi, it shall be assumed that he is entitled to sixteen per cent of one Arukazhcha cess every year,

(iii) when other dues or cesses are claimable by a Jenmi, the annual value of such shall be ascertained by calculation,

(iv) in valuing any due or cess payable in kind, the commutation price specified in the contract of Kanapattom or understood to be the one conformable to the local customary rate, whichever is the lower, shall be the guide,

(v) the sum total of the value or amounts of the dues or cesses ascertained as annually payable to the Jenmi in

(iv) in valuing any customary dues payable in kind, the commutation price specified in the contract of Kanapattom or understood to be the one conformable to the local customary rate, whichever is the lower, shall be the guide;

(v) the sum total of the value or amounts of the customary dues ascertained as annually payable to the Jenmi in accordance with the calculation made under clauses (i) to (iv) shall be deemed to be the 'commuted cess' in any given case"]

Duly registered

(13) "Duly registered" means registered in accordance with the law for the time being in force relating to the Registration of Assurances

Jenmivaram

[" 14 Jenmivaram in respect of a Jenmom land or holding means the total of the amounts of the annual Michavaram, the fractional fee and the commuted cess in respect thereof

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accordance with the calculation made under Clauses (i) to (iv) shall be deemed to be the "commuted cess" in any given case."

2. The First Select Committee inserted in the definition of "Commuted cess, the words "the sum total of after the word "means," substituted "twelve" for "sixteen" in Clause (ii), and omitted Clause (v)

3. The Second Committee restored the definition as it stood in the original Bill

4. When the Bill was considered by the Council, "12 per cent" was substituted for "16 per cent" in the case of the apportionment of the Arukaccha dues in Sub clause (ii) on the motion of a Non-official member—*L C P, dated 28-7-1938.*

5. At the final reading of the Bill, the word "sixteen" was substituted for the word "twelve" on the motion of the Official member in charge who said:—"This also arises out of the agreement which has been arrived at between the parties. It was agreed that the figure, sixteen, that was reduced to twelve by the House at the second reading may be restored at the third reading — *L. C P, dated 20-12-1938*

Clause (14) *Jenmivaram.*—I Regulation V of 1071 had, as the last of the definitions, that of "Improvements.' The original Bill retained the definition, and it was as follows.—

"(14) "Improvement" means, with reference to a holding, any work including its product which is suitable to the holding and consistent with the conditions on which it is based by which the value of the holding has been and continues to be increased, and which, if not executed on the holding, is either executed directly for its benefit, or is, after execution, made directly beneficial to it.

Explanation I—It includes among other things—

(a) the construction of wells and other works for the storage or supply of water for agricultural or domestic purposes,

(b) the construction of works for drainage and for protection against floods,

(c) the planting of trees

(d) the reclaiming, enclosing, levelling and terracing of land for agricultural purposes and other works of a like nature,

(e) the erection in Purayadoms or plantations of farm buildings and of dwelling-houses, cattle-sheds or other structures, permanent walls

"(15) Settlement pattom in respect of a Jenmom land means the pattom fixed by Our Government for the Land Revenue purposes at a general Revenue Settlement and includes also the proportionate pattom chargeable on each portion of a land wherever the land is divided for any reason

Settlement pattom

(16) Settlement pattamicham in respect of a Jenmom land means its Settlement pattom *minus* the tax due thereon to Our Government.

Settlement pattamicham

Explanation—Wherever the Settlement pattom is fixed in kind, 'tax' means the tax in kind fixed with reference to the Settlement pattom although the tax may be payable to Our Government in money

(17) Jenmikaram in respect of a Jenmom land or holding means the amount payable in respect of that land or holding under the provisions of this Regulation by the Kudiyan to the Jenmi every year in lieu of all

Jenmikaram

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or strong fences which are not of a temporary nature, and

(f) the renewal or reconstruction of any of the foregoing works or such alterations or additions thereto as are not of the nature of mere repair and as durably increase their value

But it does not include such clearances, embankments, levellings, enclosures, temporary wells and water channels as are made by tenants in the ordinary course of cultivation and without any special expenditure or any other benefit accruing to land from the ordinary operations of husbandry

Explanation II.—A work executed by a Kudiyan is not an "improvement" if it substantially diminishes the value of any other part of his Jenmi's property"

11. The Second Select Committee omitted the definition, as "a definition of the word "improvement" in the manner in which it appears in the existing Regulation does not appear necessary"

The Committee substituted as Clause (14), the definition of Jenmivaram now found in the Regulation—

S. C. R. Para VIII 6.

Clauses *15–19* 1. The original Bill added the following Clauses after Clause (14),—

"(15) "Jenmikaram" means and includes all or any of the following items claimable by a Jenmi, namely, the fractional fee, the commuted cess and the Michavaram.

(16) "Net produce" means the surplus remaining after deducting from the gross produce of any land a portion equivalent in value to the cost of cultivation and the Sirkar assessment and cesses, if any, chargeable on such land, and includes the value of such surplus.

(17) "Average annual net produce" means the net produce ascertained as derivable on an average for one year, by calculation of the net produce for each year during a period of not less than ten

and every one of the Jenmi's claims in respect of the land or holding such Jenmikaram being fixed as follows :—

(*a*) so long as the last general Land Revenue Settlement made by Our Government remains in force, the Jenmivaram shall, except in the case of cherikkal lands, be the Jenmikaram, and, in the case of cherikkal lands, the Settlement pattamcham with reference to the said last Revenue Settlement *minus* the interest on the kanom amount shall be the Jenmikaram ; and

(*b*) if the Jenmikaram as under clause (*a*) is altered or revised at or after any future general Land Revenue Settlement under the provisions of this Regulation, such altered or revised Jenmikaram shall thenceforward be the Jenmikaram and, if it is not so altered or revised, the then existing Jenmikaram shall continue to be the Jenmikaram

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years immediately preceding the date of such ascertainment

(18) "Margin of profit" when used with reference to a Kudiyan and his holding means the minimum net gain claimable by the Kudiyan out of the average annual net produce of his holding, such gain being fifty five per cent of such average annual net produce, when the holding is paddy land, or sixty per cent of such average annual net produce, when the holding is land of any other description.

(19) "Timber trees" means trees declared to be such from time to time by Our Government, by Notification in Our Government Gazette

(20) "Prescribed" means prescribed from time to time by Our Government by Notification in Our Government Gazette

(21) "The Amendment Regulation" means the Travancore Jenmi and Kudiyan (Amendment) Regulation, 110 ."

11. The First Select Committee made the following amendments :—(1) In Clause (16), the word "tax" was substituted for the word "assessment", (2) in Clause (18) the words "garden land" were substituted for the words "land of any other description" occurring at the end, and (3) the following definition of timber trees was substituted for Clause (19) :—"Timber trees' means and includes the trees specified in the Schedule to this Regulation.' The Schedule appended was as follows,—

Schedule of timber trees

1. Teak	11 Venthekku
2. Black-wood	12 Red Cedar or Mathahari Vampu
3 Ebony	
4. Sandal-wood	13. Mayila
5 Angil	14. Manjakadampu
6. Thumbagom	15 Manimaruthu
7 Vengai	16 Mulvengai
8. Thempavu	17 Vengaetta
9 Akil	18. Poovarasu
10 Erupool	19 Mahogony"

The Committee said :—"We consider that it would be better to specify the timber trees in the Regulation itself than to leave it to be prescribed by Government. The Committee are of opinion that the trees described in the Schedule shall be regarded as timber trees for the purpose of this Regulation, and the majority are of opinion that no other trees should be classed as timber trees."—

S C. R., Paras 16-18.

Explanation 1—Payment of or the liability to pay the Jenmikaram is equivalent to paying or the liability to pay the Michavaram, renewal fees and customary dues

Explanation 2,—When any Jenmom land or holding is divided for any reason the Jenmivaram and the Jenmikaram chargeable proportionately on each part shall respectively be the Jenmivaram and the Jenmikaram due on that part.

III The Second Select Committee put in the following Clauses in the place of those given above They said ,—"The new definitions, those of 'Jenmivaram', 'Settlement pattam,' 'Settlement pattamicham' and 'Jenmikaram,' are inserted with a view to give effect to the formula proposed by the Committee A definition of the expressions 'net produce" 'average annual net produce" "margin of profit" and "timber trees' does not appear to be necessary in the proposed scheme of things. Those definitions are therefore omitted' —

S C R, Para VIII, 8

The Clauses added were —

"(15) Settlement pattom in respect of a jenmom land means the pattom fixed by Our Government for the Land Revenue purposes at a general Revenue Settlement and includes also the proportionate pattom chargeable on each portion of a land wherever the land is divided for any reason."

"(16) Settlement pattamicham in respect of a jenmom land means its Settlement pattom *minus* the tax due thereon to Our Government"

Explanation—Wherever the Settlement Pattom is fixed in kind, 'tax' means the tax in kind fixed with reference to the Settlement Pattom although the tax may be payable to Our Government in money

"(17) Jenmikaram in respect of a jenmom land or holding means the amount payable in respect of that land or holding under the provisions of this Regulation by the Kudiyan to the Jenmi every year in lieu of all and every one of the Jenmi's claims in respect of the land or holding, such Jenmikaram being fixed as follows -

(a) When the Settlement pattamicham with reference to the last general Revenue Settlement and the Jenmikaram in respect of any jenmom land or holding are the same in amount or (if they differ) when the amount of the difference between the two is not larger than ten per cent of the Jenmivaram, the Settlement pattamicham shall be the Jenmikaram

(b) When the amount of the Settlement pattamicham with reference to the last general Revenue Settlement is larger than the amount of the Jenmivaram by more than ten per cent of the latter, the Jenmivaram *plus* ten per cent thereof shall be the Jenmikaram

(c) When the amount of the Settlement pattamicham with reference to the last general Revenue Settlement is less than the amount of the Jenmivaram by more than ten per cent of the latter, the Jenmivaram *minus* ten per cent thereof shall be the Jenmikaram.

Explanation 1—Payment of or the liability to pay the Jenmikaram is equivalent to paying or the liability to pay the michavaram, renewal fees and customary dues

Explanation 2—When any jenmom land or holding is divided for any reason, the Jenmivaram and the Jenmikaram chargeable proportionately on each part shall

Explanation 3.—The term 'cherikkal land' means all land recognised as such in the Sirkar accounts in which paddy or other cultivation is or has been carried on in recurring periods and on which, until the last Revenue Settlement, *malavaram* or *vilameladi* tax alone has either been levied or was leviable by Our Government when such land was cultivated,

Prescribed

(18) 'Prescribed' means prescribed from time to time by Our Government by Rules or by Notification in Our Government Gazette

Amendment Regulation.

(19) 'The Amendment Regulation' means the Travancore Jenmi and Kudiyan (Amendment) Regulation, 1108"]

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respectively be the Jenmivaram and the Jenmikaram due on that part

(18) 'Prescribed' means prescribed from time to time by Our Government by Notification in Our Government Gazette.

(19) 'The Amendment Regulation' means the Travancore Jenmi and Kudiyan (Amendment) Regulation, 110 "

IV *Clause (17)*.—When the Bill was considered by the Council, a Non-official Member moved to substitute the following for sub-clauses (a), (b) and (c) —

"(a) so long as the last general Revenue Settlement remains in force, the *Jenmivaram* shall be the *Jenmikaram*, and

(b) if the *Jenmikaram* as under clause (a) is altered or revised at or after the next general Revenue Settlement under the provisions of this Regulation, such altered or revised *Jenmikaram* shall be the *Jenmikaram*." The amendment was carried *nem con* —

L. C P. dated 30-7-1932

V. At the final reading of the Bill, for sub-clauses (a) and (b) as given above, the sub-clauses now found in the Regulation were substituted and also another Explanation—(3)—was inserted, on the motion of the Official Member in charge who said :—"This amendment makes a change specially applicable to the cherikkal lands At the second reading, there was no special provision relating to cherikkal lands, and in regard to *all* lands Jenmivaram was fixed to be the Jenmikaram, but when the parties came to an agreement in regard to the enhancement or reduction of Jenmikaram, one of the terms of the agreement was that special provision should be made in regard to cherikkal lands, as regards the present Jenmikaram, and it was agreed that, in regard to cherikkal lands, the Settlement pattamtcham *minus* the interest on the kanom amount should be the Jenmikaram In view of that agreement arrived at when the proposed Section 14 was passed, I bring forward this amendment"—

L. C P dated29-12 1932

Clause (18) *Prescribed*.—At the final reading of the Bill, the words "by Rules or" were inserted after the word "Government" on the motion of the Official member in charge —

L. C P.. dated 29-12-1932.

CHAPTER II.

Of the Rights and Liabilities of Jenmis and Kudiyans

Tax on Jenmom lands transferred by sale, &c., to be borne by transferee.

4 When a Jenmi transfers by sale, gift or otherwise, the Jenmom right in the whole or any part of [*] Jenmom lands and the Sirkar imposes or enhances the tax on the Jenmom lands transferred, such tax shall be borne by the transferee

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Sec 4 The word "his" which occurred before the words "*Jenmom lands*" in Section 4 of Regulation V of 1071, was omitted by Section III-A of Regulation XII of 1108.

The Second Select Committee made this verbal change.— *S C R, Para VIII, 7*

Secs. 5-15 I These Sections were substituted for Sections 5-14 of Regulation V of 1071, by Sections IV of Regulation XII of 1108.

II The old Sections were as follow :—

"5 *Right of Kudiyan to permanent occupancy* —Subject to the provisions of this Regulation, every Kudiyan shall have a right of permanent occupancy in his holding and shall be exempt from liability to eviction save as laid down in Section 7

In the absence of an express contract, nothing in this Section shall be taken to confer the right of permanent occupancy on the Kudiyan of a non-Malayalee-Brahmin Jenmi, unless he or his predecessors in interest or both have uninterruptedly held the holding for a period of not less than twenty-five years.

The provisions of para 2 do not apply to assignees of Malayalee-Brahmin Jenmis.

6 *Right of Kudiyan heritable and transferable* —The right of a Kudiyan in his holding shall be heritable and transferable, but every transfer shall be in writing, and no transfer of a portion of the holding, without the consent, in writing, of the Jenmi, shall affect the liability of the entire holding for Michavaram and other dues leviable by the Jenmi.

7 *Eviction of Kudiyan* (1) No Kudiyan shall be evicted from his holding or any portion of his holding except in execution of a decree of Court, and no Court shall make a decree for such eviction except for—

(a) non-payment of Michavaram for 12 years consecutively, notwithstanding an express demand in writing made at any time after the first year's arrears shall have accrued ·

(b) neglect or refusal to pay renewal fees and take a renewal within one year from the date on which such fees fall due and six months after the service upon him of a notice of demand in writing :

Provided that, when such neglect or refusal has taken place before this Regulation comes into force, it shall not confer on the Jenmi the right of eviction unless he proves that such neglect or refusal has been continued for a period of one year after this Regulation comes into force and six months after the service upon him of a notice of demand in writing under this Regulation

Explanation —Failure to pay renewal fees or take a renewal, due to *bona fide* differences between the Jenmi and the Kudiyan as to the amount of the renewal fees or as to the terms of the renewal, shall not be deemed to be neglect or refusal within the meaning of Clause (*b*),

(c) wilful denial of Jenmi's title and persistence in such denial even at the time of the first hearing of a suit for eviction :

Explanation.—A denial of the Jenmi's title under a mistake of fact or of law is not wilful within the meaning of Clause (c).

(d) intentional and wilful commission of such acts of waste as are calculated to materially and permanently impair the value and utility of the holding so as to injure the interests of the Jenmi.

(2) The written demand or notice mentioned in this Section shall be presented to the Court of the District Munsiff in whose local jurisdiction the holding is situated, and it shall be served by such Court on payment by the Jenmi of the prescribed process fees in the manner provided for the service of summons in the Code of Civil Procedure. But no Court fees shall be levied on the application presented to the Court by the Jenmi requesting the service of such demand or notice.

(3) A suit for ejectment on the ground stated in Clause (d) shall not be entertained unless the Jenmi has served a notice on the Kudiyan specifying the particular act of waste complained of, and, when the waste is capable of remedy, requiring the Kudiyan to remedy the same and in any case to pay reasonable compensation for the waste, and the Tenant has failed to comply within a reasonable time with that request.

(4) In case of eviction, the Kudiyan shall, in addition to a refund of the Kanom money, be entitled to be compensated for improvements made by him or by his predecessors in interest for which compensation has not already been paid, and his sub-tenants, if any, shall also be entitled to such compensation in respect of improvements made by them.

Explanation.—Nothing in this Section shall be construed to bar the right of the Jenmi to recover the arrears of Michavaram and customary dues at the date of eviction.

8. *Compensation for improvements how estimated*.—(1) The compensation to be awarded for items of improvement (*a*), (*b*), (*d*), (*e*) and (*f*) in Clause 14 of Section 3 shall be the estimated full cost of such improvements *minus* any deduction for wear and tear, and the compensation for item (*c*) shall be three-fourths of the capitalized value of the product of the trees other than wild trees of spontaneous growth, unless the Jenmi proves that, by local usage in respect of Janmom lands, the compensation to be awarded to the Tenant for trees is less than three-fourths.

(2) In awarding compensation for improvements, any reduction or remission of rent or any other advantage given by the Jenmi to the Kudiyan in consideration of the improvement shall be taken into consideration, and no compensation for an improvement shall be claimable when the Kudiyan has made the improvement in pursuance of a contract in writing binding him, in consideration of some substantial advantage to be obtained by him, to make the improvement without compensation, and he has obtained that advantage.

9. *Court to cancel forfeiture on payment of arrears into Court*.—When the Kudiyan has incurred forfeiture for non-payment of Michavaram or renewal fees and the Jenmi sues to eject the Kudiyan—if, at the first hearing of the suit, which shall not take place within three months from the date of the service of the original summons in the suit, the Kudiyan pays into the Court the Michavaram and other dues in arrears together with the interest thereon and the Jenmi's cost of the suit, the Court shall pass an order relieving the Kudiyan against forfeiture, and thereupon the Kudiyan shall hold the land as if the forfeiture had not occurred.

10. *Decree to declare amount of compensation in suit for ejectment of Kudiyan for waste*.—A decree passed in favour of the Jenmi in any suit for ejectment of a Kudiyan on the ground that he has committed intentional and wilful acts of waste, shall declare the amount of compensation which would reasonably be

[*5 From and after the commencement of the Amendment Regulation, the Jenmi shall not have any right, claim or interest in any land in a holding except the right to receive the Jenmikaram thereon and the Kudiyan shall be deemed to be the owner of the land subject only to the payment of the Jenmikaram

Kudiyan owner of land subject only to payment of Jenmikaram

payable to the Jenmi for the waste, and whether in the opinion of the Court the waste is capable of remedy, and shall fix a period during which it shall be open to the defendant to pay the amount to the plaintiff and, where the waste is declared to be capable of remedy, to remedy the same.

If the Defendant, within the period fixed by the Court under this Section, pays the compensation mentioned in the decree and, where the misuse or breach is declared by the Court to be capable of remedy, remedies the misuse or breach to the satisfaction of the Court, the decree shall not be executed

11 *Renewal of Kanapattom every twelve years* —In the absence of an express written contract to the contrary, on the expiry of a period of twelve years from the date of every Kanapattom, and thenceforward at the end of every successive period of twelve years, it shall be obligatory on the Jenmi to give and on the Kudiyan to accept a renewal of the Kanapattom, save and except in the cases mentioned in the next following Section.

12 *Kudiyan may surrender his holding at the end of twelve years* —A Kudiyan may, at the end of twelve years from date of a Kanapattom or of its last renewal, surrender in writing his holding to the Jenmi after six months' notice in writing, and claim refund of the Kanom In such cases, the Jenmi shall not be liable to pay to the Kudiyan the value of the improvements and he shall not be bound to accept the surrender, unless the whole of the arrears of Michavaram and other dues, if any, are also tendered at the time of surrender.

Notice under this Section shall be served through the Munsiff's Court in the manner provided in Section 7.

13. *Arrears of Michavaram and renewal fees to have priority over other charges* — Arrears of Michavaram and renewal fees due to the Jenmi shall be a charge on the holding of a Kudiyan and shall have priority over all other charges on the same, save arrears of tax due to Government

14. *Enhancement of Michavaram* —Subject to the limitations and conditions prescribed in Chapter III, every Jenmi may, at the time of periodical renewals of Kanapattom, enhance the Michavaram payable by a Kudiyan,

(1) (*a*) by increasing the Pattom assessment on the land,

(*b*) by reducing the rate of interest allowed to the Kudiyan on the Kanom money, if such rate is in excess of the rate usually allowed to Kudiyans holding on Kanapattom in the same Proverthi,

(*c*) by both the modes (*a*) and (*b*), or

(2) Where the Jenmi has hitherto been levying additional Kanom (or Ettartham) in lieu of enhancing the Michavaram, he may continue to do so at the customary period

Provided that no Jenmi shall without the consent of the Kudiyan be entitled to enhance the Michavaram and levy Ettartham at one and the same time"

Sec. 5. I. In the original Bill, the Section stood as follows —

"5. Notwithstanding any usage or contract to the contrary, no Kudiyan shall have the right to relinquish or apply for permission to relinquish his holding or a

Explanation 1—The Jenmi's right as well as the Kudiyan's right is heritable as well as transferable by sale, gift or otherwise

Explanation 2—Notwithstanding any usage or contract to the contrary, no Kudiyan has the right to relinquish or apply for permission to relinquish his holding or any portion thereof and no Jenmi has the right to evict or sue for the eviction of a Kudiyan from his holding or any portion thereof This prohibition shall apply also in the case of all applications made and suits instituted even before the commencement of the Amendment Regulation if such applications or suits are pending disposal on the date of commencement of the Amendment Regulation and were made or instituted, as the case may be, after the 19th Meenom 1105 The term 'suit' herein includes also applications for the execution of decrees passed in suits

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portion thereof and no Jenmi shall have the right to evict or sue for the eviction of a Kudiyan from his holding or a portion thereof

Provided that this prohibition shall not affect any order made or decree passed on an application presented, or in a suit instituted, under the provisions of Regulation V of 1071 prior to the commencement of the Amendment Regulation."

See *S O & R* (1)

II For the Proviso in the original Bill, the First Select Committee substituted the following —"Provided that this prohibition shall not affect any order made or decree passed on an application presented or in a suit instituted under the provisions of Regulation V of 1071 prior to 1st April 1930/19th Meenam 1105 even though the order or decree be made or passed after the commencement of the Amendment Regulation." They said :—

"The majority were of opinion that in the absence of the proposed change the Jenmis would rush to Courts for enforcing their right of eviction and the Kudiyans may be equally disposed to file suits for relinquishing their holdings, for neutralising the effect of the proposed Section 5. The date mentioned is the date on which the Select Committee held its first sitting for considering this Bill —*Paras 19 and 20*

III The Second Select Committee recast the Section and substituted the following as Section 5, and in so doing, they said —

"The proposed Section 5 carries out the decision of the Committee When the Jenmi has only the right to receive the Jenmikaram and no other right in respect of the land, it must *ipso facto* follow that the Kudiyan becomes the virtual owner of the land subject only to the payment of the Jenmikaram. And when he becomes the owner, he has the right to cultivate the land in any manner he chooses or to improve it or to make any use of the land, and the Kudiyan has no right to surrender the land and the Jenmi no right to evict the Kudiyan."—*Para VIII, 8*

"5. From and after the commencement of the Amendment Regulation, the Jenmi shall not have any right, claim or interest in any land in a holding except the right to receive the Jenmikaram thereon, and the Kudiyan shall be deemed to be the owner of the land subject only to the payment of the Jenmikaram

Explanation 1—The Jenmi's right as well as the Kudiyan's right is heritable as

Explanation 3—Notwithstanding any usage or contract to the contrary, every Kudiyan has the right to make any use of the land in his holding, to change its character either by converting wet land into garden land or by converting garden land into cultivable wet land, or in any other manner, to cut down and appropriate any trees standing thereon, to alter the course of cultivation in respect thereof and, in short, to do or suffer any thing to be done on the land without reference to, or interference from, the Jenmi.

Explanation 4—Notwithstanding any usage or contract to the contrary, every Kudiyan has the right to make any improvement in respect of his holding without reference to, or interference from, the Jenmi, and no Kudiyan shall thereby become liable to pay any higher Jenmikaram on account of any increase of production or any change in the nature of the crop raised in consequence of such improvement

Explanation 5—The Jenmi's right to the Jenmikaram shall be deemed to be immovable property

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well as transferable by sale, gift or otherwise.

Explanation 2—Notwithstanding any usage or contract to the contrary, no Kudiyan has the right to relinquish or apply for permission to relinquish his holding or any portion thereof and no Jenmi has the right to evict or sue for the eviction of a Kudiyan from his holding or any portion thereof

Provided that this prohibition shall not affect any order made or decree passed on an application presented or in a suit instituted under the provisions of Regulation V of 1071 prior to 1st April 1930/19th Meenam 1105, even though the order or decree be made or passed after the commencement of the Amendment Regulation

Explanation 3.—Notwithstanding any usage or contract to the contrary, every Kudiyan has the right to make any use of the land in his holding, to change its character either by converting wet land into garden land or by converting garden land into cultivable wet land, or in any other manner, to cut down and appropriate any trees standing thereon, to alter the course of cultivation in respect thereof, and, in short, to do or suffer anything to be done on the land without reference to, or interference from, the Jenmi.

Explanation 4—Notwithstanding any usage or contract to the contrary, every Kudiyan has the right to make any improvement in respect of his holding without reference to, or interference from, the Jenmi, and no Kudiyan shall thereby become liable to pay any higher Jenmikaram on account of any increase of production or any change in the nature of the crop raised in consequence of such improvement.

Explanation 5.—The Jenmi's right to the Jenmikaram shall be deemed to be immovable property "

IV When the Committee's Bill was considered by the Council, a Non-official Member moved the following amendment in substitution of the Proviso to Explanation 2 of Section 5. "This prohibition

6. (1) If in a holding there are more parcels of land than one, each having Settlement pattom assessed separately, the Jenmikaram of the entire holding shall be ascertained in accordance with the provisions of this Regulation and distributed in respect of each parcel of land in the proportion of the Settlement pattamcham bearing on such parcel of land

Apportionment of Jenmikaram as amongst various lands.

(2) The Jenmikaram so distributed in respect of each parcel of land shall be the Jenmikaram due thereon

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shall also apply to all applications or suits pending on the date this Amendment Regulation comes into force if such application was made or suit was instituted since 1st April 1930/19th Meenom 1105 Suits referred to herein shall include applications for execution of decrees specified in this paragraph and also all those passed before the 19th Meenom 1105" This amendment was carried —

L C, P, dated 19-8-1932

V. At the final reading of the Bill, on the motion of the Official Member in charge, the above was amended in view to make the meaning clear.—

L. C P dated 20-12 1932

Secs. 6, 7 & 8 · I In the original Bill these Sections stood as follow ·—

"6. The Jenmi's interest in all land in a holding as well as the Kudiyan's interest therein shall each be deemed to be immovable property, which is not only heritable, but also transferable by sale, gift or otherwise.

7 Notwithstanding any usage or contract to the contrary, every Kudiyan shall have the right to make any use of the land in his holding, to change its character either by converting wet land into garden land or by converting garden land into cultivable wet land or in any other manner, to cut down and appropriate, subject to the proviso next following, any trees standing thereon, to alter the course of cultivation in respect thereof, and, in short to do or suffer anything to be done on the land, without reference to, or interference from, the Jenmi

Provided that timber trees of not less than thirtysix inches girth standing on holdings on the date of the commencement of the Amendment Regulation shall not be cut down by the Kudiyan without the consent of the Jenmi or, in the absence of such consent, without giving fifteen days notice to the Jenmi by registered Anchal, and when any such tree is cut down by the Kudiyan the value thereof deducting the cost of cutting shall belong to the Jenmi and the Kudiyan in the proportion of three-fourths to the Jenmi and one-fourth to the Kudiyan

Explanation 1—The Jenmi shall not hereafter have the right to cut down any trees standing on holdings.

Explanation 2—If, when any timber tree as contemplated in the above proviso is cut down, the Jenmi and the Kudiyan are not able to agree as to the appropriation of the timber or as to the value thereof for purposes of apportionment the timber shall be appropriated by the party, the Jenmi or Kudiyan, who offers the higher value as between themselves and the other party shall be given his share of that value in money.

8. Notwithstanding any usage or contract to the contrary, every Kudiyan shall have the right to make any improvement in respect of his holding without reference to, or interference from, the Jenmi, and no Kudiyan shall, except as otherwise

7 If any Jenmom land is divided for any reason, the Jenmikaram on each portion of the land shall be fixed in the proportion of the Sirkar tax that will be fixed on such portion of land and the Jenmikaram so fixed shall be the Jenmikaram due thereon

Jenmikaram how fixed on land being divided

8 Notwithstanding any usage or contract to the contrary, it shall not be lawful hereafter to take into account in any case as renewal fees any amount exceeding thirty per cent of the kanom

Renewal fees not to exceed 30 per cent of Kanom

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expressly provided by this Regulation become liable to pay a higher Michavaram on account of any increase of production or of any change in the nature of the crop raised in consequence of such improvement.

Provided that if waste land or land subject only to Payattupattom as Pattom is converted into paddy land, that shall be a ground for increasing the Pattom in the same manner as if there had been an excess in the area of the holding actually under cultivation"

See *S O & R, (3)*

II For the above Sections, the Second Select Committee substituted the following —

"6 (1) If in a holding there are more parcels of land than one, each having Settlement Pattom assessed separately, the Jenmikaram of the entire holding shall be ascertained in accordance with the provisions of this Regulation and distributed in respect of each parcel of land in the proportion of the Settlement Pattamicham bearing on such parcel of land

(2) The Jenmikaram so distributed in respect of each parcel of land shall be the Jenmikaram due thereon.

7. If any Jenmom land is divided for any reason, the Jenmikaram on each portion of the land shall be fixed in the proportion of the Sirkar tax that will be fixed on such portion of land, and the Jenmikaram so fixed shall be the Jenmikaram due thereon.

8 Notwithstanding any usage or contract to the contrary, it shall not be lawful hereafter to take into account in any case as renewal fees any amount exceeding twenty-five per cent of the Kanom"

The Committee said :—"The Sections 6, 7 and 8 proposed by Clause IV of the Bill have now been drafted as Explanations, as we are of opinion that when the Kudiyan's right as an owner is declared, these provisions would come more appropriately as Explanations rather than as direct enactments conferring a right or imposing an obligation

The proposed Sections 6 and 7 lay down Rules for the apportionment of the Jenmikaram having regard to the Settlement Pattamicham or the Sirkar tax charged or chargeable on a land The proposed Section 8 is only the proposed Section 17 (2) of the Bill transferred to this place and adapted to the scheme of things now proposed"—*Para VIII, 8*

Section 17 (2) of the Original Bill referred to above, as transferred here, was as *follows* —"(2) Notwithstanding any usage or contract to the contrary, it shall not be lawful hereafter to enhance the existing rate of renewal fees or to claim in any case, as renewal fees, any amount exceeding twenty-five per cent. of the Kanom.

III. At the final reading of the Bill, the word "thirty" was substituted for the word "twenty-five" on the motion of a Non-official member —

L. C P., dated 13-9-1933.

9 The Jenmikaram of a holding together with the interest, if any, due thereon, when it becomes an arrear, shall be claimable by the Jenmi and shall, subject to the priority of the rights of Our Government, be a first charge on the holding

Jenmikaram, first charge on land

10. No Kudiyan shall, when, without his consent, the Jenmi's right in any Jenmom land is transferred by sale, gift or otherwise, be liable to the transferee for the Jenmikaram which became due after the transfer and was paid to the Jenmi whose right was so transferred unless the transferor or transferee has, before the payment, given notice of the transfer to the Kudiyan by registered Anchal or Post

Kudiyan's liability on Jenmi's right being transferred

11 When a Jenmom land or holding is divided or is transferred by sale, gift or otherwise by the Kudiyan without the consent of the Jenmi, the Kudiyan shall continue liable for the Jenmikaram accruing due after such division or transfer unless and until notice by registered Anchal or Post of the division or transfer is given to the Jenmi by any sharer or by the transferor or transferee, as the case may be, and until pokkuvaravu is effected in the Land Revenue records in accordance with the division or transfer

Kudiyan's liability on holding being transferred

Explanation—This provision does not affect any liability of any sharer or transferee as between such person and other sharers or the transferor, as the case may be, to pay the Jenmikaram.

Sec. 9: I In the original Bill, the words "and the penalty" occurred after the word "interest.' The First Select Committee omitted them, ' in view of the decision of the majority that no penalty shall be payable by the Kudiyans as proposed in the Bill'—*Para 22*

Sec. 10 I In the original Bill, there was also a Sub-section—(2) '—"(2) When there are more Kudiyans than one paying Jenmikaram to the Jenmi whose interest is transferred, a general notice from the transferor or transferee to the Kudiyan, published in the prescribed manner shall be a sufficient notice for the purposes of this Section."

II The First Select Committee omitted this Sub-section, and added the words "by registered Anchal or Post ' at the end of the main Section.—*Para 23*

III The Second Select Committee redrafted the Section "to suit the proposed scheme of things.'—*Para VIII, 10*

Sec 11. I. This Section was, in the original Bill, as follows —"11. When a Kudiyan s holding is transferred by sale, gift or otherwise, without the consent of the Jenmi, the Kudiyan shall continue liable for all Jenmikaram accruing due after the transfer unless and until notice of the transfer is given to the Jenmi by the transferor or transferee."

12 No division of the Jenmi's right in any Jenmom land shall be binding on the Kudiyan thereof, unless it is made with the consent of the Kudiyan or notice thereof is given to the Kudiyan by registered Anchal or Post informing him of the prescribed particulars of the division, and the Jenmikaram which may become due subsequent to such division made without such consent may until the receipt of the notice be paid to the Jenmi entitled thereto before such division.

Kudiyan's liability on Jenmi's right in land being divided.

If The above Section was re-drafted by the Second Select Committee with some change See under next Section

Sec. 12 I The Section was as follows in the original Bill :—"12. (1) No division of a holding or distribution of the Kanom or Jenmikaram charged thereon shall be binding on the Jenmi unless it is made with his consent and all Jenmikaram which may become due subsequent to such division or distribution made without such consent shall continue to be a charge on each and every portion of the holding, and may be recovered from the Kudiyan bound to pay Jenmikaram prior to such division or distribution as the case may be

Explanation.—If any Kudiyan gives notice to the Jenmi by registered Anchal informing him of the particulars of the division or distribution and the Jenmi does not within twenty-one days of that notice notify in reply by registered Anchal that, for reasons stated, he considers the distribution unfair and inequitable to his interest and therefore withholds his consent, he shall be deemed to have consented to the division and distribution given notice of

(2) No division of the Jenmi's interest in any holding or the distribution thereon of the Jenmikaram due to him shall be binding on the Kudiyan thereof, unless it is made with the consent of the Kudiyan, and all Jenmikaram which may become due subsequent to such division made without such consent may be paid to the Jenmi entitled thereto before such division.

Explanation.—If any Jenmi gives notice to the Kudiyan by registered Anchal informing him of the particulars of the division or distribution and the Kudiyan does not within twenty-one days of that notice notify in reply that, for reasons stated, he considers the distribution unfair and inequitable to his interests and therefore withholds his consent, he shall be deemed to have consented to the division and distribution given notice of

(3) When the Jenmi or the Kudiyan as the case may be withholds his consent the aggrieved party may institute a regular suit in a Civil Court of competent jurisdiction for the recognition of the division and for the distribution of the Kanom and Jenmikaram in a fair and equitable manner

Explanation —' In a fair and equitable manner" means without prejudice to the interests of the Kudiyan or of the Jenmi."

See *S O & E (4)*

II The First Select Committee omitted the Explanations to Sub-sections (1) and (2) and made some changes in the three Sub-sections. They said :—

"As regards the division of a holding or the distribution of Kanom or the Jenmikaram or the division of the Jenmi's interest, it is felt desirable that both the Jenmis and Kudiyans should have the right to do so without necessarily securing the consent of the other party. An intimation of the proposed change is certainly desirable. The jurisdiction of the Courts to grant relief against any inequitable

13 Notwithstanding any usage or contract to the contrary, it shall not be obligatory on the Jenmi to renew, or on the Kudiyan to accept the renewal of, a contract of Kanapattom

Renewals not obligatory.

14 (1) Notwithstanding any usage or contract to the contrary, the Jenmikaram of any land shall not be liable to alteration or revision at any time except after any future general Land Revenue Settlement by Our Government

Revision of Jenmikaram

(2) Whenever Our Government make any general Land Revenue Settlement in the future and the amount of the Settlement pattamcham at that Settlement and the amount of the then existing Jenmikaram in respect of any Jenmom land are found to differ, the Jenmikaram shall be liable to be enhanced or reduced as the case may be in the proportion that the Settlement pattamcham bears to the Jenmikaram :

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division or distribution is affirmed. Hence the change in the proposed Section 12."— *Paras 25-29*

III. The Second Select Committee substituted the following as Section 12 :—

"12. No division of the Jenmi's right in any Jenmom land shall be binding on the Kudiyan thereof, unless it is made with the consent of the Kudiyan or notice thereof is given to the Kudiyan by registered Anchal or Post informing him of the prescribed particulars of the division, and the Jenmikaram which may become due subsequent to such division made without such consent or notice may be paid to the Jenmi entitled thereto before such division," They said —

"This is only Section 12 (3) of the Bill, as revised by the Committee, re-drafted for the present purposes. Section 12 (1) has been incorporated in the Section, 11 proposed by us."— *S C R., VIII, 16.*

IV At the final reading of the Bill, on the motion of the Official Member in charge, the words "or notice" were omitted before the word "may" and the words "until the receipt of the notice" inserted after that word —

L C P., dated 20-12-1932.

Sec. 13: I The original Bill had after the word "Kanapattom" at the end, the following —

"at any time after three years from the commencement of the Amendment Regulation except in execution of a decree passed by a competent Civil Court in a suit instituted before, or within three years from, the commencement of the Amendment Regulation.'

See *S C R.*, (3) and (5)

II. The Second Select Committee omitted all the above words, "as the Jenmikaram is proposed to be paid in lieu of all the rights of the Jenmi, there is no real scope for any renewal thereafter."—

S C R., VIII, 13

Sec. 14: I. In the original Bill, this Section was as follows :—"14. (1) Subject to the limitations and conditions laid down in Chapter III, every Jenmi may enhance the Michavaram payable by a Kudiyan,

(a) by increasing the Pattom assessment on the holding, or

Provided that in no case shall any Jenmikaram be enhanced by more than ten per cent thereof

Provided also that in the case of the Land Revenue Settlement next following that now in force no Jenmikaram of any land shall be enhanced if within twelve years preceding the date of the commencement of the operations for such Settlement there has been an enhancement of Michavaram in respect of that land

Explanation 1—If there is no difference between the amount of the Settlement pattamicham at any future Revenue Settlement and the amount of the then existing Jenmikaram, such Jenmikaram shall continue to be the Jenmikaram during the currency of such Settlement also

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(*b*) by reducing the rate of interest allowed to the Kudiyan on the Kanam if such rate is in excess of the rate usually allowed to Kudiyans holding on Kanappattom in the same Pakuthi, or

(*c*) by both the modes (*a*) and (*b*)

Provided that the modes (*b*) and (*c*) mentioned above shall be available to a Jenmi only once and that within twelve years from the commencement of the Amendment Regulation

Explanation.—No Ettartham shall be levied by any Jenmi after the commencement of the Amendment Regulation

(2) Subject to the limitations and conditions laid down in Chapter III, every Kudiyan may reduce the Michavaram by decreasing the Pattom assessment on the holding"

II The First Select Committee deleted in Sub-section (1) the heading "(*a*)" in the proposed sub-clause (*a*) and also sub-clauses (*b*) and (*c*) and the Proviso.

They said —"The majority of us are of opinion that *the Jenmi should* not be allowed to enhance the Michavaram on the ground of a fall in the rate of interest usually allowed to Kudiyans in the same Pakuthy TheKudiyan is not allowed under the existing law to seek for a reduction of the Michavaram on the ground that the *rate of interest allowed in the* Kanom deed is below the rate prevailing in the same Pakuthy It was also suggested that the prevailing tendency is for a rise in the rate of interest and not a fall throughout the country and that therefore there was no justification for allowing the Jenmi to move for a further reduction of interest for the purpose of enhancing the Michavaram. Hence the proposed change."—

S C R, para 39

III The Second Select Committee substituted the following Section

"14. For the proposed Section 14, the following shall be substituted, namely —

"14. (1) Notwithstanding any usage or contract to the contrary, the Jenmikaram of any land shall not be liable to alteration or revision at any time except after any future general Land Revenue Settlement by Our Government

(2) Whenever Our Government make any general Land Revenue Settlement in the future and the Settlement pattamicham at that Settlement is found to differ from the amount of the Settlement *pattamicham with reference to* which any Jenmikaram has been fixed, that Jenmikaram shall be enhanced or reduced in proportion as the Settlement pattamicham at the later Settlement is larger or smaller than the Settlement pattamicham at the previous Settlement.

Explanation 2.—When the Settlement pattamicham or the Jenmikaram or both consist of paddy or other commodity and money such commodity portion shall, for the purposes of comparison, be commuted into money at the average commutation rate, the average being taken on the rates of the three years immediately preceding the date of such comparison This average rate is intended only for the purposes of comparison, and when the Jenmikaram has to be enhanced or reduced in any proportion the commodity portion and the money portion shall each be enhanced or reduced, as the case may be, in that proportion

(3) Except under the provisions of this Section, the Jenmi shall not be entitled to claim any enhanced Jenmikaram and the Kudiyan shall not be entitled to reduce the Jenmikaram

(4) The enhanced Jenmikaram or the reduced Jenmikaram due on a land, as the case may be, shall be payable from the 1st day of Chingom in the year next following that in which the Revenue Settlement comes into operation in respect of that land, and with effect from that day the enhanced Jenmikaram or the reduced Jenmikaram, as the case may be, shall be the Jenmikaram due thereon."

They said —

"According to the proposed scheme of things, the Jenmikaram is expected to be permanent and, in any event, not liable to alteration by the mere act of the parties. When a further Revenue Settlement takes place and the Settlement pattom is increased or reduced, it is fair to presume that the productivity or yield of the land has also correspondingly increased or reduced On that basis, the Jenmi would be entitled to enhance the Jenmikaram and the Kudiyan to reduce the Jenmikaram, as the case may be, in like manner as the Settlement pattom has increased or gone down. It is, therefore, provided that any alteration of Jenmikaram can take place only after a general Revenue Settlement and having regard to the result of that general Revenue Settlement."—*S. C. R., VIII, 14.*

IV (A) When the Select Committee's Report was considered by the Council, a Non-official Member moved to substitute the following for Sub-section (2) of Section 14, and it was passed

"*Section 14* (2) Whenever Our Government make any general Land Revenue Settlement in the future, and the amount of the Settlement pattamicham at that Settlement and the amount of the then existing Jenmikaram in respect of any Jenmom land are found to differ, the Jenmikaram shall be liable to be enhanced or reduced as the case may be in the proportion that the Settlement pattamicham bears to the Jenmikaram

'Provided that in no case shall any Jenmikaram be enhanced by more than ten per cent. thereof

"Provided also that in the case of the Land Revenue Settlement next following that now in force no Jenmikaram of any land shall be enhanced if within twelve years preceding the date of the commencement of the operations for such settlement there has been an enhancement of Michavaram in respect of that land.

Explanation I—If there is no difference between the amount of the Settlement pattamicham at any Revenue Settlement and the amount of the then existing Jenmikaram, that Jenmikaram shall continue to be the Jenmikaram during the currency of that Settlement also.

"*Explanation 2*.—When the Settlement pattamicham or the existing Jenmikaram

(3) From and after the 1st day of Chingom 1108 no enhancement or reduction of the Jenmi's dues, whether Jenmikaram or Michavaram, shall be made otherwise than in accordance with the provisions of this Regulation, and even if a Court has decreed contrariwise on or after the said 1st day of Chingom 1108, the Court shall review that decision and pass a decision in accordance with the provisions of this Regulation on application being made for the purpose by any aggrieved party within six months of the commencement of the Amendment Regulation

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or both consist of paddy and money, the paddy portion shall, for the purposes of comparison, be commuted into money at the average commutation rate, the average being taken on the rates of the three years immediately preceding This average rate is intended only for the purposes of comparison and when the Jenmikaram has to be enhanced or reduced by any percentage, the paddy portion and the money portion shall each be enhanced or reduced, as the case may be, by that percentage"

'In moving the above amendment, the Member said —"This amendment is now being moved as a result of an agreement arrived at in the conference The Jenmi members have also agreed to this amendment. * * *

"At present, the Jenmies have the right to enhance the michavaram due to them, under Regulation V of 1071 There have been loud complaints against the difficulties and hardships experienced by the Kudiyans, on account of a number of litigations started by the Jenmies to get the michavaram enhanced The Jenmies also had to undergo many difficulties to get the michavaram enhanced. To avoid such litigation and hardship, the members came to the understanding that the enhancement or reduction could be made only when the Government tax on such lands are revised at the times of future Settlements. It is stated here that the Jenmikaram should be enhanced in the proportion which the Settlement pattamcham bears to the present Jenmikaram."

"There are two exceptions to this Rule in the amendment. One is that the enhancement should not be by more than 10 per cent Even in the present Regulation, there is a provision that the enhancement should not be unfair or inequitable. The application of that provision has not been giving satisfaction to any of the parties. It was therefore thought that restriction must be imposed with regard to the extent to which the Jenmikaram can be enhanced.

The other exception contained in the amendment is that if the michavaram had been enhanced within the last 12 years preceding the next general Land Revenue Settlement, it could not be enhanced at the next Settlement, since, at the revision within the 12 years preceding the Settlement, the increase in the yield of the property must have been taken into consideration. There should therefore be no further revision of the michavaram so soon after revision once"

The Member further said — "This amendment relates only to enhancement, reduction is not usual because usually cultivation improves, larger area is brought under cultivation and yield is larger That is why while it is provided that enhancement should not be by more than 10 per cent, there is no restriction as regards reduction. If the yield, in exceptional cases, goes down owing to causes which could not have been prevented by the Kudiyan, then the necessary reduction is effected without any restriction."

The Official Member in charge, in supporting the amendment, said —" It is the

Explanation —Nothing in the Travancore Limitation Regulation (VI of 1100) or the Code of Civil Procedure, 1100, shall be deemed to bar such applications for review.

(4) The enhanced Jenmikaram or the reduced Janmikaram due on a land, as the case may be, shall be payable from the 1st day of Chingom in the year next following that in which the Revenue Settlement comes into operation in respect of that land, and with effect from that day the enhanced Jenmikaram or the reduced Janmikaram, as the case may be, shall (in case there be enhancement or reduction) be the Jenmikaram due thereon "]

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result of a long discussion, but a unanimous conclusion * * In the discussion at the conference, the integral parts of the agreement arrived at were, " (1) that this amendment, the text of which was itself approved by the conference should be moved " and accepted by the Jenmies, and (2) that the non-Jenmi members should agree to give effect to certain special provision relating to cherikkal lands—the text of that amendment has itself not been accepted by the conference, but I have now worded it tentatively and may move it in its final form at the third reading of the Bill In regard to the cherikkal lands, the Jenmies want a special provision to last until the next Revenue Settlement That has been agreed to by practically all the members, and that also is an integral part of the agreement arrived at. * "—

L. C P., dated 9-12-1932.

(B) The same Non-official member moved the substitution of the following for Sub-section (3) and the amendment was carried —"(3) From and after the 1st day of Chingom 1108, no enhancement or reduction of the Jenmi's dues whether Jenmikaram or Michavaram shall be made otherwise than in accordance with the provisions of this Regulation, and even if a Court has decreed contrariwise on or after the said 1st day of Chingom 1108, the Court shall review that decision and pass a decision in accordance with the provisions of this Regulation on application being made for the purpose by any aggrieved party within six months of the passing of the Amendment Regulation.

Explanation —Nothing in the Travancore Limitation Regulation, VI of 1100, or the Code of Civil Procedure, 1100, shall be deemed to bar such application for review '

In moving the amendment, the Member said :—" This amendment is also the result of an agreement arrived at The only object of the amendment is to prevent the Jenmies or the Kudiyans, who, fully knowing that there is every probability of this Bill becoming law in the near future and having rushed to the Court from frustrating the object of this measure. * * "— *L C P., dated 8-12-1932.*

(C) At the final reading of the Bill, the Official member in charge, moved a few amendments which were passed and which made the Section read as it stands in the Regulation — *L. C P., dated 20-12-1932.*

Case Law

1. The suit was by a Jenmi for renewal of a kanom with enhancement of michavaram The Court of first instance gave a decree in terms of the plaint on 10-12-1102. The lower appellate Court confirmed the decree of the trial Court on 30-12-1106. The defendant preferred the special appeal on 6-5 1107.

It was contended for the defendant in special appeal that, under Section 14, Clause (3), of the new Jenmi and Kudiyan Regulation the decree passed by the lower

Court in respect of the enhancement of the Michavaram had to be modified

Held (accepting the contention of the defendant)—The High Court was bound to take notice of Section 14, Clause (3), of the new Regulation and pass a decree in accordance with the provisions thereof The decree of the lower Court had, therefore, to be modified by holding that the plaintiff was not entitled to an enhancement of the Michavaram until a future settlement took place.

Under Section 14, it is clear that, after the first day of Chingom 1103, no decree can be passed otherwise than in accordance with the provisions of this Regulation which, by Section 14, Clause (1), enacts that no such enhancement as is in question in the suit can be effected except at a future settlement No such new settlement having taken place, if the Court in second appeal passed a decree confirming the decree of the lower Court, that would be frustrating the object the Legislature had in view in enacting Section 14 (3) The earlier portion of the Clause clearly implies that no Court can from and after 1-1-1103 decree enhancement of Michavaram except in accordance with the Regulation This is made clear from the provision that even if a Court has decreed contrariwise, the Court shall review, &c. If after the first day of Chingom 1103, no Court can pass such a decree, it must naturally include the Court (Appellate Court) which finally passes the only effective decree in the suit capable of execution and in whose decree the decrees of the lower Court become merged Section 14 itself is manifestly on the face of it to some extent retrospective, as it alters the rights of the parties under the law existing at the time of the passing of the new Regulation. The High Court is bound to take notice of Section 14 and pass a decree in accordance with its provisions.—

49 T L. R., 399 (= 23 T L. J., 784)

2. The special appeal was by the first plaintiff's legal representative and the second plaintiff in a suit for renewal of Kanom and recovery of Michavaram and other dues and also for enhancement of Michavaram by reduction of the rate of interest on the Kanom amount The suit was instituted on 10-10 1092 and decreed on 24-6-1098 The District Court reversed the decree in appeal on 10-6-1103 The special appeal was heard after the enactment of Section 14 (3) On reference to a Full Bench the question whether in view of Section 14 (3) a decree for enhancement could be passed

Held—*Per Venkita Rao and Gopala Menon, JJ.*—The position that there is a merger of the original Court's decree in the decree of the appellate Court where the latter merely dismisses the appeal cannot be regarded as being entirely free from doubt This difficult point however does not arise in the case inasmuch as the Munsiff's decree has been reversed in appeal and the plaintiff in this special appeal prays for a decree for enhanced Michavaram It is quite clear that if we were to allow that claim we should be acting against the first part of Clause (3) of Section 14 of the Jenmi and Kudiyan (Amendment) Regulation which prohibits enhancement except as provided in this Regulation The reason is that in decreeing the special appeal in such circumstances we shall be passing a decree which we are competent to pass and not merely restoring the first Court's decree which had been reversed by the District Court The Court of appeal would not be merely declaring what should have been decided by the trial Court but passing its own decree with due regard to the facts and circumstances as they exist at the date of its decision.

Per Raman Tampi, J.—There can be only one decree in a case and that is the final decree. The decree of the High Court whether it affirms or reverses the decree of the lower Court is the final one and in passing such a decree, the law as it stands now has to govern the decree,

CHAPTER III.

Part A—[Jenmikaram and its recovery]

15. [(1) Every contract of Kanapattom made or renewed after the commencement of the Amendment Regulation shall, in addition to other particulars, specify—

Particulars of Kanapattom contract

(*a*) the name, if any, the description and the extent of the holding, and

(*b*) the Settlement pattom, the Settlement pattamicham, the Jenmivaram and the Jenmikaram in respect of the land or each of the several parcels of land comprised in the holding]

Explanation (3) of Section 14 is clear in its wording and imperative in its import It enjoins that "from and after the first day of Chingom 1108 no enhancement or reduction of the Jenmi's dues whether Jenmikaram or Michavaram shall be made otherwise than in accordance with the provisions of this Regulation." The method of such reduction or enhancement provided is by a general Revenue Settlement undertaken by the Sirkar It implies that Courts cannot decree either enhancement or reduction So far it is clear that the question does not turn on the correct view as to whether the expression "Court" in the Explanation refers to the trial Court only or to the appellate Court (F B)— 24 T L J, 329

Chapter III - Part A. I The heading to this Part, in Regulation V of 1071, was— "Of Michavaram and customary dues." For this, the orginal Bill substituted— "Of Jenmikaram and the Enhancement and Reduction of Michavaram."

II. The Second Select Committee put in the heading now found in the Regulation—*Vide* Section V of Regulation XII, of 1108

Sec. 15: *Vide* Sections VI and VI-A of Regulation XII of 1108.

II. In the original Bill, Sub-section (1) of Section 15 stood as follows:—

"(1) Every contract of Kanapattom made or renewed after the commencement of the Amendment Regulation shall, in addition to other particulars, specify –

(*a*) the name, if any, the description and the extent of the holding,

(*b*) the Pattom assessed on the several parcels of wet land and dry land comprised in the holding, and in the case of garden land, the number of assessable trees thereon, if any,

(*c*) the amount of the Kanom and the interest thereon,

(*d*) the Michavaram,

(*e*) the amounts of the customary dues, if any, or the value thereof, and the cess payable annually, in lieu of such customary dues, and

(*f*) the amount or value of the renewal fees agreed upon and the percentage thereof payable annually as fractional fee in lieu of such renewal fees."

III. The first Select Committee made some changes in Clauses (*a*) and (*b*) in view to avoid dispute in future, and also substituted for Clause (*c*) the following:—

"(c) The amount of Kanom apportioned for the several parcels of wet lands and dry lands and garden lands if any comprised in the holding and the interest thereon"

(2) (a) If the [Jenmikaram or any portion thereof is] made payable in kind it shall be specified according to the standard measure or Parah prescribed by Our Government or which may be agreed upon between the parties.

(b) If any local Parah or measure is used by the parties, the difference between it and the Government standard Parah must be set forth in the Kanapattom

(3) Registering officers shall refuse to accept for registration any Kanapattom instrument unless it shall contain the particulars above set forth The order of the Registrar shall be subject to appeal according to the provisions of the Registration Regulation for the time being in force

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They said —"Some of us were of opinion that to facilitate apportionment or division in future, the particulars of Kanom and the interest apportioned over the several plots comprised in the Kanom deed should be inserted in the document Hence the change"—*S C F Paras 31 39*

IV The Second Select Committee retained Clause (a) of the original Bill with slight changes, and for the other Clauses, substituted Clause (b) as it now stands in the Amendment Regulation.

They also added a new Section (VI A) to the Amendment Regulation which substituted the words "Jenmikaram or any portion thereof is" for the words "Michavaram or other dues are" in Sub-section 2 of Regulation V of 1071

V Sub-sections (1) and (2) of Section 15 of the old Regulation were as follow —

15 *Particulars of Kanapattom contract*—(1) In every contract of Kanapattom granted or renewed after this Regulation comes into force,

(a) the name, description and extent of the holding,

(b) the Pattom assessed on the holding,

(c) the deductions therefrom on account of interest on the Kanom money,

(d) the amount of Michavaram agreed upon,

(e) the renewal fees and customary dues intended to be levied from the Kudiyan, and the rate at which and the occasions on which they are to be levied, and

(f) if customary dues are commuted under Section 26, the amount so commuted,

shall be distinctly specified.

(2) (a) If the Michavaram or other dues are made payable in kind, it shall be specified according to the standard measure or Parah prescribed by Our Government or which may be agreed upon between the parties.

(b) If any local Parah or measure is used by the parties, the difference between it and the Government standard Parah must be set forth in the Kanapattom

Secs 16—18 These Sections were substituted by Section VII of Regulation XII of 1106, for Sections 16 to 18 of Regulation V of 1071, which were as follow —

"16. *When suit or claim for renewal fees or customary dues to be entertained.*—No summary suit or claim for enforcing payment of renewal fees or customary dues

["16 No summary suit or claim for enforcing payment of any Jenmikaram shall be entertained by the Courts under this Regulation unless either the Jenmikaram or the renewal fees and customary dues, with reference to which the Jenmikaram has to be ascertained, are specified in the Kanapattom or its counterpart duly registered or in a decree of a Civil Court obtained in a regular suit between the Jenmi and the Kudiyan

When summary suit will not lie.

shall be entertained by the Courts under this Regulation, unless such fees or dues, as the case may be, are specified in the Kanapattom or its counterpart duly registered

Exception,—Nothing in this Section shall affect the Jenmi's right to recover summarily the renewal fees or customary dues under the existing Kanapattom though not expressly specified in the instrument of Kanapattom

"17 *Payment of Michavaram, renewal fees, &c*,—Every Kudiyan shall pay his Jenmi the Michavaram, renewal fees and customary dues at such time and place as may be agreed upon between them in writing, and, in the absence of such written agreement, in the manner following, namely —

(a) the annual Michavaram shall be paid on or before the thirtieth day of Audi of each Malabar year at the residence or at the granary (Sekarippoo) of the Jenmi, provided that such residence or Sekarippoo is within the Proverthi in which the holding is situated,

(b) customary dues, after demand—except in cases where they become due on recognised dates, such as Onakaloha,

(c) renewal fees, on or before the last day of the year following the period when the renewal of the Kanapattom ought to take place under Section 11

Rate of interest in default of payment—In default of such payment, interest shall be charged on the arrears from the date they become due, at the rate of 12 per cent per annum when the arrears are payable in money, and of 18 per cent per annum when the arrears are payable in kind

"18 *Jenmi to renew Kanapattom on payment of renewal fees*—On payment by the Kudiyan of the renewal fees, together with any arrears of Michavaram which may remain unpaid for the whole or any portion of the expired period of 12 years, the Jenmi shall renew the Kanapattom and the Kudiyan shall thereupon execute a counterpart of such Kanapattom

Provided that when a Kanapattom and its counterpart containing the particulars specified in Section 15 and duly registered shall have been once before exchanged between a Jenmi and his Kudiyan, the parties may, by mutual agreement, dispense with the execution of a fresh Kanapattom and counterpart. In such cases, a receipt for payment of renewal fees shall, if duly registered, be deemed to operate to all intents and purposes as a renewal of the Kanapattom."

Sec. 16. I This Section stood in the original Bill as follows —

"16. No summary suit or claim for enforcing payment of any fractional fee or commuted cess shall be entertained by the Courts under this Regulation unless the renewal fees or customary dues, on which the fractional fee or customary dues, as the case may be, are based or specified in the Kanapattom or its counterpart duly registered or in a decree of

17 (1) Subject to the provisions of this Regulation every Jenmi shall be entitled to receive and every Kudiyan shall be bound to pay in respect of all land in the latter's holding the Jenmikaram due thereon, and notwithstanding any contract or usage to the contrary the Jenmi shall not be entitled to receive and the Kudiyan shall not be bound to pay anything else in respect of the land

Jenmikaram alone payable to Jenmi with interest if in arrears.

(2) The Jenmikaram shall be payable in such instalments and on such dates as Our Government may, by Rules made under this Regulation, prescribe, or, in the absence of such Rules, at or before the close of each Malabar year

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Civil Court obtained in a regular suit between the Jenmi and the Kudiyan."

II The first Select Committee made a drafting amendment by substituting, for the words "customary dues" before the words "as the case may be", the words "commuted cess"—*S C R, Para 34*

III. The Second Select Committee substituted the Section as it now stands in the Regulation.

Sec. 17: I In the original Bill, the Section was as follows,—

"17 (1) Subject to the provisions of this Regulation, every Jenmi shall be entitled to receive, and every Kudiyan shall be bound to pay, in respect of all land in the latter's holding, the several items of Jenmikaram due thereon and no dues or cesses other than those specified in a contract of Kanapattom or in a decree of Court passed in modification or on the basis of such contract shall be claimable by a Jenmi or payable by a Kudiyan.

(2) Notwithstanding any usage or contract to the contrary, it shall not be lawful hereafter to enhance the existing rate of renewal fees or to claim in any case, as renewal fees, any amount exceeding twenty-five per cent of the Kanom

(3) Notwithstanding any usage or contract to the contrary, when renewal fees or customary dues are payable according to the terms of a contract of Kanapattom made or renewed before or after the commencement of the Amendment Regulation, the Kudiyan shall be bound and entitled to pay such fees or dues in annual instalments of fractional fee or commuted cess, as the case may be, before the close of each year, except with regard to such renewal fees or customary dues as have become arrears before the commencement of the Amendment Regulation:

Provided that, when according to the terms of any contract of Kanapattom, renewal fees are payable on the expiry of a specified period and part only of such period has expired before the commencement of the Amendment Regulation an amount which bears to the aggregate *amount or value of such renewal fees* the same proportion as the expired part of the period bears to the whole period specified in the contract, shall be payable by the Kudiyan to the Jenmi without interest within three years from the commencement of the Amendment Regulation or *with interest at six per cent per annum* thereafter within a further period of three years, and the remaining portion of such renewal fees shall be payable in annual instalments of fractional fee

(4) Michavaram shall be payable in instalments according to agreement, or when there is no agreement, in such instalments and on such dates as Our *Government may, by Rules made under*

(3) The Jenmikaram or any instalment of Jenmikaram payable on any date, if it is not paid on or before that date, shall become an arrear on the first day after that date

(4) An arrear shall bear simple interest at the rate of nine per cent per annum when it is payable in money or in paddy, and at the rate of six per cent. per annum if it is collected or recovered by Our Government under the provisions of Chapter IV

this Regulation, prescribe, or in the absence of such Rules or agreement, in two equal half-yearly instalments before the close of the month of Vrischikom and the month of Edavom respectively

(5) An instalment of fractional fee or commuted cess payable before the close of any year becomes if not paid accordingly, an arrear on the first day of the ensuing year

(6) An instalment of Michavaram not paid on the day on which it falls due becomes an arrear on the following day

(7) (*a*) An arrear shall bear simple interest at the rate of twelve per cent per annum when it is payable in money and of eighteen per cent. per annum when it is payable in paddy

(*b*) In case any arrear remains unpaid for a period of three years consecutively, the Kudiyan shall be liable to pay, besides the interest, a penalty also of a sum equivalent to twelve and a half per cent. of that arrear for the fourth year that it remains unpaid, another sum of twelve and a half per cent of the arrear for the fifth year that it remains unpaid and yet another sum of twelve and a half per cent of the arrear for the sixth year that it remains unpaid

Provided that no such penalty shall be payable in respect of any existing arrears if they are paid up before the expiry of two years from the commencement of the Amendment Regulation."—

See *S O & R., Paras 6, 5 and 8.*

II. The First Select Committee substituted the following for Sub-section (4)—

"(4) In the absence of any agreement to the contrary Michavaram shall be payable by the Kudiyan to the Jenmi at or before the close of each Malabar year" The majority of the Committee were "of opinion that there was no necessity for providing for payment by instalment' —

S C, R, Para 35

The Committee also substituted the word "The' for the words "An instalment of ' in Sub-section 5, and in Sub section (7) deleted Sub-clause (*b*) and the proviso and in Sub-clause (*a*) substituted "nine" for "twelve" and the word "or for the words "and of eighteen per cent. per annum when it is payable"

They said:—"The majority are of opinion that the existing rates of interest are very high and that they should be reduced to a uniform rate of nine per cent both for money and for paddy They are also of opinion that no penalty should be allowed as the interest allowed must be a sufficient compensation to the Jenmi for the delay in the payment of the dues by the Kudiyans. Hence the above alterations."— *S C R, Paras 36-38*

III The Second Select Committee substituted the following for the proposed Section —

"17 (1) Subject to the provisions of this Regulation every Jenmi shall be entitled to receive and every Kudiyan shall be bound to pay in respect of all land in the latter's holding the Jenmikaram due thereon and notwithstanding any contract or usage to the contrary the Jenmi shall not be entitled to receive and the Kudiyan shall not be bound to pay anything else in respect of the land.

Renewal fees for expired period how payable

(5) When according to the terms of any contract of Kanapattom renewal fees are payable on the expiry of a specified period and part only of such period has expired before the commencement of the Amendment Regulation, an amount which bears to the aggregate amount or value of such renewal fees the same proportion as the expired part of the period bears to the whole period specified in the contract shall be payable by the Kudiyan to the Jenmi without interest within three years from the commencement of the Amendment Regulation or with interest at six per cent per annum thereafter within a further period of three years

Jenmikaram payable only in money.

18 Where the Jenmikaram or any portion of it consists of paddy or other commodity the Kudiyan shall be entitled to pay in money the value of such paddy

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(2) The Jenmikaram shall be payable in such instalments and on such dates as Our Government may, by rules made under this Regulation, prescribe, or in the absence of such rules, at or before the close of each Malabar year

(3) The Jenmikaram or any instalment of Jenmikaram payable on any date if it is not paid on or before that date, shall become an arrear on the first day after that date.

(4) An arrear shall bear simple interest at the rate of nine per cent per annum when it is payable in money or in paddy

(5) When according to the terms of any contract of Kanapattom, renewal fees are payable on the expiry of a specified period and part only of such period has expired before the commencement of the Amendment Regulation an amount which bears to the aggregate amount or value of such renewal fees the same proportion as the expired part of the period bears to the whole period specified in the contract shall be payable by the Kudiyan to the Jenmi without interest within three years from the commencement of the Amendment Regulation or with interest at six per cent. per annum thereafter within a further period of three years."

They said —"This amendment is proposed to suit the proposed arrangement of paying the Jenmikaram to the Jenmi in lieu of all his rights. The dates for payment and the interest for arrears have been fixed as in the Bill revised by the previous Select Committee."—

S C R, VIII, Para 19.

IV When the Bill was considered by the Council, a Non-official member moved an amendment (which was carried) to add, at the end of Sub-section (4), the words " and at the rate Chapter IV " He said —"Government have undertaken to collect the dues of Jenmis under the Revenue Recovery Regulation. Chapter IV is drafted for the purpose. The Jenmi is at a very great advantage with regard to that matter and when he is assured of speedy realisation and when the machinery of Government is available to him for collecting it, it is only proper that he should not be given more than six per cent interest on the arrears realised."—

L C P, dated 9-12-1932

Sec. 18 I. This Section stood as follws in the original Bill —"18 (1) The Jenmikaram payable in paddy shall be paid at the Jenmi's residence or granary, if any,

or other commodity at the commutation rates fixed under the provisions of Section 46"]

Contents of receipt for Jenmikaram

19 Every Kudiyan paying [any Jenmikaram] shall be entitled to a receipt specifying—

(*a*) the date of payment,

(*b*) the amount paid,

(*c*) the period for which it is paid,

(*d*) the holding in respect of which it is paid, and

(*e*) such other particulars as may be necessary to elucidate the transaction

Sections 20 26 [Omitted]

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within the Pakuthi in which the holding is situated

(2) Where the Jenmi has no residence or granary within that pakuthi, he may notify the Kudiyans of the holdings in that pakuthi that they may produce the paddy for payment at some specified place within that pakuthi at specified hours on specified dates in which case the Kudiyan shall make the payment there, in the absence of any such notification or in case there is none to receive any paddy tendered at the place and time notified, the Kudiyan shall not be bound to make the payment in paddy

(3) When the Kudiyan is not bound to make payment of any Jenmikaram in paddy he may make the payment of the amount of the Jenmikaram in money including the money value at the then current market rate of any portion of the Jenmikaram payable in kind either personally to the Jenmi or to his agent or remit the same, to the Jenmi by Anchal Hundi or Postal Money Order,"

See *S O & R* (7)

II The Select Committees passed the above provision. When the Bill was considered by the Council, the Section now found in the Regulation was put in, on the motion of a Non-official Member—

L. C P., dated 9-12-1932.

See 19 Section VIII of Regulation XII of 1108 substituted the words within brackets for the words "Michavaram or customary dues."

Secs. 20-26 I. Section IX of Regulation XII of 1108 omitted these Sections of Regulation V of 1071

II 1. The original Bill contained Sections 20 to 26, which were modifications of the corresponding ones in Regulation V of 1071 To these, the Bill added two more Sections—26-A and 26-B—

See *S O & R., Paras 3, 8, 9, 10 and 11*

2. The First Select Committee adopted these provisions with changes.—

S C R Paras 39-56

3. The Second Select Committee, however, omitted all of them, "as there is no enhancement or reduction of Michavaram or of Jenmikaram hereafter except in the manner already provided.—

S C R. VIII 20

III. Sections 20 to 26 of Regulation V of 1071 were as follow —

"20. *Revision of terms on renewal of Kanapattom.*—(1) Every revision or re-adjustment of the terms of a Kanapattom at the end of 12 years shall be made by a contract in writing duly registered.

(2) If the parties cannot agree as to the terms of such revision or re-adjustment

or as to the amount of additional Kanom or Ettarthom, the Jenmi or the Kudiyan, as the case may be, may institute a regular suit in a Civil Court of competent jurisdiction for the purpose of compelling the other party to accept the terms proposed by him, or such other terms as to the Court may seem fit

(3) Notwithstanding anything contained in the Stamp Regulation, no such contract of Kanapattom executed in renewal of a prior contract of Kanapattom shall be subject to stamp duty when the annual Michavaram reserved in such renewed Kanapattom does not exceed Rs. 50 in value

(4) In the absence of an express contract to the contrary, the cost of stamp and registration of Kanom deeds shall be borne by the Kudiyan, and the cost of stamp and registration of counterparts or Kychits by the Jenmi.

"21 *When Jenmi entitled to claim enhancement of Pattom*—The Jenmi of a holding shall not be entitled to claim an enhancement of the Pattom assessment fixed under any existing Kanapattom except on one or more of the following grounds, *viz* —

(*a*) In the case of paddy lands,

(1) that the area of the holding actually under cultivation is in excess of the area on which the Pattom was previously fixed,

(2) that the rate of current Pattom is below the prevailing rate for lands of a similar description and quality, with similar advantages in the same Elai or Muri, and that there is no reason for the holding being assessed at so low a rate,

(3) that the productive powers of the land comprised in the holding, as compared with those powers at the time when the current Pattom was fixed, have increased from causes not merely temporary or casual

(*b*) In the case of other lands, in addition to the foregoing grounds,

(4) that the number of trees in the holding on which Pattom is assessable has increased,

(5) that there has been a substantial rise in the average local prices of the produce of those trees during the currency of the previous Kanapattom

(*c*) In the case of either description of land,

(6) that, after this Regulation comes into force, the Kudiyan erects factories, shops or other buildings, not being erections referred to in (*c*) of Explanation I to Clause 14 of Section 3, and the annual rental value of the holding has thereby increased

When the excess to the area under cultivation or the increase in the productive powers of the land is due to reclamation or other works of permanent improvement effected at the expense of the Kudiyan, the cost of such reclamation or other works of improvement shall be estimated and interest on the capital outlay so estimated shall be deducted from the difference between the old and new assessment and allowed to the Kudiyan at the same rate at which the interest on the Kanom money is allowed to the Kudiyan under the Kanapattom

Where an enhancement is allowed on garden lands, Nadavukoor or deduction on account of the cost of planting and rearing the trees sought to be assessed with the Pattom, shall be allowed to the Kudiyan at such rate as may have been agreed upon between him and the Jenmi, and, in the absence of such agreement, at the usual rate prevailing in the Proverthi in which the land is situated

Where enhancement is allowed on the ground mentioned in Clause (6), the rental value shall be the annual rental of the building according to the rates prevailing in the neighbourhood less interest at 6 per

cent per annum on the value of such building and the cost of maintenance

"22. *Rate of assessment of pattom.*—

(*a*) The Pattom on paddy lands shall not exceed one-fourth of the gross produce.

(*b*) The Pattom on other lands shall, in like manner, not exceed one-fourth of the estimated average annual yield of the trees growing thereon, commuted into money at the average market rate, the average being based upon the market price of the different kinds of staple produce for 12 years preceding If no such trees exist, the Pattom shall be taken to be equal to the Payattupattom prevailing in the Proverthi

(*c*) The Pattom on buildings shall be one-half of the rental value fixed under the last para of the preceding Section,

(*d*) The Pattom so assessed shall be subject to deduction on account of interest on the Kanom money, but not on account of existing Sirkar tax or customary dues and renewal fees which shall be paid by the Kudiyan out of his share of the produce

Provided that the existing Pattom shall not be disturbed for the reason only of its being above or below the proportion fixed under this Section

"23 *Amount of Ettartham leviable on renewal of Kanapattom*.—The amount of additional Kanom or Ettarthom leviable by the Jenmi at the time of renewal of Kanapattom, when such is leviable under the provisions of this Regulation, shall not, without the consent of the Kudiyan, exceed six times the amount of the enhanced Michavaram which would have been payable by the Kudiyan, had the Jenmi claimed such enhancement under the provisions of Sections 20 and 21.

"24. *Kudiyan may claim reduction of Pattom in certain cases*.—A Kudiyan may, at the time of renewal, claim reduction of Pattom on the grounds,—

(*a*) that the area of his holding has been diminished, not by his neglect, but by the action of sea, river or lake, or like causes,

(*b*) that the soil of the holding has, without the fault or neglect of the Kudiyan, become permanently deteriorated,

(*c*) that, in the case of gardens, there has been a fall in the average local prices of the produce of the trees in the holding during the currency of the current Kanapattom,

(*d*) that the number of assessable trees in the holding has substantially diminished by causes not preventable by the Kudiyan,

(*e*) that the rate of the current Pattom of his holding is above the prevailing rate for similar lands in the village in which it is situated

"25 *Courts not to decree unfair enhancement or abatement*.—Notwithstanding anything in the foregoing Sections, the Court shall not in any case decree any enhancement or abatement which is, under the circumstances of the case, unfair or inequitable.

"26. *On transfer of Jenmom right, Kudiyan entitled to have customary dues commuted into fixed annual payment*.—In the case of a transfer of Jenmom right, it shall be competent to the Kudiyan to call upon the transferee to commute customary dues into fixed annual payment. The transferee shall comply with such demand. If they disagree as to the rate of commutation, the Court shall decide what shall be the fair and equitable rate."

Part B —[Summary recovery and deposit of Jenmikaram.]

Jenmi may apply to Tahsildar to recover Jenmikaram under Revenue Recovery processes.

[26-A. (1) It shall be competent to the Jenmi of any holding, without prejudice to any other right of action that he may have, to make an application to the Tahsildar of the Taluk in which the holding is situated to recover the arrears of any Jenmikaram in respect of that holding.

Provided that the arrears are not more than one year old on the date of the application.

(2) The application shall be in such form and shall contain such particulars as may be prescribed by Our Government and shall be signed and verified by the Jenmi in the manner prescribed by the Code of Civil Procedure, 1100, for the signing and verification of plaints.

(3) The applicant shall from time to time pay to the Tahsildar such fees as may be prescribed by Our Government for the several processes that may be necessary for realising the arrears. The applicant shall be entitled to a refund of any portion of such fees that may remain unexpended at the termination of the proceedings

(4) If the Tahsildar is satisfied that the application has been duly presented, that the arrears are due from the Kudiyan, that the applicant is entitled to recover them and that they are not more than one year old on the date of the application, he shall proceed to recover the amount of the arrears and interest and the fees paid under Sub-section (3) by the applicant as if they were an arrear of public revenue due to Our Government and the provisions of the Revenue Recovery Regulation, I of 1068, (as amended by Regulations III of 1087, VIII of 1094, X of 1097 and II of 1099) shall *mutatis mutandis*, apply to all the proceedings.

(5) (*a*) The amount that is recovered shall be paid by the Tahsildar to the applicant on taking a receipt from him in a form as near as may be to that contemplated by Section 19

Part B. The Heading of Part B was, in Regulation V of 1071, "Deposit of rent and customary dues in Court" The present heading was substituted by Section X of Regulation XII of 1108.

Sec. 26-A 1. This Section was inserted by Section XI of Regulation XII of 1108

2 The original Bill contained this Section and was adopted as such without modification.

(*b*) A copy of the receipt with the attestation of the Tahsildar shall be given free of cost to the Kudiyan if he applies for it

Explanation—Nothing in this Section shall be deemed to bar the right of civil suit which any aggrieved party may have in law]

[27 (*a*) When a Jenmi refuses to accept Jenmikaram tendered by the Kudiyan, or

Jenmikaram may be deposited by Kudiyan

(*b*) when the Kudiyan in any case is doubtful as to the person entitled to receive the Jenmikaram,

the Kudiyan may make an application to the Court of the District Munsiff having jurisdiction over the place where the holding or any part of it is situated for permission to deposit in such Court the entire amount of the Jenmikaram due in respect of the holding till then together with the interest due thereon under this Regulation]

Contents of the application.

28 The application shall specify, as far as possible,—

(*a*) the name of the Jenmi and his description when known, and, in case of doubt, the name and description of all the rival claimants,

(*b*) the local name, description and extent of the holding,

(*c*) the particulars of the tenure on which the holding is held by the Kudiyan,

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Sec 27. I This Section was substituted for Section 27 of Regulation V of 1071, by Section XII of Regulation XII of 1108

II. 1 The original Bill contained the Section.—See *S O & R.* (*18*)

2. The First Select Committee adopted the proposed Section with slight changes. —*S C R Paras 59 & 60*

III. The old Section was as follows—

"27 *Kudiyan may apply to Munsiff's Court for leave to deposit Michavaram on Jenmi's failure to accept tender*—If any Kudiyan tenders to the Jenmi full payment of Michavaram or renewal fees or other dues as they fall due, and if the Jenmi is not ready or willing to accept the tender and grant a receipt forthwith, or if the Kudiyan entertain a *bona fide* doubt as to the party entitled to receive the Michavaram and other dues, the Kudiyan may apply to the Munsiff's Court within whose jurisdiction the holding is situated, for leave to deposit such amount in Court to the credit of the Jenmi."

Sec. 28: I Section XIII of Regulation XII of 1108 substituted Clause (*d*) for the old Clause (*d*) which was—"(*d*) the full amount of Michavaram or customary dues due up to date and."

[(*d*) the entire amount of the Jenmikaram and the interest due thereon up to date and the value, at the commutation rates, of such portion of it as is in kind,]

(*e*) the circumstances under which the application is made, and shall be verified in the manner prescribed by the Code of Civil Procedure for the verification of plaints

Jenmikaram due up to date of application to be paid into Court

29 The amount of [Jenmikaram] [* *] specified in Clause (*d*) of Section 28 shall be paid into Court at the time of the application, the price of grain or other commodities payable as [Jenmikaram] [and the interest, if any, due thereon] being commuted into money [* *]

Procedure on deposit of Jenmikaram.

[" 30 (1) When such application as is aforesaid is made the Court shall grant the permission applied for and accept the deposit unless it appears on an examination of the applicant that the application has been made without justifying grounds or unless he has failed to pay the fee, if any, chargeable for the issue of the notice hereinafter referred to

(2) The applicant shall be entitled to a receipt from the Court accepting the deposit, and the deposit, shall be deemed to be a payment made by the Kudiyan to the Jenmi in respect of the Jenmikaram or arrear due

Further procedure on deposit

31 (1) The Court accepting the deposit shall give notice of the same to every person who is reasonably believed to claim or to be entitled to the deposit, and may, after hearing such of them as may appear in Court, pay the amount thereof or remit the same less the

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Sec. 29 I Section XIV of Regulation XII of 1108 made amendments in the old Section, and these are shown in square brackets.

II To facilitate reference, the old Section is reproduced below —"29 The amount of Michavaram or other dues specified in Clause (*d*) of Section 28 shall be paid into Court at the time of the application, the price of grain or other commodities payable as Michavarom or dues being commuted into money at market rates."

Secs 30 and 31 I 1 These Sections were substituted by Section XV of Regulation XII of 1108

2. They were in the original Bill
See S O & R Para 12

II Sections 30 and 31 of Regulation V of 1071 were as follow —

"30. *Munsiff to issue notice to Jenmi.*— The Munsiff shall, upon such payment as aforesaid, issue a notice to the Jenmi or other persons named in the application

Hundi or Money Order commission by Anchal Hundi or Postal Money Order to any person appearing to the Court to be entitled to the same or may, if it thinks fit, retain the deposit pending the decision of a competent Civil Court as to the person so entitled

(2) Nothing in this Section shall affect the right of any party to institute a regular suit in a competent Civil Court to contest the payment, remittance or order made under Sub-section (1) or to recover the amount from the party, if any, to whom it has been paid or remitted under Sub-section (1) but, so far as the Kudiyan is concerned, the receipt granted under Sub-section (2) of Section 30 shall be deemed a full acquittance in respect of the amount covered by the receipt and shall have the same force and effect as a receipt granted by the person rightfully entitled to receive the amount "]

Applications under Part B to be exempt from Court fees.

32 Every application made under this Part B shall be exempt from payment of Court fees

Part C —[Of the Jurisdiction of Courts over petty claims for Jenmikaram]

Summary jurisdiction of Courts.

33 Claims by Jenmis for recovery of arrears of [Jenmikaram] shall, when the amount or value of such claim does not exceed Rs 100, be taken cognizance of and disposed of summarily by the Courts hereinafter mentioned

(1) District Munsiffs shall have jurisdiction in respect of all such claims where the amount or value of the claim does not exceed Rs 30.

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mentioned in Section 28, calling upon him or them to show cause why the payment should not be accepted and a receipt granted to the Kudiyan.

31. *Further procedure*—(1) On the day fixed for the appearance of the parties, or on any other day to which the hearing of the application may be adjourned, the Munsiff shall hear the objections, if any, of the Jenmi or other parties claiming the right to receive the Michavaram and dues, and on being satisfied that the full amount due up to date has been paid into Court by the Kudiyan and that the Kudiyan is entitled to make the application, shall grant a receipt in the Form prescribed by Section 19

(2) If the amount paid into Court be less than what is justly due to the Jenmi at the date of the application, the Munsiff shall reject the application and return the deposit, unless the Kudiyan offers to make good, and does make good, the deficiency within six weeks from the date of the order by the Munsiff to make good the same.

(3) In all cases where a receipt is granted by the Court, the deposit shall be paid over to the Jenmi or other party appearing on a summary investigation to be

(2) Zillah Judges shall have similar jurisdiction where the amount or value of the claim exceeds Rs 30 but does not exceed Rs 100

34 Except as otherwise provided by this Regulation, the procedure prescribed by an law for the time being in force for the trial of non-appealable cases shall be the procedure to be followed by the District Munsiffs and Zillah Judges in all suits and proceedings summarily cognizable by them under this Regulation

Procedure for trial of non-appealable cases to be followed in summary suits under this Regulation.

35 The cause of action for recovery of such claims shall be deemed to have arisen at the place where the holding, in respect of which the claim accrued, is situated, and the suit shall, subject to the provisions of Section 33, Clauses 1 and 2, be preferred to the Court within the local limits of whose territorial jurisdiction the cause of action shall have arisen as aforesaid

Where cause of action arises.

36. The plaint in such suit shall be exempt from payment of Court fees, if the claim be for recovery of arrears which accrued due within 12 months next preceding its institution, if otherwise, the regular Court fee which would have been levied, had the claim been instituted as a regular suit in a competent Court, shall be levied on the plaint

Plaint when exempt from Court fees

37 Any agent or Vicharippukaran of a Jenmi empowered in this behalf by a written authority under the hand of the Jenmi shall, for the purposes of a summary suit or application under this Regulation, be deemed to be

Agent of Jenmi

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entitled to the deposit In cases of dispute as to the person entitled to receive the deposit, the Munsiff may take security from the person in whose favour he adjudges in the summary investigation before making the payment

(4) Nothing in this Section shall affect the right of any party to contest by a regular suit the decision passed under Clause (1) or to recover the amount paid from the party receiving the deposit under the summary order of the Court.

(5) A receipt granted by a Court under Clause (1) shall operate as a full acquittance for the amount paid into Court and shall have the same force and effect as a receipt granted by the Jenmi himself "

Part C Section XVI of Regulation XII of 1108 substituted the present heading for the one in Regulation V of 1071, which was —"Part C—Of the Jurisdiction of Courts over petty claims for Michavaram and Customary dues,'

a recognised agent of the Jenmi within the meaning of the Code of Civil Procedure, notwithstanding that the Jenmi may reside within the local limits of the jurisdiction of the Court in which the suit is to be instituted or is pending or in which the application is made

Power of Court to decide question of title to immovable property or status.

38. If, in the decision of a suit cognizable summarily by a Munsiff or a Zillah Judge under Section 33, it becomes necessary to decide incidentally any matter in dispute between the parties to the suit, concerning title to immovable property or the status of either of them or of those under whom they claim, which, if it had been the immediate subject-matter of the claim, would not be cognizable by the Munsiff or the Zillah Judge under the procedure applicable to non-appealable cases, it shall be competent to the District Munsiff or the Zillah Judge, as the case may be, to decide such question of title to immovable property or status, so far as it may be necessary to do for the determination of the summary suit; but such decision shall not be conclusive evidence of such title or status in any other action between the same parties or their representatives

Procedure when Kudiyan admits the money due but pleads title of third person

39 (1) When a Kudiyan-Defendant admits that money is due from him on account of [Jenmikaram], but pleads that it is due not to the Plaintiff but to a third person, the Court shall, except for special reasons to be recorded in writing, refuse to take cognizance of the plea, unless the Defendant pays into Court the amount so admitted to be due

(2) When such a payment is made, the Court shall forthwith cause notice of the payment to be served on the third person

(3) Unless the third person within three months of the notice institutes a regular suit against the Plaintiff and therein obtains an order restraining payment of the money, it shall be paid over to the Plaintiff on his application

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Sec. 38 For the words "Michavaram, renewal fees or customary dues' which occurred in Section 33 of Regulation V of 1071, the word "Jenmikaram" was substituted by Section XVII of Regulation XII of 1108

Sec. 39. Section XVIII of Regulation XII of 1108 substituted the word Jenmikaram ' for the words "Michavaram or renewal fees or customary dues ' which occurred in Section 39 of Regulation V of 1071

(4) Nothing in this Section shall affect the right of any person to recover from the Plaintiff the money paid to him under Clause (3) of this Section

Decision of Munsiffs and Zillah Judges to be final

40 The decision of Munsiffs and Zillah Judges passed in summary suits under this Part shall be final, but shall be subject to revision by the High Court in the manner provided for by Section [89 of the Code of Civil Procedure, 1100]

Provided that, no judgment, decree or order, in supersession of the decision or order of the subordinate Court, shall be passed by the High Court without giving the parties an opportunity of stating their case either in person or by Vakils

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["CHAPTER IV

Collection and payment of Jenmikaram by Government

Power of Government to assume collection of Jenmikarams.

40-A It shall be lawful for Our Government to assume the collection of Jenmikarams for payment over to the Jenmi concerned

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Sec 40 Section XIX of Regulation XII of 1108 substituted—"89 of the Code of Civil Procedure 1100" for "568 of the Civil Procedure Regulation (II of 1065)"

Chapter IV I This Chapter with Sections 40-A to 40-N was inserted by Section XX of Regulation XII of 1108

II 1 This Chapter was not in the Bill At the second reading of the Bill, the Official Member in charge said —"My amendment with regard to Clause XX is that two other Clauses may be substituted, namely, Clauses XX and XX-A The substituted Clause XX proposes to incorporate certain Sections in the Regulation for the purpose of enabling the Government to collect the Jenmikaram for payment over to the Jenmis. The House will remember that the obligation on the part of the Government to take over the collection of Jenmikaram and pay to the Jenmis was undertaken as a result of the agreement between Jenmies and non-Jenmies and as a result of their joint recommendation that the Government should undertake the collection Government, therefore, have undertaken the obligation and I have accordingly drafted the necessary Sections for that purpose and I propose to introduce it by the proposed Clause XX By the Sections 40-A to 40-L, I propose to introduce the requisite procedure for the purpose of settling Jenmikaram before their collection is taken over by Government, because before the Jenmikaram is settled, Government cannot take over the collection of Jenmikaram" The member then explained the scheme of these Sections and said — "These provisions were drafted in their final form as a result of the understanding arrived at in an informal conference between the Jenmis and the non-Jenmis during the last session of the Council These Sections have therefore got the full approval of the informal conference * * "

2. *Sec 40-A* A Non-official member moved an amendment to the Explanation

Explanation—Our Government shall assume the collection in respect of all the Jenmom lands in the State at the same time although the proceedings towards such assumption may be made in respect of all the Jenmom lands in the State together or of such lands in any local area or in such other convenient groups as may be determined by Our Government

Settlement of Jenmikaram and Register of Jenmikarams.

40-B (1) For carrying out the purposes of the foregoing Section, Our Government shall as soon as may be, cause a Register of Jenmikarams to be prepared, after settling the Jenmikarams, showing in respect of each Jenmom land the Survey Number and such other particulars of description as may be prescribed, the names of the Jenmi and the Kudiyan, the Settlement pattamicham, the Jenmivaram, the Jenmikaram, the date and nature of the document, if any, on the basis of which the Jenmikaram was fixed and such other particulars as may be prescribed

(2) The Register may be prepared for the whole State or for each Pakuthi or other local area or for such groups of lands as may be determined by Our Government

Explanation—The 'Register of Jenmikarams' shall for the purposes of this Regulation mean the Register in respect of the whole State or in respect of the Pakuthi or other local area or the group concerned

Jenmikaram Settlement Officer

40-C Our Government may appoint any person or persons that they may deem fit for the Settlement of the Jenmikarams and the preparation of the Register of Jenmikarams and such person or persons (referred to hereinafter as the Jenmikaram Settlement Officers) may, for such settlement and such preparation, make such investigation and follow such procedure as may be prescribed

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as proposed by the Official member, in view to ensure that the Government should take over the collection of Jenmikaram only in respect of all lands in the State together and at the same time. The Explanation as it now stands in the Regulation was the result of the amendment which was carried.

3. *Sec. 40 B*—Consequential amendments were made, on the motion of the same Non-official member, to Sub-section (2) of this Section and the Explanation.

4. *Secs. 40-E & 40-F*—On the motion of the same Non-official member, the Sections as they now stand in the Regulation were substituted for the ones proposed by the Official member—*L C P., dated 15-12-1932*

Preliminary Notification for Settlement of Jenmikaram

40-D Not less than one month before the work of the Settlement of Jenmikarams and the preparation of the Register of Jenmikarams is proposed to be begun, Our Government shall publish in Our Government Gazette, and in such other manner, if any, as may be prescribed, a Notification giving notice of the appointment of the Jenmikaram Settlement Officer for the Pakuthi, local area or group concerned and calling upon the Jenmis and Kudiyans and all persons interested to supply all necessary information and render all assistance in the matter

Final Notification notifying completion of Register of Jenmikarams.

40-E When the preparation of the Register of Jenmikarams has been completed in the prescribed manner in respect of the whole State and such Register has received the approval of Our Government, Our Government shall publish in Our Government Gazette, and in such other manner, if any, as may be prescribed, a Notification notifying that, with effect from a specified date thereafter, which shall not be earlier than two months from the date of the Notification, they have under Section 40-A assumed the collection of Jenmikarams in respect of the whole State

Jenmikarams to be paid to Government and recoverable as arrears of land revenue.

40-F. (1) The Jenmikarams in respect of the lands covered by the Register of Jenmikarams referred to in the foregoing Section and accruing due from and after the date specified in the Notification published under that Section shall be paid to Our Government in such manner and at such times as may be prescribed and may in default of such payment be recovered under the provisions of the Revenue Recovery Regulation (Regulation I of 1068 as amended by Regulations III of 1087, VIII of 1094, X of 1097 and II of 1099) in the same manner as arrears of Land Revenue

Jenmikaram to be paid in money only

(2) No such Jenmikaram shall be payable or be allowed to be paid in kind Jenmikarams due in kind shall be paid at commutation rates fixed under the provisions of Section 46

Jenmikaram to be paid to Jenmi deducting cost of collection

40-G The Jenmikarams collected by Our Government shall be paid to the Jenmi concerned deducting therefrom a fee, towards the charges incidental to collection and payment, of such amount as may

be prescribed from time to time not exceeding in any case two and a half per centum of the amount collected for payment

Explanation 1—If interest on any Jenmikaram is collected such interest also shall be paid over to the Jenmi deducting the fee in respect of such interest also

Explanation 2—If any costs are recovered on account of any processes taken for the recovery of any Jenmikaram such costs shall not be paid over to the Jenmi

Explanation 3—Our Government shall be liable to pay only the Jenmikaram and interest actually collected by them

Jenmikaram to be paid only to Government.

40-H. Notwithstanding anything contained in the foregoing provisions of this Regulation no payment of any such Jenmikaram as is referred to in Section 40-F, Sub-section (1), made otherwise than in accordance with the provisions of that Sub-section, shall be deemed to be a valid discharge of the liability to pay such Jenmikarams, and in respect of such Jenmikarams it shall not be lawful for any Jenmi to institute any suit under the provisions of Chapter III or for the Jenmi or the Kudiyan to make any application under the provisions of the same Chapter.

Jenmikarams must be collected according to the Register of Jenmikarams.

40-I No collection or payment of Jenmikaram shall be stayed by Our Government merely on the ground that any party has any objection to the entries in the Register of Jenmikarams or to the collection or payment in accordance with such entries:

Provided that any party aggrieved shall have the right to institute a suit in a Civil Court of competent jurisdiction to establish the right which he claims and Our Government shall abide by the final result of such suit and may, if necessary, correct the Register of Jenmikarams accordingly

Revision of Register of Jenmikarams.

40-J (1) Our Government shall, at or after every future general Revenue Settlement, cause the Register of Jenmikarams to be revised. At such revision, Our Government may, if they deem fit, cause the particulars required to be entered in the Register of Jenmi-

karams to be incorporated in the Register that is prepared in respect of the Land Revenue Settlement

(2) When any such revision has to be made the procedure prescribed by Sections 40-B to 40-E shall be followed as far as may be; and when the revised Register is completed and notification made under Section 40-E, such revised Register shall be the Register of Jenmikarams and when the particulars required to be entered in the Register of Jenmikarams are incorporated in the Register prepared in respect of any Land Revenue Settlement, such Register shall be deemed to be the Register of Jenmikarams for the purposes of this Regulation

Subsequent changes *re* Jenmikaram, etc may be recorded

40-K. Any changes in respect of the particulars entered in the Register of Jenmikarams, arising by reason of any circumstances, such as the transfer of the right to receive Jenmikaram and the like, occurring after the publication of the notification under Section 40-E, may be caused to be recorded in such manner as may be prescribed, and such record shall be deemed, if so prescribed, as a part of the Register of Jenmikarams

When suits against Government will lie and when not

40-L. (1) No suit or other proceedings shall lie against Our Government or their officers for doing, or failing to do, anything in connection with the settlement of Jenmikarams or the preparation of the Register of Jenmikarams or for having collected or paid any Jenmikaram in accordance with the Register of Jenmikarams

(2) Nothing in Sub-section (1) shall be deemed to prohibit any person aggrieved by any collection or payment from instituting any suit against any other person in a Civil Court of competent jurisdiction for establishing the right which he claims or for following any money in the hands of any person to whom it was paid or for recovering any money from any person who was bound to pay it; or to prohibit any suit against Our Government for the recovery of any moneys realised by them on account of any dues already collected by them,

Power to make Rules.

40-M (1) Our Government shall have power to make Rules for carrying out the purposes of this Chapter.

(2) Without prejudice to the generality of the power aforesaid, Our Government may make Rules not inconsistent with the provisions of this Regulation—

(*a*) to provide for the registers or other records or accounts to be kept for facilitating the collection and payment of Jenmikarams and to determine which of these registers or records or accounts shall be deemed a part of the Register of Jenmikarams,

(*b*) to provide for the transfer of the right of the Jenmi or the liability of the Kudiyan by sale, gift, partition, or otherwise being recognised and recorded and the procedure to be followed in recognising and recording such transfers,

(*c*) to provide for the grant of documents to the Jenmi and the Kudiyan evidencing the amount of the Jenmikaram and the manner and time of the payment of the same,

(*d*) to provide for the grant of receipts or vouchers for the payment made by a Kudiyan, or the receipt by a Jenmi of any Jenmikaram,

(*e*) for authorising the Jenmikaram Settlement Officers to exercise all or any of the powers exerciseable under the Departmental Enquiries Regulation, Regulation VI of 1073;

(*f*) for giving notice to the Jenmis or the Kudiyans or both when coercive steps are taken against Jenmom lands for the recovery of the Jenmikaram or the Sirkar tax and for determining the amount of the cost recoverable for the same and the party from whom it may be recovered;

(*g*) to make provision for any incidental matters that may arise in the settlement of the Jenmikaram or the preparation of the Register of Jenmikarams pursuant to the provisions of this Regulation, and

(*h*) for any matter that has to be prescribed under the provisions of this Regulation.

40-N No Jenmikaram shall be recoverable under the provisions of this Chapter by the sale of any land except the land on which the Jenmikaram is a charge "]

What land can be sold for Jenmikaram

[CHAPTER V
Miscellaneous.]

41 The High Court may, from time to time, make Rules consistent with this Regulation for regulating the practice and procedure of Courts acting under this Regulation The Rules so made shall be published in the Gazette

Power of High Court to make Rules.

42 Notwithstanding anything contained in the foregoing, the provisions of this Regulation shall not apply to any Kanapattoms executed since the twenty-fifth day of Karkatakom 1042, which expressly provide for redemption

Saving of Kanapattoms executed since 25th Karkatakom 1042

43 In contracts relating to Jenmom lands entered into for the first time after this Regulation comes into force, the question whether the tenancy is terminable or otherwise shall be determined according to the intention of the parties as gathered from the terms of the contract

Terminable nature of tenancy to be determined from terms of contract

44 Notwithstanding anything contained in the foregoing [no Jenmikaram shall be recoverable by any Jenmi or by Our Government from] any Kudiyan who or whose predecessor in interest has held his holding for more than fifty years preceding the date of this

Saving of rights of Kudiyans of more than fifty years standing

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III. *Sec 40-N* —This Section was inserted on the motion of a Non-official member who said, in support, that "the Jenmis have always been getting only a very small fraction of the yield as Jenmikaram, and now, very extraordinary remedies are being given to them to realise their dues. Government have agreed to collect the Jenmis' dues. It is therefore only fair and just that, for the realisation of the Jenmis' *dues*, the Government proceed only against the property on which the Jenmikaram is a charge —

L C P dated 15-12-1932

Chap V. The Heading was inserted by Section XX-A of Regulation XII of 1108

Sec 44 I This Section was amended by Section XXI of Regulation XII of 1108

II. Section 44 of Regulation V of 1071 was as follows :—

Regulation, without paying Michavaram and other dues or without taking any renewal within the said period of fifty years

And of established rights

The provisions of this Regulation shall not apply to any right declared, established, or already acquired by Jenmis or Kudiyans at the date this Regulation comes into force

Explanation.—If any time for redemption has been specially provided for, the fifty years shall be calculated from the date on which the stipulated time expires

Apportionment of compensation money on land acquisition

[45. When the Jenmi and the Kudiyan cannot agree as to the apportionment as between them of the compensation money awarded or awardable on the acquisition, under the Land Acquisition Regulation, of any land or portion of land comprised in any holding, the portion due to each shall be determined in accordance with the following Rules —

(*a*) So much of the compensation money as is due to any buildings shall belong entirely to the Kudiyan,

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"44. *Saving of rights of Kudiyans of more than fifty years' standing*.—Notwithstanding anything contained in the foregoing, the provisions of this Regulation shall not apply to any Kudiyan who or whose predecessor in interest has held his holding for more than fifty years preceding the date of this Regulation, without paying michavaram and other dues or without taking any renewal within the said period of fifty years.

And of established rights.—The provisions of this Regulation shall not apply to any right declared, established or already acquired by Jenmis or Kudiyans at the date this Regulation comes into force.

Explanation.—If any time for redemption has been specially provided for, the fifty years shall be calculated from the date on which the stipulated time expires.'

III. The Second Select Committee substituted the words—"no Jenmikaram shall be recoverable by any Jenmi from ' for the words—" the provisions of this Regulation shall not apply to ". They said — 'As the Jenmikaram is the only right of the Jenmi hereafter, Section 44 is proposed to be altered as above,—

S C R., Para VIII, 27

IV When the Bill was considered by the Council, the words " or by Our Government " were inserted after the words " any Jenmi " on the motion of the Official member in charge who said —" It is practically only a drafting amendment which is necessitated by the introduction of the proposed Chapter IV "—

L. C P dated 15-18-1912

Secs. 45, 46 & 47 I These Sections were added, by Section XXII of Regulation XII of 1108, to Regulation V of 1071

II *Sec 45*—1 As proposed in the original Bill, this Section stood as follows :—

"45 When the Jenmi and the Kudiyan cannot agree as to the apportionment as between them of the compensation money awarded or awardable on the acquisition, under the Land Acquisition Regulation, of

(*b*) the balance left after deducting the portion of compensation money referred to in Rule (*a*) shall belong to the Jenmi and the Kudiyan in the proportion of the Jenmikaram charged or chargeable on the land or portion of land and the average annual net produce of the land or portion of land, as the case may be

Provided that if the capitalised value of the Jenmikaram is smaller than such share of the Jenmi the capitalised value alone shall belong to the Jenmi and all the rest shall belong to the Kudiyan.

Explanation —

1 The capitalised value of any Jenmikaram means an amount equal to sixteen and two-third times the amount of the Jenmikaram

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any land or portion of land comprised in any holding, the portion due to each shall be determined in accordance with the following Rules —

(*a*) So much of the compensation money as is due to any buildings or to any improvements not liable to be assessed to Pattom shall belong entirely to the Kudiyan,

(*b*) if the balance left after deducting the portion of compensation money referred to in Rule (*a*) is sufficient to cover the Kanom money charged or chargeable on the land or portion of land as well as the capitalised value of the Jenmikaram charged or chargeable on the land or portion of land an amount equal to the said capitalised value shall belong to the Jenmi and all the rest to the Kudiyan,

(*c*) if the balance referred to is not so sufficient, it shall belong to both of them (the Jenmi and the Kudiyan) in the proportion of the benefit derivable by each from the land or portion of land, the benefit derivable by the Jenmi being the Jenmikaram charged or chargeable on, and the benefit derivable by the Kudiyan being the average annual net produce of the land or portion of land as the case may be less such Jenmikaram,

(*d*) if a portion alone of any land comprised in a holding is the subject of the acquisition the Kanom and the Jenmikaram chargeable in respect of that portion shall be what are fairly and equitably apportionable in respect of that portion in the same manner as if there had been an alienation of that portion by the Kudiyan to Our Government

Explanation 1—The capitalised value of any Jenmikaram means an amount equal to twenty-five times the amount of the Jenmikaram

2 "Jenmikaram' shall not, for the purpose of this Section, include any michavaram charged on account of buildings.' — See *S O & R*, (*13*)

2 The First Select Committee added at the end of Clause (*b*) the following — "but a Kudiyan who wants apportionment to be made only according to the provisions of Clause (c) shall have the right to seek apportionment in accordance therewith." The Committee also inserted

2 'Net produce' means the surplus remaining after deducting from the gross produce of any land a portion equivalent in value to the cost of cultivation and the Sirkar tax and cesses, if any, and the Jenmikaiam chargeable on such land and includes the value of such surplus

3 'Average annual net produce' means the net produce ascertained as derivable on an average for one year, by calculation of the net produce for each year during a period of ten years immediately preceding the date of such ascertainment.

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after the word 'sufficient" in Clause (c), the words "or in the event of the Kudiyan electing to proceed under this Clause." They said —"It was felt desirable that the apportionment of the compensation money should be made on some definite and equitable basis and that the Kudiyan should have the option for electing to proceed under Clause (b) or Clause (c) " The Committee further substituted "twenty" for "twenty five," as in the opinion of the majority, twenty times the annual Jenmikaram should be sufficient compensation for the Jenmi's share in the holding "—
S C R, Paras 65-66,

3. The Second Select Committee substituted the following as Section 45, stating that the "change is made to suit the proposed scheme of things."

"45 When the Jenmi and Kudiyan cannot agree as to the apportionment as between them of the compensation money awarded or awardable on the acquisition, under the Land Acquisition Regulation, of any land or portion of land comprised in any holding, the portion due to each shall be determined in accordance with the following Rules —

(a) So much of the compensation money as due to any buildings shall belong entirely to the Kudiyan;

(b) the balance left after deducting the portion of compensation money referred to in Rule (a) shall belong to the Jenmi and the Kudiyan in the proportion of the Jenmikaram charged or chargeable on the land or portion of land and the average annual net produce of the land or portion of land, as the case may be

Provided that if the capitalised value of the Jenmikaram is smaller than such share of the Jenmi the capitalised value alone shall belong to the Jenmi and all the rest shall belong to the Kudiyan,

Explanation —1 The capitalised value of any Jenmikaram means an amount equal to twenty-five times the amount of the Jenmikaram.

2 'Net produce' means the surplus remaining after deducting from the gross produce of any land a portion equivalent in value to the cost of cultivation and the Sirkar tax and cesses, if any, and the Jenmikaram chargeable on such land, and includes the value of such surplus.

3 'Average annual net produce' means the net produce ascertained as derivable on an average for one year, by calculation of the net produce for each year during a period of not less than ten years immediately preceding the date of such ascertainment

4. When a portion alone of a land is acquired, the portion of Jenmikaram chargeable on that land shall be ascertained as if the land had been divided, and the Jenmikaram of the portion of land acquired shall cease to be payable to the Jenmi." —*S C R., Para, VIII, 28*

4. When the Bill was considered by the Council, on the motion of a Non-official

4 When a portion alone of a land is acquired the portion of Jenmikaram chargeable on that land shall be ascertained as if the land had been divided, and the Jenmikaram of the portion of land acquired shall cease to be payable to the Jenmi or to Our Government

Government to fix commutation rates on advice of committees

46 (1) Subject to the provisions of this Regulation, Our Government may from time to time fix the rates for the commutation into money or paddy or other commodities for the purposes of this Regulation and notify the same in Our Government Gazette, and the rates so fixed shall be the rates for commutation for the purposes of this Regulation

Explanation 1—The rates may be uniform for the whole State or for all purposes or may vary

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member, the words "16 2/3 times" were substituted for "twenty-five times' in Para 1 of the Explanation

In Para 4 of the Explanation, the words "or to Our Government" were added at the end, on the motion of the Official member in charge—

L C P, dated 15 12-1932

Sec 46 1. In the original Bill, the Section stood as follows —

"(1) Our Government may, for the purposes of this Regulation and after following the procedure prescribed, fix the commutation rate for paddy or other commodities payable by the Kudiyan and publish the same in Our Government Gazette.

(2) Such rates shall be fixed at the average price for three years preceding the date of the publication and shall be in force for three years from the date of the publication

(3) The rates fixed under Sub-section (1) may be uniform for the whole of Travancore or may be different for different local areas."— See *S O & R (15)*

2. The First Select Committee inserted the words "in accordance with the Rules passed by Government after previous publication" between "prescribed" and 'fix" and deleted Sub-sections (2) and (3) They said —"It was felt desirable that the Rules issued by Government shall be published in the form of draft Rules before they are finally adopted by Government The proposed Rules should, among other matters, deal with the question mentioned in Sub-sections (2) and (3)"—

S C R, Paras 69 to 71.

3 When the Bill was considered by Council, a Non-official Member moved an amendment fixing the commutation rate of paddy at 13 chuckrams for standard parah. A long discussion followed, and in the course of the debate, the Official Member in charge moved to substitute, for the proposed Section, another Section which is the same as that now found in the Regulation excepting explanation (2) for which see below In moving the amendment the member said —"I find that it is not possible to reach an agreement as to any figure that may be embodied in the statute itself " But it is absolutely necessary that when this measure is passed we must find a way out of the difficulty because when the collection of Jenmikaram is taken by Government, it has to be paid and collected in money Therefore, it is absolutely essential to devise a

Explanation 2.—The power to fix rates includes the power to revise rates already fixed.

(2) In fixing the rates, Our Government shall be guided by such Rules as may be passed by Our Government after previous publication

(3) Such Rules shall, *inter alia*, provide for the appointment of a Committee to advise Our Government as to the rates to be fixed under this Section The Committee shall consist of five members, two to represent the Jenmi interests, two to represent the Kudiyan interests and one, an Official, to be the Chairman, and shall follow such procedure as may be prescribed,

Explanation.—The Committee may be a single Committee for the whole State or there may be different Committees for different places,

Limitation period for Jenmikaram.

47. (1) Notwithstanding anything contained in the First Schedule annexed to the Travancore Limitation Regulation, no suit for any arrear of Jenmikaram or the interest due thereon shall be entertained by any Civil Court unless instituted within six years from the date of the Jenmikaram becoming an arrear:

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machinery which would fix what the money payment should be. " " The commutation rates must be settled by the Government on their responsibility but with the advice of a Committee in which the Jenmi and the Kudiyan interests will be represented "

There was further discussion on the amendment proposed, and finally, it was passed.— *L. C P., dated 15 & 16-12-1932*

(4) At the final reading of the Bill, Explanation (2) to Sub-section (1) was inserted on the motion of the Official Member in charge.—

L. C. P., dated 20-12-1932.

Sec. 47: This Section adopted the provision contained in the original Bill —

See S O & R., 16

It may be noted here that, as per the original Bill, Regulation V of 1071, as amended, was to consist of 48 Sections. One of these Sections, namely, 46, was omitted by the Second Select Committee, and the remaining Sections renumbered. The omitted Section is noted below

1. In the original Bill, this Section was as follows —"46. Whenever the interest of either the Jenmi or the Kudiyan in any land comprised in a holding is transferred to, or otherwise devolves on, Our Government, the transfer or devolution shall not as such affect the interest of the other person, the Kudiyan or Jenmi as the case may be, in such land:

Provided that Our Goverment shall have the right in any such case to compulsorily acquire, under the provisions of the Land Acquisition Regulation, the interest of such person or to make any permanent arrangement which may have the effect of converting the Jenmom

Provided however that suits for Jenmikaram which are barred by reason alone of the above provision, on the date of the commencement of the Amendment Regulation may be instituted within two years from that date,

(2) The Explanation to Article 119 of the First Schedule to the Travancore Limitation Regulation shall be deemed to stand repealed.']

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tenure of the land into Pandaravaka tenure and securing and protecting, however, as far as practicable, the rights of such person in respect of the said land "—

See *S O & R*, (14)

2. The First Select Committee deleted the word "compulsorily" and also the words "or to make any permanent of the said land" They said that "it was undesirable that any permanent arrangement should be made without the consent of the party concerned'—

S C R, Paras 87 & 88

3 The Second Select Committee omitted the Section as they did not think "that, in the proposed scheme of things, there is necessity for the provisions contained in the proposed Section 46—

S C R Para VIII, 29.

RULES AND NOTIFICATIONS.

I. RULES.

(1)

(R. O. C No 1105/33/Rev , dated 4th March 1933) (a)

Under sanction of His Highness the Maha Raja, it is hereby notified that the Rules noted below are framed under Section 40 M of the Jenmi-Kudiyan Regulation, XII of 1108, for the Settlement of the Jenmikaram

1 (i) The Taluk Jenmikaram Settlement Officer (the Tahsildar) shall keep a pakuthiwar list of all Jenmom lands in his Taluk in accordance with the Settlement Register

(ii) If any person applies that any land is Jenmom land and therefore available for the Settlement of Jenmikaram, he should include that also in the list

2 A case may be taken for each Survey No or for a convenient group of Survey numbers (convenient group means for example contiguous Survey numbers in one pakuthi belonging to one Jenmi and held by one Kudiyan)

3 Notice should be given to the Jenmi and the Kudiyan to appear with all available records and to give a statement of Jenmikaram as per form appended (a form may be supplied free to any *bona fide* applicant)

4 The decision shall in every case be notified to the parties in writing. It should be in the following form —

Survey No	Name of the Jenmi	Name of the Kudiyan	Amount of Jenmikaram

5 The Jenmi as well as the Kudiyan shall be allowed to appear and produce documents through their agents

6 In the absence of deeds and of the parties the Tahsildar (the Taluk Jenmikaram Settlement Officer) shall make an enquiry and pass decision if he can come to a satisfactory conclusion as to the Jenmikaram, the names of the Jenmi and the Kudiyan If not he may write "Nil" as Jenmikaram

7 When one party alone appears and the other does not, he may proceed *ex parte*.

(a) *T. G G dated 11-4-1933, Pt. I P 967*

8. On enquiry if the Tahsildar finds that the land is not Jenmom land he may strike off the case noting that it is not Jenmom land

9 The procedure laid down in Section 3 of the Regulation shall be followed in ascertaining the Jenmikaram

10 After ascertaining the Jenmikaram the Tahsildar shall proceed to make the necessary entries in the draft Jenmikaram Register

11. Jenmikaram Register may be prepared for each pakuthi Survey number war in the following form

1	2	3	4	5	6	7	8
Sl No	S No. & Sub-Dn	Extent A C	Lekkom	Inam	Whether wet or dry	Settlement pattom.	Sirkar tax.

9	10	11	12	13
Settlement pattamicham	The No & date of Kanom deed	Kanom amount.	Name of Jenmi	Name of Kudiyan.

14	15	16	17
Jenmivaram	Total of	Jenmikaram	Remarks.
i	ii		
Michavaram Fractional fees.	i to iii		
iii			
Commuted cess.			

NOTE —When a sub-division has to be made in Jenmom properties the sub-divisions should be numbered as in the case of Pokkuvaravu Sub-divisions following the same principles.

[*Rule 12* The Dewan Peishkars of Trivandrum, Quilon and Kottayam who are also Jenmikaram Settlement Officers of their respective Divisions shall have power to supervise the work of the Taluk Jenmikaram Settlement Officers within their Divisions and to correct and rectify the mistakes in the Settlement of Jenmikaram and the preparation of the Register of Jenmikaram Appeals from the decisions or orders passed by the Taluk Jenmikaram Settlement Officers shall lie to the Division Jenmikaram Settlement Officers (Dewan Peishkars)

Rule 13. The State Jenmikaram Settlement Officer (Land Revenue Commissioner) may, on his own motion or on the application of the parties, revise any order, original or appellate, if he thinks fit.

Rule 14 (1) Appeals shall be presented within two months from the date of the decision appealed against or the date of communication thereof as the case may be In computing the period, the day on which the decision appealed against was pronounced or communicated and the time required for obtaining a copy of it shall be excluded On all copies issued, shall be entered the date of the decision, the date of the application for copy, the date fixed for receiving the copy and the date on which the copy was ready for delivery

(ii) The appellate authority may admit an appeal after the expiry of the period of limitation, provided he is satisfied that the appellant had good and sufficient cause for not presenting the appeal within such period

(iii) The appellate authority may confirm or cancel or modify the decision or order appealed against.

(iv) No appeal shall be admitted unless accompanied by a certified copy of the decision or order appealed against No officer shall decide a case in appeal or revision without giving all the interested parties notice to appear and an opportunity to be heard

(v) All decisions or orders, original or appellate, shall be incorporated with the records of the case. They should be communicated to the parties in writing free of charge

NOTE —The Revision cases already filed in the State Jenmikaram Settlement Office shall be treated as appeals as contemplated in Rule 12 above and may be disposed of by Division Jenmikaram Settlement Officers (Dewan Peishkars),] *

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(2)

(R O C. No. 739/33/Rev, dated 21st April 1934) (a)

In exercise of the powers conferred by Sections 17 and 46 of the Travancore Jenmi and Kudiyan Regulation of 1071 (Regulation V of 1071, as amended by Regulation XII of 1108), the Government of His Highness the Maha Raja are pleased to make the following Rules :—

1 These Rules may be called the Jenmikaram Payment and Commutation Rules and shall come into force at once

2 In these Rules unless there be anything repugnant in the subject or context

(a) "Commutation rates" means rates at which paddy or other commodities forming part of Jenmikaram are to be commuted into money for purposes of payment and recovery of the Jenmikaram.

(b) "Gazette" means the Travancore Government Gazette

(c) "Regulation" means the Travancore Jenmi and Kudiyan Regulation of 1071, V of 1071, as amended by Regulation XII of 1108

3. The Jenmikaram shall be payable in two instalments of one-half each in accordance with the particulars shown in the subjoined table.

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* Rules 12 to 14 modified by Notification R. O. C. No. 445/34/Rev., dated 2nd April 1934.—*T G G., dated 8-4-1934, Pt. I. P. 847*

(a) *T G G., dated 24-4-1934, Pt. I P 972, and T. G G., dated 15-5-1934, Pt. I, P 1092*

Provided that if a one half of the Jenmikaram can be paid only by paying also a fraction of one cash, that fraction shall, for purposes of payment, be deducted from the first instalment and added to the second

Table

Name of Revenue Division, Taluk or other locality in which the land in respect of which Jenmikaram is payable is situated	Garden land		Paddy land	
	Date for payment of first instalment.	Date for payment of second instalment	Date for payment of first instalment	Date for payment of second instalment
Trivandrum Division	15th Vrischigom	15th Meenam	15th Vrischigom	15th Medom
Quilon Division	Do	Do	Do	Do
Kottayam Division	Do	Do	Do	Do
For Punja lands in all the Divisions.			15th Edavom	15th Mithunam

4. The provisions for commutation in these Rules shall apply in respect of the commutation into money of paddy and other commodities for the purposes of payment and recovery of Jenmikarams payable under the Regulation

5 Government may fix different commutation rates for different instalments or a uniform rate for all the instalments according as they may determine from time to time

6 The commutation rates once fixed shall ordinarily remain in force for two years but may be revised at any time and shall remain in force until rates are fixed in their place afresh

7 The commutation rates shall be fixed with reference to the places or locality where the lands liable to payment of Jenmikaram are situate Government may fix a uniform rate for the whole State or different rates for different places or localities such as, *e g*, Revenue Divisions, Taluks, or pakuthies or parts of Revenue Division, Taluk, or pakuthy or groups of Revenue Divisions, Taluks or pakuthies

8 Government shall appoint a Committee as required by Section 46 (3) of the Regulation

9 The members of the Committee (including the Chairman) shall be nominated by Government from time to time

10 The members (including the Chairman) shall ordinarily hold office for two years and shall, unless Government otherwise direct, continue in office until their successors are appointed Any member may be removed

by Government at any time within two years Vacancies in the Committee arising by death, resignation or removal will be filled by Government

11 Government may appoint a single Committee for the whole State or different Committees for different portions of the State according as Government may determine from time to time

12 The Chairman shall be the convener of the meetings of the Committee

13 The Committee shall meet whenever the Chairman calls a meeting of the Committee Ordinarily, the Chairman shall give the members not less than seven days' notice in writing of the time and place fixed for the meeting

14 No business shall be transacted at any meeting of the Committee unless the Chairman and at least two members are present

15 All matters excepting matters of procedure relating to the meetings and work of the Committee shall be decided by the vote of a majority of the members present.

16 In case of equality of votes, the Chairman shall have a second or casting vote

17 Subject to the provisions of these Rules, all matters of procedure relating to meetings and work of the Committee shall be determined by the Chairman The Committee may however propose rules of procedure for the consideration of Government Government may on such proposals, or otherwise, pass rules for procedure Whenever such rules are passed by Government, the procedure shall be in accordance therewith, provided that in all cases not provided for by such rules, the procedure shall be determined by the Chairman Any doubt arising in regard to procedure shall be referred to Government whose decision shall be final

18 For the purpose of advising Government on commutation rates, Committee may call for reports or information and may take such evidence as is considered relevant The Chairman shall decide whether any evidence is relevant or not, as also the manner in which evidence is to be taken. The Committee may also take expert evidence and hear the representatives of any interests and may for the purpose of obtaining information invite any person to be present at its sittings. Any member dissatisfied with any decision of the Chairman passed under this Rule may refer the matter to Government whose orders shall be final and shall be carried out.

19. The minutes of the proceedings of each meeting of the Committee shall be recorded in a book kept for the purpose and shall be signed by the

Chairman The book may at any time be called for and inspected by Government

20 Government shall call upon the Committee through the Chairman to advise them as to the commutation rates to be fixed They may call upon the Committee to recommend a uniform rate or different rates for the various instalments as well as to recommend a uniform rate or different rates for various places or localities, such as *e. g*, Revenue Divisions, Taluks, or pakuthies or parts of Revenue Divisions, Taluks, or pakuthies or groups of Revenue Divisions, Taluks, or pakuthies

21, The Committee shall, through the Chairman, report to Government, in accordance with the reference made by Government, the commutation rates that they advise. If the Committee are of opinion that the commutation rates should be fixed in some manner other than that indicated by the reference, the Committee may, in their report, advise Government of that also.

22 On receipt of the report of the Committee—

(*a*) the Government may finally fix the commutation rates; or

(*b*) they may provisionally fix rates and publish them in the Gazette for public criticism, and if any criticism is received within fifteen days of the publication, the Government shall consider such criticism also and then finally fix the rates.

23 When commutation rates are finally fixed by Government they shall notify the same in the Gazette, and the commutation rates so notified shall come into force on the date of the Gazette in which the notification is published unless some specific date is mentioned in the notification for the coming into force of the rates, in which case the rates shall come into force on such date

24 Government may call for any reports or information from the Committee on any matter connected with their functions and such reports and information shall be supplied through the Chairman

25 In fixing the commutation rates, the Committee as well as Government shall have regard, *inter alia*, to the following, namely —

(i) The price at which the Kudiyan can sell the commodity in a convenient market in or near the Taluk in which the land liable to the payment of Jenmikaram is situate.

(ii) The price at which the Jenmi can buy the commodity in a convenient market in or near the Taluk where the commodity is likely to be spent by him.

(iii) The fact that within the period of the instalment of payment the prices may vary from time to time

(iv) The cost of the remittance of the Jenmikaram by the Kudiyan to the Jenmi ;

(v) That a percentage variation may be necessary for equalising prices

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(3)

THE JENMIKARAM RECOVERY RULES.

(Dated—May 1934)

In exercise of the powers conferred by Section 26-A of the Travancore Jenmi and Kudiyan Regulation of 1071 (Regulation V of 1071 as amended by Regulation XII of 1108) the Government of His Highness the Maha Raja are pleased to make the following Rules —

1 These Rules may be called the Jenmikaram Recovery Rules and shall come into force at once.

2 In these Rules unless there be anything repugnant in the subject or context

(*a*) "Commutation rates" means the rates fixed by Government under Section 46 of the Regulation,

(*b*) "Regulation" means the Travancore Jenmi and Kudiyan Regulation of 1071, V of 1071 as amended by Regulation XII of 1108

3. (*a*) Applications to the Tahsildar under Section 26-A of the Regulation for recovery of arrears of Jenmikaram shall be made in the Form appended to these Rules.

(*b*) There shall be a separate application in respect of each holding.

(*c*) Every application shall be accompanied by a copy of the same certified by the applicant to be a true copy.

4. (*a*) In respect of the several processes consequent on the application, fees shall be levied at the same rates as are leviable for similar processes under the Revenue Recovery Regulation I of 1068.

(*b*) The fees shall be paid by the applicant within such time as may be fixed by the Tahsildar.

FORM.

APPLICATION FOR RECOVERY OF JENMIKARAM

To

The Tahsildar of

Name and address in full of the applicant	Name and address in full of the respondent : *e*, the person against whom the application is made	The Survey No. name (if any) and other description of each parcel of land in respect of which Jenmikaram is claimed	Particulars of the transaction under which the Jenmikaram is due, such as *e*, *g* whether under a kanom document or a court decree etc	Particulars of the Jenmikaram due in respect of each parcel of land, *1	Particulars of the right of the applicant to get the Jenmikaram
1	2	3	4	5	6

*1 NOTE.—*Commodity portions* of the Jenmikaram must be shown as commodities and money portions as money separately

Particulars as to how the respondent is sought to be made liable for the Jenmikaram	Particulars of the arrears of Jenmikaram claimed under this application. * 2	The amount in money of the arrears of Jenmikaram claimed with particulars as to the commutation into money of the portion in commodity, if any * 3	The amount of interest, if any, that is claimed. * 4	The total amount sought to be recovered	Remarks if any
7	8	9	10	11	12

*2 NOTE.—In this column the period in respect of which the arrear of Jenmikaram is claimed, particulars as to the receipt of amounts, if any, towards the Jenmikaram for that period, and such other particulars must be shown.

*3 NOTE.—(i) The commutation rates prevailing on the date on which the Jenmikaram became an arrear should be adopted. (ii) The Commutation of each commodity should be separately shown

*4 NOTE.—In regard to rate of interest, see Section 17 (4) of the Regulation.

INSTRUCTIONS *re* RECOVERY OF JENMIKARAM BY TAHSILDARS.

In view of the provisions of Section 26-A, Sub-section (4), of the Travancore Jenmi and Kudiyan Regulation of 1071, the Government of His Highness the Maha Raja are pleased to issue the following instructions for the guidance of Tahsildars —

1 On receipt of an application for recovery of arrears of Jenmikaram under the provisions of Section 26-A of the Regulation and the Rules thereunder, the Tahsildar shall examine the application for the purpose of ascertaining whether it is *prima facie* sustainable under the said provisions.

2 If the Tahsildar finds that it is not *prima facie* sustainable, he may reject the application or allow it to be amended by the applicant The Tahsildar shall, as far as possible, hear the applicant before any such order is passed.

3 If the Tahsildar finds that the application is *prima facie* sustainable, he shall issue a notice to the respondent together with copy of the application presented under Rule 3 of the Jenmikaram Recovery Rules calling upon him to show cause, within a time specified in the notice, why the application should not be granted A fee shall be levied from the applicant for the issue of this notice as for a demand notice under the Revenue Recovery Regulation. The notice shall be served in the same way as the demand notice and the copy of the application shall also be delivered to the respondent on service of the notice

4 On the day fixed for the appearance of the respondent, or on such other day as may be fixed by the Tahsildar from time to time for the disposal of the application, the Tahsildar shall make a brief and summary inquiry in the presence of the parties if they appear and pass written orders as to whether any amount is recoverable and if so what amount, and notify the parties if they are present.

—T G G dated 12-6-1934, Pt. I, P 1134

II NOTIFICATIONS

(1)

(R O C No 80 of 33/Legis, dated 14th February 1933)

It is hereby notified that, in exercise of the powers conferred by Section 40-C of the Travancore Jenmi and Kudiyan Regulation of 1071, V of 1071, as amended by Regulation XII of 1108, the Government of His Highness the Maha Raja have been pleased to appoint the Tahsildars of the Taluks as the Jenmikaram Settlement Officers for their respective Taluks for the settlement of Jenmikaram and the preparation of the Register of Jenmikarams in respect of Jenmom lands.—*T G G, dated 3 7 1108, Pt I, P. 734*

(2)

(R O C No. 5942/33/Rev, dated 27th November 1933)

It is hereby notified that in exercise of the powers conferred by Section 40-C of the Travancore Jenmi and Kudiyan Regulation of 1071, V of

1071, as amended by Regulation XII of 1108, the Government of His Highness the Maha Raja have been pleased to appoint the Land Revenue and Income Tax Commissioner, Travancore, as Jenmikaram Settlement Officer for Travancore in addition to his own duties—*T G G, dated 28-11-1933, Pt I, P 287*

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(3)

(R O C No 5689/33/Rev, dated 27th February 1934)

It is hereby notified that in exercise of the powers conferred by Section 40-C of the Travancore Jenmi and Kudiyan Regulation of 1071, V of 1071, as amended by Regulation XII of 1108, the Government of His Highness the Maha Raja have been pleased to appoint the Dewan Peishkars of Trivandrum, Quilon and Kottayam, as Jenmikaram Settlement Officers for the respective divisions in addition to their own duties—*T G G, dated 27-2 1934, Pt I, P 662*

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(4)

(Dis 582/34/Revenue, dated 21st May 1934.)

In exercise of the powers conferred by Section 40 M (2) of the Travancore Jenmi and Kudiyan Regulation of 1071 (Regulation V of 1071 as amended by Regulation XII of 1108) the Government of His Highness the Maha Raja are pleased hereby to authorise the Jenmikaram Settlement Officers noted at foot to exercise, in connection with the settlement of Jenmikarams all the powers under Section 4 of the Departmental Enquiries Regulation, Regulation VI of 1073.

1 All the Tahsildar Jenmikaram Settlement Officers

2 All the Additional Taluk Jenmikaram Settlement Officers

T G G, dated 22 5 1934, Pt I, P 1099

APPENDIX B.

CASE LAW.

REGULATION I OF 1010

(Powers and Jurisdiction of Munsiffs)

1. *On a construction of Section 17, Clause 5, of Regulation I of 1010 read with Section 21 of Regulation IV of 1010, the plaintiff is entitled to recover interest on the principal money not exceeding a moiety of the principal from the date of suit up to the date of decree. He is also entitled to recover interest from the date of decree up to the date of realisation not exceeding a moiety of the principal*

The date of the decree found in Section 21 of Regulation IV of 1010 is the date of the original decree.—

22 T L J, *1166*

2. In the case of money, whatever be the rate of interest agreed upon by the parties, when it comes to a matter of decree in a Court, nothing more than twelve per cent. per annum could be awarded. In the case of paddy, the only restriction was that interest could be awarded in case of accumulation as much as the principal, but not more. As regards the rate of interest, no restriction was prescribed

The current of decisions is against the interference by Court with contract rates in so far as paddy transactions are concerned The interference with the agreements between parties should be made only in the case of palpably hard or unconscionable transactions and not otherwise. If any freedom has been allowed, it should be left unfettered as far as possible This is the case of suits for paddy—

49 T L. R, *139*(=23 T L J, *145*)

3 In cases where there is a written contract between the creditor and the debtor to carry interest on interest allowed to fall in arrears there is nothing unjust or contrary to public policy to give effect to the terms of the agreement The result of this view would be in one sense to allow interest on interest. But the point to be noted is that the interest so allowed is not allowed on interest as such, but on an amount which both parties have agreed to treat as a principal debt by itself The difference may be considered to be fine, but it is a real and substantial one. This view has also the merit of binding parties to carry out obligations lawfully entered into by them If the terms of the agreement are very harsh or unconscionable, the Courts have the power and will not hesitate to intervene (F B)—

24 T L J, *442*

REGULATION IV OF 1010

(Zillah Jurisdiction)

See under Regulation I of 1010

REVENUE SETTLEMENT PROCLAMATION, 1061

1. The commutation rates specified in Section 19 of the Settlement Proclamation

relate to the 'Government demand' mentioned in it which is referred to again and defined with precision in Section 20 The latter Section shows how such net demand is arrived at and one among the deductions which have to be made is the payment of Thiruppuvarom —

46 T L R., 276 -

2 The commutation rates allowed by Section 19 of the Settlement Proclamation and the Government Notification of 1061 relate only to Government demand, that is, the amount directly payable to Government Government demand in Section 19 means the residue due to Government after deducting the share diverted in favour of third parties The Settlement Proclamation should not be so construed as to effect any assignment of land-tax or any part thereof in favour of third parties effected before the promulgation of that Proclamation — 20 T L J, 672

3. Thiruppuvarom is a part of the tax or net Government demand In respect of that also, the pattadar is entitled to the benefit of the commutation rate as per Proceedings of Government of 1081 His burden cannot be enhanced by the diversion (Thiruppuvarom)

Per Joseph Thaliath, J —A pattadar by accepting a patta, in which he is asked to pay a certain quantity of paddy annually to a third person, is not precluded from taking advantage of the concessions granted by the Government in the matter of paying the paddy portion of the revenue No question of estoppel arises in the matter — 20 T L J, 819

4 The Government assess the tax upon a property at the Settlement which assessment cannot be altered until a fresh Settlement is made at the end of 30 years. The assessment may be subject to certain deductions or additions in the case of lands belonging to particular tenures but apart from these deductions or additions incident to tenure, the assessment is also the Government demand and under Section 19, half the Government demand is payable in money at the commutation price of 6 chuckrams per parah The Thiruppuvarom is not a deduction to be made in arriving at the Government demand but a part of the Government demand and therefore irrespective of any direction in the patta as regards the payment of Thiruppuvarom, the Pattadar is entitled to pay half of the amount payable as per his patta at commutation rate Hence the benefit of Clause 19 of the Settlement Proclamation, 1061, could be claimed by holders of lands charged with liability of paying Thiruppuvarom under the patta issued with respect thereto

On the footing that the Thiruppuvarom is only a diversion out of the tax payable to Government, the tenant cannot be liable to the Thiruppuvarom holder save to the extent to which he is liable to the Government In this view such holders can claim the benefit of the Government notification dated 20-6-1081 relating to commutation rates with respect to Thiruppuvarom payable in kind provided for under pattas issued before the date of the above notification (F B).—

37 T L R 301 (=21 T L J, 669)

5 See also—

Regn V of 1071, (Other Cases) } — 21 T L J, 528 21 T L J, 598

Regn VI of 1100, Art 109 —21 T L J, 918

Regn VIII of 1100, Sec 8 —21 T L J, 968

VIRUTHI PROCLAMATION, 1061.

1 Holders of Viruthi lands are merely tenants-at-will and the Sirkar has an absolute right of disposal in respect of such lands. *It may be that the occupancy right of the tenant-at-will is capable of acquisition by adverse possession* But what is acquired being only a tenancy-at-will may be terminated by the Sirkar at their pleasure — 23 T L J, 24.

2. The Sirkar has the absolute right to register Viruthi lands in the name of any one they choose Any party aggrieved by the action of the Revenue authorities has only the right of appeal to the Government. The only condition under which the Courts could interfere is where a registry was obtained on a false representation by either party — 23 T. L. J., *902*

REGULATION V OF 1067
(The Criminal Procedure Code)

Section 10.

See Sec 307 —

47 T. L. R., *826* (=21 T. L. J., *780*)

Section 20

1. The accused, a Proverthikaran, received a sum of Rs. 15-11 ch 2 cash from P. W 1 on account of the land tax due from him and committed criminal breach of trust in respect of the said sum He omitted to enter it in the revenue account wilfully and with intent to defraud He was tried on a charge framed under Sections 419 and 460 of the T P C and sentenced to undergo rigorous imprison ment for one year (six months for each of the offences)

Held (On appeal) — Where the facts constituting the offences charged are so closely interrelated as to loose their distinctive perceptibility in the light of the criminal intent, the offences are not distinct for the purposes of Section 20 of the Criminal Procedure Code

The omission to make the entry in the account books appears to be a sequel of the misappropriation committed by the accused. Therefore the falsification forms part of the same transaction as the criminal breach of trust and the offences, therefore, are not distinct offences for purposes of Section 20.

In awarding punishment under Section 60 of the Penal Code, the Court should pass one sentence for either of the offences and not a separate sentence for each, though, if separate sentences are passed for each, it would only be an irregularity and not an illegality so long as the aggregate sentence does not exceed the maxi mum provided for any one of the offences or the jurisdiction of the Court.

Thus viewed it is open to the Appellate Court to give an aggregate sentence for one offence, provided however that it does not exceed the maximum provided for that offence or the jurisdiction of the Court In so doing the Court does not offend the provisions of Section 318 (*b*) of the Criminal Procedure Code

According to the amended Criminal Procedure Code of British India, even if the offences are not distinct, consecutive sentences subject to the provisions of the Penal Code can be passed in British India —

46 T. L. R., *105* (=20 T. L. J., *885*)

2. Section 20 of the Code, corresponding to Section 35 of the Indian Criminal Procedure Code, does not vest the Courts with power to give concurrent sentences. Various cases may arise in which the Magistrates and Sessions Judges would find it desirable to pass separate sentences, but to give effect to them concurrently It has to be seen whether an amendment to Section 20, on the lines of Section 35, is or is not desirable.— 23 T. L. J., *756*

3. See also Regulation I of 1074, Sections 469 & 473 —

47 T. L. R. *81* (=21 T. L. J., *999*).

Section 35

A search conducted in the presence of Police men alone is illegal Noncompliance with the provisions of Section 35 would compel the High Court to consider the search as not having taken place. The object of the Section presumably is to secure as reliable evidence as possible of the search excluding the possibility of

concoction or manipulation, and it is incumbent on the Police to try to comply with its provisions. The Officer who conducts the search cannot be deemed to be an entirely satisfactory witness to prove the search It is not enough if the witnesses are kept outside the house while the search goes on within, but they should accompany the Officer throughout and should actually witness the recovery of the articles searched for No doubt, the observance of the Section may be variable in the circumstances of each case, but such circumstances should be established to justify the deviation from the Section.

Where the house breaking and the breaking open of the boxes were for the purpose of committing the theft, separate sentences are not permissible.—

21 T L J, 809

Section 89.

It is open to an Appellate or Revisional Court to pass an order under Section 89, in view of the amendment of the Section by the addition of the last paragraph.

According to Section 103, the period for which security is to be given shall commence on the date of the Judge's order The last paragraph of the Section is quite inelastic and does not give any option to the Court to fix a later date for the commencement of the period for which security should be given.

[The corresponding Section 120 of the British Indian Act has been amended and the Court there in its discretion is empowered to fix a convenient date on which security may be given.]— 20 T. L J, 85

Section 90.

1. The revision petitions arose out of proceedings taken by the Additional District Magistrate, Padmanabhapuram, against six persons under Section 90, for prevention of breach of the peace apprehended to arise out of an attempt to effect entry by non-caste Hindus and other depressed classes into the streets within the Sanketham limits of the Suchindram Devaswom As it was deemed emergent, warrant for the immediate arrest of the first counter-petitioner was issued even at the time of the preliminary order

Held (in revision by the counter-petitioners) —(1) The Magistrate was entitled to initiate proceedings against the counter-petitioners even if they were at the time illegally detained in jail

(2) Before an order can be passed under Section 101 in proceedings under Section 90, it must be shown that the counter-petitioners before the lower Court intended to commit a breach of the peace or to do some unlawful act which might probably occasion a breach of the peace.

(3) In order to be wrongful, the act threatened by the persons who are proceeded against must be shown to violate some provision of law or the right of some other person or persons.

(4) The roads of the State belonging to Government are divided into public highways open to all persons for all lawful purposes and private ways which can only be used for purposes not repugnant to the bulk of the residents in the properties adjacent to them. In the case of the former class of roads it is extremely doubtful whether any usage or custom however ancient and continuous could restrict the usage of any class of His Highness' subjects. As regards the second class of roads, an entirely different state of affairs would exist and from the language used by the learned Judges it would seem that they considered that the burden of proof would rather be on the persons who claimed the use of such roads that the use claimed was in accordance with custom

It is one of the signs of the road being public that it leads to public offices.

(5) The existence of a custom is not a mere question of fact, but is also a question of law. It is, therefore possible in revision to see whether its existence as a

custom can be inferred from the evidence The evidence in the case was not sufficient to find a custom, and in the absence of an allegation or a finding by the lower Court as to the roads in question being village roads and not King's highways it was extremely doubtful whether any amount of evidence could establish a custom by which a section of the community should be excluded from the use of the roads.

(6) It is not necessary in all cases for the Court to hear arguments in cases the Criminal Procedure Code does not lay down any such rule It has however been held by this Court that it is usual and desirable to hear arguments and though the failure to hear them may not be enough to induce interference, the High Court will interfere when as the result the judgment of the lower Court shows that it has failed to understand the case —

46 T L R, 454 (=21 T L J, 356)
Ref —50 T L R, 1

2 Section 90 presupposes that the person sought to be proceeded against is likely (*not was likely*) to commit a breach of the peace, and it cannot be presumed from the fact that the person has done a wrongful act in the past he is likely to do the same again There must be evidence of specific conduct on the part of the accused from which a reasonable immediate inference could be drawn The mere *ipse dixits* of witnesses are not enough. In the absence of a finding either express or by clear implication that the accused is likely to commit a breach of the peace or a wrongful act that may probably occasion a breach of the peace the Magistrate has no jurisdiction to order the accused to execute a bond for keeping the peace.

The omission to use the language as employed in Section 90 in the order of the Magistrate does not vitiate the order if from the language used by him it is reasonably clear that he meant to record a finding to that effect. Nevertheless Magistrates who take action under Section 90 would do well if they conformed strictly to the words of Section 90 in view of the fact that, in exercising their powers under that Section they are interfering with the liberty of the subject and no amount of care and vigilance on the part of the Magistrate in such matters will be deemed to be excessive —

47 T. L R 455 (=21 T L. J, 794)

3. See also—Secs. 128 and 130 *Infra*

Section 93.

See Sec 307 —

47 T L R, 336 (=21 T L J, 780)

Section 97

The revision petition was preferred against the order of the lower Court cancelling the bail bond executed on behalf of the petitioner against whom proceedings were pending before the First Class Magistrate and remanding him to custody

It was contended in revision that the lower Court had no jurisdiction to order the petitioner to be detained in custody The question for decision was whether, under the provisions of Section 97, the Magistrate could pass an order for detention pending enquiry.

Held.—Section 97 only lays down the procedure that should ordinarily be followed in cases where proceedings are started under Section 90 with a view to securing the attendance of the person proceeded against. It provides that in the first instance a summons should issue, and it authorises the Court to order immediate arrest under certain circumstances. It is not reasonable to construe this provision for immediate arrest as implying also the authority to detain the person arrested till the termination of the enquiry In the case the Magistrate's order for detention in custody was wrong The petitioner had the right to be enlarged on bail pending the enquiry against him —

21 T. L. J, 766.

Section 101

The trial Magistrate ordered the revision petitioner to furnish security for Rs. 500 for being of good behaviour during the period of one year On his failure to produce security, order was passed against the petitioner under Section 101 of the Code to undergo simple imprisonment for one year The petitioner without appealing against the order to the District Magistrate, filed the revision petition.

Held—The High Court will not ordinarily entertain an application for revision unless the lower Court has been moved This is not an inflexible rule and the High Court might interfere if it is required in the ends of justice—

22 T L J, *748*

Section 103

See Sec. 89— 20 T L J, *85*.

Section 107.

See Sec 307,—

47 T L R., *526* (=21 T L J, *730*)

Section 116.

Once it is found that there is a *bona fide* dispute as to the existence of the public right of way (alleged to be unlawfully obstructed) the Magistrate has no jurisdiction to go on with the proceedings under Section 116 Even assuming that he has such jurisdiction, it is not desirable to go on with the proceedings without referring the parties to a Civil Court The jurisdiction of the Magistrate will not of course be ousted, if the dispute is not real and *bona fide* but only a mere pretended claim.— 22 T L J, *1266*

Section 127

1. Where an order has generally been passed by the Magistrate under Section 127, the High Court will not interfere in revision. The High Court may, however, call for the records of the case in order to ascertain whether there has been any defect in procedure As regards Section 127 there is practically no procedure to be adopted as the Section authorises the Magistrate, if necessary, to act without giving notice to the parties concerned. It might be possible for the High Court to interfere when the Magistrate had no jurisdiction to pass an order under the Section or when he attempts to give his order greater effect than is permitted by the Section.

Section 127 is purely an emergency Section and has nothing to do with the determination of any right to possession of property or to the use of property There is nothing to prevent proceedings being taken both under Section 127 and either under Section 128 or 130 at the same time.

Section 127 gives a very wide discretion to the Magistrate to pass orders seriously interfering with the rights of individuals which take effect for two months or for a longer period if confirmed by a Gazette Notification. This jurisdiction is not under the effective control of the High Court The High Court cannot question the reality of the emergency An amendment of the Travancore Regulation similar to the one in British India might be beneficial *Per Venkata Rao J*—The view expressed in 20 T L J, 940, as to the High Court's power to revise orders under Section 127 by virtue of Section 7 of the High Court's Regulation, requires further consideration.— 47 T L R., 88 (=21 T L J *553*)

2. See also Sec 326.—

46 T L R, *203* (=20 T L J, *949*).

Section 128.

1 The 'dispute' contemplated in Section 128 would necessarily be deemed to *relate* to that which existed at the time of the preliminary order. If in the course

of the proceedings, the breach of the peace apprehended originally was made out to be unlikely to the satisfaction of the Court, it has to proceed under paragraph 5 of the Section and drop the proceedings initiated with respect thereto. It would not be proper to continue the enquiry with respect to disputes between other parties which are brought to light during the enquiry, as it is not unlikely that the parties would be embarrassed thereby The proper procedure in such cases would be for the Court to drop the proceedings already initiated by it and start fresh proceedings if considered necessary and expedient in its opinion and pass a fresh preliminary order with respect thereto— 20 T L J, 82

2 Where a person who is entitled to complain under Section 128 of forcible dispossession, goes before a Magistrate and complains of forcible dispossession, if, for no reason or any fault of his, the Magistrate does not pass a preliminary order within two months, the complainant should not be made to suffer by reason of the delay caused in the Magistrate's Court.

It is impossible to lay down any hard and fast rule which may be applicable to all cases as to the exact point of time to which an enquiry under Section 128 must be directed, and the time at which possession must be found in one party or the other, must be governed by the fact of each particular case. To hold that the Magistrate is precluded from enquiring into anything before the date when he actually commenced his own proceedings might, in some cases, lead to a person who had been acting in an unwarrantable manner misusing the process of the law to enable him to carry out a high-handed and improper scheme which could never have been the intention of the Legislature. A Magistrate does not act without jurisdiction if he takes action under Section 128 even when the dispossession had taken place more than two months prior to the initiation of proceedings.— 20 T L J, 758

3 When once proceedings under Section 128 have been started, there is no compulsion on the Magistrate to complete the enquiry in any event. But when a preliminary order under Clause 1 of Section 128, is passed on the ground that there is a likelihood of a breach of the peace, the Magistrate cannot afterwards say that there is no likelihood of such breach without an enquiry and without taking the evidence which the parties are willing to offer— 20 T L J, 947

4 Where a preliminary order passed under Section 128 of the Criminal Procedure Code, was assailed on the ground that it was indefinite and insufficient

Held.—The question whether a preliminary order is sufficiently definite or not is one that has to be determined with reference to the facts of each case If the parties had clearly understood to what the order related, and filed the written statement called for by the Court relating to such property, and adduced evidence in support of their possession whereupon the Court upheld on the evidence possession with one of the parties, it is not open to the party aggrieved by such final order to invoke the revisional powers of High Court to vacate the whole proceedings on the ground that the preliminary order is defective in regard to the description of the property The foundation for invoking such interference is the inability of the aggrieved party to know precisely what the subject matter of dispute was. If he had full knowledge of the same despite the defect in the preliminary order, if it was a defect at all, the order of the lower Court could with propriety be interfered with. It could not be laid down as an inflexible rule that the preliminary order should be self-contained.

In a case where the parties were fully cognisant of the matter in dispute, they

could not be heard to impeach the preliminary order on the ground of indefiniteness

Held also—The final order under Section 128 could relate only to the property specified in the preliminary order, the Magistrate having no jurisdiction to deal with a property of larger area than that included in such order — 21 T L J, 106

5 Where there was a dispute about possession of lands which threatened to end in a serious breach of the peace, the Magistrate's obvious duty was to take steps to avert a breach of the peace by timely action under Section 128 or Section 90 In exceptional cases where the possession was absolutely free from doubt, *e g*, where a Civil Court had declared one party to be in possession, he might properly refuse to take action under Section 128 Even in cases where the Magistrate is of the view that the dispute is not a *bona fide* one, he may take action under Section 128 as under that Section the matter to be determined is the actual possession of the properties in dispute — 21 T L J, 387

6 The First Class Magistrate, Kottayam, attached the disputed property and placed it in the hands of a Receiver pending the disposal of a petition under Section 128, Criminal Procedure Code, filed by the revision petitioners. Previous to the starting of these proceedings, O S. No 86 of 1089 had been filed in the Kottayam District Court for the recovery of the whole cherikkal of which the disputed property formed a part on the basis of a lease to one who was the senior member in the Tarwad of the revision petitioners. The other members of the Tarwad were not parties to the suit A decree was passed in this suit for recovery of the property on payment of a large sum of money for improvements. This decree was upheld with certain modifications by the High Court on appeal In execution of the decree an application was made to the District Court to obtain delivery of possession and an order was passed permitting this. The District Judge accordingly wrote to the First Class Magistrate informing him of the fact. The First Class Magistrate thereupon, without giving notice to the parties, directed the Receivor who was in possession of the property to permit the effecting of delivery The delivery was effected accordingly by the Amin from the District Court The revision petition was filed against this order of the Magistrate

The parties to the proceedings under Section 128, Criminal Procedure Code, were not parties to the Civil Suit O S No 86 of 1099 and so could not *prima facie* be evicted from the land in dispute in that suit assuming them to be in possession of it If the Criminal Court had decided that the petitioners were in possession and subsequently an attempt had been made to deliver possession to the decree-holder, it would have been open to the revision petitioners to obstruct the delivery of possession Of course, a decision of the Civil Court subsequent to such obstruction might terminate the possession of the petitioners as effectively as a decision in a civil suit against them No final orders have been passed in proceedings under Section 128, Criminal Procedure Code. The order of attachment under this Section takes effect pending the decision of the Magistrate. Therefore the attachment is unaffected by an order passed by any other Court unless the effect of it is to put an end to the proceedings under Section 128 altogether, but to have this effect it would appear necessary that the order must be of such a nature as to indicate that there could be no *bona fide* dispute as regards the land in question. (*Vide* Clause 5 of Section 128) This result could not be attained by an order in proceedings in which the parties in the proceedings before the Magistrate were not impleaded. Pending an order of such a nature, it is the duty of the Magistrate to maintain possession of the Court over the property in dispute

Though the District Court may be regarded in some respects as a Court superior to that of the First Class Magistrate, each Court has its own jurisdiction which it has the right and duty to exercise without any interference, save as provided by law The order of the Magistrate effecting the attachment has a definite legal consequense which cannot be avoided save in certain definite ways. The Magistrate was in error therefore in passing the order under revision.

Apart from some special power or provision, a prior legal possession or custody obtained by the one Court must be respected by the other

For a conditional order passed by the Civil Court to take effect on the Magistrate withdrawing the attachment, the parties to the proceedings under the Criminal Procedure Code should also be parties to the suit —

47 T L R, 148 (=21 T L J, 736)

7 The foundation of the proceedings under Section 128 is the existence of the likelihood of a breach of the peace. The jurisdiction to attach the subject of dispute is further limited in asmuch as the Court can resort to that step only in cases of emergency, Proviso 2 to Clause 4, Section 128 An attachment necessitated by the emergency of the situation is removable if the Magistrate thinks that the emergency no longer exists though such a course may no doubt be beset with many practical difficulties. But so soon as the Magistrate is satisfied that the likelihood of a breach of the peace has passed away or has not existed, his authority to carry on the proceedings comes to a stop (Section 128, Clause 5).

Where, therefore, with the passing of a preliminary order under Section 128, the properties forming the subject of dispute were also ordered to be attached, but before the attachment was effected the Magistrate after hearing both parties passed orders staying the attachment "until further orders" on the reasoning that there was no likelihood of breach of the peace

Held (on reference) —In the light of his reasoning the Magistrate's authority to continue the proceedings seemed to be at an end The procedure to be followed was to quash the whole proceedings if the Magistrate was not satisfied as to the evidence of the likelihood of a breach of the peace If he thought otherwise, he could continue the proceedings with or without attachment according as he considered the situation emergent or not —

21 T L J, 1228

8. During the course of proceedings under Section 128, pending before the Magistrate the petitioner contended that in the light of the evidence already on record, the counter petitioners had not even a shadow of title or possession in regard to the land in dispute and that they were merely keeping up a show of struggle without good faith and prayed for immediate disposal of the case. The Magistrate, however, ordered recording of further evidence In revision against this order by the petitioner:

Held —Good faith or no good faith, the Magistrate cannot avoid deciding the issues in the case In coming to a finding as to which side was in actual possession, it was not desirable for the High Court to fetter the discretion of the lower Court in any way In any case the Court should see that a petition of the kind was not long kept pending on the file If at any time the Court was satisfied as to the possession of a particular party the Court could record a finding to that effect and proceed if necessary under Section 90, against the party who still gave trouble

Per Narayana Pillai J —In the interests of peace the Magistrate may move under Section 90 or 128. The rulings of this Court favour action under Section 128 when the apprehended breach of peace has relation to a dispute regarding the possession of immovable property It is a

matter for consideration why only the mild measures provided by Section 128 should be deemed applicable to one who is bent on a disturbance of the public peace because he draws a thin veil over his threatening activities by raising an unfounded dispute about a bit of land and why such a person should escape the disgrace of an order under Section 90 —

21 T L J, *1298*

9 A land-lord, who has let his land on Pathivaram, is in joint possession of the standing crop with the lessee and can take action under Section 128 of the Code —

22 T L J *22*

10 Proceedings under Section 128 constitute a criminal case and the Sessions Court is a Court of superior criminal jurisdiction to the First Class Magistrate's Court, within the meaning of Section 404 of the Code The High Court has therefore power to transfer proceedings under Section 128, pending before a Magistrate to the Sessions Judge

Section 128 (4) does not in itself impose a duty on the Magistrate to summon witnesses but only to hear the evidence adduced by the parties. It is usual however for a Court to give its assistance and it has been held that the Magistrate should record his reasons for refusing to summon witnesses cited by the parties. In any event, it is open to the Court before issuing summons to require the reasonable expenses of the witnesses to be deposited in Court by the party It is not the duty of the Sirkar to pay the travelling expenses of witnesses in such cases.—

22 T L J., *475*

11 *Per Chakko, J* —Under 128 the only point the Magistrate has to consider is as to who is in actual possession of the property and not as to who has the title to the property or the title to possession though, no doubt, under certain circumstances the Court may consider the question of title in so far as the evidence as to title may throw light on the question of actual possession A bare right or more strictly a licence to go on the land at the time of the harvesting, does not give the lessors a right to the possession of the property much less actual possession within the meaning of Section 128 The principle of constructive possession cannot be applied to a case where the dispute is between the lessor and the lessee who is actually in possession under the lease

There is however nothing in the Criminal Procedure Code or any other law to prevent the High Court from interfering with an order under Section 128 at any stage of the case when the Court is satisfied that an obvious injustice has been done by the Magistrate's order

Per Raman Tampi, J —Standing crops not cut and severed fall within the definition of immovable and rival claims in respect to collection of the same should be deemed to be disputes regarding the actual possession of immovable property and action may be taken under Section 128 The fact that the crops have been harvested subsequent to the filing of the petition does not oust the jurisdiction of the Magistrate — 22 T L J *759*

12. On 5-4-1104 the High Court passed an order transferring Miscellaneous case No. 1 of 1104 on the file of the Peermade First Class Magistrate's Court and Miscellaneous cases Nos. 11 and 18 of *1104* of the Division First Class Magistrate's Court, Kottayam, to the file of the Sessions Judge, Kottayam, for disposal The array of parties was different in these cases. The properties involved in them were the estates belonging to the Tropical Plantations Ltd No specific order for joint trial was passed by the High Court. The parties and the Court took this order of transfer to be tantamount to an order for joint enquiry in respect of all these cases. The point arising for decision was identical in the three cases. The Sessions Judge finally passed orders in Summary Case No. 18 of 1104 in favour of the first

counter-petitioner and this decision was confirmed by the High Court on revision. The Sessions Judge, Kottayam, passed a subsequent order directing the interim receivers to hand over the properties in their possession to the 1st counter-petitioner This revision petition is preferred against this order

The contention was raised on behalf of the revision petitioner that since the case heading related to Miscellaneous Case No 18 of 1104, Summary Case No 1 of 1104 transferred from the file of the Peermade First Class Magistrate's Court should be deemed to be undisposed of

It was held that the case which is referred to as Case No 18 of 1104 of the Kottayam Sessions Court was manifestly understood by the parties to relate to the consolidated proceedings arising out of the three cases pending in that Court which had been received from the two Magistrates' Courts. The petitioner was fully aware and was willing that those cases were to be tried together and that the enquiry was to be jointly held in respect of these properties. The cases appear in fact to have been consolidated and tried together as the points arising for decision were identical though the properties involved were different.

The omission to pass an order for joint trial can at best amount only to an irregularity which can be regarded as material only if it has resulted in substantial prejudice to the petitioner

Though there is some difference in the array of parties it does not debar a joint trial because of the existence of two parties which are represented by them and of a common interest *inter se*

It was also contended that the order under revision is *ultra vires* inasmuch as with the passing of a final order disposing of a summary case there was nothing else to be done by the Court.

Held.—The properties being in the possession of receivers under the control of the Court such possession could be determined only by an order of the Court releasing the receivers from their responsibility and withdrawing the Courts' control over those properties. The final order of the Court cannot be regarded as having put an end to the receiver's possession *ipso facto* In the nature of the case a final order was necessary —

48 T L R, 211 (=22 T L J., 894).

13. Where, pending proceedings under Section 128 in respect of a tile factory, the Magistrate conducting the enquiry appointed a "receiver" with plenary powers, over the subject in dispute,

Held (Setting aside the order for the receiver") —The Magistrate may appoint an agent whose function was to be merely to keep the property in custody, pending the disposal of the proceedings under Section 128, or until further orders, for the purpose of preventing loss and detriment to the property

Per Chakko, J —The order of the lower Court appeared to be passed under Section 129, but it had no jurisdiction to do so A receiver can be appointed under Section 129, only after the completion of the enquiry under Section 128 The question whether proceedings under Section 128 could at all be started in respect of the tile factory was left open.

Per Narayana Pillai J —Undeniably Section 128 empowered the Magistrate to attach properties in case of emergency and the usual practice, whether supported by law or not was to appoint a receiver to the properties attached There was ample authority however for the proposition that no receiver of the same status as the one contemplated by the Civil Procedure Code could be appointed when the proceedings were exclusively under Section 128.

The contention that attachment under Section 128 stood only on the same footing

as an attachment by a Civil Court was hardly sustainable So the Court should be held to be in possession of the property attached and it was open to it to take necessary action to prevent loss to the parties It was also open to the Court to appoint some one else to take care of and to manage the property under attachment

Desirability of including attachment in Section 75, Criminal Procedure Code, with summons and warrant in view of the need of the general applicability of attachment as a process throughout the Code—pointed out—

22 T L J, 995

14 Under Clause (2) of Section 128, the expression 'land' in clause (1) includes crops and other produce of land also. A dispute regarding the right to gather standing crops from a property falls, therefore, within the scope of Section 128, clause (1)

Where under the terms of a lease, the lessee is bound to give previous intimation to the lessor before the crops are harvested and the lessor has the right to be present and to see that the produce is harvested and a division is duly and properly made

Held—It is reasonable to view the lessor's right, in the circumstances, as a right to collect the crops jointly with the lessee This involves a right to joint possession of the crops when they are in a fit condition to be gathered and any dispute in regard to such right falls within the scope of Section 128, clause (1)—

22 T L. J, 1151

15. The material date on which possession should be found is the date at which possession is disturbed and not the date on which the preliminary order is passed If the Magistrate takes his own time to pass the preliminary order or for some reason or other, the order is delayed, the parties ought not to suffer

Where a person who is entitled to complain of forcible dispossession goes before a Magistrate and complains of forcible dispossession, if for no reason or any fault of his, the Magistrate does not pass a preliminary order at once, but delays the passing of the order though it may be *bona fide* the person who complained to him of forcible dispossession should not be deprived of the benefit of the Section by reason of the delay caused in the Magistrate's Court— 23 T L J, 908

16 Section 128 does not render it obligatory on the Magistrate to summon witnesses at the instance of the parties or to compel their attendance after they have been summoned but failed to appear

The omission to cite the witness again could not be regarded as irregularity in procedure which would justify interference in revision with the order of the Magistrate—

46 T L R, 93 (=23 T L J, 264).

17. A Magistrate before taking action under Section 128 is not bound to satisfy himself and find that the dispute stated to be likely to lead to a breach of the peace is a *bona fide* dispute.

As laid down in so many decisions of the High Court, where there is a dispute relating to immovable property which is likely to cause a breach of the peace, ordinarily the Magistrate should start proceedings under Section 128. But in exceptional cases, where clearly there could not be a dispute that merits an enquiry under the Section, the proper procedure will be to take action under Section 90 of the same Code. Perhaps, certain Judges have used the expression 'bona fide dispute' and 'reasonable dispute' in the sense of a dispute that requires or merits some investigation at least, and not mere brawls caused by a worsted, but turbulent antagonist or quarrels of a similar nature At any rate, the Courts have no concern whatever to see, when they proceed under Section 128, how just or equitable are the

claims put forward by the parties to substantiate the *factum* of actual possession (F B)—

40 T L R, *837* (= 28 T L J, *1225*)

18 See also Sec. 255 —

30 T L J, *1042*

Section 130

1. The scope of the expression 'land' in Section 130 is co-extensive with that relating to that word in Section 128 Sections 128 to 131 occur in the Chapter with the heading—'Disputes as to immovable property' In view of the definition of immovable property in the General Clauses Regulation, buildings and other fixtures attached to land could not for the purpose of user properly be dissociated and treated independently of the land. To hold that the expression 'land' occurring in the Section refers only to the surface of the land and not to permanent structures would result in the deprivation of the remedies contemplated in this Section, so far as disputes relating to use of the buildings or other structures on land are concerned The occurrence of the expression 'whenever any Magistrate is satisfied' would indicate that the intention of the Legislature is to provide for an additional remedy over and above what had been already laid down in Section 128 with respect to immovable properties dealt with therein. The restriction of this additional remedy to user of the surface of the land alone in the nature of the scheme of the Code seems to be doubtful Further, it cannot be said that the omission of an explanation like that contained in Section 138 (3), in Section 130 would not *per se* justify such a limited construction in the absence of a specific provision to that effect. The expression 'land' used in Section 130 includes building also.

The management of the mosque and the collection of the dues on festive occasions could therefore be deemed to be a mode of user of the mosque and would therefore fall within the purview of the Section,

In cases where the grounds for the inauguration of the proceedings have been recorded in unambiguous terms, a repetition of the same in the final order is not necessary

The passing of a preliminary order before issue of process in proceedings under Section 130 is not essential —

20 T L J, *804.*

2. Section 130 of the Criminal Procedure Code deals with cases different to those within the scope of Section 128, and the procedure laid down in the latter class of cases has not been expressly made applicable. Indeed, no particular procedure has been provided in cases falling under Section 130. As Section 130 stands at present, it does not appear that the Magistrate has been given authority to pass any order restraining the parties to the proceedings before him until he has made up his mind as to the rights of the parties. Until that time he may only inquire into the matter It would, in any event, not be permissible to the hands of one of the parties pending enquiry into the merits of the respective claims.

Rights which may be exercised in buildings, such as Churches, Temples and Mosques fall within the scope of Section 130.

A right exercisable whenever one deems fit and, therefore, at all times of the year, but is also such that it will be exercised only when an occasion necessitates it, cannot be deemed to fall within Section 130

Where therefore, the Malankara Metropolitan was sought to be restrained, under Section 130, from exercising his rights of supervision over Churches within the jurisdiction of his spiritual authority on the ground of an apprehension of breach of the peace, as a result of disputes regarding such rights

Held.—The right did not fall within the scope of Section 130. In any event he alone could not be restrained till the result of the enquiry and if deemed necessary it was open to the Courts to preserve peace under Section 90 of the Code— 20 T L J, 833

3. No special procedure is laid down under Section 130 of the Code as has been done under Section 128, though under the amended British Code the procedure under Section 145 has been prescribed as far as practicable for cases falling within the scope of Section 147 of that Code (corresponding to Section 130). It follows that even after proceedings have been started under Section 90, it may be open to the Court in certain circumstances to pass orders under Section 130 if the requirements of the Section are fulfilled and the Court thinks it advisable to do so — 21 T L J, 809

4. The words 'the right of use of any land or water including any right of way or easement over the same' in Section 130 includes also a right to resort to a place of religious worship.— 22 T L J, 581

Section 135-A.

See Regulation I of 1074, Section 176 — 24 T L J, 97

Section 144.

The accused in P. E. No. 11 of 1106 of the Thodupuzha First Class Magistrate's Court applied for copies of the statements of prosecution witnesses recorded by the Police under Section 144. This application was rejected on the ground that no statements were recorded by the Police. The accused again applied for copies of the statements alleging that the notes of statements were incorporated by the Police in the case diaries prepared under Section 154, Criminal Procedure Code. The Magistrate rejected the second application on the ground that the Court had no power to revise its own order

Held —The accused has a right to obtain copies of statements recorded by the Police under Section 144 for purposes of cross-examination when any witness examined by the Police is called for the prosecution, subject, of course, to the discretion of the Court

There is nothing like *res judicata* in the matter of applications in criminal trials. In fact the application itself did not seek revision of a prior order. The orders on an application for copies of statements under Section 144 cannot bar an application of this kind. A Court might allow copies to be furnished to the accused, if found expedient and necessary for the ends of justice. *No doubt* a discretion is vested in the Court to allow or disallow the prayer for copies after scrutiny of the statements. *Semble* —The proper stage for the accused to apply for copies is after the examination-in-chief and before the cross examination.— 48 T L R, 207(=22 T L J, 1203).

Section 146.

1 The statement of a witness recorded under Section 145 cannot be used as substantive evidence, but can be relied upon only for purposes of corroboration. If such statements are recorded *de bene esse* on the ground that the witness may not live till a later stage owing to serious illness or that they were going to a foreign place and may be not available for examination at a later stage, the statements may not be open to suspicion. But a different consideration attaches to statements that are recorded owing to fear that the witnesses may be tampered with later on.— 22 T L J, 899

2. *Per Raman Tampi, J.*—The law keeps a jealous and watchful eye on the

confessional statements of accused persons in criminal cases In British India, Clause (3), Section 164, Criminal Procedure Code, has been amended so as to cast on the Magistrates the duty of explaining to the accused person that he is not bound to make a confession and that if he does so, it may be used against him as evidence in the later stages Though our Section has not been amended to this effect, there is no doubt that this precautionary step may well be taken by our Magistrates also. The Magistrate should question the person to find out whether he is making the statement voluntarily, and such questions must be directed towards eliciting facts which will enable him to judge of the character of the confession and not merely to repeat some formulae which the accused person can scarcely appreciate —

23 T. L J , *1067*

3 Section 27 of the evidence Act embodies an exception to the general rule which makes confessions to Police Officers inadmissible. For the exception to be relied on, the confession should be (1) by an accused person, (2) in Police custody, and (3) which directly leads to the discovery of a fact As regards the question whether the confession has led to the discovery of a fact, in the first place, the confession should be *antecedent* to the discovery Another important condition is that the discovery must be an original one resulting from the confession. The confession will not be admissible if the fact discovered was already known to another Police Officer The discovery should be of a *material fact* or *physical fact* as distinguished from a mental condition of which any person is conscious.

A confessional statement by an accused person has to be recorded under Section 146. In doing so, the Magistrate is bound to ascertain whether the accused is making the statement voluntarily without any sort of inducement or threat by others. If he is so satisfied, he may record the statement and shall certify in his own hand that he believes the statement to have been made by the accused person voluntarily If in the mind of the Judge, the circumstances of the case raise even a faint or feeble doubt of the voluntary nature of the confession, it should be rejected

In recording a confessional statement, it is, no doubt, open to the Magistrate to put questions. In fact, he ought to put such questions. But such questions are only meant to ascertain the voluntary nature of the statement which the accused person proposed to make The recording should begin only after the Magistrate is convinced that the man is making the statement voluntarily When once that is done, there is no more scope for questions except such as would enable a clear narrative being taken down

The words 'ഞാൻ മജിസ്ട്രേട്ടൻ', പോലീ സുകാരൻ പറയാതെയും പറയും' told by the Magistrate to the accused before recording his confessional statement, hold out an inducement to the accused as contemplated in Section 27 of the Evidence Act and are therefore sufficient to invalidate the confession. —

50 T L R., *140*(=23 T L J, *1807*)

Section 147.

On the contention that the search for articles stolen having been made in places outside the jurisdiction was illegal and that the evidence in regard to the alleged discovery of the articles should be discarded on that ground

Held —Even though the search was illegal, it would not follow that the evidence relating to the recovery of the property at the search would be inadmissible. All that could be said in such circumstances is that the evidence in regard to a search of this nature should be accepted with care and caution.—

49 T L R., *954*(=23 T L J., *975*).

Section 161.

The 'consequences' referred to in Section 161 mean the ultimate loss sustained by the complainant

Where a complaint for cheating, by means of a cheque which was drawn at Alleppey, was filed before the Kottayam Magistrate on the ground that there was a previous misrepresentation at Kottayam to prepare the ground for deceit and that some consequences ensued at Kottayam,

Held (Directing the Alleppey Magistrate to try the case)—There was nothing in the case to deviate from the general rule laid down in Section 161, *viz* that every *offence shall* ordinarily be enquired into by a Court within whose local limits it was committed—

22 T L J., *699*

Section 173

A sanction to prosecute should not generally be accorded where it would enable the applicant to wreak his private vengeance on his opponent It is the Court that should feel more aggrieved than a private party by the commission of an offence like the one for which sanction is prayed for (perjury) That is why the Legislature has thought fit to hedge about the prosecution for such offences with the discretion of the Court The Court representing as it does the body politic in the administration of justice, has to see whether in the wider interests of public justice, the prosecution sought to be launched is necessary before sanction is granted—

20 T L J, *895*

Section 175.

1. By virtue of G O R. Dis No 1981/Judicial, dated 16/26 th July 1927, revising the powers of the Police Commissioner, a Police Inspector of the 3rd Grade is not a Public Servant not removable without the sanction of Government within the meaning of Section 175, Criminal Procedure Code No sanction of Government is therefore necessary for prosecution of a complaint against such Inspector—

46 T L R., *938*(=20 T L J, *945*).

2. The complainant was in enjoyment of property under a mortgage from the second accused and subsequently obtained title under a Court sale held in execution of decree against the second accused The second accused in the meantime had been adjudicated insolvent, and the first accused, the Official Receiver, prayed for the annulment of the sale and had it set aside The complainant applied for cancellation of the order of annulment. While the application was pending, the accused entered on the property and cropped nuts On being charged of the offences under Sections 379 and 449, of the Penal Code, the first accused contended that sanction of Government was necessary for taking cognisance of the complaint

Held—The offences imputed to the first accused were not offences of which his being a public servant was a necessary element, *i e*, were not offences which could be committed only by a public servant Therefore Government sanction was not necessary—

22 T L J, *630*

3 The privilege of immunity of officials from prosecution without Government sanction only extends to acts which can be shown to be in discharge of office duties or fairly purporting to be in such discharge It is not enough for him merely to be in an official position which he may abuse. He must act in his official capacity Acting refers to the specific action which comprises the offence.

Though the person accused is a public servant if the act complained against cannot be deemed to be one which has to be done in his official capacity, no sanction for his prosecution is necessary But if the act is one which can be done in the discharge of official duty though it be unnecessary for the purpose of that duty, it

must be taken to be an act purporting to have been done in the discharge of that duty A Police Officer investigating a case which is cognisable by him may arrest a person and keep him in custody and it may afterwards be found that that arrest and detention were uncalled for. Even then the Police Officer is protected under Section 175, Criminal Procedure Code, and under Section 70 of the Police Regulation But if such Officer while acting as such inflicts grievous hurt on the person arrested or takes away any valuable property from him or, if the person arrested is a woman behaves indecently towards her, the Officer will not be protected in asmuch as these offending acts cannot be treated as official acts.

Sanction for prosecution can be insisted upon only in respect of official acts or acts which could be done only by an officer acting officially If the act is such as could be done by any one, that is, even one that is not an Officer, sanction is unnecessary It is not enough if the person who does the act complained against pretends that he is an Officer acting as such.

Whether the act of a Police Officer was done or purported to have been done in the discharge of official duties is always a question of fact and where a complaint is filed making allegations against a Police Officer the Magistrate is bound to make an enquiry into the facts of the case,

Merely because the counter-petitioner is a Public Servant, it cannot be presumed that all his acts are protected An enquiry should be held and if it is proved that the acts complained against were as a fact committed in the discharge of official duties then it will be time to say that sanction is necessary for the prosecution.

The complaint in the case was for wrongful restraint against a Police Officer—

43 T L. R., *431* (=23 T L. J. *43*).

Section 176.

The junior members of a Malabar Tarwad are co-parceners with the Karanavan and have equal right in the *corpus* of the joint property of the Tarwad. A junior member is therefore a person aggrieved by a trespass on Tarwad property as contemplated by Section 176 of the Code. This is especially so, after the passing of the Nair Regulation by which individual members have been invested with the right to claim partition though certain limitations have been placed on that right —**20 T L J, *384***

Section 178

Reference by District Magistrate moving for setting aside the order of dismissal of a complaint by Stationary Second Class Magistrate on the ground of an earlier order passed by him accepting a referred charge sheet filed by the Police upon the same set of facts. The Stationary Magistrate had not complied with the provisions of Section 178 of the Code by examining the complainant On behalf of the accused, it was argued that while the omission to record the statement is a violation of the statutory provisions on the subject, the same was only an irregularity curable by Section 413 of the Code

Held—The fact that a referred charge sheet filed by the Police with reference to the same set of facts had been accepted by the Magistrate before, was no justification for summarily rejecting the complaint, especially where the complainant stated in unambiguous terms in his complaint that he had no notice of the charge sheet in question had been served on him —**20 T L J, *706***

Section 180

1. The preliminary enquiry contemplated in Section 180 is for the purpose of ascertaining the truth or falsehood of the complaint. Evidence in rebuttal of the

possible pleas of the accused does not form an item for consideration under that Section. A consideration of the question of *bona fides* does not arise at the stage of preliminary investigation, and the dismissal of a complaint on the possible *bona fides* of the accused is not warranted in law

Even an opinion of the Court below that there is no chance of a conviction and that the prosecution would not serve any useful purpose, is not enough to dismiss the complaint

When a complaint is dismissed under Section 181 before the issue of the process to the accused and such order of dismissal is sought to be revised, it is not necessary to issue notice to the accused on the revision petition.—

20 T L J, 197

2. A local inspection shall be made only for the purpose of *properly appreciating* the evidence given at the enquiry or trial, and not for obtaining evidence in regard to the facts in issue as this course is not open to him under the law A local inspection is permitted only for appreciating evidence adduced in the case and cannot take the place of evidence itself

The result of such inspection should be placed on record so that the parties may have an opportunity of seeing what the facts are which the judicial officer considered to be established by the local investigation and he should never deliver his judgment relying upon that evidence without giving an opportunity to the parties to rebut his opinion —

20 T L J, 852

3. Criminal Circulars No. 6 of 1075 and 3 of 1099 direct that Magistrates should make liberal use of their powers under Section 180 The Ruling reported in 9 T L J., 319 only lays down that there ought to be more than a formal examination of the complainant in such cases before the complaint is dismissed and also that the Magistrate should give a reasonably full statement of the grounds on which the order of dismissal is based It is not possible to hold that either the Circulars or the ruling referred to absolutely prohibit the dismissal of a complaint if the Magistrate finds after an examination of the complainant that it is false or unbelievable

The provisions of the Code give a wide discretion to the Magistrate in respect of refusal of process, as it is essential in the interests of the community generally, though such discretion is not unfettered "Discretion means, when it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion, according to law, not *honor* It is to be not arbitrary, vague and fanciful, but legal and regular And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself"

Thus, in determining whether process ought to issue, a Magistrate must proceed according to the provisions of the Code, and if after carrying out the instructions therein contained, he is of opinion upon the materials before him that a *prima facie* case has been made out he ought to issue process, and in such circumstances he is not entitled to refuse to issue process merely because he thinks that it is unlikely that the proceedings will result in a conviction. If the Magistrate were to refuse to grant a summons on that ground, it would mean either that he was trying out the merits of the case at a preliminary stage in the proceedings or was following a process of guess work and speculation, and neither of these things is he permitted to do. If upon the facts alleged by the complainant, and upon the assumption that the statement by the complainant is true, no offence is disclosed, it is of course the duty of the Magistrate to dismiss the complaint. Again, the Magistrate would

not be justified in issuing process unless he could place reliance upon the statement which the complainant has made—and this is the ordinary case—than, *if he distrusts the statement made by the complainant*, or if he distrusts the complainant's statement and the distrust—though not sufficiently strong to warrant him in acting upon it without further enquiry—is confirmed as the result of an enquiry or investigation, in either case also it is his duty to dismiss the complaint:—

20 T. L. J., 768.

Section 181.

1 On the contention that dismissal under Section 181 was only an executive order and not revisable.

Held:—The order was a judicial one and was revisable— 23 T. L. J., *960*

2. See Section 180,— 20 T. L. J., *197*,
" 230—
46 T. L. R., *366* (=24 T. L. J., *31*).

Regn. VI of 1087, Section 24,—
46 T L R., *223* (=23 T L J, *178*)

Section 187.

1 It has been laid down in certain decisions of this Court that if the evidence is of such a nature that no reasonable person would hold the accused guilty upon the evidence placed before him, the Committing Magistrate may discharge the accused.

Held:—In a case which depends entirely on oral evidence it cannot be said that the Magistrate is bound to commit merely because there is some evidence, however weak and flimsy in support of the complaint The Committing Magistrate has jurisdiction, however limited, to decide as to the credibility of witnesses examined before him,—

23 T. L. J., *754*.

2. When a Magistrate holding a preliminary enquiry in the case triable exclusively by the Sessions Court, takes it into his head to discuss and weigh the evidence as regards the credibility of the prosecution witnesses with meticulous care and discharge the accused, he runs a considerable risk of having his order set aside by the High Court since it is just possible that the Sessions Court may take a different view as regards the credibility of the witnesses to the one taken by the Committing Magistrate,—

23 T. L. J., *767*.

3. If there is no probability of a conviction being recorded on the strength of the evidence adduced before him, the Magistrate ought not to subject the accused to the hardship of a trial in the Sessions Court, but should discharge him taking care, however, to state judicially and in detail his reasons for taking that course —

46 T L R., *146*, (=23 T L J, *468*).

Affirmed,—24 T L J., 183

Section 188.

It is not the duty of a Committing Magistrate to act merely as a machine for the purpose of recording evidence in the case and at the end committing automatically the accused to the Sessions. It is his duty to sift the evidence and see whether it is reasonably clear that upon the evidence the accused stand a chance of being convicted if committed to the Sessions Court. The Committing Magistrate in his preliminary enquiry has to determine whether there is a case for trial — 23 T L J, *679*

Affirmed —24 T L J, 183

Section 199.

The revision was from an order of the lower Court rejecting the application of the accused to modify the charge so as to make it conform to the provisions of Section 198.

In the circumstances of the case, the order was set aside and the lower Court

directed to dispose of the application afresh.

There can be no doubt that the High Court does not ordinarily interfere with an order passed by a subordinate Court in the course of pending proceedings. But it has always been held that it may do so in a case of an exceptional nature, and one test of its being of such a nature is the fact that the bare statements of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is one fit for interference at an intermediate stage.—

22 T. L. J., *1295.*

Section 210

Two forged cheques were both presented simultaneously *before* the same Bank by the first accused with the aid of the second accused. It was contended that, under Section 210 of the Code, all the offences charged against both the accused could not be validly tried together.

Held.—Section 210 is subject to Section 212 of the Code. So the question of multifariousness has to be decided by the application of the test whether the acts are so connected together as to form the same transaction. "A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the *same transaction*, the circumstances which must bear on its determination in each individual case are proximity of time, unity or proximity of place, continuity of action and community of purpose or design. The word "transaction' in Section 213 suggests not necessarily proximity of time so much as continuity of action and purpose. A mere interval of time between the commission of one offence and another does not necessarily import want of continuity, continuity of action and purpose common to all the accused throughout is sufficient to make the transaction one and the same.

Comparison of signatures is often hazardous and inconclusive, and is a method that should be adopted by the Courts only with great caution, in the absence of *express* evidence as to the forgery. But even then comparison is a well recognised mode of proof, and under proper safeguards should be resorted to in appropriate cases.

When the accused is charged with a crime the fact that, after the commission of the alleged crime, he absconded is relevant. Though absconding is a matter equally consistent with *innocence* as with guilt, it could be considered in connection with the rest of the evidence.

The possession of property connected with a crime is often a highly incriminatory fact.

One specific illustration of the presumption from such *possession* is that relating to the possession of recently stolen property, which presumption is only an example of the manner in which inferences can be drawn *from* the *common course* of human conduct, &c.

The possession of the forged cheques means that either the accused forged them or abetted their forgery and in the absence of direct evidence that he actually forged the false signatures he is liable to be convicted of the offence of abetment of forgery.

It is not necessary that the deception contemplated by Section 416 of the Penal Code should be by verbal *misrepresentation* only. A dishonest concealment of facts is a deception within the meaning of that Section.—

24 T. L. J., *42*

Section 212

1. Whether a series of acts in a particular case formed part of the same transaction has to be decided with reference to the facts of each case. It may not be possible to lay down a comprehensive

formula regarding the question whether two or more acts constitute the same transaction What has to be considered is whether they are connected together by proximity of time, unity or proximity of the place, continuity of action and community of purpose or design Continuity of action and purpose is one of the essentials to determine whether the acts form part of the same transaction.

The question whether acts form parts of same transaction is a question of fact which cannot be interfered with in revision

Omission to set forth the common object necessary under Section 135, of the Penal Code in the charge is not a defect which vitiates the trial

Omission to question accused under Section 253, Criminal Procedure Code, does not vitiate trial —

46 T L. R., 94 (=20 T L J, 391)

2 If there is only one transaction, more offences than one can be charged against the same person under Section 212 of the Criminal Procedure Code. The question in such cases is whether there is a complete unity of project and the whole series of acts are so linked together by one motive and design as to constitute one transaction.—

21 T L J, 1183,

3 See also Sec. 210 —

24 T L J, 43

Section 213

A 20 seater bus, in sound mechanical condition, running on a road 15 feet wide, dashed against the rafters of a ricketty old kalithattu rest house situated on the roadside, as a result of which the kalithattu fell down and killed a child and injured a few people who were resting in it. The accident took place in broad daylight and there was no suggestion that there was traffic on the road or any other obstruction or danger The evidence showed that the driver who was in general a careful and cautious driver was driving at a moderate speed and on the correct side of the road.

Per Chakko J—Rashness or negligence cannot be presumed even in a civil case, except where the doctrine of *res ipsa loquitur* applies In criminal cases, it is obvious that no such presumption can be raised as the prosecution has to prove affirmatively beyond doubt that the accused is guilty of rashness or negligence. In the circumstances of the case under consideration, rashness or negligence on the part of a driver of a bus cannot be presumed from the mere fact of an accident having happened. The lower Court was in error in having charged the first accused with having himself driven the bus or, in the alternative, allowed the second accused to drive it Section 213 which allows the framing of alternative charges, does not apply where there is any doubt as to the facts, but applies where there is a doubt as to the law applicable to a certain set of facts which have been proved The illustrations to the Section also indicate that the Section does not contemplate cases where it is doubtful as to which of the accused committed the offence or offences.

Per Venkata Rao, J.—There are acts which are *per se* negligent and when a driver, even though he be skilful and cautious ordinarily, is found steering a bus along an open road in broad daylight in such a manner as to make it hit against a building situated beyond the limits of the road, he must be regarded as being guilty of negligence or rashness unless he is able to prove that it happened in spite of his efforts to prevent it. It is unnecessary also to prove in such cases that before the accident the accused was driving at a dangerous speed or in a negligent manner The evidence as to the circumstances in which the accident happened proves clearly that without rashness or negligence on the part of the accused the

accident could not have happened The rickety condition of the building or any other allied fact has no bearing at all on the question of the accused's guilt (F B) 22 T L J, 109.

Sections 213, 214 & 219

See Section 304— 23 T L J, 177

Section 215

The accused in the case was tried for an offence under Section 421 of the Penal Code. It was found that on the circumstances proved in the case a conviction under the Section cannot stand, but facts were proved which rendered the accused guilty of a minor offence under Section 416.

Held —Under Section 215 of the Procedure Code, when a person is charged with an offence and facts are proved which reduced it to a minor offence, he may be convicted of the minor offence although he is not charged with it.

Held further —The dictum in 38 T L R, 135 is far too general There is no distinction in the Code between the right of appeal against a conviction and the right of appeal against an acquittal, both being governed by the same rules and subject to the same limitations. To hold otherwise would be to practically ignore the well-marked distinction between the High Court's power in revision and appeals. To limit the power of Government to appeal from an acquittal in those cases where through the incompetence or perversity of a subordinate tribunal such unreasonable or distorted conclusions have been drawn from the evidence as to cause a positive miscarriage of justice is hardly warranted by the language of Section 313 of the Procedure Code—

24 T L J, 711.

Sections 221 & 222

The accused were acquitted in the course of the trial under Section 222, Criminal Procedure Code It was contended that the order acquitting the accused under Section 222 could be passed only after taking evidence under Section 221, which enjoined that the Court should take all the evidence produced by the prosecution The provision under Section 221 was mandatory Hence the acquittal was incompetent

Held —If the contention of the petitioner were accepted, and if the provision were construed as a mandatory provision it would follow that even in the case of an obviously frivolous or false complaint the trial would have to be carried on until it is finally decided even in respect of accused against whom no credible evidence or any evidence at all has been adduced This could not have been in the contemplation of the Legislature

Further, assuming that the provisions were mandatory it did not follow that any infringement of these provisions would afford ground for interference in revision in all cases. The passage beginning with "unless such error' in Section 413, Criminal Procedure Code, qualifies each of the clauses that preceded it and not clause (*d*) only It must be shown that the omission did lead or even with probability might have led to some material error and that the bare fact of such omission or irregularity unaccompanied by any probable failure of justice having been thereby occasioned is not enough to warrant interference in revision.—

21 T L J 791

Section 224.

1 Under Section 224 of the Code, a Magistrate has jurisdiction to acquit a person charged by the Police with the commission of a non-cognisable offence.—

21 T D J, 1223

2 Under Section 224 the Code, the adoption of the line of action prescribed therein except in cases covered by the Proviso is made obligatory upon the Magistrate No doubt where a summons case is instituted by a public servant acting as such and no appearance is made on behalf of the prosecutor, the presiding Magistrate should use his discretion as to whether such a case should be dismissed or adjourned, and when the discretion is improperly exercised, it is open for the High Court to interfere —

24 T L J, 10

Section 225.

See Sec 304.— 20 T L J, 177

Section 227

Under Section 227 of the Code, a Court proposing to direct payment of compensation shall record and consider the objection, if any, urged by the complainant against the proposed step The reasons for awarding the compensation should also be stated in the order An order passed without affording an opportunity to the complainant to show cause is illegal -

21 T L J, 344

Section 229.

1 Section 229 provides that the Magistrate shall take all such evidence as may be offered by the complainant and also imposes on him further the duty of ascertaining the names of persons likely to be in a position to give evidence. These provisions are mandatory Before the Magistrate proceeds to exercise the discretion allowed to him under the second paragraph of Section 230 he must be satisfied that the case is "groundless" and to say that "no case was made out" would not amount to saying that it was "groundless" as the Section evidently uses the two phrases as meaning two different things.

"Where a complaint *prima facie* discloses an offence a Magistrate cannot hold the charge to be groundless unless he knows what is the sort of evidence that is going to be adduced to prove it, and he cannot for example examine one or two witnesses or, for the matter of that, no witnesses at all and then without knowing what the other witnesses are going to say, hold that the charge is groundless.' —

21 T L J, 103

2 There is no provision in the Criminal Procedure Code, which empowers a Magistrate to compel a prosecutor to file a schedule of witnesses, in a warrant case When the complainant mentions the names of the witnesses who would swear in support of the prosecution the Magistrate's duty is obviously to summon the witnesses and examine them before any order of discharge is passed Even if the names of witnesses were not stated in the complaint, it would be the plain duty of the Magistrate to ascertain the names from the complainant and summon them to give evidence before him —

21 T L J, 876

3 During the course of an enquiry under Section 379 T P C., for theft of a motor lorry by the accused, the complainant petitioned the Sub-Magistrate that his witnesses were won over by the accused and that he had no further evidence to offer The accused also put in a petition that the thondi might be returned to the complainant The Magistrate therefore ordered the restoration of the thondi article *status quo ante* and discharged the accused On revision, the District Magistrate was of opinion that the order of the Sub-Magistrate discharging the accused and disposing the thondi was illegal He was of opinion that a retrial was necessary and therefore referred the matter for orders of the High Court.

Held.—It is manifest that where there are reasonable grounds for believing that an offence triable under Chapter XXI of

the Code has been committed, the mere statement of the complainant that *he* is unable to give evidence would not justify the termination of the enquiry, and the Magistrate would still have to discharge the duty of ascertaining whether evidence is available and if it should appear that there is such evidence, of taking steps for securing it In a case where there is nothing in the circumstances to indicate *prima facie* that an offence has been committed, it would be unnecessary to go on with the case if it appears that any further steps would be futile. It depends therefore entirely on the circumstances of each case whether the procedure under Section 229 should be followed

Though the Magistrate's procedure was not strictly justified, it was found that there was no necessity to order a retrial

The disposal of the thondi articles being a matter within the discretion of the Magistrate, interference by the High Court would not be justified unless such discretion was wrongly exercised —

49 T L R, *468*

4 Under Section 229 of the Code, the duty imposed on the Magistrate is to summon and examine persons able to give evidence for the prosecution if he thinks that such persons are likely to give evidence for the proper decision of the case This duty has to be discharged only if there are witnesses who, the Magistrate believes, would be in a position to give evidence necessary for the prosecution and with a view to find out whether as alleged by the complainant an offence triable under Chapter XXI of the Code had in fact been committed by the accused "The principle underlying the provisions dealing with the trial of non-compoundable or cognisable warrant cases is that whether instituted on complaint or otherwise the final responsibility for the conduct of such cases rests with the State and where there is reasonable ground for believing that an offence has been committed, once the machinery of law has been set in motion the right of arresting its progress rests with the State alone, and not with a private individual" Where, therefore, there are reasonable *grounds for believing* that an offence triable under Chapter XXI has been committed, the mere statement of the complainant that he is *unable to give* evidence would not justify the termination of the enquiry and the Magistrate would still have to discharge the duty *of ascertaining* whether evidence is available, and if it should appear that there is such evidence, of taking steps for securing it It depends entirely on the circumstances of each case whether the procedure under Section 229 should be followed —

24 T. L. J, *177*

5. See also Sec 304 —

20 T L J, *177*

Section 230

1 Petition against an order issuing summons to the petitioner upon a complaint, the petitioner having been discharged on a previous complaint with respect to the same matter In the prior case the charge was for an offence under Section 324 T P C., compoundable under Section 256, Criminal Procedure Code with the permission of the Court The offence was compounded without permission of the Court and the accused (complainant) was discharged It was urged that the prior order of discharge should be taken to be one under Section 230 of the Procedure Code, and not one under Section 256, the latter Section having *reference only* to cases compoundable without intervention of Court, and consequently a subsequent complaint with respect to the *same matter* would not lie

Held.—The argument that the expression 'compoundable offence' occurring in Section 256 has application only to offences under the Schedule contained in Section 256 does not appear to be acceptable, for

paragraph 4 of the Section dealing with the abetment of compoundable offences lays down that 'when any offence is compoundable under this Section the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compoundable in like manner' It could not be said that the expression compoundable occurring here would relate only to offences liable to be so settled without the intervention of the Court under the Section and not to cases where such settlement is provided for laying down the permission of the Court as a condition precedent thereto It may also be noticed here that in the Schedule attached to the Code, offences like the one under consideration have been described as compoundable in Column 6 thereof It is clear therefore that in spite of the provisions requiring the permission of the Court as a condition precedent to the validity of the compromise, the offences specified in paragraphs 1 and 2 of the Section have to be held to be compoundable. The order in the prior case passed in the absence of the complainant must therefore be deemed to be one under Section 236 of the Procedure Code.

The general rule is that every complaint had to be enquired into and disposed of according to law unless there is any bar thereto by any express provision of the statute or other considerations having statutory force One of the provisions in the Code creating such a bar is that relating to *autrefois convict* and *autrefois acquit* contained in Section 304 of the Procedure Code. Such order of discharge would not amount to an acquittal, whether it be under Section 236 or 234 or under Section 181 of the Procedure Code.—

46 T L R., 366 (=21 T L J., 31).

2. The revision petition was preferred against the order of discharge passed by the Magistrate.

It was contended for the petitioner that the Magistrate disposed of the case without hearing the prosecution arguments and that thereby he committed a substantial irregularity

Held—There was no provision in the Criminal Procedure Code which made it imperative on the Magistrate to hear arguments The Code permitted a Magistrate to discharge the accused at any stage or to frame a charge even after the examination of the complainant, and a Magistrate intelligently following the evidence let in, should resort to such provisions of the Code and thus avoid unnecessary delay in disposing of cases —

23 T L J, *1065*

3. Under Section 230 of the Code, a discharge is contemplated after all the prosecution evidence is recorded and the examination of the accused, if necessary, has been had In a trial of a warrant case regarding a compoundable offence (and the offence under Section 503 T. P C., defamation, is compoundable), if the complainant is not present, the Court has to proceed under Section 236 of the Code —

24 T L J, *305*

4. See also Sec 229— **21 T L J, *103***

Section 233

1. It is clear law that absolute privilege can be claimed in respect of statements in writing made by a Vakil in the course of judicial proceedings. The privilege can be claimed by any one lawfully exercising the functions of advocacy The scope of the Full Bench decision in 44 T L R. 375 (=18 T L J, 1028) cannot be said to have been limited to declaring such absolute privilege in respect only of words spoken in office by counsel in a case. The decision is applicable to words spoken and written.

A judicial officer has power to accept a plaint which is presented to him outside the court-house and after office hours. Though a judicial officer may receive plaints in this manner it would not follow that he must do so. It is in his discretion

to accept it or to refuse it as he chooses, when the plaint is so presented, the suit is *properly* instituted within the meaning of Order IV, Rule 1, of the Civil Procedure Code

When a plaint is presented by a party before a judicial officer for acceptance outside Court and out of office hours and the party in conformity with this direction, presents the plaint in Court the next day, the plaint must be deemed to have been accepted on the first day of presentation.

An accused may file written statements after final arguments in the case, as the last paragraph of Section 233 does not expressly limit the time within which written statements may be filed —

46 T L R, *127* (=20 T L J, *247*)

2 The accused in the case was charged with theft of cocoanuts and in answer to the question put by the Magistrate said "your humble servant did it unwittingly" The lower Court treating this as a plea of guilty, convicted the accused

Held (in revision against the order) — The statement given by the accused was not an unequivocal admission of guilt The act would only be a crime if done with a particular intention It is doubtful whether the words used were not intended to deny the existence of such an intention — 20 T L J, *1064*

Section 234

See Sec 230 —

46 T L R, *366* (=21 T L J *31*).

Section 236

1 The discharge of an accused on account of the absence of the complainant, though a matter of discretion, should be ordered only after considering all the facts and circumstances as the record stands at the time of the proposed order. The order should not be merely mechanical The discretion itself is exercisable only before the charge is framed As the evidence approaches nearer and nearer to the framing of a charge, the chances for the accused's discharge should be viewed as becoming slenderer and slenderer A Magistrate in exercising his discretion under the Section is bound to regard the evidence and to consider whether there is a *prima facie* case against the accused The presumption arising from the absence of the complainant, that he does not wish to prosecute the case, would be greatly counteracted by the earnestness displayed by him and the evidence he has succeeded to adduce in the case

21 T L J., *239*

2 *See* also—

Sec 230 46 T L R, *366* (=21 T L J, *31*)
24 T L J, *105*

261 — 22 T L J, *498*

Section 237

The provision in Section 237 of the Code that every trial in a Court of Session shall be conducted by a Public Prosecutor, who, as defined in Section 4, Clause (*u*), of the Code, is the Head or other Sirkar Vakil or any person appointed under Section 362, would indicate that the intention of the Legislature is to ensure the case for the prosecution being conducted fairly and impartially by a disinterested person without allowing private malice or vindictive spirit being imported into the same The imperative provisions of Section 237 would clearly and unambiguously show that, so far as trial of Sessions Cases is concerned, private prosecutors have no *locus standi* The practice of allowing this to be done, whatever may be the nature of the considerations that prompt the Courts to resort thereto, cannot but be characterised as unwarranted and unjustifiable, resulting as it would in denying the safe-guards for conserving

the interests of the accused provided for under the Code. However fair the Counsel or Vakil appearing for a private party may be, the fact that such appearance by him is for a private person who could be expected to act under his own client's instructions, would *per se* be a sufficient ground for his not being allowed to conduct the prosecution in the interests of an accused in a Sessions trial, for it may lead to the importation of other matters which may prejudice the accused otherwise and benefit the person who engages the Counsel or Vakil concerned in other proceedings or shape the evidence in such way as could not, taking all the facts into consideration, be fair Such a contingency will assuredly result where there are cases and counter-cases with respect to the same incidents It is with a view to avoid this that the Code insists upon a special Officer of the Crown to be in charge of the prosecution and conduct the case fairly and impartially A retirement of such Officer leaving the case to be conducted by a private prosecutor on the face of the peremptory provision of Section 237 would be a gross dereliction of duty

In a capital case, the duty of the Crown is to place before the Court all the materials irrespective of the question as to whether they exculpate the accused or incriminate him The Court shall be allowed to have the whole of the material evidence, whether in favour of or hostile to the prosecution, so as to have an opinion on the entire evidence. This Rule is not one of procedure but one based on common sense dictated by humanity

The rule is that the decision of a case should be upon the evidence on record in that case, and it would be improper to refer to the evidence in the connected counter-case for the purpose even though the two cases related to the same incident. — 20 T L J., 26

Not fol,—

49 T L R., 307 (=23 T L J, 603).

Section 242

1 The use of the statements recorded during enquiry as evidence at the trial under Section 242 is within the discretion of the Judge.

The right of private defence is a valuable right and it cannot be discounted by sentimental considerations on account of the loss of life on the aggressor's part —

20 T L J, 277

2 The Sessions Court convicted the accused of murder and sentenced him to rigorous imprisonment for life The accused preferred the appeal against the conviction and sentence, while the Sirkar moved for enhancement of sentence in the Revision petition.

At the time of argument, the Sirkar Vakil complained that the principal witnesses for the prosecution had gone back upon their earlier statements and invited the High Court to ignore their evidence before the Sessions Judge and to uphold the conviction upon their evidence before the Committing Magistrate The Court declined to adopt the course suggested

Per Gopala Menon J —In view of Section 242 of the Code, there is nothing illegal in admitting the statement of a witness before the Committing Court as substantive evidence at the Sessions trial. But the admission of such evidence is within the discretion of the Sessions Judge. So long as the Sessions Judge has not invoked Section 242, the High Court could not do so, except in the case of such statements on which the witnesses have been examined and marked in the case.

To have some understanding as to the direction, distance of range, and nature of the shot in gunshot wounds, the one point to be carefully noted is, as to whether or not the region of injury was charred, and if so, to what extent

Per Nokes, J —There are serious objections to the procedure suggested by the Head Sirkar Vakil In the first place,

upon the strictly technical grounds mentioned by Gopala Menon, J, it is more than doubtful if an Appellate Court has any jurisdiction to take such a course. In the second place, it appears almost equally doubtful if it is properly open to the prosecution, even *though they have* filed a revision petition against sentence, to attempt to support a conviction on grounds not relied upon in the Court below Such a proceeding as this should not be treated as a Civil Suit in which a respondent employs every possible means to support the judgment appealed against To attempt to do so in a Criminal Proceeding may work the greatest injustice to the accused, in this case, for instance, many of the witnesses were not cross-examined by the defence before the Committing Magistrate, and considerably modified their evidence under cross examination before the Sessions Judge Thus the attitude of the Sirkar involves reliance upon evidence which has not been tested by cross-examination, because subsequent cross-examination of the witnesses proves unfavourable to the prosecution Further, this attitude appears to be a complete negation of the spirit in which prosecutions are now conducted in all countries which are influenced by English practice If the judgment of the trial Court cannot be supported on the evidence before it, this fact should be frankly admitted by the prosecution before the Appellate Court In Criminal Cases, neither the trial nor proceedings in appeal or revision should develop into a blood-thirsty feud between the prosecution and the accused, but the prosecution should content itself with a restrained and almost impartial presentation of every circumstance of the case which may enable the Court to arrive at a just decision.—

24 T L J, *658*.

Section 247.

1 It is not perhaps easy to keep the mind entirely free from prejudice when the record and *the police papers* show that the prisoner in the dock is an *ex-convict* But *the provisions* of Section 247 indicate the importance of the complete exclusion of all knowledge of previous convictions when weighing the evidence as to the truth or otherwise of the main charge The provisions of the Section are mandatory and their contravention vitiates the trial and could not be brought within the scope of Section 413 which provides that merely by reason of certain irregularities in the trial a sentence passed by a competent Court shall not be reversed unless such error or irregularity has occasioned failure of justice —

21 T L J., *820*,
Fol—49 T L R, 142 (=23 T L J, 227)

2 The provisions of Section 247 are mandatory and their contravention is not a mere irregularity that could be cured under Section 413 of the Code but an illegality which vitiates the trial altogether

There should be no occasion for the presiding Judge to become prejudiced against the accused *by a knowledge about* his criminal antecedents which cannot fail to exert a *subtle and unconscious* influence in the mind, however sincere the effort to resist it. *The plain object* of the Legislature is to avoid such a possibility *The disobedience* of an express provision as to a mode of trial cannot be regarded as a *mere* irregularity The remedying of mere irregularity is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that, when the Code positively enacts that such a trial as that which has taken place shall not be permitted, that this contravention of the Code comes within the description of error, omission or irregularity If once it is found that the trial in the case was illegally conducted, it is not proper to act upon such evidence that might be on record as would

have sufficed to support a conviction, if the appellant had been properly tried.—
42 T L R 182 (=23 T L J, 227)

Section 253

1 No doubt, the accused is not bound to explain anything Yet where a set of circumstances is proved, from which having regard to human experience only one reasonable inference can be drawn, the accused would do well if he wishes to escape the consequences of that inference, to offer an alternative inference which can compete in probability with that suggested to an ordinary mind by the evidence — 22 T. L J, 1145.

2. See also—
Sec 212 — 46 T L R, 94
(=20 T L J, 891)

Section 255

1. By orders of the High Court (Proceedings No 36 reported in 18 T L.J, 940), an enquiry was directed under Section 128 of the Code in regard to the disputes between the respective managers of the two rival Boards of directors that purported to function simultaneously, on behalf of the Tropical Plantations Co., Ltd, Kottayam Pending such enquiry, certain shars-holders of the Company, who were not parties to the said proceedings filed a Civil Suit O S No. 23 of 1104, disputing the rights of both sets of directors to represent the Company and praying for ascertainment in meeting convened by Court of the wishes of the general body of share-holders as regards the management of the Company or in the alternative for winding up the Company One of the parties in the summary enquiry moved the lower Court for stay of the proceedings under Section 128 in view of the Civil Suit O S. 23 and stay was accordingly granted. The revision petition herein, was directed against the order of the lower Court granting stay It was contended *inter alia* by the revision petitioner that the lower Court wrongly exercised its discretion inasmuch as (1) the civil suit was filed after the initiation of the proceedings under the Criminal Procedure Code, (2) there was no guarantee that the civil suit will not be unduly prolonged and (3) the plaintiffs in the civil suit had not moved in the matter

Held.—(1) Though proceedings under Section 128 have not the same object in view as the proceedings in the civil suit, the present case differed greatly from an ordinary case under Section 128

(2) On the facts it did not appear that the lower Court has acted perversely or that the interest of the Company have been unduly prejudiced

(3) The discretion of the lower Court to decide under Section 255, whether the Criminal case should proceed or not is one which should not be lightly interfered with.

(4) Therefore the revision petition was not maintainable.—
20 T L J, 1042.

2. In the matter of staying criminal proceedings during the pendency of a civil suit in regard to the same subject-matter, there is no hard and fast rule. Each case must be considered on its merits and the only general rule that can be adumbrated is that every Court should be left as far as possible to dispose of the case on its file with the utmost expedition.

The Courts where such cases are pending have to exercise their discretion (as to staying the same) Only when such discretion is not properly exercised will the High Court interfere — 24 T L. J. 29

Section 256.

See Sec. 230.—
38 T. L. R., 366 (=21 T L. J., 31).

Section 259

Three accuseds stood charged for certain offences, and the Magistrate who tried the case entered conviction and awarded sentence as against the first two accuseds, but committed the third accused to the Sessions, after finding him guilty, because he was liable to enhanced punishment as an old offender

Held—The Magistrate had no jurisdiction to find the third accused guilty and then commit him to the Sessions Court It is only the Sessions Court which has jurisdiction to say whether the man is guilty or not, All that a Magistrate is empowered to do is to say whether a *prima facie* case is made out against the accused so as to warrant his committal to the Sessions Court

In the case, the Magistrate would have exercised a better discretion if instead of convicting the first two accused himself he had committed them to the Sessions Court for trial along with the third accused. No doubt there is no rule of law or procedure which makes it obligatory on the Magistrate in such cases to commit all the accused to the Sessions Court. But the practice generally followed in such cases is to commit all the accused to the Sessions Court unless any one of the accused is discharged under Section 187 — 49 T L R 425 (= 24 T L J, 801).

Section 261

1 The recommencement of an enquiry or trial under Section 261 of the Criminal Procedure Code has not got the effect of wiping out all the proceedings before the Magistrate who was transferred —

20 T. L. J., 748.

Fol — 48 T L R., 327 (=22 T L J, 645)

Ref —23 T. L J., 156

2. A Stationary Magistrate committed the accused to the Sessions on the evidence which had been recorded not by himself but by the Additional District Magistrate, refusing the prayer of the accused for a re-examination of the witnesses already examined

Held—The order of the commitment by the Stationary Magistrate was proper inasmuch as the proceedings before the Stationary Magistrate were only in the nature of a preliminary enquiry and the trial of the case had not begun. In such cases a preliminary enquiry started by one Magistrate may be continued by a succeeding Magistrate from the point where he had left it —

20 T L J, 958

Ref —48 T L R, 327 (=22 T L J, 645)
24 T L J, 161

3. The words 'in any trial' in Proviso (a) to Section 261, according to the definition in Section 2 of the Code, relates to the proceedings after the charge.

Where the offence mentioned in the complaint was a compoundable offence (mischief) but the Magistrate after hearing evidence had framed a charge against the accused for a non-compoundable offence (theft) and the case was transferred to the file of another Magistrate

Held—The proceedings up to the framing of the charge by the first Magistrate were not wiped out and the subsequent proceedings were a continuation of the former proceedings. The succeeding Magistrate had at the request of the accused, to resummon and re examine such witnesses as the accused required to be re-called and had no jurisdiction to discharge the accused under Section 256 on the ground of absence of the complainant as if the case were one regarding a compoundable offence.— 22 T. L. J., 498

4. The recommencement of an enquiry or trial under Section 261 has not the effect of wiping out all the proceedings before the Magistrate who was transferred. The Section empowers the succeeding

Magistrate to act on the evidence recorded by his predecessor The scope of Proviso I is restricted only to trials and does not include proceedings up to the framing of the charge It has also to be noted that the right of the accused is to demand that all or any of the witnesses be recalled and re examined, The use of the expression 'or any of them' is a clear indication that the intention of the Legislature was not to regard the whole of the previous proceedings as having been wiped out by the order for retrial but that it was intended merely to confer on the accused the right to have material witnesses examined by the Magistrate who would ultimately decide the case. It appears clearly to be an enabling provision and the exact significance of it can be gathered from these considerations as well as the policy which clearly underlies this Section, *viz*, that the accused shall have the right to see that all the material witnesses in the case are examined by the trying Magistrate himself, but that in the absence of such a demand the latter shall have the power to act upon the evidence recorded by his predecessor —

43 T. L R, *327* (=22 T L J, *645*)

3. The proceedings before a charge is framed in a warrant case are only an enquiry and a Magistrate succeeding another may continue the enquiry if the proceedings have not reached the stage of framing a charge The accused therefore has no right in law to apply for the re-summoning and re-examination of the prosecution witnesses as the trial' of the case has not commenced within the meaning of Section 261 of the Code.

It is clear from Proviso (*a*) that the accused's right to re-summon the prosecution witnesses is restricted to a *trial* as distinguished from an *inquiry* because the Section speaks generally of an inquiry or a trial, but when it comes to the Proviso (a) the word used is only trial and the word 'inquiry' is deliberately omitted It is therefore necessary to consider what precisely is the meaning or scope of the word 'trial' as used in the Code Although the word 'trial' is not defined in the British Criminal Procedure Code and consequently there has been some conflict of decisions in British India with regard to the exact meaning and scope of the word trial, the Travancore Code has clearly defined the word 'trial' in Section 4 as meaning 'proceedings taken in Court *after a charge has been drawn up* The word used in Proviso (*a*) of Section 261 and in Section 4 (*d*) is the same, *viz*, 'trial' It is reasonable to presume that the same meaning is implied by the same expression in every part of an Act. Accordingly, in ascertaining the meaning to be attached to a particular word in a Section of an Act though the proper course would seem to be to ascertain that meaning if possible from a consideration of the Section itself, yet if the meaning cannot be so ascertained, other Sections may be looked at to fix the sense in which the word is there used —

24 T L J, *161*.

6 See also Sec. 273 — 23 T L J, *156*.

Section 272

A judgment in a civil suit pronounced several months after the arguments in the case were heard is on that ground alone liable to be set aside. This salutary principle applies to Criminal Cases also.—

20 T L. J., 73.

Section 273.

The judgment of a Criminal Court should contain the points for determination, the decision thereon and the reasons for the same (Section 273) If it is a judgment of acquittal, it shall state the offence of which the accused is acquitted

Section 261 no doubt vests a discretion in a succeeding Magistrate to recommence the enquiry or trial If a charge has already been framed, he can re-commence only the trial, for he cannot quash the charge already framed without acquitting

the accused The recommencement of a trial has not got the effect of wiping out all the proceedings before the Magistrate who leaves the trial incomplete.—

23 T L J, *158.*

Section 298.

Section 298 is a very beneficial provision of law which the Courts are bound to give effect to The words used in the Section "it shall be lawful" are mandatory and not merely directory Generally in public statutes where the thing to be done is for the public benefit or in advancement of public justice, enacting words must be taken to have a compulsory force. The Section was obviously enacted for the public benefit and in advancement of public justice

The expression "Court of Appeal or Court of Revision" in Section 298 is merely descriptive of the Court which can exercise the power of allowing deduction of the period of imprisonment and does not mean that the Court can deal with the matter only at the time of dealing with the appeal or revision The power to allow the deduction subsists even after the Court has finally disposed of the appeal or revision petition —

20 T L J, *827*

Section 304

1. The rule of *autrefois acquit* embodied in Section 304, Criminal Procedure Code, does not rest on any doctrine of estoppel, but is based rather on grounds of public policy for no man could be put twice in peril for the same offence It has to be remembered that this provision bars the second trial itself of the accused on the same facts and does not amount to a direction to acquit him therein

A reading of Section 304 indicates that to attract its provisions, it is essential to make out the following matters —

(1) That the accused indicted a second time was charged before a Court of *competent jurisdiction*

(2) That he was *tried* by that Court before,

(3) That he has been acquitted or convicted by that Court,

(4) That such conviction or acquittal remains in force,

(5) That the second trial had been for the *same offence* or on the same facts for any other offence for which a different charge from the one made against him under Section 213 or a conviction entered under Section 214.

To the above rule, the Section lays down that there are three exceptions, *viz*,

(1) Where a separate charge is possible to be framed for another distinct offence under Section 212 of the Code,

(2) Where consequences of this act which, with the act itself would constitute a different offence, had happened after the previous trial, as were not known to the Court during such trial

(3) Where the Court which previously tried the suit was not competent to do the same

The principle underlying the first exception is that if the crimes are so distinct that the evidence necessary to prove one will not prove the other, it could not properly be stated that they are so far the same that the acquittal of one is a bar to the prosecution of the other What should be considered in this matter is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first

The second exception is based on the allegation and proof of additional facts not dealt with in the previous trial.

A liberal construction has to be placed upon the expression 'competency' occurring in paragraph 4 of Section 304. The expression 'Court of competent jurisdiction'

in paragraph 1 of the Section indicates that it is essential that the previous trial should be conducted by a Court which had jurisdiction to try the case Such trial could be conducted only after the Court takes cognisance of the case Without taking cognisance, it would not be possible to try it The provisions of Chapter XV of the Code lay down the conditions precedent that have to be satisfied to enable the Court to take cognisance of the case By using the expression "Court of competent jurisdiction" the Legislature should have intended the same to relate not only to the enabling provisions contained in Section 15 of the Code, but also to the various provisions contained in Chapter XV specifying the conditions necessary in the matter of enquiries or trials. The provisions contained in Sections 173 to 177 insisting upon sanctions or complaints in the cases specified therein are as essential as the power to try the case under Column 8 of Schedule II in determining whether the Court which tried the case before was one of competent jurisdiction for the purpose of this Section Where a complaint or sanction as required in Sections 173 to 177 of the Code is not *had* at the previous trial or where the Court had not the power to try the cases consistently with the provisions relating to local jurisdiction above referred to except in cases under the latter category the same had been transferred to its file by an appropriate proceeding by a Court of competent jurisdiction, an order of acquittal passed in an earlier case even if it be on the same facts and not covered by exceptions in paras 2 and 3 of Section 304, would not operate as a bar to a second trial

It is essential for the purpose of the Section that the persons charged in the second case must have been tried and acquitted in the previous one. The fact that they were charged with others who were tried in the other case upon the identical facts and convicted or acquitted as the case may be therein would not make this plea available to the accused if as a matter of fact the accused charged in the second trial had not been tried or convicted or acquitted in the prior case

The *trial* contemplated in the Section necessarily relates to the proceedings detailed out in Chapters XX, XXI, XXI-A and XXII It cannot be taken to relate only to the proceedings defined as such in Section 4 (*d*) of the Code With reference to summons cases, all proceedings after the appearance of the accused as contemplated in Section 219 would be parts of the trial within the meaning of Section 304 Similarly, the trial of warrant cases could commence from the stage at which the accused appears or is brought before the Court under Section 229 If the order of acquittal has been passed after the inauguration of the proceedings before a Court, the trial should be deemed to have been commenced and the provisions in the Section taken to have been complied with

As regards the requisite of an acquittal in the former case, if an acquittal has as a matter of fact been entered in the prior trial, the second trial upon the same set of facts is not permissable It is not open to the Court before which the second case has been brought to impeach the order of acquittal on any ground for "it would be a dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates."

In considering whether there has been an order of acquittal or not it is the substance of the decision and not the wording that has to be looked into If a case which could not have been acquitted under the Code has by inadvertence been disposed of by an order of acquittal, the provisions of the Section are not applicable. If similarly an order of discharge is entered by inadvertence the provisions of the Section would nevertheless be applicable,

An acquittal contemplated under Section 304 need not necessarily be a decision on the merits What is essential is that the proceedings in which the same has been passed should be in the nature of a trial

Where the order of acquittal has been set aside by a superior Court in appeal or revision, the provisions of the Section are inapplicable

Whether a case would fall within the condition enumerated as (4) of Section 304, *supra*, would depend on the facts of each case Section 213 of the Code deals with a case where a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute In such a case the accused is allowed to be charged with all or any of such offences or in the alternative of one of such offences, he being liable to be tried for all such offences in one trial Section 214 provides for cases where a conviction could be entered for an offence different from that under the charge If the same set of facts form the basis of the charge in both the cases, the rule of *autrefois acquit* applies. The circumstance that the same is indictable under two different statutes would not affect the question

What has to be considered in cases of this kind seems to be whether the Court which tried the first case, can, upon the evidence deal with the offence for which the charge has been laid for the second trial. If the facts constituting the charge and the persons who are indicted are identical the offence would be one for which the accused might have been charged at the previous trial within the meaning of the Section and the rule embodied therein would be applicable. The test in such cases is to determine whether the charge under which the accused was previously charged and acquitted is different from that on which he was subsequently tried and whether the evidence is the same in both cases —

45 T L R, *884*
(=20 T L J, *177*)

Ref —24 T L J, 161

2. The accuseds 1 to 4 in the case were charged for offences under Sections 380, 459, 463 and 64, T, P C, and Section 17 of the Telegraph Regulation for having entered a Post Office and committing theft of a telegraph table after cutting off the telegraph wires attached thereto. The Magistrate who tried the case convicted the accused for the offences under the Penal Code, but discharged them for the offence under the Telegraph Regulation on the ground that the cutting off of the wires was only to commit theft of the table On reference by the Sessions Judge suggesting retrial for the offence under Section 17 of the Telegrah Regulation —

Held —In view of the fact that the cutting off of the wires was one of the necessary ingredients constituting the offence of theft of the telegraph table a trial for the offence under the Telegraph Regulation on the same fact was not permissible, while the convictions and sentence entered against the accused were in force The rule of *autrefois convict* laid down in Section 304, Criminal Procedure Code, would clearly operate as a bar

If the same set of facts would form the basis of the charge in the former and latter cases, the prohibition contained in Section 304 would be clearly applicable. What should be considered is, whether the Court which tried the first case can upon the evidence deal with the offence for which the charge has been laid at the second trial, *i. e*, whether the facts are the same in both trials and whether the conviction for the theft charge necessarily involves a conviction under the second charge — 21 T L J., *187*

3. The revision petitioner filed a complaint for obstruction of way, but withdrew the same at a later stage and the

accused was acquitted Subsequently a similar complaint was lodged by the same complainant against the same accused for the same act This also resulted in the acquittal of the accused under Section 222 In revision, it was contended that the order of acquittal in the prior case was not an order in a case which was tried and it could not be construed as a bar to the present proceedings.—

Held—In a summons case where the accused is summoned and he appears under the process, the trial is deemed to have begun. The prosecution in the case was barred under Section 304.—

49 T L R, *940* (=24 T. L. J., *194*).

See Vol. VI, P 1459—

55 T L R., *884* (=20 T. L J., *177*).

Section 307

Under Section 307 an appeal lies to the District Magistrate against an order of the Additional District Magistrate demanding security for good behaviour The words "A Magistrate other than a District Magistrate" in Section 307 includes an Additional District Magistrate

Where therefore a person was ordered to furnish security for good behaviour by the Additional District Magistrate and for failure to do so was sentenced to a term of imprisonment, it was not open to him to invoke the Revisional jurisdiction of the High Court instead of seeking his remedies by way of appeal to the District Magistrate.

The High Court may, however, interfere in revision if the Additional District Magistrate improperly rejected the security furnished before him. The provision for the exercise of discretion under Section 107 by the District Magistrate to order the release of the person imprisoned for failure to give security cannot be regarded as depriving the right of the person aggrieved to move the High Court in revision.

Under Section 10, Clause (ii), the Government is empowered to appoint Additional District Magistrates with all or any of the powers of a District Magistrate and such powers are those defined in Schedule III, Clause (iv) Nevertheless it is clear from Section 10 itself that in a District there can be only one Magistrate who shall be the District Magistrate.

An appeal lies to the District Magistrate against the order of the Additional District Magistrate demanding security for good behaviour —

47 T L. R, *328* (=21 T L J, *780*)

Section 313

1 The powers of the High Court of interfering with an order of acquittal are limited and will be justified only if the finding of the lower Court is perverse and palpably erroneous and has been the result of gross misappreciation of evidence and had led to a miscarrige of justice.—

49 T L R., *430* (=24 T L J, *486*)

2 See also Sec 215—

24 T L J, *711*

Section 318

1 The High Court has no power to convert a finding of acquittal into one of conviction under Section 330, where the matter comes up before the High Court for the purpose of revising the conviction and sentence without an appeal by the accused. But under Section 318, the Court of appeal may, in an appeal from a conviction, alter the finding maintaining the sentence. This power of enhancement of the sentence is conferred on the High Court in its revisional jurisdication by Section 330. Thus reading Sections 318 and 330 together, the High Court has, in an appeal from a conviction, the power to alter the finding and to enhance the sentence provided of course opportunity is given to the accused to be heard either personally or by pleader in his defence.

The High Court alone has this power and no other Court of appeal has it —
20 T L J 491

Ref —23 T L J, 253

2. The law does not require the Appellate Court to see whether there is evidence to warrant a conviction before it remands a case under Section 318 B of the Code. The Appellate Court may quash the conviction and order a retrial in a proper case. Though in a case where no evidence of a reliable character has been adduced, a Court should not by its order subject the accused to the protracted vexation of a re-trial, still, if there is evidence which if believed would establish the commission of an offence of a graver nature than the offence found by the trying Magistrate, the Appellate Court would be acting properly in ordering retrial on a proper charge.—
21 T L J, 877

3. Section 318 states that before disposing an appeal in any of the ways provided by that Section the Court must peruse the records and hear the appellant or pleader if he appears and the Public Prosecutor if he appears. The duty of perusing the records is not obviated by the failure of the appellant to appear
21 T L J, 1244

4. Under Section 318, the Appellate Court is bound to peruse the records and to decide the appeal on the merits whether the appellant appears or not It cannot dismiss the appeal for default of appearance.— 22 T L J, 1270

5 When the appeal is against an order of acquittal, it has been held that interference with it would be justified only if the finding of the lower Court is perverse and palpably erroneous and has resulted from gross misappreciation of the evidence and led to a miscarriage of justice. But it is also true that where the balance of evidence is distinctly against the accused or where material evidence has been misappreciated, overlooked or ignored, the High Court is bound to step in as much as in the interests of the administration of justice as of the public generally

Even delay in the execution of the death sentence caused by the pendency of an appeal against it might justify the imposition of a lesser penalty.— 23 T L J, 896

Fol —49 T L R., 430
(—24 T L J, 436)
Ref —50 T L R., 1

See also Sec 20— 46 T L R, 105
(=20 T L J, 385)

Section 319

The judgment of the Court in a criminal appeal should show on the face of it that the Appellate Court has applied its mind to the consideration of the evidence on the record, and the pleas raised by the appellant both in the Court below and in his memorandum of appeal The judgment of the Court of appeal should be such that the High Court as a Court of revision might on looking into the judgment be in a position to judge for itself what the case was and how the Court of appeal considered the evidence as bearing on the guilt or innocence of the individual accused before the latter affirmed the judgment of the trial Court A judgment of the Appellate Court which does not set out or discuss the evidence on which the conclusions are based is not a proper judgment and is liable to be set aside.—
23 T L J, 206

Section 326

1. The High Court has jurisdiction to revise orders passed by the Magistracy under Section 127 of the Code. Under Section 326, such orders are not revisable. But as far as the High Court is concerned the High Court Regulation passed in 1929 (Section 7) gives very wide powers to the High Court.—
46 T L R., 203 (=20 T L J., 940).
Ref —48 T L R., 88 (— 21 T, L J., 533).

2. As the law now stands, there is no means to make a Revision petitioner pay the costs of the opposite side. In the case of frivolous and vexatious transfer applications, the amendment of the Procedure Code in British India provides for payment of the reasonable expenses incurred by the party opposing such applications It is well worth considering whether it is not necessary to arm the High Court with the power to award costs generally in Revision Proceedings to check the inflow of frivolous petitions.—

21 T L J, *1087*

3. To make the punishment suit the crime is often a difficult task. No Court should indulge in flightiness in so important a matter. For instance, if a Court sentences one to rigorous imprisonment for six months for grievous hurt one day and another to imprisonment till the rising of the Court for the same offence on another day, the differential treatment will not fail to attract attention and to undermine faith in the incidence of punishment which should fall on all offenders alike But occasions would arise to draw distinctions and to vary punishments. In such instances the subordinate Courts will do well to assign reasons in support of the variations deemed necessary

There is no reason to delimit the revisional jurisdiction of the High Court to enhance the sentence by fostering any practice on inelastic lines The fact that the accused has been discharged from prison on the expiry of the sentence is in itself no justification to withhold the revisional discretion. Were it otherwise, justice may be defeated by delaying the submission of calendars.—

22 T L. J., 39

4. The accused in P E. No. 2 of 1108 before the Division First Class Magistrate of Kottayam was committed to stand his trial before the Sessions Court. Even after his commitment to the Sessions Court, he was kept in the Police lock-up at Kottayam, the reason given being that he had to be examined as a witness for the prosecution in P E No 4 of 1108 before the same Magistrate. Thereupon the accused in P E. No 4 put in a petition before the Magistrate who was enquiring into that case alleging that the Police were tutoring the accused to give evidence against him, that they were forcing him to deny averments of facts sworn to by him in previous records and praying that the accused should therefore be taken away from Police influence and lodged in the Kottayam District Jail The Magistrate, without making any enquiry of the accused or the Police Officers, rejected the petition

Held (in revision overruling the preliminary objection raised by the Sirkar) — The order of the Magistrate was one passed by him in his judicial capacity and as such was open to revision by the High Court — 23 T L. J, *566*.

Section 330

1. Though the charge was under Sections 301 and 324, T P C, the accused was convicted under Sections 326 and 324 T P C, and the Sirkar had not appealed from the acquittal under Section 301. The accused appealed against the conviction and sentence. Notice was also issued to the accused in Calendar Revision to show cause why the conviction should not be altered into one under Section 301

Held.—The conviction could not be altered in revision Section 330 does not authorise the High Court to convert a finding of acquittal into one of conviction. The Section applies not only to a case of complete acquittal but also to a case of acquittal of any of the offences charged

It is by virtue of the notice in revision that the superior Court can interfere with acquittal. It is really a revisional jurisdiction. Section 330 peremptorily ousts the jurisdiction of the revisional Court

to convert an acquittal into a conviction. In an appeal from a conviction on any charge, acquittal on any accompanying charge is not within the ambit of the case before the Appellate Court —

49 T L R, 249
(=23 T L J, 253)

2 *Held* (*Per Venkata Rao, J concurring with Sivasankara Pillai, J*) —The jurisdiction to interfere in revision with an acquittal should ordinarily be exercised sparingly, and only where it is urgently demanded in the interests of public justice.

Though the High Court has power, it would refuse to exercise it at the instance of a private party or perhaps any one other than the Government, unless there is an error of law apparent on the face of the record or interference is required in the interests of public justice

In regard to revisional powers there is no distinction between cases of defamation and cases regarding other offences.

So long as there is no breach of a mandatory provision, the mere omission to hear arguments again cannot be held to amount to a material irregularity which vitiates the order of the Magistrate

The Court's duty does not stop with the disposal of the plea actually put forward, it is bound to decide whether the exceptions though not specifically pleaded are applicable if the case is found from the facts proved to fall within their scope. The burden which rests on the accused may be discharged by either adducing specific evidence on his own behalf or by making out the said plea from the evidence adduced by the prosecution and the proved facts or probabilities of the case.

The High Court's power to interfere in revision is undeniably more restricted and narrow than in an appeal, and so far as questions of fact are concerned, the High Court seldom examines the evidence in order to find out whether the findings are reasonable and as such require interference in the ends of justice in the exercise of its revisional powers.

Per Sivasankara Pillai, J.—It cannot be denied that acquittal orders stand upon a unique footing and are favoured by law, in that interference with them is permitted only in exceptional cases. The Government alone has the power to appeal from an original or appellate order of acquittal (under Section 313 of the Code), and even in the matter of such appeals, the law is jealous. The appeal is permissible only under certain circumstances and the right is to be most sparingly exercised Where the decision of the subordinate Court is an honest and not an unreasonable one of which the facts are susceptible the High Court will not interfere. It goes without saying that the rights of private parties who could not appeal in cases of acquittal must be very narrowly circumscribed when the application is one for revision

The powers of the Court to interfere in cases of acquittal are very limited Where the Government could appeal and had not appealed, the powers will be rarely used As a general rule, there should be only a sparing exercise of revisional jurisdiction. For such exercise there should be some error of law or gross miscarriage of justice The mere misappreciation of evidence by the Magistrate is not sufficient If two views are possible and the High Court is inclined to take one view in preference to what had been adopted by the Magistrate, even then interference will not be justified

Though it is not necessary in all cases for the Court to hear arguments, the Criminal Procedure Code not laying down any such rule, it is usual and desirable to do so The failure to hear them may not be enough to induce interference, but the High Court will interfere when as a result, the judgment of the lower Court shows that it has failed to understand the case.

In private prosecutions, the question whether the offender should be convicted and brought to punishment is a matter solely resting on the discretion of Government who is interested in Criminal administration and the maintenance of law and order—a discretion on which the Court should be chary of encroaching—and the proper course for the aggrieved individual is to have resort to the Civil Court for recovery of compensation

The pendency of the Civil suit is one of the reasons why interference in revision should not be made in the case

Per Joseph Thalwath, Acting Chief Justice (Dissenting)—When the High Court is satisfied that there has been a serious miscarriage of justice, it is bound to step in as much in the interest of the administration of justice as of the public generally No one can deny that with all the restrictions and limitations imposed by precedents there is still some discretion left with the High Court to interfere in revision with orders of acquittal For the purpose of revision, acquittals in defamation cases should be looked at from a slightly different stand-point from acquittals in other cases.

A finding arrived at without taking into consideration the most relevant facts bearing on the question, is no finding at all

In prosecutions for defamation it is not always necessary for the prosecution to establish *actual malice* If a statement is proved to be false and defamatory, the presumption of malice naturally arises and it is for the accused to make out that the case is covered by any one of the exceptions. To prove malice extrinsic evidence of malice is not necessary The words of the libel and the circumstances attending its publication may themselves afford evidence of malice.

As long as the accused has not attempted to prove the truth of the assertion and as the imputation relates to a question of fact and not an expression of opinion, the only exception on which the accused can rely is Exception 9 To take advantage of this Exception the accused should show that he published the imputation in good faith *Nothing is to be done or believed* in 'good faith' which is done without due care and attention 'Due care and attention' imply a genuine effort to reach the truth and not the ready acceptance of an ill-natured belief

'When construing newspaper articles or correspondence we have to look at the writing and determine what is its true meaning and also what is the innuendo it conveys, what is the correct meaning, if any, it has and we must decide in our minds what is the probable or natural effect of the words'

The Magistrate need not have depended entirely on the testimony of witnesses in construing the article,

'The distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man and quite another to assert that he has been guilty of particular acts of misconduct.'—

50 T. L R., *1*

S. See also Sec 318 —

20 T L. J, *491*.

Regn. I of 1074, Sec 326 —

47 T L. R., *330*

(=21 T L. J., *785*).

Other cases.— 47 T L R, *100*

(=21 T L. J., *1340*)

Section 345.

The procedure to be adopted in cases against lunatics is contained in Chapter XXXIII of the Code That does not recognise a guardian for the accused or a Vakil appointed by the guardian to represent the accused. Section 345 is a mandatory provision of law. In an enquiry as

to the lunacy of the accused, the Prosecution should begin the evidence No doubt, it is open to the Magistrate to resume the enquiry if he is satisfied that the accused is sane enough to make his defence (*Vide* Sections 348 and 349), but the Magistrate should be satisfied as to the capacity of the accused to defend himself as laid down in those Sections. The mere word of the accused that he is sane is not enough, for no mad man had been known to speak of himself as a mad man Further, when the enquiry is resumed, it should be commenced *de novo* — 21 T L J., *644*

Section 352

The prisoner was charged before the Sessions Court under Sections 301, 307 and 427 of the Penal Code The Sessions Judge found on the evidence that as a matter of fact the prisoner was guilty of the offence under Section 301, but acquitted him on the ground that he was insane at the time when he committed the offence

Held —It was clearly the duty of the Sessions Court to pass orders for the detention in custody of a prisoner who had been acquitted by reason of unsoundness of mind, and to report the matter to Government The lower Court in acquitting the prisoner failed to observe the provisions of Section 352 of the Criminal Procedure Code

The High Court sitting as a Revisional Court has the power to pass orders under Section 352 when the lower Court has omitted to do so — 46 T L R *460* (=21 T L J, *848*)

Section 366

1 In petitions for maintenance under Section 366 a finding as to the income of the counter-petitioner as accurate as possible has to be made. In the past it had been held that the fact that a Hindu had taken a second wife is not itself justifying cause for his wife to refuse to live with him But the sentiments prevailing in a particular community should be considered In a case where a Nayar husband had taken a second wife after the passing of the Nayar Regulation which prohibited a second marriage but before it came into force, it was held that the sentiments of the community at the time of the second marriage were against such conduct There was, no reason, therefore, why this should not be regarded as falling under the words "just grounds for so doing" in para 4 of Section 366 — 46 T L R., *370*

2 The petitioner who was the wife of the counter-petitioner resided in Cochin territory She filed a petition under Section 366, Criminal Procedure Code, to get maintenance from the counter-petitioner for herself and two of her minor children born to the counter-petitioner The counter-petitioner lived within the jurisdiction of the Alwaye First Class Magistrate The question arose whether the the Alwaye First Class Magistrate had jurisdiction to entertain the petition.

Held —The Travancore Courts can entertain petitions under Section 366, from foreigners. The Alwaye First Class Magistrate had jurisdiction to start proceedings under Section 366, at the instance of the petitioner The Section was not solely meant to prevent vagrancy It was enacted to enforce also the natural obligation of the father to maintain his children and the husband, his wife The jurisdiction is on ground of claim being *ex debito naturali* — 46 T L R., *168* (=20 T L J, *936*)

3 The ordinary presumption of law that where a man and a woman have lived together as man and wife, they were living together by virtue of a legal marriage and not in concubinage does not hold good under all circumstances. For instance, in criminal matters as on a charge of *bigamy* or suits for dissolution of marriage, judicial separation and restitution of

conjugal rights and the like, the fact of the marriage must be strictly proved

"In a criminal or quasi-criminal matter where the petitioner claims maintenance from the counter petitioner on the alleged ground of a valid marriage between them, the *onus* of proving the *factum* of the marriage lies heavily on the party setting up the marriage as the basis of her claim"— 20 T L J, *688*

4. The petition was for maintenance under Section 366 of the Criminal Procedure Code by a Nayar wife against her husband who took a second wife just before the Nair Regulation of 1100, which prohibited such second marriage, came into force

Held—The petition was competent It was true that at the time the second marriage was contracted, it was perfectly legal But the sentiments of the community at the time of the second marriage were against such conduct There were, therefore, no reason why this should not be regarded as falling under the words "just grounds for so doing" in para 4 of Section 366 - 20 T I J, *699*

5. Criminal Courts have no jurisdiction to pass orders under Section 366 except in cases where the husband or father has neglected or refused to maintain the wife and children Neglect or refusal may be by words or by conduct. It may be express or implied Implied or express denial of paternity may safely be construed as neglect to maintain.

The words 'unable to maintain itself' refer merely to physical and mental incapacity and have nothing to do with the independent means of the child There is nothing on principle to distinguish the cases of children belonging to Makkathayam or Marumakkathayam families in regard to the question of their right to maintenance under Section 366. The object of the Section is to provide a speedy remedy for maintenance of children in a summary way and an elaborate enquiry into the property qualifications of the child would in most cases, frustrate the very object of the Section and the intention of the Legislature

Although as a matter of practice the income of the husband or father is taken into consideration in fixing what would be a reasonable sum to be awarded as maintenance, it appears that no hard and fast rule can be laid down in regard to this matter Each case has to be decided on its own merits In the case of an able bodied man, not affected by any infirmity, the presumption is that he has sufficient means to maintain himself and the child and that the burden of proving insufficient means lies on him and mere denial of sufficiency of means is not conclusive proof of it.— 47 T L R, *192* (=21 T L J, *539*)

6. Where the differences between a husband and wife were referred to arbitrators and by their award they decided that the husband must take the wife back to his house after her confinement, in default of which he should pay her maintenance at a certain rate and the wife was accordingly taken to the husband's house, but subsequently sent away and refused maintenance

Held—The contingency (failure on the part of the the counter-petitioner to take back his wife after confinement) referred to in the award did not happen and that, therefore, the wife was entitled to apply under Section 366 for maintenance on the ground of neglect to maintain. Apart from this aspect of the case, the parties cannot in the circumstances, be considered to be living apart by mutual consent within the meaning of Section 366 so as to bar the wife's application. The award was no more than a direction to pay maintenance, and it could not be a bar to the petitioner's application under Section 366.— 21 T L J., *1215*

7 An order for maintenance under Section 366 in terms of the agreement or

compromise entered into by the parties is valid in law— 22 T L J, 755

3 In a suit for declaration that the plaintiff was not the legally wedded husband of the first defendant and that the second defendant was not born for the plaintiff to first defendant, the plaintiff contended the correctness of an order for maintenance already passed against him by the Magistrate in proceedings under Section 366 of the Code (which order had been upheld in revision by the High Court) and pending suit, the plaintiff applied to restrain the defendants from executing the order for maintenance they had obtained The primary Court dismissed the application *in limine* relying on 18 T L J, 694

Held—Though it was possible to accept the contention of the plaintiff that the existence of the order for maintenance was not a bar to restrain the execution of the same, on a civil suit being filed and that therefore the Court below would have done well to consider the plaintiff's application on the merits, still, inasmuch as it was clear that the equities were in favour of the defendants and that the plaintiff had not made out a *prima facie* case, the order of the lower Court could not be interfered with.— 24 T L J., 527

Section 370

The duty of a public prosecutor is not to support a theory but to help the Court in determining the guilt or innocence of the accused He is bound to conduct all Sessions Cases himself and not delegate the conduct of such cases to a Vakil engaged by a private party, his retirement from the case by so doing having to be considered as a dereliction of duty and a shirking of the responsibilities devolving upon him by virtue of his office. He could allow a Vakil so engaged to instruct him in such cases as provided for in Section 370.

All the material witnesses who can speak to the subject-matter of the charge will have to be placed before the Court by the prosecutor in trials of grave charges like murder, especially when they have been examined during the preliminary enquiry: It would be safe for the Public Prosecutor to examine such witnesses irrespective of the nature of the story given by them whether it fits in with the charge or not He may, when he believes a particular witness to be untruthful, dispense with his examination or withhold such examination by reason of the statement of the witness given during the preliminary enquiry being irrelevent for the purpose of the charge or unnecessary in his estimate by the other evidence on record upon the matter he had been called upon to speak to In doing this, he may either give up the witnesses leaving it to the defence to examine them on its behalf or tender them for cross-examination by the defence In either case it would amount to his dispensing with their examination and he is in such cases bound to assign reasons for so doing and satisfy the Court as to the propriety of the course taken by him If the Court is not so satisfied, it could draw an inference favourable to the accused from the omission to examine the witnesses concerned on its finding that their evidence was material It has to be remembered that the Court cannot play the role of the Prosecutor in the trial of criminal cases and it would be improper on its part to fill up the gap in the prosecution evidence by examining persons whose evidence is considered by it to be material but who have been deliberately given up by the prosecution.

The duty cast upon the Court for the exercise of its extraordinary powers to take any evidence considered by it to be material has to be discharged consistently with the above position. In this view, it is for the Public Prosecutor with reference to the facts of each case to decide whether he could take the responsibility upon himself and risk the possibility

of a verdict in favour of the accused by the exercise of this discretion in which matter the Court may probably not agree with him It would be safe for him to examine all the witnesses in the Preliminary Enquiry and leave the Court to form its opinion upon the entire evidence placed before it — 46 T L R 75

Ref —47 T L R, 462 (= 22 T L J, 347)

Section 371.

Recording of the reasons in cases where withdrawal of prosecution is allowed, is not imperative, as the High Court in examining the propriety of the order passed allowing or refusing the withdrawal could call for explanations from the subordinate Court concerned setting forth the reasons in support of the orders sought to be revised

The order tantamounted only to one of discharge under Clause (a) of Section 371, and would not preclude reagitation of the matter by a fresh complaint as the rule of *autrefois acquit* would be inapplicable.— 20 T L J, 1977

Section 378.

The accuseds were first granted bail by the Magistrate, but as some of them failed to attend Court at a subsequent stage, he called upon them to make a deposit of Rs. 500 as a condition for the continuance of their bail As the order calling for deposit was passed without notice to the accuseds, they moved the Magistrate for a reconsideration of the condition and as a result he dispensed with the deposit and substituted sureties instead The Sirkar called in question the final order of the Magistrate.

Held —(1) There is a distinction between a right to bail and the terms on which bail is to be granted. Circular No. 2 of 1099 requires the Police or Sirkar to be consulted only in deciding the question of the right to bail, the settling of the terms as to grant being within the discretion of the Magistrate under Criminal Circular No 1 of 1083

(2) The order of the Magistrate calling for deposit in variation of his prior order was itself irregular since no reasons were recorded, as required by law

(3) Though the Criminal Procedure Code does not provide for review, the Magistrate was entitled to modify the conditions of a bail order with reference to the development of the case from stage to stage — 21 T L J, 178

Sections 374 and 375

1. Under exceptional circumstances the Court of Sessions or the High Court may grant bail under Section 375 of the Code But before exercising the wide discretion conferred on the superior Courts under the Section, the Court will have to take into consideration, among other matters, the character and status of the accused, the nature of the alleged offence, the *prima facie* strength of the accusation in the light of the evidence available, the likelihood of the accused absconding or tampering with the prosecution evidence, the apprehension of the perpetration of other offences on account of the charge having been made and other undesirable consequences.— 20 T L J, 933

2. Under Section 374 the grant of bail is discretionary in non-bailable offences, and there is no room for the discretion itself when there are reasonable grounds to presume the guilt of the accused. No doubt a Court of Sessions or the High Court is not fettered by Section 374. But what Section 375 enacts is that the High Court or the Court of Sessions may direct that any person be admitted to bail. There again it is a question of discretion. It is not mere whim, but a matter of sound judicial discretion to be exercised according to well established principles.

The gravity of charge and the degree of probability of the accused's guilt in the

light of the available materials are important factors in considering an application for bail — 20 T L J, *1125*

3. While under Section 374, Criminal Procedure Code, the jurisdiction of the Magistrate in granting bail is limited, the powers of the High Court under Section 375 are wider and not controlled by Section 374. Under Section 375 the Sessions Court has concurrent jurisdiction with the High Court regarding this matter Such jurisdiction is "not arbitrary but judicial and is governed by established principles."

The primary consideration for grant of bail in capital cases is whether there are grounds for believing the accused to be guilty of the offence charged There might also be other facts to be considered as for instance the position in life of the accused, his state of health, the likelihood of the accused absconding or committing acts of violence and so forth, but the paramount consideration in capital cases must always be the probability of the guilt of the accused persons being established at the trial.

The High Court would be reluctant to interfere with the Sessions Court's exercise of discretion ordinarily where on the grounds stated it may not be unjustifiable. And though the reasons for granting or refusing bail need not or perhaps ought not to be set forth in detail in such cases, still some indication of the reasons which weighed with the Sessions Court must appear in its order so that the High Court might be in a position to judge whether its discretion has been properly exercised — 21 T L J, *255*

4. Where an application for bail is made before a Magistrate in a serious case in which the charge is one for murder, the Magistrate should realise the restraints on his jurisdiction to grant bail, imposed by Section 374. He has to see whether there are grounds to grant bail If, therefore, the grounds that exist on the record do not permit that course, but the Magistrate relying on fanciful grounds does grant bail, his order granting bail cannot but be set aside.

Per Narayana Pillai, J —As long as the Prosecution holds itself ready to satisfy the Court of the guilt of the accused and the Court finds nothing to discount the weight of the evidence held in readiness, how can it be said that there is no reason to think that the accused is guilty ?

Per Venkata Rao, J —It is in the highest degree inexpedient for a Magistrate to release persons charged with murder as soon as they are arrested and thereby incur the risk of hampering the work of the investigating authority

49 T L R., *87*
(=22 T L J, *1289*)

Section 389

Whatever the proper view might be under Section 33 of the Evidence Act, the rule applicable here is clearly set forth in Section 389 of the Code, and under its provisions mere delay or inconvenience in procuring the attendance of witnesses cannot be a ground for admitting their prior depositions given before the committing Magistrate in evidence at the subsequent trial, as the Section requires that the Court should be satisfied that "for any sufficient cause the witness s attendance cannot be procured — 21 T L J, *1014*

Section 395.

1 Ordinarily, no doubt, the proper order to be passed under Section 395, in regard to the property produced before the Court is to restore the property to the accused, if it was taken from his possession. But this is not an invariable rule, and circumstances would justify an order for the disposal of the thondy in favour of the party who is seen to be the rightful owner — 20 T. L. J, *858*

2. The complaint was that the accused committed theft of certain items of movable properties which belong to the father of the complainant from Parampil Veedu where the deceased father of the complainant lived and died. The Magistrate ordered the Chilakkoor Police to enquire and report about the matter The Police sent up a report alleging that no theft was committed by the accused Thereupon, the Magistrate struck off the case from his file and ordered to place the Thondy articles in *status quo ante* A few days later, the mother of the complainant and the widow of the deceased petitioned to the Magistrate that the Thondi articles should be returned to her on taking security from her Accordingly the Magistrate granted her prayer The fifth accused appealed to the District Magistrate, Trivandrum, who confirmed the order of the Subordinate Magistrate. It is this order that is now sought to be revised

Held—The procedure adopted by the Magistrate was irregular The second order passed by him was behind the back of the accuseds to whom no notice was served on the petition presented by the mother of the complainant—

22 T L J, 793

3. Ordinarily when an accused is acquitted, the article, in respect of which the prosecution was taken, would be ordered to be restored to *status quo ante* But under Section 395, it is open to a Magistrate or Sessions Judge to conduct an enquiry for disposal of the Thondy Though such enquiry is of a summary nature, if there are materials on record for arriving at a satisfactory conclusion, the Court is competent to make such order as it thinks fit.

Where, therefore, the Police seized a motor car from the accused and charged him for causing death by rash and negligent driving of the car, but the accused was ultimately acquitted and there were materials on record to show that the accused was only a hirer of the car at the time of seizure and that the contract of hiring was terminated and the ownership had passed to a stranger during the course of the prosecution

Held—The order as to the return of the car should be made in favour of the stranger and not the accused—

24 T L J, 581

Section 400

A petition was presented before a Magistrate for delivery of possession under Section 400 of the Code The Magistrate without issuing notice to the other side ordered delivery of possession *ex parte*

Held—Such an order *ex parte* without notice to the other side was erroneous.—

24 T L J, 862.

Section 404

1 The District Magistrate, Kottayam, moved the High Court for orders under Section 404 of the Code transferring a case on his file to that of the Sessions Judge at that station as the prosecution in the case had been sanctioned by the Government at his instance as Dewan Peishkar

Held—The provisions relating to transfer contained in Section 404 have to be construed in the light of the other provisions of the Code, and transfers of cases to Sessions Courts could be ordered only where a commitment has already been made as contemplated in Chapter XVIII of the Code. Hence the transfer recommended by the District Magistrate could not be allowed

Section 431 lays down that no Judge or Magistrate shall try or commit for trial any case to or in which he is a party or personally interested The principle underlying the above provision is that it is important to clear away everything which may engender suspicion and distrust of the tribunal, and so promote the

feeling of confidence in the administration of justice which is so essential to social order and security The word 'personally' occurring in the Section has a wider significance than its mere literal sense It includes every kind of interest, however small It does not imply mere intellectual interest, but something of the nature of an expectation of an advantage to be gained or of a loss or some disadvantage to be avoided by the person who is said to be interested in the case. An official connection with the institution of proceedings would constitute interest within the above Section (F B) —

20 T L J, 337.

2. See also—

Sec 128— 22 T. L J., 475

Section 405

Section 404 deals with applications for transfer before the High Court. Section 405 expressly requires the provisions relating to postponement or adjournment contained in Section 355 to be exercised where the intention to move the High Court is notified to the Court As the Section stands, therefore, it could not be said that the Magistrate had acted illegally in refusing the adjournment when he had only been informed of an intention to move the District Magistrate for a transfer Of course, the Magistrate could have exercised his discretion in allowing adjournments in such cases, especially when a party represents to him that he entertains a reasonable apprehension of not having a fair or impartial trial before him so that reasonable facilities may be afforded him to move the superior Courts to decide whether such apprehensions are reasonable and to secure orders of transfer if his plea in this behalf is upheld, but where the Code expressly casts a duty on him only in cases where the motion is proposed to be made before the High Court, it is doubtful whether the Magistrate could be held to be guilty of a breach of such duty when he had been informed by the parties of their intention to move the District Magistrate in the matter The stage at which such a statement is made cannot be considered to be immaterial in this matter, for applications for transfer have to be made at the earliest opportunity after the occurrence of whatever facts and circumstances which are alleged or supposed as affording a reasonable cause for the same

The pronouncement of judgment on a date prior to the date on which it is posted for the purpose only amounts to an irregularity This would be insufficient to warrant interference with the order of acquittal passed by the trying Magistrate

Interference with orders of acquittal has to be refused unless there has been a defective trial or public interests are shown to be otherwise jeopardised —

20 T L J 75.

Section 426.

A complainant in a Criminal case is entitled to get a copy of the progress diary, so far as it goes, at any stage of the case Criminal Circular No. 3 of 1068 contemplates the case of an application for progress diary on the close of an enquiry or trial in Court In other words, it refers to a complete progress diary If that can be supplied to a party as the Circular distinctly directs, there cannot be any conceivable objection to give a copy of the progress diary so far as it goes.— 20 T L J, 127

Other Cases

1. An order of discharge by the Magistrate was impugned on the ground of the pendency of a counter-case in the Sessions Court The contention that the lower Court was bound in law to order the commitment of the accused in the case also could not be upheld as sound, though it

is desirable that where there is a case and counter-case, commitments are made in both the cases if practicable so that the Sessions Judge trying them may have the whole evidence before him An order of discharge in one of the cases where in the opinion of the Magistrate conducting the preliminary enquiry, the evidence does not warrant a commitment, cannot be considered to be illegal or so improper as to justify its cancellation of an order of commitment No hard and fast rule can be laid down in the matter The question whether an order of discharge deserves an interference has to be decided with reference to the facts of each case. The existence of a counter-case which has been committed to the Sessions Court would not *per se* warrant such an interference. What has to be considered in a Sessions trial is whether the prosecution case is proved beyond reasonable doubt. This rule is applied even where there is a case and a counter-case. Even in cases where the prosecution case in one is the defence case in the counter-case, the Criminal Court is not, unlike in Civil Cases, to decide which of the versions is true, but to determine whether in the light of the evidence on record in the case, the prosecution can be held to have established beyond reasonable doubt the several acts set out in the charge. In this view, the commitment of both the case and the counter case cannot be laid down as an inflexible rule irrespective of other considerations—

20 T L J., *302*

2. The petition was for the expunction of certain passages from the judgment of one of the five Judges who participated in the contempt proceedings case reported in 47 T L R., 176 (=21 T L J., 424). The petition was heard by the same Judge sitting as a single Bench. At the hearing it was argued on behalf of the petitioner that the petition had to be dealt with by a Division Bench under the High Court Regulation.

Held,—The inherent jurisdiction in Criminal Cases was not provided for in the Criminal Procedure Code, though the British Code provides for the same in Section 561 A of that Code So much so, it was difficult to construe the High Court Regulation as applying to something left unprovided for by the Statute On the other hand, if the petition was viewed as for revising the proceedings of the High Court itself as a Criminal Court, a single Judge may deal with it within the limits laid down in Section 7 (4) VI of the High Court Regulation.

The principle that should guide the Court in expunging passages from a judgment is that if an unjustifiable attack be made on a person who had no opportunity of being heard in his own defence and the remark against him is irrelevant and separable, it can be expunged, especially if he is neither a party nor a witness—

21 T L J, *1398*,

3. The remedy by way of review in a Criminal Case by the exercise of the inherent powers of the High Court is a very extraordinary remedy to be used only in extreme cases like the one reported in 15 T L J, 85, where the refusal to exercise the inherent powers would have brought about a deadlock—

23 T L J., *878*.

4. It is not open to the Police Officer in charge of the case before the Committing Magistrate to give up witnesses cited in the charge sheet on the sole ground that to his knowledge or belief such witnesses had gone over to the side of the accused and would not speak the truth. 'Unless it is shown by facts and circumstances in the case that the witnesses were withheld because they would not tell the truth, the prosecution should not be left the option to choose. To allow such an option is to create embarrassment. The Court should have the whole of the material evidence and of all the eye witnesses

whether in favour of or hostile to the prosecution so as to form its own opinion upon the entire evidence'

Where, therefore, as in the case, there was nothing on the record to enable the Court to decide whether such a witness's testimony was withheld on proper grounds and when the other evidence was highly unsatisfactory it was open to the Court to draw an inference adverse to the prosecution

A dying declaration stands upon a widely different footing from the testimony of a witness given in Court In the case of the latter it is permissible and at times necessary under certain circumstances to accept a part which is unimpeachable and reject that which is obviously untrue, though to found a criminal conviction on such appraisement of evidence is very often unsafe As regards a dying declaration, to accept a portion and reject the rest is entirely out of the question, there must be absolute guarantee of the accuracy of the records and the truth of the entire statement before it can be acted upon. Where there is hardly any other evidence in regard to the details of the occurrence it would be quite unsafe to act on the dying declaration especially when a material part of it was found to be untrue and untrust worthy by the investigating Officer —

47 T L R., 462
(=22 T L J, *347*)

5 The proceedings in contempt of Court in the case was initiated by the communication of the District Magistrate addressed to the High Court and was in reference to certain violent attacks directed against a Second Class Magistrate and published in the Malayalam Newspaper 'Rajyabhimani.'

Held —Any act done or writing published, calculated to bring a Court or Judge into contempt or to lower his authority is a contempt of Court and the High Court has jurisdiction to take action in cases of such contempts against subordinate Courts

The sole purpose of the sentence for contempt of Court is to serve the interests of the administration of justice and not meant to be vindictive

(In the circumstances of the case, the apology tendered was not accepted as sufficient satisfaction and a fine of Rs 25 was imposed) — 22 T L J, *661*

6 The High Court, in the exercise of its powers of superintendence over subordinate Courts, has inherent powers to order expunction from judgments and orders of subordinate Courts of passages reflecting on the character of individuals which, in the opinion of the High Court, ought not to be allowed to disfigure solemn judicial proceedings.—

22 T L J, *730*,

7 Roads leading from one part of the country to another and through which traffic is ordinarily carried on, are to be presumed to be Rajapathas.

The Sirkar is the proper authority to determine whether a particular road belonging to it and maintained by it is a Rajapatha or Gramaveethi

If they are Rajapathas, there is no doubt that they are open to all classes of His Highness' subjects without distinction of caste or creed for all lawful purposes. Taking a procession along a public road with music cannot be said to be a use of the public road forbidden by law in Travancore — 22 T L. J, *1371*.

8 An order of a superior Court as to stay of proceedings in a subordinate Court takes effect only when the subordinate Court was duly informed of it

There appear to be no good grounds for holding that the principle enunciated in 40 T L. R., 237 (=15 T L J ,52) is applicable only to civil cases. *49 T L. R., 289*
(=23 T. L J, *83*)

9 On the question whether in a criminal trial, the evidence in a case may be

made use of in a connected counter-case relating to the same transaction

Held—No hard and fast rule could be laid down in these matters The chief point to consider is whether the method adopted in a particular case has resulted in a miscarriage of justice Rules of procedure are meant only for the guidance of Courts in the administration of justice, and in cases where no specific procedure is laid down by the statute, Courts have got inherent jurisdiction to do all that is required to meet the ends of justice In such cases the duty of the Court is to sift the evidence before it to find out the truth and to deal out to the parties the treatment they deserve The Courts ought not to shut its eyes to the evidence recorded in one of the cases merely because the whole of that evidence is not incorporated in the other case. But if, however, the reading of the evidence in one case for the purpose of the other will lead to a miscarriage of justice, it ought not to be done Within these limits, the evidence in one case may be made use of for the decision of the other case

Held further—If the charge as definitely framed is not proved, it could not be said that the accused is entitled to acquittal The charge is generally framed on the facts alleged by the prosecution. In many cases neither the prosecution nor the defence put forward events as they occurred. Each party would shape its case according to its own requirement. It is the duty of the Court to sift the evidence and find out how the events actually happened If on such scrutiny of evidence, it is found that the accused have been guilty of penal acts, the Court would be justified in punishing them,—

49 T L R., *367*
(=23 T L J, *603*).

10. A case and counter-case arising out of the same affair should be tried by the same Magistrate and disposed of side by side. They are, for practical purposes, one, and it is an accepted practice and recognised rule that such cases should be tried by the same Judge in quick succession, and the Judge should not pronounce judgment till the hearing of both cases is finished —

49 T L R, *337*
(=23 T L J, *957*)

11 A confession is always admissible in evidence against the person who makes it, and if it is of a voluntary character, even without corroboration sufficient to support a conviction. Even when a confession is retracted, there is no legal impediment to its being acted upon, but it is not ordinarily safe to do so in the absence of corroborating evidence

A misconception which is not unusual in an accused person that a disclosure would result in some advantage to him is not such as would invalidate his confession for this he must make out that it was the result of inducement, threat or promise from a person in authority as specified in Section 24 of the Indian Evidence Act

If the accused s own statement is to be relied upon, it must be taken as a whole and nothing can be read into it which is not within the four walls of the statement — 24 T L J, *33*

12. The complaint was that the accused who were defendants in a Civil case from whom property was delivered over to the complainant by the order of the Civil Court trespassed into the property and committed theft. Sanad and Kyohit were produced to prove complainant's title to property and two witnesses swore to the alleged occurrence. The Magistrate discharged the accused stating in his order that no patta had been issued to the complainant

Held.—It was certainly the duty of Criminal Courts to respect the proceedings of Civil Courts and in the absence of strong circumstances to the contrary, to attach due weight to documents like delivery kychits. In law, it had to be

presumed, in the absence of strong evidence to the contrary, that the proceedings in execution including delivery, had been conducted properly and in strict compliance with law, the burden of proving the contrary lying heavily on the party impeaching the proceedings.—

49 T. L. R., *461*
(=24 T. L. J., *197*).

13. "In law a man's motives are irrelevant As a general rule, no act otherwise lawful becomes unlawful because done with a bad motive, and *contra*, no act otherwise unlawful is excused or justified because of the motives of the doer however good The law will judge a man by what he does, and not by the reason for which he does it"—

24 T. L. J., *140*

14. On a careful consideration of the case-law, it is clear that the Magistrates who enquire into a case triable by the Sessions Court cannot be treated as a conduit pipe for letting out the evidence collected by the complainant or investigating officer on to the Sessions Court but that they have the right to determine whether the evidence on record makes out a case to be tried before a Court of Session. No doubt this power has to be judicially exercised and with great care. Otherwise an unfettered exercise of this power would enable the enquiring Magistrates to scotch every case enquired into by them at its very inception. The golden mean between these two positions has to be accepted But the difficulty is to draw the line It is always a question of fact whether, in a particular case, the Magistrate has exercised his discretion properly and whether all that he has done is attempting to find out whether there is a case in which, judged by ordinary standards, a conviction is probable on the evidence recorded.— 24 T. L. J., *183*

15. In a case triable by a Court of Sessions it is not for the Magistrate to decline to order a commitment unless there is no evidence to prove the charge or the evidence is such that no reasonable person and no tribunal would ever on such evidence find the accused guilty It would be well if the subordinate Courts in such cases are guided by the Rules formulated in 18 T. L. J., 1104 24 T. L. J., *578*

REGULATION I OF 1068
(*Revenue Recovery*)

Section 1 (*c*)

The definition of "land-holder" in Section 1 (*c*) of the Revenue Recovery Regulation would include not only the registered holder but also his "legal representative" This latter expression obviously cannot refer to heirs of the registered holder only Transferees in whose name transfer of registry has not been effected must also be considered to be within the ambit of that definition —

20 T. L. J., *949*

Section 34

The Rules published on the 5th October 1924 under the Revenue Recovery Regulation I of 1068 extending the powers of the Dewan Peishkars to confirm sales of lands for arrears of land revenue, includes also the power to set aside such sales.

A Division Assistant to whom a revenue sale was reported for confirmation can exercise a discretion under the proviso to Section 34 (4) of the Revenue Recovery Regulation so as to set aside the sale. It was not correct to say that the Dewan Peishkar alone could exercise such discretion— 22 T. L. J., *802*.

Section 39.

For recovery of arrears of rent due from a Vempattom tenant in respect of property belonging to a private Devaswom, the Sarkar which had taken the

Devaswom under its management, sold certain properties of the tenant under the provisions of the Revenue Recovery Regulation

Held—The sale did not convey title free from all encumbrances. Though under Section 39, a sale held under the provisions of the Regulation is declared to be a sale free from all encumbrances it did not follow that all sales held under it would be of that character In other words, property would be conveyed free from all encumbrances only in cases of sale held for realisation of arrears of revenue and not in the case of sales held under other circumstances.—

23 T L J., *1051*

Section 51

The suit was for a declaration that the plaintiff was the owner and possessor of the plaint schedule property which had been sold in revenue auction for arrears of tax due from a stranger in whose name its patta stood and for auxiliary reliefs. The suit was filed more than a year after the date of confirmation of the sale but within 6 years of plaintiff's knowledge of the sale. It was found as a fact that the property belonged to the plaintiff and not the registered holder and that no arrears were due or alleged to be due from the plaintiff and not the registered holder and that no arrears were due or alleged to be due from the plaintiff or the property in question. On the plea of limitation and non-maintainability of the suit set up by the Sirkar

Held—(1) Section 51 of the Revenue Recovery Regulation did not apply, as according to its wording it applied only to suits by parties feeling themselves aggrieved by any decision or order passed or proceeding taken or purporting to be taken under the Regulation for arrears due or alleged to be due from such parties and in the case no arrears were alleged to be due from the plaintiff or were due from the plaint land

(2) The rights of the plaintiff were not affected by the sale. For, the properties which the Sirkar could proceed against under Section 5 of the Regulation were only those of the registered holder but the mere fact that they were registered in his name was not conclusive.

(3) Article 9 of the Limitation Regulation was also no bar to the suit inasmuch as the plaintiff, though not perhaps entitled to have the sale set aside, may treat it as a cloud on his title and also as a threat by the defendants to enter on his property and may, therefore, have a right to sue within six years from his coming to know of the sale.— 22 T L J., *668*

Section 52

The plaintiffs, land-owners, were prevented, by action of Government, from cultivating their lands for a particular period but nevertheless were compelled to pay land tax for such period. The plaintiffs filed the suit against Government for re-imbursement

Held.—Prima facie, it is highly inequitable for the Government to realise the land revenue from any land after Government themselves have prevented the owners from cultivating the land. On principle too, the Government is not entitled to realise the revenue under the circumstances of the case.

Section 52 of the Regulation is no bar to the suit because the question involved is not as to the rate of land revenue or the amount of assessment, but only the right to levy an assessment for a particular period. The Civil Courts have jurisdiction to try questions of liability to the public revenue. It is also a well-established principle of interpretation of statutes that provisions that oust the jurisdiction of the Civil Courts should be very strictly construed. 26 T. L. J., *469*

Section 54

1. The term "movable property" in Section 54 of the Revenue Recovery Regulation comprises also "standing crops", and hence a harvesting of standing crops would fall within the scope of the Section. But to constitute an offence under the Section, the harvesting must have been done with knowledge of the distraint.

A Magistrate of the Second Class has jurisdiction to try an offence under Section 54 even though it is punishable with a more severe form of sentence by way of fine than what the Magistrate could inflict. Where the ends of justice required the imposition of such severer punishment, action could be taken under Section 260 of the Criminal Procedure Code.—
23 T L J, *868*

2. See also Regn. V of 1095, Sec 138 —
46 T L R., *396*
(=21 T L J., *122*)

REGULATION II OF 1068
(*Forest*)

Section 2 (c)

Sawn pieces of teak timber are clearly forest produce as defined in Section 2 (*c*) of the Regulation, especially Clause (*a*) read with the explanation appended to that Section as well as the definition of 'timber' contained in Sub-section (*e*) of that Section.— 46 T L R, *368*

Section 31

1 Under Section 31 of the Forest Regulation, the Royal trees will become in effect the property of the Government subject to certain rights in favour of the owner of the land on which they stand. Such owner under the Statute itself is entitled to certain advantages, not as owner of the trees, but as owner of the land He may disentitle himself by a special undertaking from making a claim for the value of the royal trees removed by Government from the property But in the absence of such undertaking there is nothing to prevent him from claiming the rights given to him by the Section.—
20 T L J, *1146*

2. Under Section 31 of the Forest Regulation, when *any* Royal tree is removed from land belonging to another the owner of the land at the date of the removal of the trees, shall be entitled to a payment at rates which the Government may from time to time determine.

According to the Rules framed by Government under Sections 31, 32, 33 and 60 of the Forest Regulation, when any Royal tree is removed on account of the Government, the owner of the land shall be entitled to one half of the net profit accruing from the disposal of the trees thereon. Therefore, till the trees are disposed of and the net profits are ascertained the owner of the land on which the trees stood cannot put forward any claim for his share in the net profits. The appropriate Article under the circumstances seems to be the residuary Article, *viz*, 109 of the present Limitation Regulation.

Per Joseph Thaliath, J—In a case like this there is some difficulty in determining the date from which the *cause of* action arises. The proprietor of the land can claim only a share of the net profits, in other words, he cannot claim anything before the tree or log, as the case may be, is disposed of by the Government There is no Rule which provides for intimating the result of the sale to the owner of the land or even for publishing such information in the Government Gazette. In the absence of such Rules the cause of action can be taken to arise only from the date the owner of the land comes to know of the sale. Otherwise there would be great hardship.— 21 T L J., *168*

3. The plaintiff brought the suit against the Sirkar for a declaration that he was

entitled to fell and remove certain Royal trees standing on his registered holding on payment of one-half of the tariff value to the Striker and to compel the Striker to grant him permission to do so.

Held (*By the Full Bench Chatfield, C. J., and Chaikin, J., Roman Tungs, J., dissenting*),—The plaintiff could not be given the declaration asked for. Under Section 31 of the Forest Regulations, the written permission of the Conservator of Forests or such other officer as may be authorised by him in writing is a condition precedent on which the right to cut down the trees is to come into existence.

It is an unfortunate consequence of this view that it would reduce the concession granted by Section 31 of the Regulations and the Rules under it to something shadowy and unsubstantial. Where, however, the words of a Section are clear and distinct, it is the duty of the Court to give effect to them leaving the consequences to be dealt with by the Legislature.

Per Chatfield, C. J.—Section 31 of the Forest Regulation does not impose any duty on the Conservator of Forests. It merely lays down as a condition precedent for the felling of a Royal tree standing on private property that the written permission of the Conservator of Forests should be obtained. It in fact indicates that the Conservator is the Officer who should represent Government in giving consent for the felling of the tree. If there is no written permission of this Officer or of another Officer authorised by him, then the tree could not be felled.

Per Chaikin, J.—Section 31 of the Forest Regulation makes it obligatory on the part of the owner of the land to get the previous written permission of the Conservator of Forests or such other Officer as may be authorised by him in writing before he is entitled to cut down the trees. Under the Forest Regulations, the Conservator of Forests has an absolutely unfettered discretion in the matter of granting or refusing a private landholder's request for cutting down Royal trees. This discretion of the Conservator is not subject to revision by the Civil Courts.

Per Roman Tungs, J.—The plaintiff must be allowed the declaration asked for.

Under Section 31 of the Forest Regulations, the owner of a registered land has the legal right to fell and remove for his private use Royal trees standing thereon on payment of one-half of the tariff value to the Striker. This right can be enjoyed by him only if the Conservator of Forests grants him permission on working and arranges the work of felling to be carried out under the supervision of a Forest Officer not below the rank of a forester. If the Conservator refuses, without reasonable grounds, to grant such permission, the Civil Court has the power to grant relief to the owner of the land (F. B.)— 40 T. L. R., 258

(—32 T. L. J., 2391).

SERVICE INAMS PROCLAMATION, 1865.

1. There is a distinction between grants burdened with services and those made as consideration of the consensual performance of services. In the former class of grants the consensus of the mind for the services will not enable the grantor to resume the grant, for as the mere performance of the services is only a portion of the consideration of the grant, and therefore in the absence of express words declaring that the services constitute the entire consideration, the grant does not become void merely for the reason that the services cease to be performed.— 39 T. L. J., 2700.

2. An "Amuthagaram" grant of land was cancelled by the Striker, grantee, against the provisions of the Service Inams Proclamation by reason of the alienation of

the land by the grantee and in a suit for declaration, the alienee questioned the forfeiture and resumption on the grounds among others(1) that the term "Anubhogm' connoted a personal Inam and therefore an *irrevocable grant*, and (2) that the non-specification of the services to be rendered by the grantee, in the Inam Patta, rendered the Service Inams Proclamation inapplicable But it was distinctly found on the evidence that the grant had been made for services to be rendered by the members of the grantee's family and that the nature of such services were proved by evidence rather than the Inam Patta

Held —(1) The employment of the word "Anubhogam" did not connote a Personal Inam exclusively On the other hand, *Anubhogam grants may be either for past* services (Personal Inam) or for services to be rendered (Service Inam). And as the land in question had been proved to have been granted for services to be rendered, the Sirkar was competent to take action by virtue of Section 2 of the Service Inams Proclamation, whereby all alienations of Service Inam lands were declared null and void, and the Sirkar was empowered to resume the lands so alienated

(2) The Revenue Settlement Proclamation did not require a specification of the services in the Inam Patta. All that was needed to attract the provisions of Section 2 of the Service Inams Proclamation was that there should have been alienation, contrary to past usage, of Service Inam lands, attached to specific services of any description. The nature of the services could be proved by evidence other than the Inam Patta

[There are two classes of Inams, *viz* Service Inams, lands granted for service to be rendered and Personal Inams, those given as personal grants These have particular incidents attached to them Service Inams were inalienable, but were left in the undisturbed possession of the holders so long the prescribed service was duly rendered In the event of non-performance of service, the lands were liable to resumption by Government. Personal Inams comprised lands granted for the support of individuals and families These two classes of Service Inams were dealt with in the Revenue Settlement Proclamation in which provision was made for their settlement Service Inams were left to be enjoyed without interference so long as the service continued to be fulfilled, but when from any cause the service had ceased or had ceased to be performed, the Inam was to be resumed and assessed with Pattom In regard to Personal Inams, the settlement was to be effected with the family of the original grantee or with the alienee, but there was to be no resumption In order to remove some misconception created in regard to Service Inams by this Proclamation, the Service Inams Proclamation had to be issued whereby all alienations of Service Inam lands were declared to be null and void and the Government was empowered to resume the lands so alienated and by Section 3, any civil suit against the Government in respect of anything done in pursuance of this provision was interdicted It is worthy of note that Clause 2 of this Proclamation is retroactive in its operation, since it contemplated the case of alienations both prior and subsequent to the date of the Proclamation]—

24 T L J, 568

REGULATION V OF 1071

(Jenmi and Kudiyan)

Sections 11 & 20

Revisions and readjustments of the terms of a Kanom deed, at the instance of an assignee of a portion of the Kanom holding are permisable under Sections 11 and 20 of the Regulation V of 1071, but only at the stage of renewals. If no such attempt is made, at such time, for separate renewals, it is not open to the

assignee subsequently to claim separate credit on account of the payments made by him The Jenmi is entitled to credit the payments towards the general account but having done so, the Jenmi cannot ask that the assignee should be made liable for a ratable portion of the rent personally For, apart from the question whether an assignee of a part of the holding can be personally liable for the ratable portion, the Jenmi is not then ready to recognise any privity of estate with the assignee, or release his claim under the privity of contract with the original tenant - 21 T L J, 880

Sections 14 & 25.

Enhancement of Michavaram by reducing the rate of interest is allowable if it is shown that the rate of enhancement is in excess of the rate usually allowed to other Kudivans holding on Kanapattom in the same Proverthi. The limits of such reduction are further subject to Section 25 which prohibits any enhancement appearing unfair or inequitable in the circumstances of the case. The rate of interest is a term in the contract of Kanapattom and as such is not liable to variation except to the extent allowed by the law The prevailing rate of interest on ordinary money transactions is not the guide afforded by the law The test is the rate usually allowed to Kanapattom tenants in the same Proverthi

21 T L J, 925

Section 44

1 Much importance could not be attached to the fact that other owners whose property have been acquired under the same notification as the complainants, had acquiesced in the awards made by the Land Acquisition Officer

On the question whether the rights of the Jenmi had been lost owing to no Michavaram being paid or renewal taken for fifty years prior to the Jenmi and Kudiyan Regulation

Held —The rights of the Jenmi were lost The Legislature intended Section 44 of the Jenmi and Kudiyan Regulation to provide merely a period of limitation There was an obvious confusion of thought as, if the property was held under an express stipulation for redemption, it would not come under the definition of Jenmom land given in Section 3 (1), *i e*, it would not be held subject to periodical renewals At any rate, if any right remains with the Jenmi after the coming into force of Section 44 it must be a right of a shadowy nature and it is difficult to give it any value (F B)— 21 T L J, 517

2 The suit was for the renewal of Kanom The defendants contended adverse possession on the strength of an assertion they made more than 12 years ago in a suit for patta that the plaintiffs had lost title on account of the non payment of rent by defendants for more than 50 years. The defendants did not deny the Kanom in the earlier suit

Held —It could not be affirmed as a general proposition of law that a person who was, in fact, in possession of land under a tenancy or occupancy title could by a mere assertion in a judicial proceeding and the lapse of 6 or 12 years without that assertion being successfully challenged obtain a title as a proprietor to the lands.

Mere non-payment of rent would not enable the tenant to plead adverse possession.

To satisfy the requirements of Section 44 of he Jenmi and Kudiyan Regulation it must be shown that the Kudiyan was in possession of the holding for more than 50 years preceding the date of the Regulation and that there was no payment of Michavaram or other dues during the said period — 48 T L R, 859 (=22 T L J, 1193).

3. Where a description of the plaint item No 1 as 'Matom Vaka' in a partition deed relating to the family properties of the defendant was relied on by the plaintiff s Matom to evidence a Kanom demise thereof in favour of the defendant s family, but there was neither renewal nor payment of Michavaram for 50 years prior to the enactment of the Jenmi and Kudiyan Regulation

Held —The reference to the disputed property as 'Matom Vaka' was merely descriptive and cannot be viewed as amounting to an acknowledgment of a subsisting liability Even otherwise, under Section 44 of the Regulation, the provisions of the Regulation were inapplicable to properties which had been held by the defendants without either renewal or payment of Michavaram —

49 T L. R., *109*
(=23 T L J, *188*)

Other Cases

1 The stipulation "I shall either grant renewal of the deed or redeem the property of the Kanom" gave an option of either renewing the Kanom or redeeming it—an option to be exercised by the land-lord and not the tenant If the land-lord chose to redeem, the Court had no right to refuse to grant his prayer —

20 T L J, *873*

2. Under the Royal Proclamation of 1042, Clause 1, the only condition prescribed for securing to the tenant permanent occupancy right is that he should hold lands of Jenmies for a *consideration* by whatever name the deed may be called And so long as the stipulated rent and the customary dues are paid he shall not be liable to action for ouster by the Jenmi — 20 T L J, *884*

Fol.—22 T L J., 883
Ref —24 T L J, 621

3. The Jenmi sued for 72 parahs of paddy being arrears of Michavaram at 6 parahs per year at Nirak rate The Sirkar contended that the plaintiff could claim only at 4 parahs per year (being the provision made in the patta) at the commutation rate fixed by the Sirkar

Held.—The Sirkar would be liable for the whole of 72 parahs and interest at the Nirak rate In this the 1st defendant (Kanom-holder) was only liable for 48 parahs (i *e*, at 4 parahs per year) and interest thereon at the commutation rates

There was no restriction that remedies against the holding must be exhausted before the 1st defendant (Kanom-holder) can be proceeded against —

21 T L J, *528*

4. Aravakasoms are not payable for the Pindam and Masam ceremonies of the wife of the senior male member of a Nambudiri Jenmi's family

Oppusuchi and Olappanam cannot both be awardod in the absence of a special custom, but one of them may, it being an ordinary incident to a renewal, being the cost of preparing and attesting the Kanom deed.— 21 T L J, *574*

5 Under Section 17 of the Jenmi and Kudiyan Regulation, interest on arrears of Michavaram payable in kind can be claimed at 18 per cent, and the same rate of interest may be justly adopted in respect of arrears of Thirippuvaram also -

21 T L J, *598*

6. In the case of Jenmom lands it has been held in several cases that when the Jenmom rights pass into the hands of non-Brahmin owners the latter are not entitled to Aradiyanthiram fees.

It is immaterial whether the documents which fix the payment of Adiyanthiram fees is a Kanom lease or otherwise. These payments would be compulsory and could be enforced by any transferee of the Jenmi s rights if a fixed sum is payable on account of Adiyanthiram fees—*Vide* 16 T L J, 354.

As has been held by a Full Bench of the Court in 1 T. L. J., 3, the usual rule

is that the tenant's share of the value of the improvements is three-fourths. This rule has not been varied till now If a different custom prevails in any particular locality it will have to be established by evidence, to be recognised and enforced by Courts of law — 22 T L J, 824

7 In a suit for redemption by a Royal Proclamation Jenmi, of a property outstanding on a lease for improvements (Ozhavupattom) of 1053, the defendant raised the question of the irredeemability of the tenure, but there was a distinct provision in the lease deed that the property was to be enjoyed for 12 years from its date and the deed itself was not granted after the Royal Proclamation of 1042, but was only in renewal of an earlier lease and there was also no provision in it for *Adukkuvathu* nor was the rent fixed small in comparison with the extent of the property

Held—It cannot be said that the transaction evidenced by the lease deed in question amounted to an irredeemable tenure By a series of decisions of the High Court, it has been consistently held that the chief characteristic of an irredeemable Kanom was the payment of Adukkuvathu and nothing had happened in the meanwhile to depart from this rule. Another test of a Kanom laid down by this Court in some cases was that the smallness of the rent generally indicates a Kanom tenure.— 22 T L J, 863

Ref—24 T L J, 621

8. The suit properties were demised on Otti by the plaintiff-Devaswom in 1056 to the predecessor-in-interest of the defendants. No right of redemption or revocation was expressly reserved in the document nor were renewal fees stipulated for therein. An attempt by the defendants to prove payment of renewal fees proved unsuccessful On the question whether the document evidenced an irredeemable Kanom by virtue of Clause (8) of the Royal Proclamation of 1042

Held—Clause (8) of the Proclamation had no reference to lands other than Jenmom lands held on payment of renewal fees and customary dues to the Jenmi; and, therefore, the document represented a redeemable mortgage, and not an irredeemable Kanom

No doubt if the matter were not so concluded, there might be much to be said for the argument put forward on behalf of the special appellant, that the restricted interpretation placed on Clause (8) of the Proclamation practically renders it nugatory It would only apply to cases where the tenants had already acquired a right of permanent occupancy under the previous transactions. Clause (8), therefore, would only be a means by which tenants might surrender the rights which they already possessed by accepting a document providing for redemption and not the means for giving tenants rights which they would not otherwise possess.— 23 T L J, 499

9 Thiruppuvaram and Jenmibhogam cannot be treated alike. Hence, the principle laid down by the High Court in the matter of commutation of Thiruppuvaram cannot be extended to Jenmibhogam also — 23 T L J, 719

10. The suit was for redemption of property demised under a document, "Panayam", and executed in 1073 after the Jenmi and Kudiyan Regulation had come into operation. The document contained a provision for renewal at the end of 12 years on payment of Avakasam, &c., or for surrender if that course was not agreeable, on receipt of the Panayam amount, but there was no proof that at any time since its execution there was a payment of Adukkuvathu. The property was previously outstanding on an usufructuary mortgage, to redeem which provision was made in the document and the property had accordingly been recovered by the defendants. It was also in evidence that in relation to the extent

of property covered by the document, the Michavaram reserved was very high On the question of construction whether the document evidenced an irredeemable Kanom or otherwise

Held—The document did not amount to and was not intended to be a Kanapattom demise, but was only a terminable lease

Whether the terms of any particular document have the effect of creating an irredeemable demise is purely a question of interpretation. But though the Court has a large discretion in the matter of construction of deeds, it is not absolutely unfettered inasmuch as the Court is not at liberty to ignore the meaning which long currents of decisions have attached to particular expressions.—

23 T L J, *940*

11 The question is whether Exhibit A represents a redeemable or an irredeemable alienation of the properties comprised therein Exhibit A styled a Kanapattom, makes provision for renewal on expiry of 12 years on payment of Adukkuvathu and for continuance of the possession with the mortgagee for ever

Held.—The instrument effectuates a permanent alienation subject to periodical renewals on payment of Adukkuvathu The rule of equity relating to clog has been declared to be unfit for adoption in this State. Also it cannot be maintained that it is not permitted by law to create an interest in property providing for periodical renewals coupled with irredeemability The Jenmi and Kudiyan Regulation merely makes provision in respect of Kanapattom documents and does not interfere with the rights of individuals relating to their dealings with properties which they had irrespective of that Regulation Subject to certain limitations, the owners are competent to enter into contracts as they like regarding their properties, which, in the absence of invalidating circumstances such as fraud, undue influence and the like, must be recognised by Courts, and if an outright alienation could be allowed, there is nothing in principle so as to prevent a person from executing a lease or mortgage with the provision for renewal every 12 years on certain terms and for the tenure to continue for ever

A creditor is entitled to appropriate payments in liquidation of barred debts in the absence of any direction by the debtor regarding their application The law gives considerable latitude to the creditor in making appropriations He has the right of election up to the very last moment He may exercise the right of appropriation at any time before verdict or judgment whilst the position of the debtor remains unaltered —

24 T L J, *249*

12. The Kanom tenant of the plaint property mortgaged his rights to the predecessor in interest of the 2nd defendant The Jenmi obtained a decree against the Kanom tenant and his mortgagee for arrears of Michavaram due and in execution purchased in Court auction the rights of the Kanom tenant on 2-11 1089, but did not get actual delivery of the property, which continued to be in the possession of the mortgagee. The plaintiffs having got a sale of the rights of the Kanom tenant on 3-11-1103, has brought the suit to redeem the mortgage

Held —The suit has to be dismissed as the 2nd defendant had acquired a prescriptive title to the property by adverse possession for the statutory period both as against the plaintiff and the Jenmi

There is no substance in the contention of the plaintiff that the mortgagee having come in under the Kanomdar was estopped from denying his mortgagor's title Although as a general rule a mortgagee was estopped from denying the title of his mortgagor, the law did not say that under no circumstances could the mortgagee set up an adverse title as against the mortgagor The rule which prevented a mortgagee from disputing the title of the

mortgagor did not preclude him from showing that the title of the mortgagor had determined

The Kanomdar having lost his rights by the auction sale and the 2nd defendant having continued in possession it is quite open to him (2nd defendant) to contend that the Kanomdar's title had determined The Jenmi having obtained the sale sannad and not getting actual possession of the property, the 2nd defendant's possession at least from the date of the sale sannad must be held to have been adverse to the Jenmi The Jenmi had a right to get possession After the sale in execution of the decree to which the Jenmi, the Kanomdar and the 2nd defendant were all parties, it cannot be presumed that the mortgagee continued to be in possession under the Jenmi There is no evidence that the 2nd defendant attorned to the Jenmi The 2nd defendant's possession must therefore be held to have been adverse to the Jenmi and his possession having continued for more than 12 years from the date of the auction sale, he has acquired an indefeasible title to the property by prescription both as against the plaintiff and the Jenmi —

24 T. L. J, *411*

12. See also Regn. VI of 1100, Sec. 20—
24 T L J, *681*

„ Art 104.— 22 T L J *653*

„ Regn. VIII of 1100, Sec 10—
47 T L R., *982*
(=21 T L J, *871*)

REGULATION II OF 1072.

(General Clauses)

Section 2

See Regn , II of 1067, Sec. 10—
47 T L R, *931*
(= 21 T. L. J., *559*).

Section 7

See Regn VI of 1100, Sec 29—
20 T L J, *1298*

VIII of 1100, Or XXI, R. 90—
21 T L J, *1369*

Section 10

See Regn., VIII of 1100, Or XXI, R. 1—
20 T L J, *15*

REGULATION IV OF 1073

(Abkari)

Where an Abkari contractor, subsequent to the issue of the licence by the Excise Authorities, entered into a partnership with a stranger regarding the conduct of the trade but the terms of the licence prohibited a sale or other transference of the subject-matter of the licence except under certain conditions

Held —Even assuming that there was no sale of the subject matter of the contract, it is impossible in the circumstances of the case to hold that there was not at least a transfer of part of the subject matter of the contract or the privilege conferred by the licence "If one person carrying on a trade and possessing stock and capital admits another into partnership with himself making the stock and the capital the joint property of both, it is impossible to contend that there is no transfer in such a case" The contract of partnership is therefore illegal and unenforceable.—
21 T L. J, *768*

Dist.—23 T L J, 490

REGULATION I OF 1074

(The Penal Code)

Section 15

The plaintiff advanced moneys to the defendant under the suit promissory note,

with the object of bringing about the resignation of the defendant from her appointment as a menial servant attached to the Palace and procuring the appointment for another

Held—The contract was unlawful as against public policy and could not be *enforced* The definition of the expression "Public servant" in the Penal Code is wide enough to include the menial servants attached to the Palace within it. Even otherwise, the appointment of such servants is a matter in which the public could not be said to have no interest at all The salutary lines on which such appointments are made should not be defeated by trickeries and corrupt practices. At any rate a Court of Law could not encourage any nefarious dealing in relation to such appointments. It is enough that the public have an interest in the appointment concerned, in order to render the agreement obnoxious to public policy— 49 T L R, 27

(–23 T L J., *13*)

Section 28

1 In a case of joint trial of several accused, who are indicted for different acts, the evidence as against each accused should be discussed separately The disposal of the evidence generally is not proper

Normally every person can be held liable criminally for the acts committed by him A vicarious liability is, however, provided for under Sections 28, 104 and 141, under certain conditions. Sections 28 and 141 deal with cases of joint action

The provisions of Section 28 are stricter than those of Section 141 The former merely lay down a rule of law, they do not deal with a distinct offence A criminal act is done within the meaning of Section 28 when there is more than one person who has contributed to the result. Such criminal act would also include a series of acts, what has to be considered in such cases is whether there has been a unity of criminal behaviour which results in something for which an individual would be punishable if it were all done by himself alone, that is, in a criminal offence, and where the various acts were done in furtherance of a common intention, each of the persons responsible for such acts will be guilty of the resultant offence, even if his particular act would not by itself be an offence, or would only amount to a minor offence Of course, a distinct act of the accused will have to be found to make Section 28 applicable It is, however, essential that a common intention in furtherance of which the act is committed is made out The best evidence hereof would be with respect to the existence of a conspiracy In the absence of the same we will have to look at what actually took place and consider what must have been in the minds of the parties as the natural consequence of their conduct

Section 141 deals with a specific offence and prescribes a punishment therefor The use of expression (common) 'object' in this Section is noteworthy, for there is a difference between object and intention for though the object of the joint participators in a crime may be common, their intention may differ being similar only in respect of their being unlawful Both this and Section 28 may perhaps overlap in some cases. But greater stress is laid in this Section upon the presence of the person on whom the vicarious liability is sought to be imposed while the same is not imperative under Section 28

Section 104 deals with cases where there has been an abetment, the offence abetted having been actually committed and the abettor himself is present at the time of such commission Under certain circumstances, the crime of abetment becomes the very crime abetted The Section is evidentiary and not punitory Because participation *de facto* may sometimes be

obscure in detail, it is established by the presumption *jure et de jure* that actual presence plus prior abetment can mean nothing else but participation. This Section also lays special stress on the presence of the accused for making the same applicable

Quaere—Whether when Section 28 is applicable a conviction under Section 303, Part II, T P C is permissible—

20 T. L J, *1302*

2. In the absence of a definite finding that five or more persons were actuated by a common object there cannot be a conviction for an offence involving an unlawful assembly For a charge under Section 140, there should be the minimum number of persons without which there cannot be an unlawful assembly

The fact that prompt or better treatment might have saved an injured person cannot exonerate his assailant from the consequences of his own act

Section 28 of the Penal Code deals with the doing of separate acts similar or diverse by several persons, if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself The gist is the common intention.

To attract the operation of Section 28, and to fix constructive guilt on each of the several accuseds, there must be participation in action with a common intention although the different accuseds might have taken different parts and before any of them can be convicted of an offence read with Section 28, the Court must arrive at a finding as to which of the accuseds took what part if any, in furtherance of the common intention. A conviction without such finding is illegal.

Intention may also be gathered from the nature of the injuries. It is impossible to prove by direct evidence the intention of a particular individual. The intention can only be inferred from the reasonable and probable result of his act or conduct. The meaning of the term intention is not to be confused with desire

On there being reliable evidence only about sticks, one or two sword canes and knives which equipment did not necessarily raise a presumption of intention or preparation to commit murder, but was quite as much consistent with an intention to cause grievous hurt or hurt, and the injuries all put together, though serious, were not said to be likely to cause death

Held—It was safe to rate the injury intended as grievous hurt and not anything higher

The consummation of the offence, murder, when prevented by something unforeseen amounts to the offence (attempt to murder) — 42 T L R, *845*
(=22 T. L. J, *917*).

3. Accuseds 1 to 5 assaulted one A and caused his death The Sessions Court not finding that when they assaulted A, had any common object in view so as to constitute their assembly an unlawful assembly

Held.—Each of the accused-appellants could be convicted only of the offence or offences that he is individually guilty. Section 28 could be applied only if a common object was proved.

Per Chakko J—It is not always necessary that there should be a common object prior to the commencement of the fight Some Judges fail to recognise the fact that the existence of a common object before the commencement of the fight is not necessary and that it is enough if it is adopted by all the accused.— 24 T L. J., *493*.

Section 60.

See Regn. V of 1067, Sec 20.—
46 T L. R., *105*
(=20 T L. J., *385*).

Section 64

1 For the purpose of punishment under Section 64 of the Penal Code, proof of previous conviction may, under Section 347 of the Criminal Procedure Code, consist of the admission of the accused and nothing else.— 21 T L J, *1884*

2. The Second Class Magistrate convicted the accused of theft and sentenced him to rigorous imprisonment for one month and fifteen days. The accused, however, was an old offender liable to enhanced punishment under Section 64 of the Penal Code. But the Police neither pressed the charge nor adduced evidence with regard to previous convictions, and no conviction was therefore entered under Section 64.

The Police, not being satisfied with the conviction under Section 378 of the Code alone, the Commissioner of Police addressed the High Court direct through the Registrar regarding the inadequacy of the conviction

Held—The purity of the administration of justice in any country depends upon the integrity and independence of its judicial tribunals and it would be a most disastrous thing if the notion gains currency that the Police are directly or indirectly allowed to control the actions of the subordinate Magistracy and thereby tamper with the even course of justice.

The procedure adopted by the Police Commissioner in addressing the letter direct to the High Court (Registrar) was not quite in proper form. If the Police really thought that the order of the Magistrate was wrong and called for interference by the High Court, there were legal and constitutional methods open to them which they could have pursued. To be more explicit, the Police could have moved the Head Sirkar Vakil to take the necessary and proper steps to get the order of the Magistrate rectified or revised It is desirable that the Police should be disabused of the notion that they can sit in judgment over the pronouncements of judicial tribunals or control the actions of the subordinate Magistracy— 30 T L R., *85* (—24 T L J, *630*)

Sections 65 & 68

It is not every order given by a superior (Police) officer which protects the subordinate who obeys it The order must appear on the face of it to be a legal order

Before a Court could allow a person accused of an offence, to claim the advantage of any exception to the liability created by the Travancore Penal Code or any other Statute, it should refer to the particular exception under which, it considers the person's conduct could be excused whether it be Section 65 or 68 of the Travancore Penal Code or Section 67 of the Police Regulation, and show exactly how such Section applies to the facts of the case— 20 T L J, *649*

Section 73.

It is not every form of insanity that would form sufficient excuse. Section 73 enacts the rule laid down by the Judges in Monaughten's case. Every man is presumed to be sane and to possess sufficient degree of reason to be responsible for his crimes, until the *contrary be proved* to their satisfaction, that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that he was doing what was wrong

To ascertain the answer to these questions it is necessary to enquire into the following—

1. The family history of the accused.

2 His personal history at the time of and previous to the offence, and

3 The surroundings of the offence itself

One of the legal tests of insanity is to see whether, in the circumstances of the case, the person accused would have committed the offence if a Police-man had been at his elbow

Section 105 of the Evidence Act places the onus of proof on the accused to make out the facts which would bring him within the exception Probably no inference in favour of insanity would *per se* arise from the existence of the same in the ancestors of the accused But when testimony indicative of the insanity of the accused is given, such evidence would be admitted in corroboration of that testimony

Normally, the mere absence of a motive is insufficient to exculpate a crime but when insanity is alleged or suspected, want of motive is regarded as one of the *indicia* of the act being done by some kind of insane impulse

The rule that when the facts are clear, absence of proof of motive is immaterial and that motive cannot be considered a *sine qua non* for bringing the offence home to the accused, is inapplicable in such cases. The inference will all the more hold good where several innocent persons had been attacked by the accused unprovoked without any motive. And a series of attacks would justify an inference that at the time of the commission of the offence the accused was incapable of understanding the general nature of the act he was committing—

46 T L. R, *885*
(=21 T L J, *893*)

Sections 74 & 75

Even though Sections 74 and 75 of the Penal Code do not permit a culprit to plead voluntary intoxication in justification of an offence, drunkenness is not an irrelevant consideration when the question of intention comes in

When an offence requires that an act shall be done with a particular intention, voluntary drunkenness is an excuse, though it is no excuse where the degree of mentality necessary for the completion of an offence is limited by 'knowledge' as distinguished from an 'intention'—

49 T L. R., *445*
(=23 T L J, *941*).

Section 86.

1 As the right of private defence arises from necessity the onus of proving it rests heavily on the person who pleads such necessity in the extenuation of his offence,

When a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with men who on the other hand are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self defence arises. Neither side is trying to protect itself but each side is trying to get the better of the other— 21 T L J, *340*

Ref—23 T L J 1082

2. The practice of weighing the right of private defence in golden scales and imposing restrictions on that right further than the requirements of the law has to be discouraged An apprehension of grievous hurt is, no doubt, disproportionate to the infliction of death Yet the law allows it. It is not for the Court to discount the right of private defence on a delicate balancing of the reciprocal injuries.— 23 T L. J., *111*

Ref —24 T L. J, 221

3. In an occurrence where both the parties go prepared, realising the consequences that would ensue, the question of private defence does not arise.— 23 T L. J, *1052*

4. The exercise of the right of private defence is not an offence in return. A man

cannot be expected to judge very nicely as to what he should do when he is being assaulted. Under threatening circumstances, a person is justified even in shooting another to death There is, of course, an oft-quoted maxim that 'the right of private defence cannot be weighed in golden scales' What one has to consider under such circumstances is whether there was a reasonable apprehension in the accused that he would be seriously assaulted and not the actual continuing danger — 24 T L J, 221

Section 87.

Under *Section* 80, an act committed in the exercise of the right of self-defence does not give a right of self-defence to the person from whom the danger is anticipated

Where, therefore, the accused was pursuing P W 1 with a drawn knife and the deceased caught him with a view to preventing his attacking P W 1, and tried to overcome and disarm him and then the accused stabbed the deceased

Held—The deceased had every justification to interfere under Section 87 T P C, and this right continued so long as the accused was rendered harmless. No case for self-defence on the part of the accused could arise in the circumstances.—
20 T L J, 1262

Section 117.

A letter signed by the Chief Secretary to Government and addressed to the Commissioner of Police is sufficient authority of Government necessary under Section 174, Criminal Procedure Code, for launching a prosecution under Section 117 T P C The words "Our Government" occurring in Section 174 do not refer to Her Highness the Maha Rani Regent

The trial of a Criminal Case in a wrong Sessions Division, District or local area is not a ground for setting aside the finding, sentence or order of the Court unless it appears that the error occasioned a failure of justice.

It can be no excuse for one man to break the law that others have done so before with impunity nor can any special license be allowed to journalists above what is given to the ordinary citzen

Even if certain evidence had been adduced in the lower Court, which was not necessary or which was inadmissible, that will not justify the reversal of the decision of the lower Court

The intention to excite the feelings mentioned in Section 117, T P C, must be gathered primarily from the language used, in the article complained of, when read as a whole in a fair, free and liberal spirit In the first instance the words of the article which is the subject of the charge should be considered, and if the intention or lack of intention is perfectly clear from that article, there is no necessity for considering other articles But if the meaning of the article in question is ambiguous, it may no doubt be open to the prosecution and the defence to prove other articles published about the same time This comes under Section 14 of the Evidence Act Section 14 does not also differentiate between articles published before and after the article in question. Illustration (e) to Section 14 does not necessarily curtail the effect of the Section nor indeed can it be allowed to curtail the plain meaning of the Section And such articles need not be shown to have been written by the accused if it is made clear they were published by him

If from the plain words of the Section a particular meaning can be extracted, the illustrations cannot be allowed to curtail that meaning. Hence there is no reason on principle for rejecting the subsequent issues of the offending newspaper if it should be found necessary to examine them to ascertain the intention of the

publisher The subsequent issues would not be excluded from consideration on the ground that they have not been shown to be written by the accused The intention of the writer is deduced from the articles he writes but the intention of the publisher from those which he publishes

Speeches made in support of any Statute cannot be given any weight as authorities for construing the Section in the Statute

Section 117 consists of two parts (1) stating what constitutes sedition, *viz*, the main part of the Section and the first Explanation and (2) the other stating what does not constitute sedition, *viz*, Explanations 2 and 3 There is no inconsistency between the two parts and it is practically impossible for any person who by his words or writing has brought himself within the scope of the first part to obtain exemption under the second There is a distinction between disaffection which it is criminal for any one to excite and disapprobation which might be freely expressed if it could be done without exciting disaffection. 'Disaffection' is the contrary of affection, it means hatred, enmity, dislike, hostility, contempt and every form of ill will to the Government

In construing the documents a broad and liberal interpretation may be put on the language used Particular expressions of an offensive nature should not be dwelt upon but the thing should be construed as a whole in a manner most favourable to the writer If there are any ambiguities in the document, extraneous evidence may be admissible to clear them up and also in case where there are doubts otherwise as to the exact intention of the writer

If the tendency of the article was to create disaffection among the inhabitants in British India, it would seem that the article would fall within the Section although no question of intentional nature might be raised

An editor or joint-editor may be presumed to be responsible for the articles appearing in his paper, particularly the editorials, though he may rebut the presumption The nature of the evidence required to rebut it might differ in the case of the different parts of the paper On the question of punishment, it should in each case be commensurate with the offence A good deal must be left to the discretion of the trial Court A consideration to be borne in mind is the danger created by the action of the accused —

47 T L R, *373*
(=21 T.L. J, *691*)

Section 135

See Regn V of 1067, Sec. 212 —
46 T L R, *94*
(=20 T L J, *891*)

Section 139.

Where, of 16 persons charged by the Police for constituting an unlawful assembly and resorting to force, only 4 were found guilty of taking part in the occurrence and convicted under Sections 139 and 324, the rest having been discharged at close of the prosecution evidence because their complicity could not be believed

Held in revision —The conviction under Section 139 cannot be sustained The finding of guilt under Section 139 requires that the Court should be satisfied that five or more were present and that they came along with these accused or did various acts in furtherance of the common object. That matter cannot be left to be conjectured and the prosecution must prove definitely that those unknown or unidentified persons were actuated by the common object recited in the charge.—
21 T L J, 907.

Section 140

See Sec 28.—46 T L R., *945*
(=22 T L J., *917*).

Section 173

Refusal by the accused to sign a statement is clearly not an offence Nor is a refusal to sign a receipt for the summons indictable.—20 T L J, 196

Section 176 & 179

Under Section 135-A (2) of the Code of Criminal Procedure, a person authorised to inspect weights, measures or instruments for weighing, has no right of seizure unless on inspection, the articles are found to be 'false' The simple meaning of 'false' is untrue or unjust (the latter is the word employed in some English statutes on weights and measures) and the mere fact that the articles were unauthorised (for want of stamping or because the stamping had expired) is of itself no evidence that they were untrue or unjust The words of the Sub-section with reference to both time and place seem clearly to negative a right to remove the articles from the place of inspection for the purpose of demonstrating subsequently that they are false

Held—A resistance or obstruction caused to a Police Officer in his removal from the accused's shop of certain weights and measures which were not false but only unauthorised, did not constitute any offence under Section 176 or 179 of the Penal Code.— 24 T L J 97

Section 185

Where the accused was charged for giving false evidence in a judicial proceeding on the ground that as a defendant in a suit on a pro-note alleged to have been executed by him and another, he filed written statement denying the genuineness but the pro-note was found to be genuine and the suit decreed

Held—There was *prima facie* evidence upon which the accused might be convicted though it was open to the Committing Magistrate to come to a different conclusion on the evidence If the Magistrate thought it was a doubtful matter and two views were possible as to the genuineness of the pro-note, his duty was to commit the accused for trial to the Sessions Court

The fact that the written statement was not verified strictly according to Order VI, Rule 15 (2), Civil Procedure Code, respectively specifying the matters based on knowledge and information believed to be true, could not be urged as a defence to the prosecution, for in verifying the written statement as he had done, the accused must be taken to have verified that fact of his own knowledge —

22 T L J, 19

Section 224

According to Section 224, while intention has to be proved in the case of resistance or obstruction to lawful apprehension, no such intention is required to be proved in the case of escaping from lawful custody Even assuming that an intention has to be proved, a man who escapes from lawful custody must be presumed to intend the doing of it — 21 T L J, 1215

Section 229.

Materials and instruments for counterfeiting Sirkar coins were recovered, on information supplied by the fourth accused, from where they were hidden by the fourth accused in first accused's compound after the arrest of the first accused There was evidence in the case from which it might be safely presumed that in a general way the fourth accused was even more than a clerk or servant of the first accused

Held,—(1) The question whether the presence of the articles there and the recovery of them could affect prejudicially the first accused was a mixed question of law and fact. Under Section 27 of the Evidence Act, the discovery of the

articles and the statement that led up to such discovery will be evidence against the fourth accused, but according to the law in this State, the confessional statement made by the fourth accused which led up to the discovery was not relevant evidence against any but himself Still, in the special facts of the case, the first accused could not escape criminal responsibility on account of the proved custody of the criminating objects by the fourth accused Under Section 21 of the Penal Code, property in the possession of a person's clerk or servant on account of that person is deemed to be in that person's possession within the meaning of the Code. Living with the appellant in the same house it was incredible that the articles that were recovered on information given by the fourth accused, were kept in the premises of the appellant's house without his knowledge. As the purpose of such possession was obvious, the first accused was liable to be convicted under Section 232

(2) For a conviction under Section 229, it is seldom possible and never necessary to show that the accused had been caught in the act of counterfeiting The act would generally have to be inferred from such evidence as the possession of tools, dies, or metal necessary for the purpose, or from finding some coins finished and others unfinished or different coins in a different state of completion.

(3) It is the policy of the law to visit the offence of coining and allied offences with exemplary punishment. The safety of business demands that the coinage should be pure, and purity of coinage could be secured and maintained only by guarding by rigorous penalties. Counterfeiters are veritable pests of society and covert enemies to the State who deserve to be mercilessly exterminated —

39 T L. R., *198*
(=23 T L J, *338*).

Section 277.

To fix criminal liability under Section 277 or 304 something more is needed than a mere mistake of judgment. There should be some wilful default or violation of the Traffic Regulation. It must be possible to say that the person charged was acting wickedly —

46 T L R., *298*
(=21 T L J, *285*)

Section 299

Exception 4 to Section 299 is meant to apply to cases wherein, in whatsoever way the quarrel originated, the subsequent conduct of both the parties put them on an equal footing—

21 T L J, *817*

Section 301.

1 The Sessions Judge convicted the prisoner of murder, but refrained from imposing the extreme penalty of the law on him on the only ground that he was a boy of 18.

Held.—Youth alone is not an extenuating circumstance, although, if there are other extenuating circumstances in the case, the youth of the prisoner may also be thrown into the scales to determine the punishment. — 23 T L. J., *152.*

Ref —24 T L. J, 228.

2. The accused in the case was found to have deliberately thrown his wife, a young girl, into a well and then in order to cause her death, to have gone down the well and kept her under water by repeatedly kicking on the head till she was drowned The circumstances urged in mitigation of the offence, were the persistent refusal of the deceased, from even a week back to the crime, to leave the house of P. W. 1, where she had been left by the accused and accompany him to his home, and also the entertainment by the accused of jealous suspicions about the conduct of

his wife, particularly in regard to her relations with P. W 2 who happened to be in the house of P W 1 at the time of the last refusal and immediately before the incident It was probable that the accused attributed his wife's refusal to accompany him to the influence of P W 2

The Sessions Judge had convicted the accused of the offence of murder under Section 301, and sentenced him to rigorous imprisonment for life.

On appeal, by the accused, against the conviction and sentence and Revision by the Sirkar for enhancement of sentence *Held per curiam*—There was no question of grave and sudden provocation which could bring the case within any of the exceptions to Section 299, and the accused was guilty of the offence of murder under Section 301

On the question of sentence

Held, (*Per Chatfield C J, with whom Narayana Pillai, J agreed in reference*)—Though the circumstances proved in mitigation of the crime might justify the lesser sentence of imprisonment for life, if the appellant had killed his wife by one blow or possibly if he had contented himself with merely throwing her into the well, his conduct in descending and completing the work by kicking his wife on the head differentiated the case from ordinary cases of murder The sentence should therefore be enhanced to one of death.

Per Narayana Pillai, J—It will be dangerous to lay down as a general proposition that in cases of wife-murder, the offending husband is entitled to a more lenient treatment than a stranger offender If there is legitimate ground for provocation afforded by the assailed wife, that shall not be omitted to be taken into account But where the provocation is self-generated or where husbands give rein to their blind fury against wives, it does not seem how the element of provocation could be introduced to view the offence in a subdued light.

Per Venkata Rao J (contra)—The question whether the accused had just or reasonable grounds for suspicion regarding the conduct of his wife was not of much importance What was more important was that the conduct of the deceased might have given some provocation which, though entirely insufficient to mitigate the offence, might be regarded as sufficient to justify the infliction of the lesser punishment. The events in the case had occurred in such quick succession that they might be regarded as one transaction and even if there was an interval of time it could not be held that the subsequent act was premeditated In the circumstances, the extreme penalty need not be imposed on the prisoner in the case (F B)— **22 T L J, 189**

3. Where the accused was found to have deliberately intended to cause the death of the deceased by burning him alive by pouring petrol on the body and setting fire to it and death ensued as a result and the accused neither pleaded nor was it found that the act came within any of the exceptions to Section 299 of the Penal Code

Held—The accused was guilty of culpable homicide amounting to murder under Section 301— **22 T L. J, 798**

4 In a sudden quarrel, and apparently in the heat of the moment the accused appellant struck a fatal blow on the deceased There was also some suspicion as to the exact circumstances under which the blow was struck. There must have been a more violent passage of words between the parties than what exactly appeared from the prosecution evidence Any way, there could be no doubt that the whole thing rose out of a sudden quarrel quite unpremeditated and without malice aforethought It was also quite sufficient that the appellant only struck one blow

Held.—Under the circumstances of the case, it was not necessary to inflict the extreme penalty of the law Where fatal injuries are inflicted in a sudden quarrel without premeditation, the extreme penalty of the law, was not necessary, though the offender was guilty of murder The enormity of the offence, the particular circumstances of the case and other matters should be the guiding factors in determining the quantum of punishment under Section 301

In the case, the ends of justice would be adequately met by confirming the sentence of life imprisonment awarded by the Court below — 23 T L J, *117*,

8 If suppuration is the result of the injury, then certainly the injury was the direct and proximate cause of death, and the possibility that the suppuration could have been prevented by skilful treatment would not prevent the prisoner's act from being murder

The High Court should not enhance the sentence unless it is satisfied that the sentence of death was the only possible sentence which could have been passed by the Sessions Judge

Although the High Court in cases of conviction for murder where the Sessions Judge has passed only the lesser sentence, has power in revision to issue notice to the accused to show cause why sentence of death should not be imposed, as a rule it would be more desirable to leave it to the Government to apply in revision for an enhancement if so advised —

23 T L J., *1161*

8. Ordinarily in the case of retracted confessions, corroboration is looked for. But when ample corroboration in material particulars is forthcoming, the confession, though retracted, may be acted on Further, a confession, in itself reasonable and probable, must, if repeated more than once, have greater weight attached to it than a confession made once only and retracted after a short interval.

A plea that the accused was of unsound mind and was therefore not answerable for his acts, may be urged in his behalf even though not raised in the trial Court, if the records support it. A mere doubt as to the sanity is not sufficient When the facts of the case did not afford any material upon which to base the accused's plea of insanity, impulsive or otherwise, but showed that his cognitive faculties remained unimpaired and his motive was to kill the deceased and to commit suicide and this was deliberately planned and all but his self-immolation callously executed, the accused could not claim exemption under Section 73 T P C

Whatever be the *a priori* theory and the speculation of modern publicists as to the propriety of capital punishment, so long as the law remains as it is, the Courts are bound to apply it in fit cases without shrinking, though instances are not rare where misplaced considerations of humanity have been allowed to stand in the way of the award of death sentence

Where the accused had with deliberation killed three persons and attempted to kill three others when they were sleeping near him unsuspectingly and believing themselves to be under his protection, but no previous enmity was alleged or proved as against the six persons, and perhaps it was because the accused was brooding over his hard fate and his mind had lost its balance in consequence, that he was impelled to perpetrate the horrible deeds

Held.—This was one extenuating circumstance of which the benefit must go to the appellant

In the circumstances, the High Court refused to enhance the sentence of imprisonment for life awarded by the lower Court to one of capital sentence.—

23 T L J., *1860*

Ref.—24 T L J., 228.

7 It is only in very rare instances that the High Court would interfere with the order of the Sessions Judge sentencing

a man convicted of murder to transportation for life because the circumstances of the case appeared to him not to demand the sentence of death

The evidence being only circumstantial is not a reason for awarding the lesser sentence No doubt there are some old decisions of the Travancore as well as of the British Indian High Courts in which the evidence being circumstantial death sentence was not passed But these decisions have not been followed in later decisions and it is obvious that the position taken up in the old cases is not logical — 24 T L J, 85

8. *Per Venkita Rao and Sivasankara Pillai, JJ*—The punishment fixed under the law for murder ordinarily being the extreme penalty of the law, the Court is in each case bound to record its reasons for not imposing it

Per Venkita Rao, J—A person aged 20 is certainly not of such tender years that it can be asserted with any show of reason that his judgment might have been immature or otherwise defective, and that he could not have understood the enormity of his offence.

Per Sivasankara Pillai, J—When two Judges forming a Division Bench agree in convicting the accused of murder but disagree on the question of sentence and the case is heard by a third Judge, the latter is not competent to differ from the conclusion of the Division Bench on the question of conviction.

A Court ought not to be influenced by its own views on the academical question whether a sentence of death is at all a proper punishment in any case. We could not interpose our ideas as to the fitness of things and altered popular opinions and circumstances in interpreting statutes whose meaning is absolutely clear

"It is not absolutely necessary that the provocation should have immediately preceded the homicide in point of time, for a person may by repeated or continuous provocation inflame another to a state of mind when the provocation immediately preceding the act is only the last straw, the gravity of which should be measured not by what it amounted to, but rather by what it implied "

Provocation, though insufficient to reduce the offence to one of culpable homicide not amounting to murder, will nevertheless constitute one circumstance in extenuation Serious provocation, though not sudden, is held to be one of the grounds for not inflicting the death penalty It is impossible to lay down a hard and fast rule as to what would constitute serious provocation, but each case must be decided on its own facts. However, in determining the character of the provocation, certain fundamental facts going to the very roots of human nature and of criminal jurisprudence should not be lost sight of As Sir James Stephen remarks—"The moral character of homicide must be judged of principally by the extent to which the circumstances of the case show on the one hand brutal ferocity whether called into action suddenly or otherwise, or on the other, inability to control natural anger excited by serious cause — 24 T L J, 223

Section 326

1 Section 326 enjoins the infliction of a term of imprisonment and to make it a real penalty it must be for some reasonable period There can be no doubt that a sentence of imprisonment till the rising of the Court is legal but it is equally clear that such a sentence must be reserved for extraordinary cases where the circumstances call for special consideration.

It would be harsh ordinarily to impose in revision a fresh sentence of imprisonment long after the disposal of the case and after the sentence imposed had been suffered. But this consideration cannot

be of much weight in a case in which the sentence passed is so grossly inadequate and interference is clearly required in the ends of justice It is competent to the High Court in such case to impose an additional sentence of imprisonment on revision, even where the accused has served out the sentence of imprisonment inflicted on him by the lower Court —

47 T L R, *339*
(=21 T L J *785*)

2. Where the second accused was convicted for an offence under Section 326, for causing grievous hurt with a dangerous weapon and sentenced only to simple imprisonment till the rising of the Court and a fine, but there was nothing in the case to extenuate or mitigate the offence

Held (In Calendar Revision) —The sentence of imprisonment being obligatory under Section 326, the Magistrate had conformed to the requirements of law not in substance, but only nominally Punishment by imprisonment under the Penal Code means that the offender shall go to Jail and imprisonment till the rising of the Court was merely evading the Statute. A sentence of imprisonment for a term ought, therefore, to have been imposed on the second accused

21 T L J., *1857*

Section 332.

To apply the Section, it should be established that, when the hurt was caused, the public servant concerned was discharging his duty as such or that the hurt was caused with intent to prevent or deter him or any other public servant to discharge his duty as such, or that it was caused in consequence of anything done or attempted to be done by the public servant or another public servant in the lawful discharge of his duty

The acts done by a public servant in good faith under colour of his office are not enough for the application of Section 332 The action of the public servant should be shown to be lawful in itself —

23 T L J, *92*

Section 339

To constitute an offence under Section 339, it is essential that the obstruction caused is so complete and successful as to prevent the person obstructed from proceeding in any direction in which he has a right to proceed

20 T L J, *901*

Section 353.

Where the Accountant of a Pakuthy was deputed by the Taluk authorities to measure and determine the shares of some petitioners in a certain piece of land, it was held that the Accountant was not acting in the discharge of his duty as such public servant

The expression in Rule (6) of the Rules passed by Government under the Survey and Boundaries Regulation—"who shall themselves attend to work '—clearly shows that the Government did not wish to entrust the business to any officer subordinate in rank to a Revenue Supervisor, as the demarcation and delimitation of boundaries is a responsible piece of business not to be lightly left to the tender mercies of the underlings of the Revenue Department Rule 6 prohibits the delegation of measuring and demarcation of boundaries to any officer below the rank of Revenue Supervisor Public functions contemplated by Section 353 of the Penal Code means legal or legitimately authorised public functions and are not intended to cover any act that a public functionary might choose to take upon himself to perform — 46 T L R., *240*

(=23 T L J, *1822*).

App.,—23 T, L J, 92.

Section 363

1 It is no defence to a charge under the Section that the girl looked over 16 or told the accused that she was over 16 or the accused *bona fide* and reasonably believed her to be over 16 or had no means of ascertaining her age. He is bound at *his peril to find out* her age

The taking need not be by force, actual or constructive, physical or moral, and it is immaterial whether or not the girl consents, or whether the proposal that she should go away emanates from the accused or from the girl — **46 T L R**, *171*

2 The accused could not plead that he had no criminal knowledge or intention when he took the girl out of lawful guardianship as he believed in good faith that she was speaking the truth when she told him that she was eighteen The knowledge or belief of the accused is of no consequence and a person who takes a minor out of lawful guardianship when in fact such person is below sixteen in the belief that the minor was over that age acts at his peril "It is no defence to an indictment under this Section that the girl looked over sixteen or told the defendant that she was over sixteen, that he *bona fide* and reasonably believed her to be over sixteen, or had no means of ascertaining her age. He is bound at his peril to find out her age "

The plea that the proposal came from the girl herself and that he had acted throughout only under her directions and with a desire to carry out her wishes could not avail the accused "The taking need not be by force, actual or constructive, physical or moral, and it is immaterial whether or not the girl consents, or whether the proposal that she should go away emanates from the defendant or from the girl "— **20 T L J**, *370*

Section 366.

In a charge under Section 366, it is not necessary for the prosecution to establish that after the woman was compelled by force to leave the house, she was compelled by force to go to various places. The requisite intent or knowledge is a matter of inference from the proved facts and circumstances. The conduct of the accused would also throw light on that question The circumstances though incriminating to outward appearances may yet be properly capable of good and reasonable explanation In such cases it would be for the accused to explain away the incriminating circumstances and prove that he had no improper or sinister view

Generally speaking, it is unsafe to convict a person of rape on the testimony of the woman alone without substantial *corroboration*. But the proved facts and circumstances may be taken into account to corroborate the prosecutrix

Though *rape and* abduction are distinct offences and may be separately punished, when a girl is raped after abduction, the abduction is only an aggravating circumstance and no separate sentence need be inflicted Wrongful *confinement also need* not be separately taken into account in this case — **20 T L J**, *126*

Section 378

The accused, the conductor of a motor bus, wrested the umbrella of the complainant,a passenger in the bus,from the latter's hands with the intention of enforcing payment of the additional fare which the conductor demanded and the accused refused to pay

It was contended that the accused was not guilty of theft, as he had no dishonest intention in wresting the umbrella from the complainant's hands, since the accused's object was merely to enforce payment of the extra fare

Held—The accused was guilty of the the offence of theft. The argument confused intention with 'motive' 'Wrongful gain is not necessarily 'dishonest gain

for a person may acquire property by wrongful means without *intending* to be dishonest The Indian Legislature in enacting Section 378 of the Penal Code has deliberately departed from the English law under which *animus furandi* or an intention to appropriate permanently is the gist of the offence, temporary deprivation being no theft whether the taker takes the property under colour of right or as a creditor to put the screw on the debtor — 20 T L J *656*

Section 403

The very gist of the offence of trespass under Section 459 of the Penal Code is dispossession, and if the trespasser has never been ejected since the date of his conviction, a charge for trespass cannot be successfully maintained against him Under Section 138, Criminal Procedure Code, such possession for two months is sufficient to entitle the party in possession to be retained in such possession till evicted in due course of law That being so, it is difficult to see how the commission of acts consistent with such possession can be made ground for a criminal complaint against the party in possession.

But it did not follow from this that the accused could not be convicted of criminal misappropriation punishable under Section 403 as a person may be guilty of that offence even though he may be in wrongful possession of property belonging to another 23 T L J, *89*

Sections 403 & 425.

Agricultural produce was attached by an Amin who affixed a copy of the warrant of attachment to a stick and planted the same in the field where the crops in question were standing. He omitted to affix another copy of the same to the outer door of the house of the judgment-debtor or at some other conspicuous place thereof. The services of the next adjoining owners were not secured as Thadastars though some neighbours were present as Thadastars.

The judgment-debtor removed the crops. In a prosecution against him, the judgment-debtor contended that the omission to affix the copy of the warrant and to secure the services of the next adjoining owners as Thadastars rendered the attachment invalid He further contended that even if the attachment had been validly made, he still continued to be in possession of the growing crops and his removal of the crops would not therefore be indictable

Held —The omission to affix a copy of the warrant of attachment to the outer door of the house of the judgment-debtor and to secure the services of the next adjoining owners as Thadasters would amount only to an irregularity

Agricultural produce is intended by the Legislature to be treated as movable property for purposes of attachment The provisions of the Civil Procedure Code make it clear that such crops are required to be placed in *custodia legis*, interference wherewith being made permissible only with the permission of the Court. The right given to the judgment-debtor to collect the growing crops and store up the same, contained in Clause (2) of Rule 43 of Order XXI is made exercisable only with the sanction of the Court, such sanction being made a condition precedent to the exercise of the said right.

The right to claim the attached property as available for the decree-debt is a legal right and an infringement thereof would be clearly actionable. If such infringement has been made with the knowledge of the attachment and with a view to cause wrongful gain to himself or wrongful loss to the decree-holder, such action would be clearly indictable under Section 403 or 425, T P C.

46 T L R, *546*
(=20 T L J, *1181*).

Section 416

1 Where the accused falsely represented his name and address and so got the Police to accept him as a surety in a bail bond

Held—The conduct on the part of the accused satisfied the definition of cheating given in Section 416, inasmuch as the bail bond would be extremely difficult if not impossible to enforce and the Police Officer concerned might be suspected by Government of misconduct and would suffer in mind and reputation —

21 T L J, *325*

2. See also Regn V of 1067, Sec 210 —

24 T L J, *43*

Section 426.

1 Possession has nothing to do with the offence of mischief It is on that principle that a mortgagee cutting trees though planted by himself on the mortgaged property is deemed guilty of the offence of mischief

It is now well-settled that a decree obtained by or against the benamidar is as effective as if it were obtained by or against the real owner himself

Delivery of possession being generally preceded by notice to the judgment-debtor, an order of the Court directing delivery is effective to determine the possession of the parties to the suit —

20 T L J, *514*

Ref—22 T L J, 603

2. Mischief is not merely an offence against possession The owner of a property may not always be in actual possession, nevertheless the acts which constitute the offence might cause the owner wrongful loss or damage, and if the acts are done with the intention of causing such wrongful loss or damage, they will constitute the offence of mischief According to Explanation 1 to Section 426, it is not essential to the offence of mischief that the offender should intend even to cause loss or damage to the owner of the property injured or destroyed It is sufficient if he intends to cause wrongful loss or damage to any person by injuring any property whether it belongs to that person or not — 22 T L J, *603*

3 Though certain decisions of the High Court and of the Courts in British India have held that the word 'property' as used in Section 426 means some tangible property capable of being destroyed, it is somewhat doubtful whether the word is used in so restricted a sense

Where, at any rate, a change in tangible property is necessary for the destruction of an easement, and the accused in bringing about such change must have known that his act would be likely to cause loss or damage to the complainant to whom the easement right belongs, the loss so caused to the complainant would be wrongful loss within the meaning of Section 17, T P C, and all the necessary requirements of Section 426 would be satisfied

Held—The act of the accused in filling up an irrigation channel existing on his land, thus preventing the conducting of water to the complainant s land constituted an offence under Section 426 —(F B)—

49 T L R, *57*
(=23 T L J, [illegible])

Dist—23 T L J., 1170

Section 442.

A mere knowledge that the trespass is likely to cause insult or annoyance to the owner of the property does not amount to an intent to insult or annoy within the meaning of Section 442 But where the trespasser knows that his trespass is practically certain in the natural course of events to cause insult or annoyance to the owner of the property, it is open to the Court to infer an intention to insult or annoy It is a question of fact whether

this presumption of intent is displaced by proof of any independent object of the trespass — 23 T L J, 893

Section 449

1 The expression 'interest' occurring in Section 449 of the Penal Code has to be construed in its ordinary sense as being synonymous with 'concern' It need not necessarily be taken to refer to legal interest alone. The circumstance that the accused was conducting the suit on behalf of one of the parties would constitute him a person interested in the party within the meaning of the above Section —
20 T L J, 881

2. The landlord can prefer a complaint against a trespasser, as he is really one of the persons in virtual possession within the definition of trespass in the Penal Code.— 20 T L J., 845

Sections 469 and 473

All that Section 473 lays down is that the sentence that can be imposed for the offence of using a forged document as genuine is the same as the sentence that can be imposed for the offence of forgery They are separate offences and separate sentences may be passed on an accused person who has been convicted at the same trial of both.

The absence of a provision in the Code of Criminal Procedure enabling a Judge to pass concurrent sentences appears to be a *casus omissus* by the Legislature, as such a provision is obviously necessary under certain circumstances. As Section 20 of the Regulation stands, a direction that two sentences should run concurrently appears to be illegal Section 20 of the Regulation, however, does not render it obligatory on the Court to pass separate sentences as the Section only says that the Court may do so, although in the generality of cases it would be the more proper course to pass separate sentences for each of the offences of which an accused is found guilty at one and the same trial — 47 T L R, 81
(=21 T L J, 899)

Section 473

The presentation of a forged document before a Sub-Registrar for registration is sufficient evidence of its user as a genuine document for the purposes of Section 473
21 T L J, 1102

Section 480.

Where the accused was charged with having fraudulently omitted to make necessary entries in the Naivazhy accounts as regards certain tax collections and convicted therefor under Section 480, but it was found on the evidence that the accounts had been defaulted to be regularly kept from long before the date of the receipt of the amounts and also that the duty of writing the accounts lay with the accountant who happened to be at loggerheads with the accused

Held—The question of intention to defraud was one of fact and as there was no pretence that the accounts were regularly kept, the omission of the particular entry was not such as any body would have been taken in by it, and would not therefore give rise to an intention to defraud

Moreover for the accused to be charged for the omission of entry he must have had something to do with the accounts. The fact that he might have omitted to inform the accountant of the amount received, knowing that the accounts will be accordingly rendered incorrect, cannot amount to a wilful omission of an entry in the account books. The conviction of the accused under Section 480, was therefore not proper — 21 T L J, 899.

Section 497

Where a Roman Catholic Christian during the life-time of his wife or her husband and during the subsistence of the first marriage goes through a form of marriage with another Roman Catholic not according to Christian rites and ceremonies but according to the rites and ceremonies of the Hindu Religion

Held —He or she is not guilty of bigamy within the meaning of Section 497 Viewed from the stand-point of either the Hindu or Christian community, the union in question could not be regarded as anything better than a mere concubinage or adulterous union. The second marriage between the first and second accused was void not merely on account of the subsistence of the first marriage but on the ground of other reasons also. In fact there was no second marriage at all the parties having merely gone through a farce of a ceremony The going through this farce of a ceremony which cannot have any binding force either in the eyes of the Hindus or the Christians cannot make the accused guilty or constitute the offence of bigamy within the meaning of Section 497 (F B.).—

24 T L J 405

Section 500

One of the essential ingredients of the offence under Section 500 is sexual intercourse For making out the same with reference to the offence of rape, it has been laid down that penetration has to be clearly proved In determining whether this has been had or not, the stand point from which the evidence has to be examined with reference to the offence of adultery and rape cannot be considered to be the same, for in the case of rape, it is essential that the intercourse is had without the consent of the woman except where she is by virtue of incapacity, age or mental condition incapable to accord such consent A consent given as a result of misrepresentation or fraud may be ineffectual for the purpose In the case of adultery, however, the law presupposes the existence of consent As such, it cannot be said that a person cannot be convicted of this offence unless he is surprised *flagrante delicto* This is neither necessary nor possible, the more so in view of the fact that the offence is by its nature committed in secrecy, and the woman is not likely to make a disclosure disadvantageous to herself The question has consequently to be inferred from the surrounding circumstances, of co-habitation or the like "It is said that familiarity, even culpable familiarity does not constitute adultery, and that, even if the full credence be given to the witnesses, they do not establish conclusively the fact of sexual intercourse. It is contended that actual sexual intercourse must be proved, and cannot be presumed, and that penetration ought to be proved I have already said that this must be proved, but I know of no law in this country which requires any particular kind of proof of adultery, or which recognises any different degrees of proof in different cases. Differences in the proof required of the same fact in different cases very often arise out of the circumstances of the case You can hardly presume sexual intercourse in a charge of rape, because by the hypothesis, one of the parties is doing her best to prevent the act. The hypothesis in adultery is precisely the reverse, and the evidence differs accordingly I know of no authority for saying that the evidence of sexual intercourse must be stronger in a charge of adultery than in a suit for a divorce. The best proof available must always be produced, but in both cases evidence of opportunities sought for and obtained, and of familiarities which point strongly to an inference of guilt, are sufficient to establish the fact of sexual intercourse" (21 W R. 13),

Each case will have to be decided with special reference to the facts therein.

The fact that the accused was found in a room with a married woman would not be sufficient to convict him of this offence The circumstances must be such as to justify a legitimate inference that the necessary ingredients of the offence exist in the case— 20 T L J, 754

Section 502.

1. The point for consideration was as to the scope of privilege available to Vakils under Exception 9 to Section 502 in respect of defamatory questions addressed by them to witnesses, though under instructions

Held—The points to be considered are firstly whether the questions put to the witness were the result of private malice on the part of the person who gave the instructions, and secondly, whether the Vakil lent himself as an instrument to gratify that malice either consciously or by recklessness. That is to say, assuming the first question is answered in the affirmative and assuming that there is nothing to show that the Vakil voluntarily intended to assist the malicious objects of his client except the fact that he put the questions to the witness, were they such questions as a legal practitioner of ordinary intelligence and prudence could have thought to be proper questions to be asked in the circumstances of the particular case.

Of course it would be unwise to fetter the discretion of the members of the legal profession as to the question they could put or render them liable to prosecution except in the clearest cases. The Legislature might indeed have granted the natural privileges such as are enjoyed by legal practitioners in England but this has not been done. The question whether a statement has been made in good faith depends on the person who makes it and the occasion in which it is made.—

21 T L J, 554

2. Defamatory statements made by parties in the course of judicial proceedings are absolutely privileged and no suit for damages will therefore lie in respect of them

Quare Per Narayana Pillai, J—As it is, the Courts in Travancore have to administer the law in this respect according to justice, equity and good conscience. How far the indiscriminate application of the doctrine of absolute privilege will chime in with justice, equity and good conscience is a matter worthy of further consideration (F B),— 46 T L R., 119 (=20 T L J, 258)

Under Exception 9 to Section 502, it is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it or of any other person or for the public good The true mode of judging upon the question of interest is to put oneself as much as possible in the position of a defendant. It is not enough for the accused honestly to believe that he was discharging a duty There must be facts upon which the Court could hold that he had reason to possess that interest under which he shields his libel and he did so in good faith. It is the duty of the Judge to see whether it constitutes the privileged occasion.— 24 T. L. J, 646

Other Cases

Per Narayana Pillai, J—A charge of conspiracy may be established on the strength of the surrounding circumstances and the conduct of the accused "Direct evidence of conspiracy is hardly ever adduced but unlawful conspiracy is to be inferred from the conduct of the parties."

Where a free fight resolves into single combats, the acts of one of the combatants cannot be applied to his partisans in the

fight As a rule, the High Court does not interfere in revision with acquittals. But it does so when it is satisfied that there has been an error of law committed by the acquitting Court, or, where there has been a gross miscarriage of justice or in public interest.— 27 T L. R., *100*
(=21 T L J., *1340*)

Ref —50 T L. R., 1

REGULATION VI OF 1074
(Wills)

1 A Will executed by a Nair in favour of a male member (the second defendant in the case) and two female members of the Tarwad provided that the beneficiaries and their Santhanams should enjoy the properties after the testator's death

Held —The bequest was in favour of the second defendant and his Seshakars, *i. e.*, in favour of the second defendant's branch.— 22 T L. J., *585*

2. Though it has been held that the *onus probandi* lies on the party propounding a Will and he must satisfy the conscience of the Court that the instrument propounded is the last Will of a free and capable testator, in the case of a Will that is registered the burden is on those who impugn the capacity of the testator to make out their case The evidence as to the competency of a testator is not displaced by mere proof of his serious illness. In order to set it aside there must be clear evidence that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property —

22 T L J, *595*

REGULATION II OF 1075.
(Negotiable Instruments)

Section 4

Exhibit A, which styles itself as a Bill and which is referred to in the plaint as a Bill of Exchange, contained an unconditional undertaking to pay the amount mentioned thereunder to a certain person or his order after 89 days from the date thereof It was contended that it was a Bill of Exchange

Held.—In the light of the definitions of Bills of Exchange in Section 4 of the Negotiable Instruments Regulation, Exhibit A is only a promissory note and not a Bill of Exchange. In interpreting an instrument, what matters is not its designation but its provisions.—

21 T L J, *115*

Section 7

Where a person takes an endorsement of a promissory note after notice of demand to the maker had been made, he is not a holder in due course But he would be entitled to sue on the promissory note, as such an endorsee would be holder within the meaning of Section 7 and have the rights defined in Section 61 of the Regulation.—

20 T L J, *1050*

Section 8.

The plaint promissory note was executed by the 1st defendant in favour of the 2nd defendant who endorsed it over to plaintiff The 1st defendant contended *inter alia* that there was no consideration for the note and that the plaintiff was not a holder in due course The lower Courts while holding that the *note* was executed under coercion and that it was not supported by consideration gave the plaintiff a decree on the ground that there was consideration for the endorsement and that the plaintiff was a holder in due course.

Per Joseph Thaisath, J—To establish that he is a holder in due course, the plaintiff should show that for his endorsement there was consideration and that when he took the endorsement he did so

without sufficient cause to believe that any defect existed in the title of the endorser

From the provisions of Section 8 and 121 (*q*) of the Negotiable Instruments Regulation it is clear that, in the case, since it has been found that the plaint promissory note came into existence as a result of coercion practised upon the 1st defendant, the burden is on the plaintiff to show that he is a holder in due course

When negotiable instruments exchange hands, the persons who accept them are not expected to make a more elaborate enquiry as to the title of the transferors than to use reasonable precaution with due regard to the circumstances of the particular case. If, on the other hand, it is laid down that when an instrument is to be negotiated, there should be a more detailed investigation regarding the title of the person who negotiates it, the very object of the negotiable instruments will be defeated, also commercial transactions will be seriously impeded It cannot be denied that Section 121 casts the burden on the plaintiff to prove a certain fact. That fact is a negative fact and the plaintiff can easily shift his burden. Ultimately it would be for the person who impeaches the document to show by direct or circumstantial evidence that the holder of the instrument is not a *bona fide* holder

Ordinarily every person has the benefit of presumptions allowed by the Regulation. When the plaint promissory note was negotiated, the plaintiff was within his rights if he presumed that at that time the 2nd defendant was a holder in due course.

The payment of adequate consideration will, in itself, be an item of evidence in support of the *bona fides* of the transaction. Whether the holder is a holder in due course is always a question of fact.

Per Chakko. J—One of the essential things to be proved under Section 8 of the Negotiable Instruments Regulation is that the endorsee took the instrument without sufficient cause to believe that any defect existed in the title of the endorser

When it is proved that the promissory note in question was obtained from the maker by coercion practised on him, the onus both of proving that he paid value for the instrument and that the payment was *bona fide* was shifted on to the plaintiff In other words he had to prove not only payment of consideration but also, in the language of Section 8 of the Regulation, that he had not sufficient cause to believe that any defect existed in the title of his transferor What the nature of the enquiry should be or what particular degree of care is necessary in any given case would depend on the circumstances in each case

After remand, on the concurrent findings of the Courts below, it was held by the High Court that the plaintiff was a holder in due course and the second appeal preferred by the first defendant was dismissed — **48 T L R** *392*
(= **23 T L J**, *649*)

Section 27

(1) The Negotiable Instruments Regulation does not apply to promissory notes expressed to be payable only to a specified person and not to his order or to the order of a specified person or to the bearer thereof, but to promissory notes which are negotiable. The pro-note in the suit was not a negotiable instrument. Though the defendants did not limit their liability on the pro-note (there was no indication in the pro-note that the defendants did not contract out of personal liability), they were still not liable under Section 27 of the Negotiable Instruments Regulation, as the Section is applicable only to *negotiable* pro-notes.

(2) Nevertheless, the defendants were liable on general principles of contract,

inasmuch as their principal, though disclosed, could not be sued

Section 230, Contract Act, says that in the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal nor is personally bound by them and that such contracts shall be presumed to exist where the principal, though disclosed cannot be sued —

47 T L R, 94
(=21 T L J, 928)

Dist —22 T L J, 1017

Section 80.

A Small Cause suit was instituted for the recovery of the amount due under a promissory note executed to the plaintiff for passarom due to the Church The lower Court finding that no money consideration passed under the promissory note and that the plaintiff is not entitled to the amount, dismissed the suit as not maintainable

Held (In revision) —Whether it was for money actually paid or for passarom dues of the Church that the promissory note was executed, the note is fully supported by consideration.

Section 80 of the Negotiable Instruments Regulation says that the payment of the amount due on a promissory note, bill of exchange, or cheque must, in order to discharge the maker or acceptor, be made to the holder of the instrument The holder of the instrument is therefore the person properly entitled to sue on the note. A benamidar or trustee who takes a note in his own name is the person entitled in his own name to the possession thereof and not the *cestui que trust* or person for whom he holds the note. He is therefore the proper person to sue upon it.—

47 T L R, 97

Section 82.

Where a promissory note payable on demand did not specify any rate of interest, the question arose as to the date from which interest on the note was to be calculated, whether it was to be from the date of the execution of the note or from the date of demand :

Held —The promissory note matured and fell due within the meaning of Section 82 on the date of its execution and interest was chargeable from that date —

46 T L R, 41

Section 121.

1 The presumption contemplated in Section 121 (*g*) would arise only in the case of a holder as defined in Section 7 of the Regulation *In the case of* instruments not payable to bearer it cannot be said that the mere fact that the person claiming thereunder has the custody of the same would not constitute him a holder as defined in the above Section. The presumption contemplated in the above Section could not be construed as arising *in favour* of the custodian of a promissory note. There is no presumption in favour of the genuineness of an endorsement found on a promissory note. The burden of proving that the endorsement is genuine is upon the person claiming under the same

Even if such presumption arises, the same could be rebutted by circumstantial evidence

Events subsequent to the institution of the suit could be taken into consideration in granting appropriate relief.—

20 T L J, 970

2, See also Sec. 8 —

48 T L R, 392
(=23 T L J., 849),

Other Cases

1 In the case of a promissory note alleged to be executed by two persons

jointly, but found to have been executed only by one, the contract evidenced by it would be unenforceable against the executant only where the intention of the parties is clearly made out that the instrument should become operative only after both the parties described as the executants therein affixed their signature to it If however such an intention is not made out, the several liability arising out of a joint contract under Section 43, Indian Contract Act, has to be recognised, and the contract will be enforced as against the person proved to have executed it —

20 T L J, 50.

Ref —21 T L J, 1388
22 T L J, 1227

2 The compounding of a compoundable offence may be a lawful consideration for a promissory note — 21 T L J, 1247

3. The suit is on a promissory note said to have been jointly executed by defendants 1 and 2 The first defendant denied execution His plea was upheld by both the lower Courts. It was pressed in special appeal that the suit ought to have been decreed at least against the non-contesting party, viz, the second defendant

Held —The test in cases in which a contract purports to be made by two persons jointly with another but is really made only by one of the joint promisors, is one of intention. If the completion of the agreement depended upon the concurrrence of the joint promisors, one of them, even if he has signed the agreement, would be absolved from liability if the other has not become a party to it —

21 T L J, 1388

4. In a suit for recovery of principal and interest due on a promissory note, the defence was raised that there was no money consideration.

Held —Love and affection is sufficient consideration to support a document between near relations —

43 T L R., 365
(=22 T. L J., 997).

5. Where in a suit on a promissory note alleged to have been executed by defendants 1 to 3 in favour of a stranger and endorsed successively to the 4th defendant and the plaintiff, it was found that the promissory note was fraudulent and unsupported by consideration and that the subsequent endorsements were made with a view to create confirmatory evidence, but defendants 2 and 3 were *ex parte* and second defendant admitted execution,

Held —The suit was unsustainable even as against defendants 2 and 3, as the primary, if not the sole, object of the entire transaction clearly was to defraud the first defendant. The cause of action arose *ex turpi causa* and therefore the plaintiff did not deserve to be assisted Also the intention of the parties was that there should be joint execution by defendants 1 to 3 and as this was found against, the instrument could not be enforced even as against the persons who did in fact execute it — 22 T L J, 1227

6 The plaintiff sued on a promissory note executed by the first defendant in his favour for which the second defendant had given a letter of guarantee to the plaintiff The trial Court passed a decree in favour of the plaintiff as against both the defendants. The District Judge on appeal dismissed the suit as against the second defendant. The question for decision was whether the suit as against the second defendant was maintainable

Held —As a general rule and in the absence of any express or implied stipulation to the contrary, the creditor need not, before suing the surety, sue the principal debtor even though such principal debtor be quite solvent. If the intention of the parties was that the plaintiff should sue the principal debtor (first defendant) in the first instance before proceeding against the surety (second defendant), the intention could and should have been made clear by using appropriate language.

A creditor is not bound to exhaust his remedy against the principal before suing the surety and therefore a suit may be maintained against a surety even though the principal has not been sued The liability of the surety is co-extensive with that of the principal debtor under Section 128 of the Indian Contract Act.—
50 T L R 100

7 See also—
Regn VI of 1100, Art 105 —
48 T L R, 230
(=22 T L J, *689*)

REGULATION III OF 1075.
(Vakils)

Section 10

Per Chakko, J—Section 10 of the Vakils Regulation is a Section peculiar to our Vakils Regulation. There is no provision corresponding to Section 10 of our Regulation in the Legal Practitioners Act of British India As far as I am aware such a provision is not found in any of the Codes relating to legal practitioners in any other Native State. It is not quite clear what necessity there was for enacting a Section like Section 10 of the Vakils Regulation. If a Vakil deliberately absents himself from Court when his client's case is taken up or is otherwise negligent, the client has certain obvious remedies open to him which he may pursue, and it is quite certain that if a litigant is really aggrieved by the conduct of his Vakil, he will have recourse to the remedies provided by law. There is no reported case in which action has been taken under Section 10 of the Vakils Regulation which, so far as it goes, testifies to the good sense of the presiding Officers of our Courts. Whatever might have been its utility in the past, it appears that Section 10 of the Vakils Regulation has outlived its usefulness and the Section cannot be regarded as anything except an anachronism which ought not to be allowed any longer to disfigure the Statute Book —
21 T L J, 648.

Other Cases

1 An admission, erroneous in law, made by the Vakil, would not conclude the party

It is within the competence of a Vakil to make an abandonment of a pleading of fact — *20 T L J., 589*

2 It is clearly part of the Vakil's duty to file the Vakil's fee certificate and safeguard the interests of his client, and this certainly falls within the terms of his engagement, though there was no undertaking express or implied in the Vakalath to file a certificate.

The plaintiff's (Vakil's) claim for remuneration and the defendant's claim to recover damages by the plaintiff's omission to fulfil one of the implied terms of his engagement, namely, to file a Vakil's fee certificate in time, arose out of the same contract The two claims are as intimately connected with one another that it would be unjust and inequitable to drive the defendant to a separate suit An equitable set off was therefore allowed in respect of the two claims which arose under the same transaction —
48 T L R., 11
(*23 T L J., 86*)

3. See also Regn. II of 1100,
Other cases.— *24 T L J, 362*

REGULATION II OF 1077
(Guardian and Wards.)

Section 10

Though an application will not lie under the Guardian and Wards Regulation for the appointment of a guardian of the property of the minor, if he is a member

of a joint Hindu family it does not necessarily follow that the Court is powerless to make any order affecting the joint family property in the case of an application for the appointment of a guardian for the person of the minor A Court sitting to administer the law of Guardian and Wards has got every power to pass interim orders if need be, to carry out the declared object of the Regulation. If no order can be passed by the Court for the support of the minor affecting the portion of the property to which the minor may be legitimately entitled, one fails to see how the Court could award any relief to the minor at all pending final disposal of the petition

The allowance to be allowed to the minor should be in keeping with the social status and affluence of the family —

22 T L J, *1908*

Section 38

The respondent applied to the lower Court for an order calling upon the appellant to provide the funds necessary for celebrating the marriage of the female ward The lower Court after enquiry ordered the appellant to deposit in Court within ten days Rs 2300 out of the minor's estate in his hands, if necessary after hypothecating his properties. Against that order, the appeal was filed

A preliminary objection was raised that the order was not appealable

Held (Overruling the preliminary objection)—The order in question could be brought within the scope of Section 38 of the Guardian and Wards Regulation and such an order was declared to be appealable in clause (*i*) of Section 43 It might also be contended with force that the order, being in the alternative one granting permission to mortgage the minor's property, fell within Section 24 of the Regulation and was accordingly appealable under clause (*s*) of Section 43 —

21 T L J, *1905.*

Sections 43 & 44

1 The Civil Miscellaneous Appeal was against an order of the lower Court granting a review of an order passed under the Guardian and Wards Regulation. The respondent contended, (i) that no appeal lay against the order as no appeal is provided against it under Section 43 of the Regulation. (ii) the application for review before the lower Court was incompetent as the Regulation did not provide for a review,

Held,—(i) In granting the review, the District Court was not exercising any of the powers vested in it under the provisions of the Guardian and Wards Regulation as that Regulation does not provide for a review of any order passed by the Court under that Regulation. The Court in exercising its jurisdiction, under the Guardian and Wards Regulation acts as a Court of civil jurisdiction and, therefore, the Civil Procedure Code, as far as it can be made applicable, is applicable to proceedings under the Guardian and Wards Regulation —*Vide* Section 105, C. P C

(ii) There is no provision in the Guardian and Wards Regulation inconsistent with the Civil Procedure Code as regards the entertainment of a review Section 44 of the Guardian and Wards Regulation does not, by implication, prohibit the entertainment of a review The application for review before the Court below was therefore maintainable.—

21 T L J, *182.*

2. See also—

Regn. VI of 1100, Sec 12.—

24 T L J., *750*

Other Cases

1, Where a guardian *ad litem* is appointed, the appointment holds good for the whole *lis*, till the guardian dies, retires or is removed and the guardian so appointed is the only person who can represent the minor The guardian on

record is the only person competent to prefer an appeal on behalf of the minor

The plaintiff named the first defendant as guardian *ad litem*, of her son the second defendant minor, and the Court accepted her as such. As the guardian, however, did not defend the suit, a decree was passed *ex parte* in favour of the plaintiff The second defendant's brother-in-law subsequently applied to get himself appointed as the guardian of the second defendant and to set aside the decree against that defendant The application was in due course dismissed by the order under appeal On preliminary objection raised by the plaintiff-respondent as to the maintainability of the appeal

Held—So long as the order appointing the first defendant as guardian of the second defendant was in force no one else shall represent the minor in any proceeding relative to the same suit and the appeal was therefore unsustainable—

22 T L J, *598*

Ref—22 T L J, 358.

2 The questions for decision were—

(1) The quantum of maintenance to be awarded to a Hindu minor out of the income of joint family properties in proceedings under the Guardian and Wards Regulation, and (2) the propriety of the lower Court granting permission to the guardian to take a suit for partition of the family properties on behalf of the minor

(1) No doubt the income of the family to which the minor belongs is an element for consideration in fixing the rate of maintenance But the amount which the Court would allow or a guardian would safely expend depends upon the age, the rank, the fortune and the expectations of the minor It must be sufficient to give the minor maintenance and education suitable to the position which he would occupy on coming of age. There ought not however to be practically a division of the income,

(2) In the absence of any satisfactory materials in the case, the sanction for instituting a suit for partition should not have been granted For even assuming that it was competent to the Court to give sanction at all, the power should be exercised with proper care Besides, the question whether the suit is maintainable or not is one that should be left for decision by the Court trying it and it is inexpedient that the tribunal should be embarrassed by the expression of opinion implied in the sanction

43 T L R, *448*
(=23 T L J, *759*)

3 Suit on a hypothecation bond executed *bona fide* by a *de facto* guardian, in the interests of a Nayar minor

Held—There appear to be no good grounds for holding that a *de facto* guardian cannot in cases of necessity, raise money for the use or benefit of the minor on the security of his property This rule is applicable to all cases of proved necessity, unless it can be held to be repugnant to anything in the personal law by which the minor is governed, as for instance, in the case of Mohamedans—

43 T L R *183*
(=22 T L J, *94*)

4 See also—

Regn II of 1100, Other Cases.—
21 T L J, *474*

Regn. VIII of 1100, Or IX, Rule 13—
47 T L R, *155*
(=21 T L J, *808*)

REGULATION III OF 1079
(*Hindu Religious Endowments*)

Section 18.

The suit was by the Samudayam of a Devaswom on behalf of the Devaswom, for recovery of leased property with arrears of rent.

It was first held on special appeal, following the Full Bench ruling in 18 T L R., 129, that the Samudayam could not maintain the suit without consulting the Ooralers when such power had not been vested in him by the usage of the Devaswom and the judgment was reported in 8 T L J, 214

But on a review of the special appeal judgment, it was held that, under the express provision of Section 18 of the Regulation passed subsequent to the ruling in 18 T L R, 129, the Samudayam was competent to maintain the suit—

23 T L J, *126*

REGULATION IV OF 1080
(*Stamp*)

Section 38

1 The document, Exhibit A, on which the plaintiff relied runs as follows.—"I promise to pay you Rs. 500 being the amount due to you on account of your house sold by my father"

Held—Exhibit A comes clearly within the definition of a promissory note as defined in Section 3 of the Negotiable Instruments Regulation. There is nothing in the Regulation or in the Law Merchant preventing parties making a promissory note payable solely to one person and not also to his order or bearer

The appellant was precluded under Section 38 of the Stamp Regulation from taking the objection that the document has not been stamped

A document having once been admitted in evidence is not to be called in question at any stage of the same suit. Under Section 38 it matters nothing whatever whether a document was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objection.—

23 T L J, *1409*

2. The trial Court admitted in evidence an insufficiently stamped pro-note construing it as a bond Objections were taken in special appeal as to its admissibility

Held—The appeal was groundless as the lower Court's view was right The requirements of Section 38 are satisfied if the document has in fact been admitted. The grounds on which the document was admitted can have no significance whatever in view of the express wording of the Section, and there appears no justification for placing a restricted construction on the word used The erroneous admission of a document not duly stamped is an error, defect, or irregularity not affecting the merits of the case or the jurisdiction of the Court Once the document has been admitted, such admission even if it was by mistake or otherwise could not be called in question in subsequent proceedings in that Court or in superior Courts. It matters nothing whether a document was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objection. The proposition that Section 38 would be applicable even where there has been an erroneous admission of an insufficiently stamped document seems to be well established It matters little whether the document was admitted in the erroneous belief that it was an instrument of another description.—

50 T L R, *90*
(=23 T, L J, *889*),

REGULATION II OF 1084.
(*Civil Courts.*)

Section 16.

From the decree in a suit of the value over Rs. 1000, an appeal was filed in the District Court, and the appellate Court passed an order of remand under Order XL. Rule 23, of the C. P. C It was contended in appeal against the order of remand

that the appellate Court acted without jurisdiction and that its proceedings were mere nullities and had to be vacated

Held—Under Section 16 of the Civil Courts' Regulation II of 1084, appeals against orders passed by the trial Court in the case lay direct to the High Court, the District Court having no jurisdiction to entertain the same The omission on the part of the appellant to raise the question could not operate as a waiver to such cases, for jurisdiction could not be conferred on a tribunal by consent of parties or by their waiver If a Court had no jurisdiction over the subject-matter, such jurisdiction could not be conferred upon it by consent of parties, and any waiver on their part could not make up for the lack or defect of jurisdiction. Where no jurisdiction exists, no action on the part of the plaintiff, no inaction on the part of the defendant, could invest the Court with any of the elements of power or vitality so as to convert the proceedings before it into a proper judicial process.—

23 T L J, *601*

Section 18

1 On the question whether the members of the Sri Bandara community commonly follow the Marumakkathayam Rules of inheritance

Held—Sri Bandara Chetties are really Kalachetties and in point of succession and inheritance, the ordinary Rules of Hindu Law should be applied to them

The word 'Hindu' occurring in Section 18 of the Civil Courts Regulation has to be construed as ordinarily understood It would not be proper to give it a wider or more restricted meaning than what it conveyed in common parlance. Normally the Courts will have to apply the principles of Hindu Law, so long as the parties are Hindus understood in common parlance, and such principles will not be applicable only with respect to matters relating to which any custom having the force of law and governing the parties or properties concerned as contemplated in clause (*b*) of the above Section is made out either by admission contained in the pleadings of the parties or proved by the evidence on record Neither the admission in the pleadings nor the evidence on record warrants the upholding of any custom that the principles of Marumakkathayam Law have to be applied in cases of this kind —

47 T L R., *61*
(=20 T L J., *1170*).

2. See also Regn VIII of 1100, Sec. 31— 49 T L R, *153*
(=22 T L J, *1881*)

Section 19

Though under Section 19 of the Civil Courts Regulation, District Judges are prohibited only from trying an appeal from decrees or orders passed by themselves in any other capacity, it would not be proper to allow the hearing of appeals by presiding Officers who had disposed of the case, the case itself dealing with the same evidence in the original Court, even though the appeal to be heard is not against such decision. This has to be rigorously enforced, as it is imperative that the purity and integrity of the judiciary should be rigorously maintained and placed above cavil —

20 T L J, *103*.

SCHEDULE II (14)

The suit was for recovery of a cow entrusted to the defendant with a calf it gave birth to, after such entrustment

Held.—The suit was not one for specific performance of a contract and was not, therefore, excepted from the jurisdiction of a Small Cause Court by virtue of Clause 14 of Schedule II of the Civil Courts Regulation.

With respect to the remedy available by way of specific performance of contract, a distinction has to be kept in view between *executory contracts* or agreements not intended between the parties to be the final instrument regulating their mutual relations under the contract and *executed contracts* which are those in which everything has been done already to settle finally the relative position of the parties In the former case, a remedy by way of specific performance would be available, while in the latter the same is not had Actions for recovery of specific chattels could not be treated as partaking the character of an action for specific performance, if the right to delivery flowed from the contract itself, for it is based on an allegation that the contract has been performed, but the chattel is the property of the plaintiff and is being wrongfully detained by the defendant —

20 T L J., *204.*

SCHEDULE II (33-J)

The suit was for recovery of damages on account of loss of earnings from a sewing machine attached in execution of a decree

Held —The trial of the suit by the lower Court as a Small Cause Suit was irregular The decree under revision was therefore set aside.

The action was clearly one for damages by way of compensation, and the wrong directly attributed to the defendant was the attachment. The expression 'compensation' has to be construed as covering all claims for damages resulting from the attachment. The object of the provision in the Regulation in excluding suits of this kind from the jurisdiction of Small Cause Courts seems to be that the allegations regarding the improper or illegal invocation of the process of Court relating to attachment required a fuller and a more satisfactory investigation than a summary trial as has been provided for, for Small Cause Suits. — 46 T L R, *26*
(=20 T L J, *147*)

REGULATION I OF 1087,

(*Tobacco*)

1 The Petty Officer who arrested the accused and effected seizure of the article found in his possession made only an oral report to the Excise Inspector There was no report to the Magistrate On the question whether the conviction of the accused was liable to be set aside on account of the defect of procedure under Section 10 of the Tobacco Regulation I of 1087

Held —Section 10 directs the procedure to be adopted after an arrest and does not lay down any formality necessary to give jurisdiction to the Excise Officer to take action The failure to comply with Section 10 would be an irregularity of which the accused could only take advantage if he had been prejudiced.—

20 T. L. J., *831.*

2 The plaintiff, a Mel-labhom tobacco licensee, sued to recover the enhanced duty charged on his tobacco bonded at the Quilon Bankshall before the imposition of such enhanced duty by the publication of the Notification, dated 25th February 1926 in the Government Gazette. He questioned the legality of such enhancement The lower Court allowed the suit but the appeal by the Sirkar thereon was allowed by the majority of the Judges and it was held as follows —

By the Full Bench—The Government have the power of enhancing the duty on tobacco already bonded

Parameswaran Pillai and Chakko, J J., Chatfield, C, J dissenting—The Government intended by the Notification that the duty on tobacco was to be raised. The enhancement of the duty fell not only within the spirit of the Notification but also within its letter

The Government in readjusting the weights for the purpose of levying duty have only done indirectly what admittedly they were entitled directly to do

All Rules made by Government, whether made before or after the bonding of the tobacco, will apply also to bonded tobacco

Per Parameswaran Pillai, J—The weight and not the duty payable is ascertained at the time the tobacco is bonded. If the duty was ascertained at the time of the bonding there is no reason why the duty should not be entered in the weighment register or on the ticket attached to each bale. Rule 33, Clauses 7 and 8, provide for the time of levying the duty and that time is the removal of the tobacco from the bankshall

Per Chakko, J—The duty does not attach *ipso facto* to the goods or become payable on the mere ascertainment of the weight There is nothing in the Tobacco Regulation or the Rules framed under it, which in any way restricts or curtails the power of Government to say when the duty on a particular class of goods arises or may be levied Although the duty is an 'import' duty, it does not in all cases necessarily follow that the duty should attach itself the moment the goods are brought into the country In the absence of any binding rule or provision of law to the contrary, it is open to the Government to say that the duty on any particular class of goods shall attach or be payable only on a particular date or at a particular period of time or that for the purpose of levying or collecting duty the importation shall be deemed to be complete only, on a particular date or period even though the goods may have been already introduced into the soil of Travancore. There is no necessity in the case to determine the precise moment of importation but if it is, it may be held that in the case of bonded tobacco, the importation for the purpose of levying duty was complete only at the time of removing the tobacco from the warehouse or bankshall and in the case of tobacco directly removed by the merchant from the Customs House at the time of its removal from the Customs House

Per Chatfield, C J—The liability to duty attaches to tobacco on arrival in Travancore or in the alternative on passing through a Customs House when the weight for the purpose of duty is ascertained at the Customs House in the case of tobacco immediately removed and after the second weighing in the bankshall in the case of tobacco, which is bonded and nothing further remains to be done after that except for the Mel-labbom merchant to pay on ascertained weight of any bale received at the rate fixed in the Rules.

Interpreting the Notification as imposing an enhancement in the rate of duty on tobacco, it would not render tobacco in bond liable under the enhanced rate unless it can be construed as having retrospective effect. This construction should be avoided, if possible.

The Notification does not in terms bring about an increase in the rate however much that may be the effect of it. In terms it only provides for a new method of calculating the weight and this method should ordinarily be employed in all future calculations whether at the Customs House or bankshall The method adopted by the customs officials, *viz*, of making a recalculation on the basis of the Proclamation seems to be unauthorised and the levy of additional duty improper — **47 T. L. R., 419.**

3. Where the Rules framed by the Government under the Tobacco Regulation I of 1087 prohibited all monetary transactions between Officers of the Excise Department and licensed vendors in absolute terms, though not expressly declaring them void and provided for the prosecution of offenders for infraction of the Rules

Held.—A suit will not lie to enforce a loan made by a peon in the service of the Excise Department in favour of a licensed vendor of tobacco. The case had, of course, to be distinguished from that class of revenue cases where the prohibition by law was merely meant for the protection of the revenue and not to prohibit or invalidate the contracts

It did not matter that the objection as to the illegality was not raised by the defendant, for, when the illegality was patent on the face of the agreement, as in the case, it was the duty of the Court to take note of it The principle of public policy is this, *ex dolo malo non oritur actio* No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act—

22 T L J 397

REGULATION II OF 1087
(Registration)

Section 10

1 An Official Receiver sold certain immovable properties of an insolvent One Devaswom claimed the amount realised by the Official Receiver on the ground that the properties were included in a security bond executed to the Court by the insolvent for the satisfaction of a decree obtained by the Devaswom. The security bond was not, however, a registered one. The Court below held that the security bond did not operate to create a charge on the properties. The Devaswom preferred the appeal

Held—The appeal was unsustainable and had to be dismissed

The provisions of Section 15 of the Registration Regulation do not find a place in the Indian Act. The Regulation, however, does not mention the effect of non-compliance with the mandatory directions given in Section 15. Section 42 deals with the effect of non-registration of documents required to be registered under Section 10 Still, from Section 15 one can gather the importance our Legislature has given to the usefulness of maintaining a registry of landed properties which are affected by judicial proceedings. Those who rely on any decree or order made by a Court should have also complied with Section 15, if it is to affect any immovable property

By Exception (*V*) of Sub-section (2) of Section 10, decrees, orders of Courts and awards are not made compulsorily registrable. Perhaps, a literal and strict interpretation of the Exception might bring within its purview the present order of the Court, namely 'Security accepted' passed on the security bond If that is so, the appellant should have complied with the provisions in Section 15 before he could enforce the security This need not mean that a security does not require registration The better view to hold is that security bonds are to be registered if they deal with immovable properties. Civil Circular No 5 of 1062 strictly enjoins that such security bonds should be registered —

20 T L J, 47

2 A hypothecation right may be an interest in immovable property though it might not be immovable property as defined in the General Clauses Regulation and the assignment deed requires registration for conveying any interest to the assignee.

The expression used in Section 10 of the Registration Regulation is "interest in immovable property' and the definition of the term "immovable property" in the General Clauses Regulation cannot be regarded as defining the scope and significance of the former expression.—

47 T L R., 931
(=21 T L J., 559).

Section 14

No document purporting to create right or title to or in immovable property can be registered without a schedule being attached thereto containing the particulars mentioned in Clause (2) of Section 14. Unless the provisions of Section 14 of the Registration Regulation are complied with, the document cannot be registered in Book No 1 as an instrument relating to immovable property Mere description of property sufficient to identify the same without giving particulars under Section 14 (2) is not compliance with the Section —

46 T. L. R., *819*
(=20 T. L. J., *544*)

Section 15

1. The appeal was from an order rejecting an application to execute a decree as time-barred The decree was not registered although it created a charge on immovable property If the decree had been registered, the execution application would have been within time.

Held.—It was the duty of the Court under Section 15 of the Registration Regulation to have sent the decree for registration. Rule 790 (Second Proviso) of the Civil Courts Guide cast the duty of levying the fee of 5¼ fanams on the Court and where the Court was neglectful of its duty the party should not suffer

[The High Court, accordingly set aside the order of the lower Court and sent back the execution application for fresh disposal after giving the decree-holder an opportunity to pay the requisite fee under the Rule,] 22 T L J, *1056*

Not fol,—23 T L, J, 823
Ref—50 T. L. R., 96

2. See also Sec 10— 20 T L. J., *47*

Section 41

From Section 41 of the Registration Regulation, it is clear that a registered instrument (of sale of immovable property) takes effect against an oral agreement even though the oral agreement was accompanied by delivery of possession. —

22 T. L. J, *1341*

REGULATION VI OF 1087
(*Court Fees*)

Section 4

The plaint property is a plot of cardamom *land* The *dispute* is in regard to the method of its valuation for the computation of court fees it being contended that since cardamom plants are rather shortlived when compared to trees like coconut trees, the annual yield should not be multiplied by ten for purposes of *court fees*

Held—Court Fees Regulation Section 4 (V) is applicable to the present case According to that Section in cases of dispute the basis for the computation of court fees is ten times the annual gross yield where the land is capable of yielding annual profits *minus* the *assessment*, if any — 22 T. L J., *819*

Section 5.

In an appeal to the High Court under the Land Acquisition Regulation, the court fee payable under Section 5 of the Court Fees Regulation is not merely on the amount of *additional compensation* claimed in the appeal but also on the 15 per centum on the market value which in the event of his success in appeal, the appellant will be entitled to—

46 T. L. R., *151*
(=21 T L J., *885*).

Section 9

The concession allowed in Paragraph 3 of Section 9 of the Regulation is peculiar

to the Travancore Regulation as the corresponding Section 11 of the British Indian Court Fees Act does not contain the same By this, the Legislature has simply extended the concession allowed to plaintiff in what are technically known as suits for accounts to defendants also where the rules with reference to the plaints in suits for accounts are applicable to written statements where a counter-claim is made. In such cases, the defendants will have to state approximately what would be due to them on a settlement of accounts and pay institution fees thereon

An order of the lower Court relating to court fee is open to revision where the ends of justice require the same.—

10 T L J, 38

Section 10.

The High Court can revise orders passed under Section 10 of the Court Fees Regulation where the ends of justice require it to be done.

For purposes of valuation of Cherikkal lands, it is not necessary that the property should be cultivated every year in order that it should yield annual profit. It is enough that an average yield can be arrived at.

Buildings should be valued according to their actual value, the cost of putting up the structures less any deductions that may have to be made on account of wear and tear — 23 T L J, 851

Section 24

After a prior order of discharge under Section 181 of the Criminal Procedure Code, the complainant put in a fresh complaint for offences under Sections 379 and 428 T P C, but unaccompanied by a court fee stamp of half a rupee. The Magistrate rejected the complaint on the grounds that the petition was not stamped, that it came too late and that the papers had already been recorded.

Held (dismissing the revision petition filed by the complainant)—Though the previous discharge under Section 181 of the Crimmal Procedure Code, did not bar fresh proceedings, and the complainant was not guilty of laches in preferring the fresh complaint, still, the non-affixture of the court-fee stamp, as required by Schedule II, No I, Clause (*b*), precluded the recognition of the petition as a valid complaint For there was no provision in the Court Fees Regulation that would justify the exemption from the payment of court fee where in a complaint there is a combination of a non-cognizable with a cognizable offence It could not also be said that the Magistrate had wrongly exercised his discretion under Section 24 of the Court Fees Regulation in not permitting the unstamped complaint to be filed inasmuch as there was no failure of justice which necessitated the reception of the complaint without the proper court fee. There was besides, no duty cast upon the Magistrate, either under the Court Fees Regulation or under the Criminal Procedure Code, enjoining him to call upon the complainant to pay the necessary court fee.—

49 T L R, 283
(= 23 T L J, 178)

SCHEDULE II.

1. The amount of court fee payable on a petition to the High Court is Rs. 2 under Schedule II. Article I, Clause (*d*), of the Court Fees Regulation and not cha. 2 under Clause (*a*), pare 4, of the same Article.

It is one of the cardinal principles of interpretation of Statutes that where there are two provisions, one specific and the other general, the specific provision ought to be applied in preference to the general one. "Wherever there is a particular enactment and a general enactment in the same Statute and the latter taken in its most comprehensive sense would overrule the former,

the particular enactment must be operative and the general enactment must be taken to affect only the other parts of the Statute to which it may properly apply — 21 T L J, 788

2. The court fee leviable on a claim in a plaint has to be determined with reference to the finding as to what the subject matter of the suit is. The expression 'subject matter' in the suit does not mean the property involved, but only the right claimed over such property

Where a suit is for declaration that certain persons have only rights of enjoyment over certain properties and that they have no right to deal with them in excess of those rights, the declaration sought for clearly relates to the balance of rights in the property over and above the partial rights admitted and the value of the right cannot be estimated in money value. The declaration has to be valued under Schedule II, Article 8, Clause 7, of the Court Fees Rgulation — 20 T L J., 40

3 If the relief sought in a plaint is properly valued but the institution fee prescribed by law is not paid in part or in whole the Court ought to have required the plaintiffs to pay the Court fee within a specified time and the suit could be dismissed only if within that time the Court fee was not paid

Under Article 8, Clause 7, of Schedule II. of the Court Fees Regulation, a consolidated fee of Rs. 10 is the proper fee to be paid on a plaint where the primary relief claimed is a prayer for settlement of a scheme for the management of a trust The prayer for an account in such a suit is merely ancillary to the main prayer for the settlement of a scheme and no separate fee is chargeable on that prayer 48 T L. R., 39 (=21 T. L J, 1335)

4. The principle for determining the market value of property under the Court Fees Act as under the Land Acquisition Act is that things have to be taken as they stand at the time and as there can be no market for a temple as such there can be no market value for it, and the principle of valuation based on the value of the materials composing it is erroneous.— 22 T L J, 739

Other Cases

1 It is clear law that for the determination of the value of the suit for purposes of jurisdiction, Courts have only to look to the reliefs claimed in the plaint. They have to examine what they are, and not what they should be They should not import into such reliefs, something which they think should have been claimed If it is considered that the reliefs actually claimed by the plaintiffs could not be allowed them, unless another distinct and independent relief is prayed and granted, the Courts should either allow the plaintiffs to amend their plaint by the insertion of such a relief which is considered a condition precedent to their getting the others claimed by them, if such an amendment is allowable under the circumstances of the case, or non-suit them for their omission to pray specifically for such a relief They cannot force the plaintiff to insist upon such a relief being claimed The plaintiffs as the dominus litus, the masters of the litigation, have the right in law to place their case and seek the reliefs in the best way they choose — 20 T L J, 293

2. Where an excess amount of Court fee has been paid under a bona fide mistake of the party, the Court has inherent jurisdiction to order refund of the excess Court fee The proper order to be made by the Court in the matter of such refund would be the one contemplated by Rule 5 read with Rule 5 B (c) and 5 c of the Rules framed by the Government under the Court Fees Regulation (F B)— 22 T L J., 987

3. The plaintiff filed the suit for declaration of possession and for an injunction to issue to the first defendant restraining him from further executing his decree against the schedule properties. The plaintiff paid Rs 10 Court fees on the prayer for declaration because it was incapable of valuation and valued the prayer for injunction at Rs. 200

Held—The plaintiff should pay *ad valorem* Court fee on the amount of the decree sought to be restrained —

23 T L J., *807*

4. In a suit to set aside an order dismissing a claim to attached property, the fact that the plaintiffs prayed also for a declaration of title and a permanent injunction to restrain execution against the property, would not alter the scope and object of the suit In such cases, though unnecessary prayers are included in the plaint, the substance of the suit should be looked at, to determine what the Court fee payable is.—

23 T L J, *1048*

REGULATION III OF 1088

(*Salt*)

1 The petitioner in the case purchased salt from a merchant from Perava who in his turn purchased it from the Depot on payment of duty and price and removed the salt from the Perava market to Thalayolaparambu, which is beyond the Alwaye and Piravom Divisions. He was arrested, convicted and fined and the salt, carts, &c, were ordered to be confiscated The petitioner's case was that the transportation of salt in the course of which he was caught did not constitute an offence

Held.—The petitioner was not guilty under Section 67 of the Salt Regulation. The said Section provides punishment for the contravention of any Rules framed by Government under Clauses (c), (d) and (*f*) of Section 77 On the basis of Rule 127 of the Rules made under Section 77 (*c*) the Excise Commissioner published a Notification dated 7-7-1923 prohibiting removal of salt beyond the limits defined But the Section empowers Government to frame Rules for regulating manufacture, storage, removal, &c, of salt in and from salt factories. The case was one of removal but not from a salt factory but from the Perava market Salt factory is defined in the Regulation. A market place where salt is sold to the public could not be deemed a salt factory and Government have no power to enact Rules for the removal of salt from market place under Section 77 (*c*)

The words 'import and export' have been defined as taking into or out of Travancore from the sea or to it or from a foreign territory or to it Transport is defined as removal from place to place within Travancore Section 77 (*c*) authorises Government to frame Rules about import and export, but not about transport. Rule 127, if intended to regulate the transport of salt, is therefore *ultra vires* of the authority of Government, as also the Commissioner's Notification issued under the Rule.— 49 T. L R., *334*
(=23 T L. J, *869*)

1 See Regn. VIII of 1100, Sec 31 — 49 T L R., *451*
(=23 T L. J, *490*)

REGULATION X OF 1089

(*Co operative Societies*)

Section 42.

The Rules passed under Section 42 of the Co-operative Societies Regulation do not expressly make the provisions of the Civil Procedure Code applicable to proceedings before the arbitrator, but even so, the contention that he cannot decide the case *ex parte* cannot prevail as it would result in the anomaly that the

jurisdiction vested in the arbitrator could be defeated by the party wilfully refraining from taking part in the proceedings. If the jurisdiction of the arbitrator is granted, the further question would be whether the claim could be decided merely on the ground that it was not resisted This the Civil Procedure Code enables the Civil Court to do But the arbitrator not being empowered under the Rule to act similarly, his decision can be upheld only if it was passed on the merits of the claim

A decree passed *against the personal* representative personally is not illegal or void under Section 248 (old) of the Civil Procedure Code That Section is directory in its nature and provides that, after a decree is passed against a person as the legal representative of the deceased person, it can be executed against the legal representative personally only on proof of certain circumstances *This does* not mean that if a personal decree is passed, it can be treated as null and void, and that it can be *validly questioned in* execution The decree passed is final as between the parties and could be set aside only by appeal to the *superior Court*

The jurisdiction of the Court under Section 115 of the Civil Procedure Code can be exercised in all cases to further the ends of justice, if there is no express statutory provision enabling the Court to grant relief and prevent avoidable hardship and if there is no provision prohibiting the granting of such relief—

20 T L J, *105*

REGULATION XI OF 1089

(Land Acquisition)

Section 18

1 Where notice of the award under the Regulation had not been given to the parties within six months of the date of the award, the second part of Clause (*b*) of Sub-section (2) of Section 18 had no application and the party concerned would be entitled to ask for a reference within two months of the receipt of notice

46 T L R., *260*
(=20 T L J, *1221*)

2 Section 18 (2) of the Land Acquisition Regulation insists on specific grounds of objection to the award in the application for reference A *strict compliance* with this provision is necessary and the Court has no power to consider anything beyond the grounds specified

Where land with trees standing thereon is acquired by the Sirkar, the claimant may at his option demand payment either on the basis of the ground value or on the basis of the value of trees deducting the standing room therefor whichever is more advantageous to him In the former case the cost in rearing the tree on the land should also be added to the ground value.

46 T L R, *202*
(= 22 T L J, *669*)

Sections 18—21.

Per Venkatarama Iyer, J.—Section 21 of the Land Acquisition Regulation clearly indicates that the jurisdiction of the District Courts created hereunder is a special one, and that it is strictly limited by the terms of Sections 18, 19 and 21 The objections taken to the award in the application under Section 18 would be the 'matter' referred, the Court having no power to *determine* or consider anything beyond it.

All proceedings from the date of presentation of the application for reference are judicial in their nature and it would be open to the High Court in revision to examine the orders passed by the Land Acquisition officers on such applications. It would also be open to the District Court after having become seized of the

matter, to examine the validity or propriety of the orders of the Land Acquisition Officer and pass appropriate orders thereon, the exercise of such powers being always to be consistent with the peremtory provisions contained in Section 21 of the Land Acquisition Regulation

The Court of appeal or revision is ordinarily constituted for the correction of an error by a subordinate Court In the case of reference under the Land Acquisition Regulation, the errors relating to the amount of compensation and other matters are similarly intended to be corrected by the District Court In the nature of the duties involving on the District Court in this matter, it is clear that the District Court is, in dealing with the Land Acquisition references, exercising the same powers as those of the ordinary appellate and revisional Courts. The Land Acquisition Officer should be considered to be an inferior Court to the District Court so far as the matters covered by the reference go It is open to the District Court, as a superior Court, to examine the validity of the reference itself with respect to matters covered by the same and deal appropriately with them, examining whether the action of the Land Acquisition Officer in that behalf has been proper and justifiable or not. It would, therefore, be perfectly within the powers of the District Court to deal with questions of limitation regarding the reference

The Land Acquisition Regulation should be deemed so far as the Limitation Regulation of 1062 is concerned to be a special law as contemplated in Section 6 of the latter Regulation. But, in applying the provisions prescribing the period of limitation under special laws, the Courts have to consider whether the exercise of the right conferred by the Statute on a party is beyond human possibility by reason of want of timely knowledge of the infraction with respect to which such right is created in his favour

Knowledge of the award with respect to which the right of reference is created is an essential requirement for the applicability of the period of limitation prescribed under Section 18 of the Land Acquisition Regulation 'Date of the Division Peishkar's award' has been construed to be the date on which such award has been filed in the Division Peishkar s office under Section 12 of the Regulation

No presumption in favour of pronouncements of orders or decisions by officers of the Revenue and other Departments in discharge of the statutory duties imposed on them openly and in the presence of the parties interested therein would arise as in the the case of judicial tribunals. Hence no notice, either actual or constructive could be presumed and the insistence of a notice of the decision has been based upon the above principle In the case of such decisions or orders, the date of the decision for purposes of limitation has been construed as referring to the date of service of notice

The effect of the provisos would be that the right of seeking for a reference could not be recognised if the application is presented—

(1) after the expiry of two months from the date the award bears, if it is clearly made out that it had been pronounced in the presence of the parties or their duly constituted attorneys to represent them, or

(2) after the expiry of two months from the date of the service of notice on the party as required by Section 12, Sub section (2), or

(3) after the expiry of six months from the date of filing of the award in the Division Peishkar s Office as required in Section 11, Sub-section (1), when such award will be available for inspection by the parties.

Even in reference under the Land Acquisition Regulation it is essential that

the Rule relating to pleadings is strictly adhered to

Per Narayana Pillai, J—The proceedings before the Land Acquisition Officer are not homogeneous in character They are ambiguous, and lend themselves to be viewed as judicial or departmental according to the phase that turns up to view

The Judge (District Judge) has no general revisional jurisdiction The decision of a question of limitation is left entirely to the Land Acquisition Officer It seems to be no concern of the Judge to go behind the reference and see whether the reference is based on an application within time If the Legislature thought that the Judge should reject references made on time-barred application the terms of reference should include particulars as to the presence or absence of the claimant before the officer at the time of the award, the date of the award, and other details necessary to determine a question of of limitation But Section 19 insists on no such particulars On the other hand, the specification of the matters for reference in Section 19 and the restriction of the scope of enquiry in Section 21, would seem to preclude the consideration of other questions by the Judge on the well-known principle of construction *expressio unis est exclusio alterius*—

47 T L R, *1*
(=20 T L J, *1033*)

Section 22.

1 The principle upon which the valuation of property compulsorily acquired should be measured is that it should be *the value to the seller of the property* in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired

It is also well settled law that the value should be estimated with reference to the most lucrative and advantageous manner in which the land might be used and its special suitability could not be ignored

The importance of the test that the operative effect of special adaptability of future utility must be estimated not by idle speculation and impractical imagination, but by prudent business considerations, such as would weigh with an intending purchaser at the imaginary market which would have ruled, had the land been exposed for sale when it was subjected to compulsory acquisition, must not however be lost sight of Even the fact that a parcel of land is bought by a speculator in land with the object of reselling it at a profit is no ground for disregarding the sale in cases under the Land Acquisition Act—

46 T L R *280*
(=20 T L J., *629*)

2. By the acquisition of a portion of the plaintiff's property, the frontage of the property along the side of the lane which led to the main road was substantially reduced, making ingress into and egress out of the property left to the plaintiff very difficult

Held—The expression 'injuriously affecting his other property, movable or immovable, in any other manner' occurring in para 4 of Clause (1) of Section 22 of the Regulation was sufficiently wide to take in within its meaning a prejudicial effect of the kind specified and the plaintiff was entitled to compensation.—

49 T L. R., *248*
(=23 T L J, *1255*)

Section 27.

The Land Acquisition Regulation is more or less of an expropriatary character In consideration of the summary way in which a party is divested of his property, against his will, the Legislature

has conferred upon him the privilege to have all his rights relating to such property adjudicated upon without his paying the usual institution fee for the purpose It was considered inequitable after forcibly taking possession of his land to drive him to another suit for getting the value of such land due to him When rights and liabilities are created by a Statute and jurisdiction conferred upon a special Court for the investigation of matters which may possibly arise in controversy, such jurisdiction is exclusive and cannot be concurrently exercised by the ordinary Municipal Courts of the land Expropriatory Statutes have to be strictly construed

The Reference Court is bound to adjudicate upon the questions relating to apportionment when the same is sought for, and not refer the matter to another suit It would not be proper for him to postpone such adjudication where the same is sought for by way of express relief in a duly framed suit, the plaintiff having taken care to pay the necessary institution fee. In view of the statutory exemption from paying such court fee, references, in which apportionment is claimed by way of a distinct relief, have to be dealt with on the same basis as suits of the nature indicated above. The direction of the Reference Court requiring the parties to have the rights between rival claimants to the compensation amount adjudicated in another suit when an application under Section 27 of the Land Acquisition Regulation is put in, would therefore be clearly improper —

21 T. L J, 803

Section 28

The Land Acquisition Officer had paid compensation amount to the contending parties in pursuance of his award, but as under the appeal decision, a larger amount was due to the plaintiff, he applied for execution against the Sirkar for realisation of the sum remaining unpaid, but his prayer was resisted on the ground that there was no liability for the Sirkar, that the plaintiff must move the District Court for restitution of the amount wrongfully received by the second defendant, and that when once the Dewan Peishkar disbursed the amount under the statutory powers, there was no justification for calling upon the Sirkar to produce the money over again by means of an execution application These contentions were overruled by the District Judge

Held —The Dewan Peishkar had clearly followed the wrong procedure in disbursing the money, Under Section 28, Clause (2), of the Regulation, he was bound to deposit the amount of the compensation in the Court to which a reference under Section 18 would be submitted, if there was any dispute as to the title to receive the compensation or as to the apportionment of it The first Proviso to this Section enables any person admitted to be interested to receive payment to do so under protest as to the sufficiency of the amount When that Clause is peremptory, the existence of the Proviso referred to does not relax the obligation as to deposit or at least as to the sound exercise of the discretion

The matter is made clear by No. 21 of the Rules passed on 1-5-1090 under Section 41 relating to deposit These Rules have the force of law There is no conflict between the Rule and any Section of the Regulation under which it derives its binding force The disobedience of the express provision of law by the acquiring Officer had led to this *impasse*, for if the amount had been deposited in the District Court, it would have been available for distribution in accordance with the decree in appeal The plaintiff should not be made to suffer for the irregularity in procedure on the part of the Land Acquisition Officer

The award by the District Court did tantamount to a clear direction that the Government shall pay to each party the

amount awarded to him and that the Government was bound *prima facie* to supply the amount of compensation. The Government could not throw on the party whose property had been compulsorily acquired, the risk and burden of recovering the compensation from some one else to whom the Government had wrongfully paid it. It was open to the Government to recover the excess from those to whom it was paid The Sirkar was bound to submit to an order being passed on the plaintiff's execution application for bringing into Court the amount necessary for payment to him in full the compensation according to the decree in appeal.—

23 T L J, *1191*

Section 31

Where a person who was dispossessed without compensation under the Land Acquisition Regulation, failed to press his right to interest under Section 31 of the Regulation, either before the Court of Reference (District Court) or the High Court in appeal·

Held —It was not open to him to claim such interest in proceedings in execution for enforcing the award, The award has the force of a decree and the Court in enforcing the award is functioning merely as an executing Court and cannot go behind the 'award '—

21 T L J, *910*

Section 35.

The Dewan Peishkar acts as a Court subordinate to the High Court in making or refusing to make a reference to the District Court under Section 35 of the Regulation and its orders can be interfered with in revision in the High Court.

It is for the District Court and not for the Dewan Peishkar to dispose of the case on the merits, and it is not necessary for the owner to apply for any reference under Section 35 (F B)—

46 T L R., *351*
(= 21 T. L. J., *149*).

Other Cases

1 A Thiruppuvarom holder is not entitled to any share of the compensation awarded under the land acquisition proceedings in respect of the land charged with the Thiruppuvarom, for he is, strictly speaking, interested if at all, only in the land revenue and not in the land and land revenue which already belongs to Government cannot be deemed to be compulsorily acquired by them under the Land Acquisition Regulation, Apportionment of compensation for Jenmom land held on Kanapatton should be made in accordance with the principles enunciated in 11 T L J, 369 (=37 T L R., 292) —

22 T L J, *402*.

2 Sale of small bits afford no criterion for the valuation of larger plots. It is a well-known fact that a purchaser may be willing to pay a price far in excess of the real value for a small plot of land when that plot of land is needed by him in order to round off his own property or for some other such reason.— 22 T L J, *1188*

3 See also Regn V of 1071, Sec 44.— 21 T L J, *517*.

REGULATION I OF 1090.

(Village Panchayat Courts.)

1 The Village Panchayat Court, Parur, issued a prohibitory order to keep under attachment Rs. 10 out of Rs. 20, the pay of a clerk, Parur District Court, in execution of the decree in Case No. 289 of 1104 on its file. In execution of a decree of the Parur Munsiff's Court, Rs. 6 per measem out of the pay of the clerk was

already under attachment, leaving a balance of Rs 14 Under Section 52 of the Civil Procedure Code of 1100, the balance of Rs 14 available is exempt from attachment But under Section 53 of the Village Panchayat Courts Regulation, only Rs. 10 is exempt from attachment, leaving a balance of Rs, 4 which can be attached in execution of the Panchayat Court's decree On the question whether the provisions of Section 52 C P C which was passed subsequently, under which the salary of a public officer is wholly exempt if not exceeding Rs. 14 and to the extent of Rs 14 per mensem if exceeding that amount, do not supersede Section 53 of the Village Panchayat Courts Regulation

Held —The Village Panchayat Courts Regulation was not among the enactments referred to in the Second Schedule to the Civil Procedure Code (1100) nor was there anything in the latter Regulation to show that it was intended to alter the law as laid down by the old schedule. The Regulation was a special law which conferred a special jurisdiction of a limited nature on the Courts created by the Regulation and provided for a special procedure to be followed In executing the decree of a Village Panchayat Court against movable property within its jurisdiction, the provisions of Section 53 of the Regulation must be applied and the salary of a public officer would be exempt from attachment to the extent only therein indicated — 47 T L R, *114*

(=21 T L J, *817*)

2 In execution of a decree passed by the Village Panchayat Court, Parur, the same Court attached a cow as if it belonged to the decree-debtor The revision petitioner claimed the cow as his own and presented a petition to the Panchayat Court to release the cow from attachment The claim petition was dismissed for default of appearance on the part of the claimant who then moved the Court by what was deemed to be a review petition to readmit his claim petition.

This was granted by the Panchayat Court after notice to the decree-holder. The question arose whether the Panchayat Court has jurisdiction to grant the prayer

Held,—Regulation I of 1090 does not recognise a review But the order restoring the claim petition is supportable under Section 105 C P C or at any rate under the inherent power of the Village Panchayat Court

All final Courts including Revenue Courts have an inherent jurisdiction to make such orders as may be necessary for the ends of justice,—

46 T L R., *808*

(=20 T L J., *1022*),

Ref —21 T L J., 1219

3 The Panchayat Court has no jurisdiction to review its own judgment passed on the merits. The Regulation does not expressly confer any such power on the Panchayat Court —

21 T L J, *1219*

REGULATION VIII 1090

(Insolvency)

Section 6.

1. Whatever may be the legal position on the point under the English Bankruptcy Laws, under the Indian and Travancore Statutes, the Courts have no inherent power to dismiss a debtor's petition for adjudication on the simple ground that the petition is an abuse of the process of Court if the debtor is otherwise entitled to present his petition under Section 6, clause 3. Of course it would be open to the creditor when the debtor after adjudication comes up for final discharge, to allege and prove that the debtor had been guilty of bad faith, etc, and on proof of bad faith, misconduct and kindred matters the Court may refuse to order his final discharge.

(In the case, it was alleged that the petitioner-debtor had executed a fraudulent document in favour of the first counter-petitioner some time before his petition and that the petition was in consequence, an abuse of process of Court) —

21 T L J, 1390

2 See also Sec 9 —22 T L J, 633

Section 9

1 It is settled law that the claim of the petitioning creditor should have been in existence when the alleged act of insolvency was committed

Section 9 of the Insolvency Regulation contains no words to restrict the authority of the Court to substitute another creditor in the place of a negligent petitioner—creditor Such substitution can be made even though the prescribed period had expired after the alleged act of insolvency "The object of the Section is to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise may not diligently prosecute the petition. If it is to be regarded as a new petition, this object is frustrated and there is no purpose in having a Section of the kind If the original petition had proceeded up to adjudication or if another creditor whose debt is not barred by the date of substitution is substituted, and obtained an order of adjudication, the appellant's debt which was not barred by the date of the petition could be proved If so, there is no reason why he cannot be substituted The words 'as petitioner' in the Section show that, on substitution, the petition becomes his petition with the original date and it is enough if the debt was an enforceable debt on the original date"

An assignment for the benefit of creditors generally cannot be relied upon as an act of bankruptcy by any one who is a party or privy to it. But the assent of the creditor to the deed must be obtained without fraud or misrepresentation on the part of the debtor and the deed must not contain any unexplained provision giving an advantage to an individual creditor over the others, otherwise an assenting creditor will not be debarred from presenting a petition based upon its execution.

The burden of proof of assent is on the person who alleges it. If the deed is void assent to it by the petitioning creditor will not prevent him from petitioning —

20 T L J, 218

2 Section 9 of the Insolvency Regulation allows the substitution of parties in cases where a petitioner (creditor) does not proceed with his petition with due diligence. But Section 9 and the allied Sections presuppose that the person or persons who apply for substitution are creditors who are entitled to apply for adjudication under Section 6 (iv) (a) and (b) i e, they should be persons to whom a debt exceeding Rs. 500 is due and the debt should be an ascertained sum payable immediately or at some future period,

The plaintiff in a suit, pending against the debtor, for rendition of accounts in respect of a trust of which the debtor was a trustee, was not a 'creditor' entitled to apply for substitution.—

22 T L J, 633.

Section 12

1 The progress diary shows that on 2-8-1103 notice was issued to the counter-petitioner-appellant and also the notice was sent to the Gazette for publication. But it does not show that any notice was served upon the counter-petitioner The records also do not contain any such notice. The lower Court does not find that a notice was served upon the counter-petitioner. All that the lower Court says is '—'It is difficult to believe that the counter-petitioner was not aware of the insolvency proceedings as the petition

was disposed of after publishing the fact of the petition in the Government Gazette"

Held—No such inference can be made from the mere fact of publication in the Government Gazette Secondly the publication in the Gazette is not sufficient in the case of the debtor, because Section 12, Clause (3), of the Insolvency Regulation requires that where the debtor is not the petitioner, notice of the order under Sub-section (1) shall be served on him in the manner provided for the service of summons. This is an imperative provision of law Section 14 of the Insolvency Regulation says that on the day fixed for the hearing of the petition or on any subsequent day to which the hearing may be adjourned, the Court shall require proof that the debtor, if he does not appear on a petition presented by a creditor, has been served with notice of the order fixing a date for the hearing of the petition under Section 12, Sub-section (1), and Section 13, Clause (1) provides that where the Court is not satisfied with the proof of the right to present the petition or of the service of the notice on the debtor as required by Section 12 Sub-section (3), or of the alleged act of insolvency or is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition. Reading these provisions of law together, it is clear that the notice of the date of hearing should be served upon the debtor if he is not the petitioner Before an order of adjudication is made, the Court must be satisfied that such notice was served upon the debtor and if the Court is not satisfied with the proof of service of notice on the debtor, the petition should be dismissed These are mandatory provisions noncompliance with which will vitiate the proceedings.— **21 T L J, 948**

2. Under Section 12 (3) of the Insolvency Regulation the notice of the order fixing the date for hearing the insolvency petition has to be served on the debtor in the manner prescribed for the service of summons as laid down in Order V, Rule 9 *etc*, of the Civil Procedure Code through an Officer of the Court Service of notice by registered Anchal, as in the present case, is insufficient Rule 20 (3) framed by the High Court seems to diverge from the provisions of the parent Regulation and should give way to what the Regulation provides in this respect.

Notice to the debtor is an essential requisite and not a mere formality.—

22 T L J., 1258

Section 13

1. Under Section 13, so far as the petition of the debtor is concerned, the Court has to be satisfied only that he has a right to present the petition and if that is proved the petition cannot be dismissed. The words "for any other sufficient cause no order ought to be made" applies only to petitions by creditors and not to petitions by debtors.

The decision in *J F Watkins* v, *Rajá Roheenee Bullab*, 10 B L. R. App 11 (on which were based 13 T L J, 339 and 17 T L J, 402) did not relate to adjudication, but to discharge of the debtor—

20 T L J, 875

Section 16.

1. A plaintiff who has been adjudicated an insolvent can maintain the suit.

In spite of adjudication in insolvency and the vesting of the properties in the Official Receiver, the insolvent has still subsisting rights in the properties. Section 16 of the Regulation prohibits only suits and proceedings against the insolvent without the leave of the Court and there is no specific prohibition of suits or proceedings by the insolvent. Statutes which restrict the liberty of the subject have as a rule to be construed strictly

and no prohibition which is not expressly mentioned in the statutes could be imported into them —

23 T L J, 879

2. See also Sec 30 —46 T L R., 99 (=20 T L J, 641)

Section 21

Section 21 of the Regulation enables the insolvent to make an application to the Court against any act or decision of the Receiver 'if he is aggrieved' by such act or decision But the insolvent cannot be aggrieved in the legal sense of the word by the sale of property in which he has no interest 'A bankrupt can do nothing to embarass the administration of the estate The mischief would be enormous.'— 23 T L J, 750

Sections 23 and 25

The appeals were from an order of the Insolvency Court striking out the names of the appellants (alleged creditors who had filed affidavits verifying their debts in accordance with Section 24 of the Regulation) from out of a list of the insolvent's creditors, the Court presumably purporting to exercise jurisdiction under Section 25 The proceedings for striking out had been initiated by a creditor, by two petitions—one petition presented to the Official Receiver and apparently filed by him with the Court another petition presented to the Court, which the Official Receiver supported rather than declined to consider The Insolvency Court had however failed to frame the schedule of creditors under Section 23 (1), the only attempt to comply with the Section consisting of a list of creditors produced by the Official Receiver under orders of the Court, the list being the same as that supplied by the insolvent. It was argued on behalf of the appellants that the Court below had acted without jurisdiction in that (1) no schedule had been prepared under Section 23 (1) as preliminary to procedure under Section 25, (2) the Court should have been moved under Section 25 by the Official Receiver in the first instance and only on his declining to do so, by any creditor On behalf of the Official Receiver-respondent it was contended that there was only a defect in procedure, that the appellants did not raise the question of jurisdiction before the lower Court, that the matter had been decided against them in the lower Court on the ground of default to produce evidence in support of the genuineness of their debts

Held —(1) Sections 45 (2) and 46 (2) of the Insolvency Regulation made applicable to the appeals herein the Civil Procedure Code and the Appellate Court, in any event, would probably be erring on the side of caution, if the Rule in Section 78 of the Civil Procedure Code that no decree shall be reversed in appeal on account of any error, defect or irregularity not affecting the jurisdiction of the Court, be adopted

(2) In the absence of express authority it seemed that if the failure to comply with Section 25 did not affect the jurisdiction, the failure to comply with Section 23 might do so

(3) The well-settled rule was that jurisdiction could not be given by consent where none existed, but if the Court was competent to try the subject-matter of the dispute, consent might waive irregularities in the exercise of that jurisdiction.

(4) The original failure of the Court to perform its statutory function of framing a schedule produced the result that there was no schedule in respect of which the Court could exercise jurisdiction under Section 25, in other words, there was no subject-matter in respect of which an order could be made, and therefore, the Court, in purporting to strike names out of a non-existent schedule could not be

said to have been exercising any jurisdiction

In the result, the appeals were allowed

24 T L J, 277

Section 26.

On an application of a creditor under Section 26 (8) of the Insolvency Regulation for annulment of a composition and for re adjudging the debtor insolvent, the Judge, 'in exercise of his discretion' ordered notice to all the creditors of the insolvent and as the applicant did not pay the requisite process fees within the time fixed, the Judge subsequently rejected the application

Held—The plain intention of Section 26, Clause (8), clearly was that the Court's jurisdiction to grant relief to the petitioner was subject to the condition that the exercise of it shall not affect any act done in pursuance of the scheme sanctioned by the Court The lower Court was therefore wrong in ordering the issue of notice to the large body of creditors whose claims have with very few exceptions been satisfied in pursuance of the composition scheme. It was not to be understood, however, that if at a later stage of the case it was necessary to hear all or any of the creditors, it would not be open to the Court to order notice to them —

21 T L J, 1???

Section 29

The insolvent and another were the joint foremen of a chitty to which the appellant was a subscriber Money was due to the appellant from the insolvent on account of the chitty transaction. The appellant sought to set off against this debt another debt due by him to the insolvent under a hypothecation bond executed by him to the insolvent,

Held—The two transactions were mutual dealings which actually ended in a debt, and therefore the appellant was entitled to the set-off claimed by him

Observed further,—The appellant could not set off a debt due by him alone along with others against the chitty subscriptions due to him alone—

23 T L J, 54

Section 30

1 Section 30 of the Insolvency Regulation deals only with the proof of claims by secured creditors and does not provide for realisation of their security, but merely lays down the procedure to be followed by a secured creditor who seeks to realise anything more than the value of his security

There is nothing in the Section by which the Official Receiver can sell the property of the insolvent to any one secured creditor without regard to the rights of other secured creditors over the same property

In respect of properties which are subject to a mortgage or charge, under Section 16 (2), the equity of redemption over those properties alone vests in the Official Receiver on the passing of an order of adjudication and he can only transfer that right and no more. The Official Receiver has no power to alienate encumbered properties without the express consent of the mortgagees.

A transfer of property by the Official Receiver is not affected by the rule of *lis pendens* unless the party seeking to bind him applied to have him joined as a party to the suit —

46 T L R., 99
(=20 T L. J, 641)

Ref—30 T L, J, 858.

2 The rights of a secured creditor will remain unaffected by the adjudication of the debtor or his heir It may be that in enforcing his rights, the secured creditor will have to bring the Official Receiver in whom the equity of redemption would

have become vested by operation of law on the date of adjudication Except to this extent, the rights of a secured creditor could not be held to be affected A secured creditor may ignore the Insolvency Court altogether, in which case he will have to rest satisfied with his security and forego all claims to a dividend from the realisation from sale of other properties, if his security is eventually found insufficient for his debt, •

It is open to a secured creditor to relinquish his security and allow himself to be treated as an unsecured creditor and claim a dividend on that basis Such relinquishment must be clear A relinquishment may be presumed if it is clearly made out that the creditor has not elected to enforce his claim independently of the insolvency proceedings—

20 T. L J, *858*

Section 35

1 The expression 'void' in Section 35 of the Regulation (VIII of 1090) means 'voidable' Under the Section, the transfer is liable to be avoided at the instance of the Official Receiver, unless the transferee can uphold the transaction. The onus of proving that the transfer was made in good faith and for valuable consideration is on the transferee.—

20 T L. J. *42.*

Not fol—21 T L J, 1255
23 T L J, 620

2. Where a creditor of an insolvent, within two years prior to the commencement of the insolvency proceedings, got a compromise decree against his debtor, specifically charging certain moneys belonging to the latter and there was no case that the compromise decree was false or fraudulent

Held—The creditor was a "secured creditor" within the meaning of Section 2 of the Insolvency Regulation and was entitled to realise the moneys in satisfaction of his claim in priority to other creditors who had placed attachment thereon in execution of their decrees obtained only subsequent to the decree on compromise

Section 35 of the Insolvency Regulation was not applicable to the case as there was no question that the claim under the compromise decree was not a true and valid one and any transaction under Section 35 was good until it was set aside The word "void' in Section 35 means only voidable— 21 T L J *1240*

3. In deciding the question of the validity of assignments by an insolvent, under Sections 35 and 36 of the Insolvency Regulation, the distinction between the two Sections should be borne in mind, *viz*, that if the assignment be found to be real and supported by consideration and good faith, the question whether there was fraudulent preference could be satisfactorily decided only after considering the several points set forth in 8 T L J, 309, if on the other hand, the assignment be found to be unsupported by consideration or good faith, it would be void under Section 35 and no question of fraudulent preference would arise at all

The *onus probandi* under Section 35, is not on the transferee but on the Official Receiver to establish that the transaction was not *bona fide* or for value.

Ordinarily the question of burden of proof is of little consequence where both sides have adduced evidence, But a case might occur where the trial Judge's mind was coloured by his erroneous view of the law in regard to the *onus* and he had thereby been disabled from evenly weighing the evidence In such a case a remand for retrial might be necessary—

21 T. L. J, *1255*

4. In cases under Section 35 of the Insolvency Regulation the burden of proving that the transfer in question would fall within the exceptions enumerated in the above Section is upon the transferee, for the policy of the Insolvency

Law is to presume that transactions entered into within 2 years preceding the order of adjudication are invalid until the contrary is shown

It is incumbent on the Court however to allow the transferee an opportunity to make out that his transfer falls within the exceptions set forth in Section 35 —

22 T L J, 772

5 Under Section 35 of the Regulation, the burden of proving that the transfer was without valuable consideration and not made in good faith is on the Official Receiver, and not on the transferee Reason and policy are against holding that under Section 35 the burden of proving the good faith of the transaction is on the transferee and not on the Official Receiver There is nothing in the Regulation itself to suggest that, in enacting Section 35, the Legislature intended a deliberate departure from the general principle of law which is clear that he who seeks to avoid a document or transaction has to set up and prove affirmatively the necessary circumstances which would invalidate it (F B) —

49 T L R, 18
(—23 T L J, 880)

REGULATION IX OF 1090

(Succession Certificate)

1. The counter-petitioners obtained an order from the Munsiff for the issue of a succession certificate. The petitioner applied to the Court for the cancellation of the order on the ground that it was passed without notice to him The Munsiff rejected the application and the appeal to the District Court against that order was also rejected on the ground that no appeal lay

Held (In revision).—The order of the District Court was right. The contention that as the order for the issue of the certificate was passed *ex parte*, the petition for cancellation of it should be regarded as a petition under Order IX, Rule 13 of the Civil Procedure Code and that, under Section 105 of the Code the provisions of the Code were applicable to the case under consideration could not prevail The Succession Certificate Regulation contained no provision to the effect that the provisions of the Civil Procedure Code were generally applicable to proceedings under it. Except in so far as it was expressly provided by the Regulation itself, the general provisions of the Code could not apply by virtue of Section 105 of the Code to a Court administering the Regulation Further, there was a specific provision in the Regulation, namely, Section 16, Clause (*a*), under which the petitioner could move for revocation of the certificate on the ground that the proceedings to obtain it were defective in substance The petitioner's application to the Munsiff had to be treated as one under this Section and if it was so treated no appeal lay as no appeal was provided under Section 17 against an order refusing to revoke a certificate granted.

The contention that Section 16 (*a*) of the Succession Certificate Regulation applies only to applications for revoking a certificate granted and not to an application as in the case where no certificate was actually granted but only an order for granting a certificate was passed, must be repelled. When an order is passed for granting a certificate it is equivalent to granting a certificate because nothing more remains to be done under the Regulation except to draw up the certificate with the particulars as contained in Section 7 and the law regards that as done which ought to be done.—

22 T L J, 490

2 Where a party fails to produce the necessary succession certificate in the Court of first instance, he should be given an opportunity to produce it, by the Appellate Court on payment of costs.—

21 T L J, 339

REGULATION IV OF 1091

(Land Conservancy)

1 Plaintiff sued for declaration of the title and possession of a certain land which he claimed as his registered holding The Sirkar contended that the land was Poramboke Proceedings were started against the plaintiff for alleged encroachment and he was fined Being threatened with immediate eviction, plaintiff took on lease under protest the trees on the disputed property on Kuthagapattom It was proved in the case that the plaintiff was in possession before the lease for over 50 years

Held—Possession is evidence of title and primarily exclusive. It is for him who impugns this exclusive title, to show that the possession arose in some way which has reserved his own right *Prima facie* possession is adverse.

Adverse possession should be adequate in publicity, continuity and extent, but a burden cannot be cast on the party in possession to prove notice of such possession on the part of the real owner

As the Rules framed under the Land Conservancy Regulation make it the primary duty of the Officers in the Land Revenue Department to take prompt action in cases of unauthorised occupations of Government land, it is idle on the part of Government to profess ignorance of the plaintiffs' possession

The operation of the Limitation Regulation remains unaffected by the Land Conservancy Regulation. Adverse possession will destroy the title of Government as of any other person Even granting for argument's sake that Section 3 of the Land Conservancy Regulation serves the purpose of raising a presumtion in favour of Government, plaintiff's possession in the present case not only counteracts any presumption in Government's favour but also gives rise to a presumption in plaintiff's favour

Section 110 of the Evidence Act throws the onus of proof in cases of disputed ownership on the party out of possession. The use of the present tense in the Section is due to the recognised mode of legislative expression and does not justify the inference on the discontinuance of possession, that the possession so long as it continued was without title. The attempt on the part of the Sirkar to exclude the operation of the Section relying on the Kuthagapattom transaction cannot succeed If the plaintiffs' possession can be *presumed to have been* with title, then it is for the person who, without acquiring the title of the person ousted, admittedly disturbed the possession, to prove his title Where a party rests his case solely on adverse possession he cannot succeed unless he proves such possession for the statutory *period*, but *where* the case is put on the basis of title, possession may be of service as evidence of title. Possession plays a twofold part inasmuch as it is evidence of title and source of title The presumption of an origin in some lawful title which the Courts have so often made in order to support possessory rights, long and quietly enjoyed where no actual proof of title is forthcoming is one which is not a mere branch of the law of Evidence It is resorted to because of the failure of actual evidence. At the same time it is not a presumption to be capriciously made, nor is it one which a certain class of possessors is entitled to *de jure*. When it is necessary to indicate what particular kind of lawful title is being presumed, the Court must be satisfied, that such a title was in its nature practicable and reasonably capable of being presumed without doing violence to the probabilities of the case.—

46 T L. R., 554
(=20 T L. J., 772),

Ref—23 T L. J., 167

2. The suit was for declaration of title and possession of plaint property on the allegation that it formed part of the plaintiff's registered holding The Sirkar contended that the property was Poramboke because there was entry in the Settlement records to that effect and that the suit was barred by limitation. The suit would have been within time if the three month's time of notice to Sirkar were excluded

Held—A mere entry in the Settlement records that the land was Poramboke was not evidence which could support the claim of the Sirkar Section 18 of the Land Conservancy Regulation prescribed a period of limitation within the meaning of Section 30 of the Limitation Regulation The Section fixes a period of one year for such suits and under Section 15 (2), the plaintiff had a year and three months (the period of notice to the Sirkar) from the date of the receipt of notice of the Poramboke decision to file his suit—

46 T L R *150*
(=23 T L J, *196*)

REGULATION I OF 1092
(*Companies Regulation.*)

1. There is no express provision in the Companies Regulation for the Court to review an order already passed The wording of Section 204 does not seem to contemplate reviews. However it is open to the Court in the exercise of its inherent powers to prevent injustice to modify an order already passed on sufficient grounds being shown.—

46 T L R., *154*
(=20 T L J, *835*).

Ref—46 T L R., 208 (20 T L J., 1022).

2. The plaintiffs, five of the shareholders of the Tropical Plantations Ltd, filed the suit, *inter alia*, for convening, by direction of the Court, of a general meeting of the share-holders for ascertaining the sense of the majority regarding the management of the affairs of the Company on the allegation that a deadlock had come about in the affairs of the Company by the simultaneous activities of two rival sets of directors. The Company was made the first defendant, and the rival sets of directors were also represented on the defendant array It was prayed alternatively, that if the reliefs asked for could not be granted, the suit might be treated as a winding and orders passed thereon accordingly By interlocutory applications, the plaintiffs applied for (1) transposing the first defendant-company to the plaintiff array, (2) the calling of a general body meeting for the purpose of ascertaining the will of the shareholders in the matter of the conduct of the suit on behalf of the company, &c, (3) arranging the agenda of the proposed meeting under certain heads for purpose of enabling the company to carry on its business properly The lower Court dismissed the third application, granted the second and postponed decision on the first till the result of the general meeting could be ascertained

In revision before the High Court by both the parties

Held—The law on the subject of Companies does not appear to contemplate the intervention of the Court in order to enable Companies to be carried on. A distinction must be drawn between Companies and charities As regards the latter the Court may have to frame schemes and take other steps which may be necessary to see that the charitable objects are carried out, but Companies are expected to be run by their share holders.

Ordinarily the proper persons to file a suit on behalf of the Company are the Directors, and individual share-holders cannot sue except for some relief claimed by themselves individually or to restrain the Company from doing something beyond its powers. If the Directors are acting improperly and proposing to do

something against the wishes of the share holders or which is *ultra vires*—the Directors and not the Company—it is for the shareholders to restrain them but in certain cases shareholders have been allowed to sue on behalf of the Company against the Directors without previous authorisation and when their right to do so has been questioned, the Court has ascertained the wishes of the shareholders as regards the suit by directing the holding of a general meeting It cannot be said to be very clear as to the limits within which such suits may be brought Usually however this procedure has been adopted where some emergency has arisen necessitating prompt action to meet a danger threatening the Company's interests, where the ordinary method of calling a general meeting would take too much time In such cases the Court besides directing that a general meeting *should* be called to ascertain the wishes of the shareholders, may pass interim orders to preserve the *status quo* in the meantime. Any other prayer should not be granted.

The Court has jurisdiction under Order I, Rule 10 (1), to add the name of the company as plaintiff under certain conditions, as *e g*, if it appears that some of the reliefs asked in the plaint could only be asked for in a suit in which the company is a plaintiff or at least there is a strong doubt on this matter, the Company may be made a plaintiff if willing and if the Court thinks fit Such jurisdiction could be exercised where according to the plaintiff the company had been made a defendant by a *bona fide* mistake The fact that the mistake was one regarding appreciation of the law on the subject did not prevent the operation of the Section

The circumstance that the plaintiffs themselves could have called a general meeting may be taken into consideration for appreciating the emergency, but the objection on this score does not go to the root of the matter

The relief by winding up prayed for in the plaint was not inconsistent with the company being the plaintiff since Section 163 of the Companies Regulation permits a petition for winding up to be made either by a Company or a creditor or a contributory In the result the order of the lower Court was confirmed (F B)—

47 T L R, *868*,
(=21 T L J, *1914*)

Ref -22 T L J, 1331

3. An appeal will lie against an order made in the matter of winding up of a company provided it finally decides a dispute between the parties or deprives the appellant of a substantial and important right and is not a mere formal or interlocutory order

In fit and proper cases, the Court may stay winding up proceedings on the ground that they are abuses of the processes of the Court.

Where the managing director of a limited company moved for stay of proceedings in connection with certain winding up petitions on the ground that they were in abuse of process of the Court, but the Court ordered the admission of the petition and the advertisement thereof, proposing to consider the question of abuse of process only after issuing the necessary notice, and the managing director appealed

Held.—The appeal was competent—

49 T L R, *181*
(=23 T L J, *211*).

REGULATION II OF 1092.

(Christian Succession)

Among Syrian Christians, the husband's right in his deceased wife's property is only a life interest terminable at death or re-marriage.— 22 T L J, *721*.

REGULATION III OF 1094
(*Chitties*)

Section 3 (1).

Where a chitty scheme provided that there would be drawings for some months and the prize winners paid and thenceforward be absolved from liability for subsequent instalments and that eventually all those who had not been prize winners would be given back the amounts they had actually subscribed and the plaintiff, subscriber, who had been duped into joining the scheme by the foreman, filed the suit for paid-up subscriptions, on collapse of the chitty by the default of the foreman:

Held (On contentions set up by defendant-foreman)—(1) It could not be stated that the chitty partook of the character of a wagering transaction and was for that reason illegal

(2) The suit chitty was a transaction partaking of the nature of a chitty though not coming inside the definition of Sub-section (1) of Section 3 of the Regulation. Such transaction was not illegal but void only, and there was a clear distinction between an agreement forbidden by law and one merely void

(3) By virtue of Section 65 of the Indian Contract Act which has been held wide enough to give relief in case of contracts void in their inception and also the fact that the chitty must have been subsequently discovered to be void, the plaintiff was entitled to compensation amounting to the value of the paid-up subscriptions.

(4) The principle that restitution cannot be allowed if the illegal object had been carried out did not apply because the plaintiff was not equally at fault with the defendant.— 24 T. L. J., 538

Section 5

1. In a suit filed in the Parur Munsiff's Court for recovery of subscriptions due from the defendant to a chitty conducted at Cochin, it was contended that, as the plaint chitty was an unregistered one, it contravened the terms of Section 5 of the Travancore Chitties Regulation. It was therefore urged that the chitty did not create obligations or rights enforceable in a Court of law in Travancore

Held—The plaint chitty was one which could create rights and obligations enforceable in Travancore It would appear contrary to ordinary principles of International law to construe Section 5 as prohibiting the conduct of chitties in other countries unless registered in Travancore. As regards the validity of a contract made abroad, the *lex loci contractus* has to be followed—

56 T. L. R., *194.*
(=20 T. L. J., *325*)

2. The suit was to recover money as arrears of subscription with the penalties prescribed for default, on the basis of a chitty security bond executed by a prized subscriber The chitty was unregistered and therefore offended against the provisions of Section 5 of the Regulation

Held.—The suit as framed was not maintainable. The chitty not being registered was *prima facie* illegal

Per Venkata Rao, J—If the suit had been framed as upon the bond and for recovery of the advance made under it, the suit may not be maintainable. The plaintiff would then be simply suing for money belonging to him which has been taken and is being retained by a person who has no right to it There is no *turpis causa* in the matter—

46 T. L. R., *280*
(=23 T. L. J., *556*).

Dist.—24 T. L. J., 338.

Section 17.

According to the security bond executed by a prized subscriber to a chitty, the

prize money was reserved with the foreman for payment to a creditor of the subscriber The payment was not made

Held —The undertaking in the security deed by the foreman to pay the prize money to the creditor of the subscriber was not a payment of the prize money to the subscriber within the meaning of Section 17 of the Chitties Regulation The agreement between the foreman and the subscriber to pay off the creditor of the latter was merely the substitution of one simple contract by another similar executory contract. It is a general rule of law that one simple contract cannot be satisfied by any similar executory contract unless founded on a new consideration or it be such as to give an immediate right of action upon breach thereof, for that is merely substituting one cause of action for another — **23 T L J** *67*

Sections 21 & 23.

Where the Munsiff recorded a finding on an issue to which no objection was filed in time before the lower Appellate Court, and that Court took the view that a point could be taken without a formal objection

Held.—An objection was necessary under Rule 301 of the Civil Courts' Guide, which Rule has been held to be consistent with the Civil Procedure Code.

Although under Sections 21 and 23 of the Chitties Regulation, it might appear that the terms of the Variola would be construed strictly against a subscriber to a Chitty governed by the Chitties Regulation, yet under Section 49 of the Regulation, power is given to give relief against them, if they are unconscionable or contrary to law

The provision in the Variola that the defaulting non-prized subscriber should forego the Vesthapalisa has not been usually regarded as penalty —

22 T L J., *1910*

Section 27

The onus of proving default of subscriptions lies on the plaintiff In suits on chitty bonds, evidence *aliunde* is required to prove that plaintiff's claim to the particular relief arose on the date mentioned by him and it is manifest that he ought to lead evidence as to that fact Under Section 27 of the Chitties Regulation and under Article 120 of the Limitation Regulation, the plaintiff's claim to this relief arises only on demand being made in writing In cases governed by these Statutes, therefore, the plaintiff would have to prove not only that default occurred on the date stated by him but also that he issued a written demand to the subscriber for payment of the future instalments in a lump —

50 T L R., *126*

Section 28

Though in a case, where the chitty had collapsed and the foreman had become an insolvent, the law was clear that the non-prized subscribers should be impleaded in a suit as against a prized subscriber by the assignee of a chitty security bond for realisation of unpaid subscriptions, the question still remained to be settled whether such impleading would be imperative where a security bond had been assigned after the collapse of the chitty, but at a time when the foreman was in a solvent condition and his insolvency had happened afterwards. This must depend upon several considerations, such as, whether at the time of the assignment the foreman had no apprehension of impending insolvency, whether the assignment was in favour of a non-prized subscriber for chitty money due to him or to an utter stranger unconnected with the concern, whether it was a *bona fide* transfer of a chose in action or one in fraud of creditors particularly non-prized subscribers and whether it was an instance of fraudulent preference. If Section 28

of the Chitties Regulation be applicable, the matter would be free from doubt since it would apparently apply to assignments made either before or after the foreman's insolvency The Section cannot, however, control a chitty started before the Regulation came into force and the question depends on what the pre existing law was and whether the Regulation merely gave expression to the law as it stood at the time of its promulgation

Where an assignee from a foreman of a chitty security bond filed suit against the executant prized subscriber for realisation of unpaid subscriptions on the ground of default and the defendant contended that the assignment was fraudulent as having been made at a time when the foreman was in insolvent circumstances though this was denied by the plaintiff and hence the non-prized subscribers whose claims remained unsatisfied should also be impleaded in the suit and it was in evidence that some of the non-prized subscribers had *laid attachments on the bond amount* while others had obtained decrees against the Chitty assets

Held (Without deciding the broad question as to whether Section 28 of the Chitties Regulation enacted the pre-existing law) —Even assuming that the foreman was not in embarrassed situation when he made the assignment, the Court has ample powers under Order I, Rule 10 of the C P C, to join additional parties if it finds it necessary to do so, in order to enable it to effectually and completely adjudicate upon and settle all the questions involved in the suit The avoidance of multiplicity of litigation is one of the main considerations that should weigh with Courts when a question of impleading comes to be settled

In the circumstances of the case, there fore, the *impleading of the non-prized* subscribers, even those who had not obtained decrees or placed attachment, was a course which would conduce to the benefit of all the parties concerned —

23 T L J, *1231*

Section 46

1 An offence under Section 46 could be said to have been committed if the minute filed before the Registrar was not a true copy of the original minute maintained by the foreman, and the other essentials set forth in the Section are also proved to exist in the case A prosecution under the Section could also be validly maintained, if it is made out that the facts that the entries in the minute have been proved not to be a correct record as to what transpired on the date of the drawing in question and such false and inaccurate entries have been made with the intention and knowledge referred to in the Section In the latter case, it is essential that the entries impugned as false are clearly specified in the charge, and inasmuch as the falsity of the entries is one of the essential ingredients constituting the offence, there should be a specific finding as to whether the averments in the entries in dispute are false or not

If the falsity had been intended, the statement could be taken as having been *wilfully* made within the meaning of the Section. Intention is a state of the mind which has to be gathered from the attendant circumstances In the absence of an explanation showing good faith on the part of the accused, the conditions laid down in the Section must be considered to have been satisfied — 46 T L R, *45*

2. With the reference to the copy of the minutes of proceedings filed before the Registrar as required by Section 14 of the Regulation, an offence under Section 46 could be said to have been committed, if the same was not a true copy of the original minute maintained by the foreman and the other essentials set forth in the Section are also proved to exist in the

case. A prosecution under Section 46 would also be validly maintained, if it is made out that the facts that the entries in the minute have been proved not to be a correct record as to what transpired on the date of the drawing in question, and such false and inaccurate entries have been made with the intention and knowledge referred to in Section 46 In the latter case, it is essential that the entries impugned as false are clearly specified in the charge, and inasmuch as the falsity of the entries is one of the essential ingredients constituting the offence, there should be a specific finding as to whether the averments in the entries in dispute are false or not

The expression 'wilfully" has not been defined in the Code. In determining the exact import of the word, the definition of the word by the Commissioners on the Criminal Law of England may be referred to It has been interpreted as "a hurt, damage or other evil consequence of an act shall be deemed to have been caused wilfully where the doer of the act intended such consequence to result or knew or believed that it was likely to result from his act or where knowing or apprehending that such consequence would probably result from his act, he wilfully incurred the risk of causing it." If the falsity had been intended, the statement could be taken as having been *wilfully* made within the meaning of the Section.— 20 T. L. J , *709*

Section 49

See Secs. 21 & 23.— 22 T L. J. , *1310*

Other Cases.

1. A restriction on the assignment of the subscriber's rights in the chitty rules to the effect that the consent of one of the foremen should be obtained for the assignment if it is to be recognised by the foremen is valid and binding on the subscribers.— 20 T. L. J., *873*

Fol.—23 T L J , 478.

2. In the absence of any circumstances to indicate that the Karanavan may have joined the chitty and drawn the prize money for his own necessities, it would be unfair to deprive the foremen of the right to realise their dues from the Tarwad properties, when it is admitted that he was the Karanavan of the Tarwad who was in active management and against whom no allegation deserving of notice has been made — 20 T I J , *481*

Ref —48 T L. R., 1.
21 T. L. J , 859
21 T L J , 1195

3. The suit was by the foreman of a chitty against a defaulting prized subscriber to recover the future subscriptions in a lump with interest from the date of default

The lower Court held that the plaintiff was not entitled to interest on the lump sum from the date of default to the date of plaint, but could get interest only on such instalments as had fallen due till date of suit and on the lump sum after the date of suit

Held —The view of the lower Court was wrong. In the case of an unregistered instalment bond like the one in suit, the alternative claim to recover the lump amount with interest thereon came into play, no doubt, only on a notice in writing. But when it once came into play, it superseded the claim to recover the instalments in default one by one In the case in suit, the plaintiff had elected to claim the amount in a lump sum and had extinguished his claim to each separate instalment. To uphold his claim to the lump amount, but to allow interest only on the basis of the extinct claim to each instalment was incongruous. The notice in writing, whatever its effect on the law of limitation, operated to start the claim as it stood at the date of the first default and not as it stood on the date of the notice. The claim to interest came into

existence along with the claim to the principal, be the date of the notice what it may — 20 T L. J., 675

4. The suit was for recovery of defaulted subscriptions in a lump with interest from date of default The defendant contended *inter alia* that interest was allowable only from date of demand though under the chitty hypothecation bond executed by him, interest was to be paid on the whole of the unpaid subscriptions from date of default. The defendant also pleaded payment of subscriptions till the 17th instalment and not the 11th as alleged in the plaint and also a set-off of the amount due to him under a promissory note in his favour, Exhibit III, so that on a settlement of accounts Rs. 126¼ was due to him The Court below found against the defence contentions. The defendant in appeal objected to the findings in respect of the genuineness of Exhibit III and the payment of subscriptions till the 17th but he paid court fees on the appeal memorandam only on the amount decreed in the suit On preliminary objection as to the sufficiency of court fees on the appeal memorandam

Held —The appellant is bound to pay institution fees only upon the value of the relief claimed by him, *viz*, the dismissal of the plaint claim. The circumstance that the genuineness of Exhibit III or the payment of subscriptions from the 11th to the 17th drawings have to be considered in connection with the relief claimed, could not justify the appellants being required to pay anything in excess.

On the contention as to interest

Held —The liability for interest has to be determined with reference to the terms of the contract entered into by the parties. The necessity of a demand in writing for the accrual of cause of action for recovery of unpaid subscriptions in a lump has no reference to chitty hopothecation bonds. Even otherwise, it is doubtful whether the rule as to the accrual of the right to sue can be taken to affect the express terms of a contract providing for payment of interest from date of default.—

20 T L. J., 995

Fol.—23 T L. J, 966.

5. The retention in the hands of the foreman on account of the omission of the subscriber not furnishing security would be justifiable only with respect to the amount of future subscriptions. If there is any excess out of the prize amount over and above this sum, this should be expected to be handed over to the subscriber on the date of the prizing or on the date when the prize amount is declared payable under the Chattavariola unless the parties had entered into a contract otherwise In the absence of such a contract, the retention of such excess amount should necessarily entail the imposition of a liability on the foreman for interest on the same towards damages on account of the latter having had the use of the same,— 20 T L. J., 1250.

6 The appellant, a prized subscriber, purchased in Court auction the rights of the foreman in a chitty hypothecation bond executed in his (foreman's) favour and brought a suit for the recovery of the amount due under the bond It was contended *inter alia* that all the other non-prized subscribers are necessary parties to the suit.

Held.—The appellant so to speak has stepped into the shoes of the foreman by his purchase of the foreman's rights in auction. His position is in no way better or worse than that of the foreman. Unless there is proof at least *prima facie* that the foreman is in a state of bankruptcy or insolvency there is no necessity for impleading the non-prized subscribers as parties to a suit brought either by the foreman or by the purchaser of the foreman's rights in auction.—

21 T. L. J., 657.

Ref.— 23 T L. J., 1231.

7 Where a Karanavan prizes a ticket subscribed to on behalf of the Tarwad in order that the Tarwad should be liable for the payment of future subscriptions the money should have been received for some Tarwad purpose But the foreman starts with the presumption in his favour and a more favourable view should be taken of his case considering the fact that he is to some extent in the position of a debtor discharging a debt due to the Tarwad — 43 T L R, 1 (=21 T L J, 859)

8 It is not incumbent on a foreman, for purpose of settling the claims of a prized subscriber to pay the chitty amount only less the discount. Payment of that amount less the future subscriptions or adjustment of such claim is sufficient 'payment' within the meaning of the Chitty Regulation inasmuch as a prized subscriber who is unable to furnish security may claim and be paid by the foreman, the prize amount less the future subscriptions

Where therefore the foreman did not pay the full prize amount in cash to a particular prized subscriber but settled the claim by sale to him of a piece of land

Held.—The chitty cannot be deemed to have collapsed on the ground that the foreman did not pay the prize money in the manner required by the Regulation.— 21 T L J, 1189

9 It would be casting a most irksome and onerous duty on the foreman of a chitty in every case where he is called upon to pay the prize to a prized subscriber, to insist upon his embarking on an elaborate enquiry as to whether the Karanavan has subscribed to the chitty in his capacity as Karanavan or whether after receipt of the amount he is going to utilise the money for the benefit of the Tarwad. It is not quite sure whether the foreman of a chitty would be justified in refusing to pay a prized subscriber whom he has allowed to join in the chitty and also to bid for the prize before the subscriber produces his credentials as Karanavan.— 21 T L J, 1195

10 In the absence of any allegation of insolvency or bankruptcy on his part, the foreman of a chitty is the *prima facie* owner of any subscriptions due from defaulting prized subscribers and any such moneys or decrees for moneys in his hands may be attached for his debts without any reference to the claim of any non-prized subscriber No question of trust or trusteeship can arise between a foreman and subscriber except in cases where the solvency of the foreman is seriously in question.— 22 T L J, 818

11 The suit was by a prized subscriber in a chitty, who had not been paid the prize-money, for recovery of the paid-up subscriptions

Held,—The suit was not maintainable as the plaintiff's right to claim the paid-up subscriptions has been superseded by a right to claim the prize money The plaintiff could not waive the right to claim the prize-money and go back to the possible right to claim the paid-up subscriptions which he could have made, had the chitty not been bid, especially as he had sent a notice claiming the prize-money — 22 T L J, 1274

12 If in an agreement for the payment of an existing debt by instalments, it is provided that on default of payment of any instalment, the whole debt should be recoverable, the statute runs as to the whole debt from the time of the first default in payment of an instalment When the subscriber makes default in the punctual payment of an instalment, the primary contract is broken and in its place there arises by virtue of the contract a new obligation which is to pay the future instalments in a lump. The foreman's cause of action arose on the date of default. The simple question to be considered in such cases is when the money

becomes due which in other words means as soon as the money becomes payable and can be legally recovered by the foreman,

The question whether the foreman chooses to sue or does not sue is wholly immaterial In spite of the option given the money would nevertheless become 'payable' on the date of the first default

The Article of the Limitation Regulation which applies to the case is Article 85 of the old Regulation.—

22 T L J, 1277

13. The suit was by a defaulting non-prized subscriber in a chitty against the foreman for recovery of the paid-up subscriptions inclusive of Vesthapalisa. The question for decision was about the sustainability of the claim for Vesthapalisa, the plaintiff having been a defaulter

The chitty was conducted without any articles of association or rules to regulate the rights and liabilities of the subscribers or other relations with the foreman

Held.—The plaintiff was entitled to Vesthapalisa. Vesthapalisa is the share of the discount distributed among subscribers, the discount itself being the result of the bid at which the prize is knocked down to the successful bidder The discount is the margin left for distribution among subscribers from their collective contributions. It is not the foreman s money The Vesthapalisa for the drawings subscribed for by the plaintiff was credited in favour of the plaintiff not merely on the agreement of the foreman but also of the other subscribers, The foreman could not claim it back without the concurrence of the other subscribers. The accounts for the drawings should be taken as closed between the plaintiff on the one hand and the remaining subscribers on the other The amount standing to the credit of the plaintiff on accounts so settled is payable to him. It is not liable to be reopened at the instance of the foreman alone who dose not suffer in his pocket, since funds have been placed at his disposal by others for payment to plaintiff —

23 T L J, 29

14. A chitty hypothecation bond provided that the future subscriptions should be paid at the precise hour of the day on which the chitty took place and that if it was not so paid, it may be paid during the course of the day without a claim for Vesthapalisa or within 90 days thereafter along with Kalvasi After the instalment date but within 90 days thereafter, an amount covering the entire subscription but unaccompanied by Kalvasi was sent to the foreman by money order with a request in the coupon for the return of the Vesthapalisa by the foreman. The foreman refused the money order and filed the suit to enforce the bond, as if the subscriber became a defaulter:

Held —The provision for the payment of Kalvasi was in the nature of a penalty, and therefore the failure to tender Kalvasi along with the subscription did not occasion a default

Held further —The request in the money order coupon for return of Vesthapalisa did not constitute the tender in any way invalid or conditional By making a request which the foreman was at liberty to ignore and which he did actually ignore, the debtor was not imposing a condition. The tender was not a conditional tender There was therefore no default on this ground also.—

49 T L R, 68
(=23 T L J., 195).

15. Where the Thalavariola contained provision that no assignment by a subscriber of his chitty right would be valid without it being agreed to in writing by the foreman, an assignment in contravention of the provision would be invalid. Such provision could not be viewed as absolute restraint on alienation.—

23 T. L. J., 478

16 It is not every chitty started by the Karanavan either solely or with the co-operation of a junior member that could be considered as a Tarwad business. To hold so, there should be positive evidence that it was begun with the professed idea of its being an undertaking by the Tarwad, that it was agreed to by the other members who had assenting capacity, that it really benefited the Tarwad in the sense that the money that came into the hands of the Karanavan was utilised for Tarwad purposes or that the Tarwad members held out to the public that it was something that was run on behalf of the Tarwad, and on the faith of that representation, persons had been induced to take tickets,— 23 T L J., 964

Ref.—24 T L J, 206.

17 In a chitty started before the Chitty Regulation came into force, the necessity for sending a notice of demand is not a condition precedent to the accrual of the right in a foreman to claim a consolidated payment of all future subscriptions from a defaulting prized subscriber.

Where in a suit for recovery of future subscriptions in a lump, on breach of the condition in the chitty security bond, as to regularity of payment, the defaulting subscriber sought to uphold a plea of waiver by proof that subscriptions were paid and accepted even after breach.

Held,—The mere fact of receipt of some payments after default did not constitute waiver The existence or otherwise of a contract, express or implied, by which the parties agreed to restore the defaulting subscriber to the position of a non-defaulter, is the crucial factor for determining the question of waiver,—

23 T L J, 966

18. In suits on chitty bonds, evidence *aliunde* is required to *prove* that the plaintiff's claim to the particular relief arose on the date mentioned by him, and it is manifest that he ought to lead evidence as to that fact It may be stated that under Section 27 of the Chitties Regulation and under Article 120 of the Limitation Regulation, the plaintiff's claim to the relief arises only on demand being made in writing In cases governed by these statutes, therefore, the plaintiff would have to prove not only that default occurred on the date stated by him, but also that he issued a written demand to the subscriber for payment of the future instalments in a lump (F B) —

23 T L J, 1040

19. The suit was by the foreman of a chitty against a defaulting prized subscriber for recovery of all the future subscriptions in a lump The defendant pleaded that he had paid regularly 11 instalments and tendered the 13th instalment, which was improperly rejected, and deposited in Court the instalments from the 12th onwards that had accrued due then.

The primary Court accepted the defendants' plea, permitted the plaintiff to draw the amount deposited and to realise the subsequent instalments that had fallen due at the time of the decree and affirmed the rights of the parties *inter se* as if no default had happened

Held.—The plaintiff by drawing the money deposited in Court, had made himself incompetent to sustain his appeal from the decree. It was a well known rule of law that a party who had taken the advantage of the order of a Court could not turn round and say that for another purpose it would not bind him. He could not approbate at one time and reprobate at another the identical order which had to be taken as a whole, and that was founded on general principles of estoppel:— 25 T L J., 159

20. See also Regn. II of 1100,

Other cases.— 24 T L J, 206.

REGULATION VI OF 1094

(Motor Vehicles)

Section 5.

The word report in Section 5, clause (2), of the Motor Vehicles Regulation can be regarded as meaning only 'bringing to the knowledge of' the officer in charge of the nearest Police Station the facts of the accident and that even if such information is conveyed in writing or through some messenger, the requirements of the Section would be satisfied.—

22 T. L. J., 876

Section 11.

The appeal was by the Sirkar against the acquittal of the respondent for an offence under Section 11 (1) of the Motor Vehicles Regulation, *viz*, for keeping his car for five or six days without causing it to be registered'

Held—*(Per Joseph Thaliath and Narayana Pillai J J, Chatfield C J dissenting)*. —No rules have been prescribed under the Regulation for the registration of cars which are kept without use. The respondent was not therefore guilty of any offence under Section 11 (1) of the Regulation

Chatfield C J—Rules 2 and 9 of the Rules passed under the Regulation relating to the use of motor vehicles in public places are not alone to be considered in this connection Form A for application for registration of motor vehicles which is also part of the rules, should be taken into consideration. It is not unreasonable to regard this as setting out the prescribed manner of registering cars. Registration is thus made compulsory in all cases. As the delay in obtaining registration in the present case was however very small, the appeal may be dismissed

Per Narayana Pillai, J—Rule 2, which stands at the head of the *catena* of rules relating to registration deems registration necessary only where the vehicle is used in a public place As it stands a vehicle used in a private place or not used as a vehicle in a public place need not be registered Form A is an adjunct to Rule 3 which says that every application for registration shall contain the particulars mentioned in the said Form Rule 3 and Form A do not enlarge the scope of Rule 2, but are controlled by it— **21 T. L. J., 243**

Section 17.

1. In the case of a bus with a seating capacity of ten or more persons, the driver is not responsible for the duties of the conductor and he could not be charged or convicted under Section 17 of the Motor Vehicles Regulation for over loading—

20 T. L. J., 124.

2. The accused, a motor bus driver was convicted under Section 17 of the Regulation and sentenced to pay a fine of Rs 10 for violation of a Notification issued by the Commissioner of Police, in exercise of the powers vested in him as the registering authority, under Rule 15 passed under Section 12 of the Regulation. Infringement of the Notification consequent on the deviation from the beaten track was the offence charged against the accused He pleaded immunity on the ground that the Notification was *ultra vires* the authority of the Commissioner of Police

Held—(1) Unless a person contravenes any provision of the Regulation or any Rule made thereunder and such contravention is not made punishable any where else in the Regulation, he cannot be convicted under Section 17

(2) The only authority to whom the rule-making power has been delegated by the Regulation is the Government of Travancore. On the date of the alleged

offence in this case it did not appear that there was any rule made by the Government prohibiting or regulating the driving of motor vehicles in any public place or authority or manner to give notice of any such rule prescribed by Government.

The accused is therefore immune from punishment

Where powers and duties are conferred by a Statute affecting the rights and interests of the public, these powers and duties could be exercised only by the persons or bodies on whom they are specifically conferred It is of course open to persons and bodies deriving powers under a Statute to arrange for the performance of ministerial acts by some other agency If in virtue of its power under Rule 15 to "prescribe" the route to be followed "in respect of each public passenger motor vehicle", the registering authority had incorporated the condition in regard to the route to be followed by the accused's bus, in its certificate of registration in the permit issued under Rule 31, it would have given rise to considerations of a different kind.—

21 T L J, *182*

REGULATION IV OF 1095.

(*Police*)

Sec 67—See Regn. I of 1074, Sec 65 —
20 T L J, *949*

Sec 70—See Regn. V of 1067, Sec. 175.—
48 T L R *451*
(=23 T L J, *45*).

REGULATION V OF 1095.

(*Municipal*)

Section 15

On the failure of a Municipal Council to elect a President within two months of the direction therefor by the Government, the Government appointed the senior Official Member of the Council as a temporary President pending election and issued a second direction for election. The defendant was elected President in due course The suit was by a voter of the Municipality to declare the election void as contravening Section 15 (v) of the Municipal Regulation

Held—The provisions of Section 15 (v) must be regarded as enabling provisions The ordinary rule is that the Government appoints the President. An exception is created by Section 15 permitting the Government to direct the Municipal Councillors to elect the President But if that direction is not carried out within two months, the right to appoint returns to Government This may not prevent however a fresh direction. There is nothing in the Section itself which prohibits such a direction. If, on the other hand, it be regarded as a binding duty of the Government to appoint a President in such a case, there is no reason why a President may not be appointed by virtue of his office for such time as the Government may direct See Section 17 (1) of the Regulation. The term of appointment need not be for a fixed term. It may be until the happening of an event as in the case.

Semble.—It is difficult to see what legal right of the plaintiff had been infringed His right was to vote for the members of the Municipality, and that right had not been interfered with. He was not a Municipal Councillor himself and so was not a voter in an election of a President,—

49 T L R., *154*
(=23 T L J., *231*).

Section 48

1. The power conferred by a special Act on a Local Authority to impose a particular tax for a particular purpose in a special manner does not oust the jurisdiction of the Civil Courts to give relief

against an illegality committed by that body under cover of Statutory powers and a Civil Court has jurisdiction to determine the question whether the imposition of a tax is illegal and *ultra vires*

Section 65, Civil Procedure Code, comprises suits both against the Dewan of Travancore and against Public Officers. As regards suits against the Dewan notice is obligatory, whatever be their nature But as regards suits against a Public Officer notice is necessary only in respect of any act purporting to be done by such Public Officer in his official capacity The construction put upon the words 'act purporting to be done' in the Civil Procedure Code need not necessarily be the construction to be put on the same words in the Municipal Regulation, Section 48, Clause (3). Section 48, Clause (3), says that where it is proved that before the suit was instituted tender of sufficient amends has been made to the plaintiffs, the suit should be dismissed with costs so far as the amends go This shows that the suit contemplated in Clause (1) is a suit in which amends are possible Naturally 'act purporting to be done in the said Clause (1) should refer to a past act and therefore a suit for injunction does not require a previous notice for its institution — 38 T L R, *37*

(=22 T L J., *122*)

Ref—33 T L J, 1108

T See also Sec 61 — 23 T L J, *1108*

Section 61

The plaintiff, the Malabar Commercial Corporation Co had an office and garage at Nagercoil for which house-tax was being paid to the Municipality and its buses left and came to Nagercoil at stated hours of the day The plaintiff duly applied for a licence under Section 61 (3) of the Municipal Regulation, from the beginning of 1098, on payment of half-yearly tax on its vehicles. The Municipality delayed granting the licence applied for till 22 1-1099, and so plaintiff was compelled to pay tolls on the vehicles instead, under Section 61 (5) The plaintiff, in the suit, claimed refund of the tolls collected, as damages arising from breach of statutory duty imposed on the defendant Municipality under Section 61 The Court below decreed the suit and the defendant Municipality appeals

Held—(1) The plaintiff having kept his vehicles inside the Municipal limits was in the meaning of Section 61 of the Regulation, was entitled to issue of a licence on payment of the half-yearly tax prescribed by Section 61 (3) and imposable under Section 61

(2) As, under the provisions of the Municipal Regulation, provision was made for suits against the Council, and Sections 95 and 96 did not exclude a suit for damages of the kind in question, the suit based on neglect to perform a statutory duty was maintainable

(3) The plaintiff's cause of action being the damage caused by the non-issue of the licence his right of suit originated every time the collection of toll was made and there was no cessation of the right of suit until the issue of the licence in Chingom 1099 There being a special law, the Article of the Limitation Regulation was inapplicable. The suit was governed by Section 48, Clause (2), of the Municipal Regulation which prescribed a period of 8 months from the accrual of the cause of action The claim of the plaintiff as regards collections made beyond 8 months was therefore barred

Per Sivasankara Pillai, J—A Municipal Corporation cannot exercise the power vested in it by statute in a capricious, wanton and oppressive manner Even when acting within the defined limits of its powers, it must not conduct itself arbitrarily or tyrannically It is sometimes said that for mere non-feasance, no action for damages will lie against a public body, but it has been recently held that

the Corporation is liable in damages for injury caused by non performance of its statutory duty

The general rule is that where a right and an infringement thereof are alleged, a cause of action is disclosed, and unless there is a bar to the entertainment of such a suit, the ordinary Civil Courts are bound to ascertain the claim If a special remedy is provided by statute for the enforcement of a right or duty which is entirely the creation of such statute, then that remedy must be pursued unless the remedy does not cover the entire right Where a question of illegality or *ultra vires* is raised by the plaintiff as regards the demand by a Municipality of any tax, then Sections 95 and 96 of the Municipal Regulation do not constitute a bar to the exercise of the jurisdiction by the Courts,

Per Venkata Rao, J—Section 51 of the Municipal Regulation is intended to protect the Council against suits for damages consequent on acts done lawfully and in good faith Where the foundation for the claim is that the acts complained of is the illegal exaction or realisation of the tolls, the first requisite, *i e* legality of the action is absent, and the Council cannot invoke the aid of the provision

The plaintiff's right of suit did not depend on actual payment of tax under Section 61 (3) as distinguished from his making out that his liability to taxation arose under Section 61 (3) and that he ought to have been taxed accordingly Such a distinction was too narrow In either case, he could claim exemption from payment of tolls and therefore had a right of suit against the levy thereof 'Errors in assessment which constitute irregularities merely and do not go to the ground work of the tax and render the assessment void, can be corrected only in the manner provided by the statute which creates the authority and the remedy so provided must be treated as exclusive On the other hand, where the defects in assessment are jurisdictional rendering them void and the persons aggrieved thereby are entitled to invoke the ordinary judicial remedies, and all clear violations of law give rise to jurisdictional questions' Section 96 was, therefore, no bar to the maintainability of the suit (F B)— 23 T L J, *1108*

Section 65.

The penalty provided under Section 65, Sub-section 2, of the Municipal Regulation will be applicable to persons who do not comply with the requirements made under Section 83 (1)— 46 T L R., *864*
(=20 T L J, *1198*).

Section 81.

See Sec 61— 23 T L J, *1108*

Section 83

See Sec 65— 46 T L R., *864*
(=20 T L J, *1198*)

Section 95.

1. The petitioners were owners of buses plying for hire between Kottayam and Trivandrum The Municipality of Trivandrum took steps against them for recovery of vehicle tax The petitioners contended that vehicle tax could not be recovered on the ground that whenever they entered the Municipal limits, they have paid tolls. This contention was overruled The Dewan Peishkar was then requested to state a case for reference to the High Court. This request was also refused

Held—For purposes of Section 95, the Dewan Peishkar must be deemed to be an appellate authority and subordinate to the High Court's jurisdiction. The High Court had jurisdiction to compel a Dewan Peishkar purporting to act under Section 95, Clause (5), of the Regulation to make a reference,

Though vehicles for which half-yearly tax was paid were not subject to payment of tolls it did not follow that those vehicles for which tolls were paid could not be subjected to the half-yearly tax The half-yearly tax was compulsory in respect of any vehicle garraged in Municipal areas.— 49 T L R, *294* (=23 T L J, *829*).

2 The Parur Municipality attached and thereby realised a tax *imposed on the defendant's motor boat for plying it for trade* within the Municipal limits. Subsequently on appeal to the Dewan Peishkar, the amount realised was ordered to be refunded on the ground that the attachment was invalid The suit by the Municipality to recover the amount so refunded was dismissed by the *Munsiff* and the Judge *(in appeal) on the ground that the suit was not* maintainable and that Sirkar was a necessary party thereto

Held —(1) For the *recovery* of the amount refunded to the defendant which is the substance of the plaint claim the Sirkar is not a necessary party

When a statute creates a right or power and at the same time prescribes a particular method by which that right or power is to be exercised then it may be presumed in the absence of words to the contrary that the right cannot be enforced by means of a civil suit.

(2) The Municipality is not a mere Department of Government It has its own property and it may bring and defend suits. *The money* paid by the defendant formed part of the Municipal fund and was therefore Municipal property which the Municipality had the right and duty to protect This fund has become liable to a repayment to the defendant as the result of an order passed by the Dewan Peishkar If the order was one passed under Section 95, then it is difficult to see how it could be questioned on behalf of the Municipality even if it could be shown that a wrong view of the law or facts was taken. If on the other hand the order could not be regarded as one passed under Section 95, it is not clear why a suit should not lie. 47 T L R, *217* (=21 T L J, *198*)

Ref — 47 T L R, *294* (=23 T L J, *829*)

3. See also—

Sec 61 — 23 T L J, *1108*

„ 48 — 48 T L R., *87* (=22 T L J, *122*)

Section 96

See Sec 48,— 48 T L R., *87* (=22 T L J, *122*)

„ 61 — 23 T L J, *1108*

Section 98.

See Sec 138 —46 T L R, *398* (=21 T L J, *122*)

Section 110.

The complaint preferred was to the effect that the accused put up a masonary wall to the north of his house and along side the main southern road without sanction of the Municipality and that when a notice was issued to him to stop further construction he disobeyed that notice and proceeded to complete the *construction of the wall* The Magistrate was of opinion that there was no lawful disobedience of any valid notice issued by the Municipal Council inasmuch as the notices, Exhibits B, C and G, prohibited him from proceeding with the further construction of the wall of a building and not a compound wall It was contended that the *Magistrate* has not noticed the *definition of the expression* 'building" contained in Section 3, clause (2), of the Municipal Regulation which expressly includes a "wall"

Held.—The definitions in Section 3 of the Regulation, indicate that the terms "means' and "includes" are not of the

same significance, and the compound wall in question was a "building" within the meaning of Section 110

Section 241 of the Regulation, should not be construed with the strictness of an enabling Section, but must be read simply as requiring specific authority for the prosecution and nothing more. If the authorisation indicates the concrete acts in respect of which the prosecution is intended, the form in which such intention was indicated is not of much importance.— 20 T L J, 959.

Section 138

The petitioner used a place within a Municipality as a brick kiln without obtaining a licence therefor under Section 138 Clause (g) of the Municipal Regulation The Municipality levied the licence fee from him and for recovery of the same, the Municipality attached the kiln While the attachment was in force, the petitioner removed some bricks from the kiln. For thus removing bricks while the property was under attachment, the Municipality prosecuted him for the offence under Section 54 of the Revenue Recovery Regulation as Section 98 of the Municipalities Regulation enabled the Municipalities to treat all monies other than fines and penalties recoverable under that Regulation as arrears of public revenue within the meaning of Regulation I of 1068 and to recover the same as such.

It was contended that (1) offences under the Revenue Recovery Regulation do not come within the scope of Section 241 of the Municipalities Regulation, and (2) that the proceedings of the Municipal Council in attaching the kiln for licence fee is illegal and void *ab initio* as that is not contemplated by Section 138 of the Municipalities Regulation.

Held —*Per Parameswaran Pillai, J*— There is no provision in the Municipal Regulation enabling the Municipality to levy the licence fee on a person who uses a place as a kiln in contravention of Section 138 Clause (g) If the Legislature intended to make the person violating any of the provisions of Section 138 liable to pay the licence fee also, in addition to the conviction and sentence, it would have said so expressly The licence fee claimed by the Municipality is, therefore, not recoverable under this Regulation and therefore it cannot be treated as arrears of public revenue within the meaning of Regulation I of 1068 and recovered as such under Section 98 of the Municipalities Regulation.

Per Venkata Rao, J —A license fee should not be regarded as a tax and would not ordinarily be recoverable as such. The sub-heading under Section 98 of the Municipal Regulation inserted in the Regulation is "collection of taxes" and unless licence fee can be regarded as tax leviable by the Municipality the procedure prescribed under the Section would not be applicable. There can be little doubt that it is not a tax and nothing in Section 138 or Section 94 (2) makes it recoverable otherwise.

Held,—The attachment placed on the kiln for non-payment of the licence fee is illegal and therefore the conviction of the petitioner for the offence under Section 54 of the Revenue Recovery Regulation cannot be sustained

46 T L R, 396
(=21 T L J, 122)

Section 139.

Section 139 of the Municipal Regulation is imperative that as a condition precedent to the holding of any show a licence from the Municipality must be obtained The Section does not provide a time limit within which the Municipality has to grant or reject the petition as for instance in Section 112 It does not provide any provision that if the Municipal Council neglect or omit to give an order of sanction or refusal to a person applying for

licence to hold a picture or cinematograph show within a prescribed period the Council should be deemed to have granted the licence or permitted the performance. In other words the Section appears to insist on the applicant obtaining a previous licence from the Municipal Council before he can exhibit any picture or cinematograph or anything of that kind The Magistrate had therefore erred in acquitting the accused on the charge under the Section on the strength of a mere application for licence.

The object of a notice under Section 140 is to apprise the party that theatrical performances are prohibited for a certain period and if a communication sent by the Municipality, to a party gives him a clear indication that theatrical performances are prohibited, that is all that is required by the Section,—

50 T L R, *130*
(=24 T L J, *86*).

Section 241

See Sec. 110—20 T L J, *959*
" 138—46 T L R., *396*
(=21 T L J, *122*)

Other Cases.

What Rule 36 *re* Election wants is a finding that the petition was made without satisfactory reasons or was frivolous or vexatious. It is one thing to say that a petition was made without satisfactory reasons and quite a different thing to say that some of the allegations in it are without satisfactory reasons. Frivolity is not the same thing as absence of satisfactory reasons. As Rule 36 stands, it would not justify a forfeiture, where a petition is in part found to be frivolous or without satisfactory reasons. A provision like Rule 36, both penal and fiscal, should be strictly construed, that is to say, as far in favour of the subject as the language would permit.

Where a special tribunal is constituted to deal with any particular matter, there is an ouster of the jurisdiction of the Civil Court *pro tanto* and the exercise of any discretion vested in the special tribunal cannot be called in question before the ordinary Courts. This is subject to certain important provisos one of them being that the party affected adversely should be heard or afforded an opportunity to show cause, before the special tribunal pronounces against him. This is a matter of natural justice which no tribunal, special or ordinary, is at liberty to disregard in the absence of very clear legislative provisions to the contrary

Where, therefore, the Dewan Peishkar, as an officer designate to conduct election enquiries, ordered the forfeiture of deposit on the ground that the allegation as to corrupt practice and fraud made in the objection petition was 'frivolous or without satisfactory reasons' but no opportunity had been given to the petitioner to show cause against the proposed forfeiture

Held.—The order did not conform to the principles of natural justice and that the ordinary Civil Courts had a right to interfere— 20 T L J., *1069*

Ref —48 T. L. R., 37 (=22 T L. J., 123)
49 T L. R., 894 (=23 T L J, 629)

REGULATION VI OF 1096
(*Public Canals and Public Ferries.*)

Section 52.

The ordinary principle of law is that in a criminal offence *mens rea* must be shown unless the doctrine is excluded by express enactment. But it may be dispensed with by statute. The true test for determination of the question whether or not the rule of *mens rea* is excluded by the Statute under consideration in each case is to consider the scope and nature of the

Statute and the various circumstances which make the application of the doctrine reasonable or unreasonable as well as the language of the particular Statute under consideration

Applying this test, it is not necessary to prove any *mens rea* or guilty knowledge in a prosecution under Section 52 of the Regulation.

Section 52 is obviously intended for the purpose of preventing overloading of vessels and the evils which may result from overloading The Section contains an absolute prohibition. The gist of the offence appears to be in the vessel being found to have a greater number of passengers than the number allowed by the licence.

The words 'shall be liable' in the Section must be deemed to prescribe a punishment for the act referred to therein, and the same has to be dealt with by the Court which could take cognisance thereof under Section 5 of the Criminal Procedure Code.—

46 T L. R. 70
(=20 T L. J, 647)

REGULATION VII OF 1096.

(Registration of Births and Deaths)

Section 17

Under Section 17 of the Regulation certified copies of entries in the register of births and deaths may be produced in proof of the entries of which they purport to be copies. Such entries are admissible in evidence under Section 35 of the Evidence Act, whatever be their probative value.—

46 T L. R. 46
(=22 T L. J, 86)

REGULATION VIII OF 1096

(Income Tax)

Section 2.

1 The question referred related to the liability to income tax of the rent derived from the right to fish in the paddy lands granted by Government to Dewan Nanjappaier as per the *Danasasanam* granted dated 17-12-995 the concluding portion of which ran as follows.— " ആക നിലവും ഇന്നാടെ മുതൽക്ക് അർത്തലമായ ( ) ആവശ്യതരമെ സന്തതിപ്രവേശമെ മതലെ ലിവി അന്തരവിച്ച കൊള്ളുമടെ നാം കൊള്ളെ കോമളനെ എഴുപ്പടെ ഒഴിഞ്ഞു കൊണ്ടുപ്പു കൊടുത്തു " The assessee contended *inter alia* that under the provisions of the grant the lands were freed from liability to all taxes present and future and were therefore outside the ambit of the Income Tax Regulation and secondly that the income in question was "agricultural income" within the meaning of Section 2 (1) (a) or 2 (1) (b) (i) of the Income Tax Regulation and therefore exempt from taxation

Held—(1) On a proper construction, the terms of the grant did not indicate that grant was free from taxation of any kind and therefore any exemption which could be claimed reasonably must be traced to the principles of ancient Hindu Law regarding Danams or gifts of land by Kings to Brahmins. Such exemption could relate only to land assessments leviable on the lands comprised in the grant, but not to tax levied on incomes generally under the Income Tax Regulation. The income from the fisheries in question was therefore taxable under the residuary Clause (vi) of Section 4 of the Regulation.

(2) It cannot be contended in the case that the income from the fisheries fell within the scope of Section 2 (1) (a) as the lands in question were Karamoshiva and

were therefore not assessed to land tax or subject to a local rate within the meaning of that Section or that it was income "derived from agriculture" within the meaning of Section 2 (1) (*b*) (i) (F B)—

21 T L J, *1158*

2. The following questions were referred by the Chief Revenue Authority for the orders of the High Court

(1) Does the annual subsidy of Rs 1082-16-0 paid by the Edappalli Chief for Police protection and credited in the State accounts under 'Land Revenue' render the Chief's Edavakai lands and Desavazhies in Travancore 'assessed to land revenue' within the meaning of Section 2 (1) (a) of the Income-Tax Regulation?

(2) Does the payment of an annual subsidy of Rs. 1082-16-0 by the Edappalli Chief to the Government for Police protection render Edappalli a separate State to which the Income-tax Regulation cannot apply?

The first question was answered in the negative

The entry of the amount (Rs. 1082-16-0) in the Sirkar accounts under the 'Land Revenue' does not estop the Sirkar from contending that the income realised by the Chief from his Edavagai and Desavashi lands was assessable to income-tax The mere fact that the Sirkar has entered the payment under the head 'Land Revenue' is not conclusive of the question in issue and it is significant that the amount of subsidy had not been fixed with reference to the Chief's lands or with reference to the yields from the lands as is done in the case of ordinary lands paying land revenue to the Government. The Chief has nothing to do with the entry It is quite open to the Sirkar to enter the amount under any other head than 'Land Revenue' The annual subsidy of Rs. 1082 16-0 paid by the Edappalli Chief for Police protection and credited in the State Accounts under "Land Revenue" therefore does not render the Chief's Edavagai and Desavazhi lands in Travancore assessed to Land Revenue within the meaning of Section 2 (1) (a) of the Income-tax Regulation.

All income is *prima facie* subject to the payment of tax unless otherwise exempted from payment of tax and the onus of proving that a particular income from land is exempt from tax on the ground that it is assessed to land revenue lies on the person claiming the exemption.

The second question was not answered as it was not pressed (F B)—

48 T L R, *219*
(=22 T L J, *661*).

Section 3.

1 An association styled the Arcor Sree Moolam Kerala Pattariya Samajam was formed for the general improvement of the social, economic and material prosperity of the Pattariya Community For its proper working it was endowed with various sources of income among which were interest derived from the loan of Samajam funds to members and outsiders and also subscriptions paid by its members. The question arose whether the Samajam was liable to pay income-tax or whether it could claim the benefit of the exemption under Section 3 (2) (1) of the Regulation on the ground that its income was derived solely from property held under a trust or legal obligation wholly for religious or charitable purposes within the meaning of that Section

Held—There is no warrant for saying that in construing the meaning of the expression 'legal obligation" it is necessary to put on it a meaning *ejusdem generis* with the word trust in the phrase "trust or legal obligation.' It appears that by the use of the words "legal obligation" in the phrase "trust or legal obligation" the Legislature deliberately intended to draw a distinction between

trusts properly so called and certain kinds of obligation which although they may not come strictly under the definition of trust still would create legal obligations on the part of the holders of the property

All that is necessary to secure exemption from income-tax is a "legal obligation" to apply the income to charitable or religious purposes.

The property or the funds of the Samajam are held under a legal obligation for the benefit of the Samajam and the members thereof.

It seems to be fairly clear that the word "property" in Section 3 (2) (1) in the Income-Tax Regulation must be construed in the widest sense, namely, as the generic term for all that a person has dominion over.

There are very many transactions which the English Law would not regard as charities or "charitable" which under the Indian Law would undoubtedly fall under the definition of "charity" or "charitable"

In cases where the question to be decided is whether the income of a particular Samajam or Association is taxable, the supreme test is to see whether the object of the Association is to benefit the community in general as opposed to the individual members of the Association But from this it is not to be understood that anything which in some way or other directly or indirectly benefits the public must be deemed to be a charity or charitable within the meaning of the Income-Tax Regulation.

The fact that the benefit was confined to one community is immaterial as the words 'general public utility' in the Subsection would cover cases of utility to a community as distinguished from the general public. It would be quite sufficient if the benefit went to a section of the community.

It is a recognised principle of law that a subject is entitled, if he can, in any legal manner to circumvent the incidents of a particular taxing or finadcing Act

All the properties of the Samajam, immovable and movable, including the moneys lent out except the subscriptions paid by the members are property held by the Samajam under a legal obligation and any income derived out of these properties is entitled to exemption from the payment of income-tax under Section 3 (2) (1) of the Income-tax Regulation (F B).

48 T. L. R., 49
(=23 T. L. J., 680)

2 An assessee who resides in Travancore and has admitted income from outside the State which he merely says he has not received in Travancore and which he has omitted to enter in the accounts along with his other income is bound to prove that he received the income outside the State in order to claim exemption from assessment on it. In other words the burden of proof in such a case is on the assessee and not on the Collector

To hold that in every case the Collector should strictly prove the amount of income received by an assessee as if the Collector was the plaintiff in an ordinary civil action would be productive of considerable mischief and inconvenience and may even defeat the object of the Legislature in enacting the Income-Tax Regulation

In the Income-Tax Act itself there is no warrant for the assumption that as a matter of course the law of evidence as laid down in the Indian Evidence Act applies to the Income-Tax Act, though it would be desirable to follow the principles of the law of evidence as laid down in the Indian Evidence Act in deciding questions of income-tax between the Crown and the subject. The state of his income is a matter peculiarly within the knowledge of the assessee so that even if the principle of the law of evidence applies to the

Income-Tax Act the burden of proving the income lies on the assessee (F B) —

48 T L R., *413*
(=23 T L J., *72*)

Section 4

See Sec 2 — 21 T L J, *1158*

Section 8

1 In assessing business profits under the Income-Tax Regulation, it is not correct to debit the gross earnings of any year with the working charges incurred in previous years and already debited against the gross earnings of the respective years (F B) —

30 T L R, *113*
(=23 T L J, *1138*)

2 A mining Company with Head-office in London was carrying on business in Travancore. In assessing the company for Income tax the company is allowed to deduct certain expenses called 'Head office charges'—being expenses incurred by the company for supervising the work of the company both in England and in Travancore. The expenses incurred in England are for the supervision of the company s work in England and in Travancore,and consequently it does not appear to be quite fair or equitable that the company should be allowed to deduct the whole of the Head Office charges from the income derived and assessable in Travancore. It is not possible to say with mathematical precision what proportion of the charges should be deducted in respect of the income in Travancore and what proportion in respect of the income in England All that the Court can say is that in each year according to the circumstances the Commissioner may fix a reasonable sum as the amount deductible in respect of the incomes in Travancore and in England regard being always had to the amount of labour involved in the earning of the profits or gains.

If, by the publication of a notification in the Gazette under Section 16 of the Travancore Mines and Minerals Regulation, it was made obligatory on the part of the assessee to provide medicine, medical attendance and appliances for the employees, then the company would be entitled as a matter of right to claim the expenditure incurred on that head as an allowable item of deduction.

In *re* the expenses incurred by the company for medicine, medical attendance and appliances for their employees, it is a matter of very great difficulty to say with precision what exactly is meant by the expression "incurred solely for earning the profits." Each case has to be decided on its own merits It would be for the tribunal deciding the case to consider the particular circumstances in each case and come to a conclusion whether as a matter of fact the particular expenditure was incurred for the sole purpose of earning the profits or not At first sight one may naturally be inclined to say how any money expended for providing medicine and medical attendance for the employees of the company can be regarded as moneys expended for the sole purposes of earning profits But the tendency of the Courts at the present day is to put a liberal construction on the words "incurred solely for the purpose of earning profits." "A sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade." "In many cases the question whether the money was wholly or exclusively laid out or expended for the purposes of the trade must depend upon a knowledge of the facts of the trade, of the way in which it is carried on, of the effects of payments made in that trade, all of which are questions of fact.

In the circumstances of the case, the expenditure incurred for medicine and medical attendance must be regarded as expenditure incurred solely for the purpose of earning profits in the year and as such the company is entitled to a deduction in respect of the amount expended for the purpose during the year.

It is for the Court in each particular case to say whether a particular journal or map is necessary for the purpose of earning profits or gains in a particular year

Retaining fee paid to a Solicitor may be allowed as a deductible item (F B.)—

50 T L R., *117*
(=24 T L J, *629*)

Section 10

In settlement of a long-standing dispute between the Poonjar Chief and the Travancore Sirkar, as to the existence or otherwise of Royal Prerogative (Rajavakasom) in the former in certain tracts of land, it was agreed that 'all the rights of the Poonjar family over the properties were to be assigned once for all to the Travancore Sirkar with effect from 1-1-1075 in return for a perpetual yearly grant of Sirkar rupees 14,000 to be paid in monthly instalments from Chingom 1075' The question before the Court was whether the amount so paid annually could be assessed to income-tax It was contended for the Poonjar Chief, that it should be regarded as either premium paid by Government for one year s enjoyment of the assessee s property or part payment of price for property alienated, and therefore not assessable

Held (Rejecting the contentions of the assessee)—Unless exempted under some provision of the Income-Tax Regulation all income from whatever source if it accrues or is deemed to accrue in Travancore comes under the operation of the Regulation (Section 3) If such income does not fall under either of Sections 6 to 9, it must be included under Section 10, as income derived from other sources.

The theory of payments by instalments is that each cash instalment reduces the amount remaining to be paid, whereas in the case, however, many instalments have been paid, the liability of Government remained exactly the same

The annual payment made by Government to the Poonjar Chief is not a premium for one year's enjoyment of property as the amounts paid annually would have to be paid whatever be the yield derived from the lands which were dealt with

The annual payment is not in the nature of an instalment towards the payment of the purchase money for the land,

The annual payment is income falling under the definition of income from other sources under Section 10 of the Income-Tax Regulation (F B) —

57 T L R, *894*
(=21 T L J, *1297*).

Section 17

A notice issued under Section 17, Clause (2), requiring an assessee to furnish a return within less than 30 days is not valid in law This defect cannot be cured without issuing a fresh notice in the prescribed form

Where, therefore, the D Form issued to an assessee gave only ten days' time, but on his protest, a reply was sent to him through Anchal, by the Income-Tax Collector allowing 30 days and on the assessee's default to submit a return within 30 days allowed, the Income-Tax Collector made assessment to the best of his judgment

Held.—The assessee was entitled to ignore the D notice. The subsequent communication through Anchal could not take the place of the notice required by law The assessee's failure to file the

return in pursuance to the letter could not be penalised (F B) —

49 T L R, 228
(= 23 T L J, 521)

Sections 22 & 23

See under Sec 50 —

46 T L R 160
(=20 T L J., 806)
47 T L R, 259
(21 T L J, 371)

Section 32

1. The assessee, a non-resident foreigner was assessed by the Commissioner and Collector, Devicolom, for profits derived by him from contracts for the supply of rice to the K D H P Company Ltd., Munnar On appeal, the Income Tax Commissioner found on the facts that the contracts were concluded within Travancore even though the goods were delivered and payment received in British India and that the assessment was proper However on the assessee's application, the Revenue Commissioner has referred the following questions for the opinion of the High Court

(i) Is Section 32 merely a machinery Section ? Does it enlarge the liabilities of the tax-payer beyond the limits of the charging Section 3 ?

(ii) In view of the findings in the case, should not the applicant's profits from the rice supplied by him to the K D H P Co. Ltd, be considered liable to Travancore income tax under Section 32 (1) of the Regulation although the rice was delivered and payment received outside Travancore ?

Held,—What is meant merely by a machinery Section is a Section which provides a method of carrying out the charge imposed by some other Section.

The first part of Section 32 is not merely a machinery Section but a charging Section, but it imposes no liability on a non-resident, which is not already imposed by the charging Section 3, inasmuch as the expression 'business' used in Section 3 and "business connection" used in Section 32 (5) mean the same thing, though the expression "business connection" was substituted in Section 32 to make it more comprehensive.

The jurisdiction of the High Court in the matter of interfering with the finding of fact in exercise of its revisional jurisdiction is restricted by the provisions of Section 50 of the Regulation, according to which it can only decide the question of law raised by the reference or if an application for reference to the Chief Revenue Authority is refused by him, the High Court might require the Chief Revenue Authority to state a case and to refer it. The Regulation does not authorise the High Court to interfere with the finding of fact recorded by the Revenue Authority

The contract having been made in Travancore a business connection as contemplated by Section 32 (1) has been established and all profits or gains accruing to the non-resident foreigner from such business connection is chargeable to income-tax (F B)— 47 T L R, 253
(=21 T L J, 485)

Fol —21 T L J, 889.

Ref —48 T L. R., 10
(=21 T L J, 1403)

2. The interest on the surplus funds which the Trivandrum Branch of the Imperial Bank of India Ltd, transfers to its Head Office outside the State is liable to assessment under Section 32 (1) of the Regulation if such interest represents the amount of profit or gain deemed as accruing or arising to the Bank through or from its business connection in Travancore, calculated in accordance with Section 8 of the Regulation or Rule 37 framed thereunder

The decision as to assessability to income-tax in any year has not the force of

res judicata in regard to the question of assessability in a subsequent year so far as the proceedings before the Commissioner of Income-Tax himself is concerned Much less so is it in regard to proceedings before the High Court

From the mere fact that profits in a particular case were not actually received in Travancore, it would not follow that they are not assessable.

Profits derived from the investment of a portion of the deposits collected in Travancore but transferred to British India to be profitably employed are assessable to income tax in Travancore

Per Joseph Thaliath, J — Instead of taxing the Imperial Bank of India in this roundabout way, the better course would be to treat the Travancore Branches as a separate entity for the purposes of the Income-Tax Regulation. Interest paid by the branches to the Head Office should be deducted from profits and interests received from the Head Office taxed The case reported in 16 T L J, 611 which stands against such a reasonable and equitable procedure requires reconsideration (F B) — **48 T L R.,** *19*
(=21 T. L. J, *1403*)

3. A business connection in Travancore within the meaning of Section 32 (1) of the Income-Tax Regulation is established by purchasing goods in Travancore though for sale outside

The question whether the whole of the profits can be assessed to Income-tax in Travancore when only a portion of the transaction which resulted in the profits was done in Travancore is a question of law which the Chief Revenue Authority ought to refer to the High Court under Section 50 (3) of the Income-Tax Regulation — **21 T L J,** *889*

Section 35.

Section 35, Clause (1), of the Regulation enables the Collector of Income-Tax to recover from the assessee the tax due from the latter *as if it were an arrear of land revenue*. In the marginal note to that Section, the expression used is "mode and time of recovery" Therefore, in the Income-Tax Regulation also, the provisions of the Revenue Recovery Regulation are invoked only for the method of recovery of the income-tax

Therefore a purchaser in a revenue sale under the Income-Tax Regulation cannot have a first charge on the land, he can have no precedence over every kind of encumbrance or alienation either voluntary or involuntary traceable to the land owner — **23 T. L. J.,** *577*

Section 36—A

See Vol VI, P 1506 —
45 T L R *409*
(—20 T L J, *555*)

Section 50.

1 The assessee in the case who was a paddy merchant and commission agent of Madura was assessed to income-tax, under Section 32, on the profits derived by him from supply of rice to certain estates in Travancore The Commissioner of Income-Tax found on the facts that the contracts relating to supply of rice were concluded and that the amounts were received in Travancore. On a reference to the High Court by the Income-Tax Commissioner

Held —If the non-resident foreigner enters into contracts with the residents in this State for the supply of goods to them, the profits on such contracts would be assessable to income-tax if the contracts are made in this State If the contracts are not so made but are entered into in foreign countries, the non-resident foreigner will still be liable if the purchase money is received in Travancore, under the plain words of Section 3 of the Income-Tax Regulation. If however the contracts are made in a foreign country

and the purchase money is received there then there is no liability for income-tax.

The reference which can be asked for under Section 50 (2) of the Income-Tax Regulation must be a question of law arising out of an order passed in appeal by the Commissioner under Section 22 of the Regulation Presumably if the point of law is one which can be decided on the facts as set out in the order itself, the assessee will not be debarred from asking for a reference by the fact that he has not raised the point at an earlier stage But if any fresh fact has to be established he will not be entitled to claim a reference

Quære—Whether Section 32 is a mere piece of machinery to enable the profits accruing in Travancore to a non-resident foreigner to be assessed and recovered through an agent in Travancore (F B)—

46 T L R, *160*
(=20 T L J, *806*)

Appr— 47 T. L. R., 258
(=21 T L J, 485)

Ref— 48 T L R., 10
(=21 T L J., 1403)

1. The amount paid under Section 50 (2) is not a deposit but a fee which could be returned as such only on the withdrawal of the application, under the proviso to Section 50 (2), by the party consequent on the decision of the question to be referred, by the Chief Revenue Authority himself

It is not open to the High Court to award the amount by way of costs (F B)—

20 T L J, *842*

3. The High Court, if it chooses, can interfere and compel the Chief Revenue Authority to state a case on a point arising out of an order under Section 33 of the Income-Tax Regulation. But it required to be stated that this jurisdiction will be very sparingly exercised, and only in exceptional circumstances.

No inference can be drawn from Section 50 that the power of the High Court was meant to be confined to cases arising under Section 22 The result will be that the Commissioner would be in a position to burke any further enquiry whatever (F. B)—

47 T L. R., *833*
(=21 T. L J., *871*)

Ref.— 49 T L. R., 258
(=23 T L. J., 526).

4 Until payment to the partners the amount payable as profits would continue as profits of the firm unless a specific amount is expressly advanced to the firm by the partners concerned on the distinct understanding that it should be treated as such There is no reason why partners of a firm should not agree to pay a definite sum by way of salary to one of their members which he should be entitled to draw not out of profits but irrespective of the existence of profits. If the arrangements were made *bona fide* for enabling the partnership to earn an income and the amount was considered reasonable, the same even if paid to a partner could be held to be admissible as a valid charge If upon an examination of accounts they were found to be genuine and entries relating to payments of salary were held to have been made long before the accounts were settled and profits of the firm computed an understanding relating to payment of salary may be presumed, such presumption being liable to be rebutted by other evidence on record.

Section 50, Sub-section 2, of the Income-Tax Regulation shows that the provisions relating to the making of the reference are of a mandatory nature, the Chief Revenue Authority being allowed no discretion in the matter The assessee is bound to specify the questions of law he desires the Chief Revenue Authority to refer to the High Court. But it is not every question that is so formulated by him that the Chief Revenue Authority is bound to refer to the High Court, for it is within the powers of that Authority to refuse a reference on

any such question, if in its opinion the same does not arise on the findings of fact arrived at therein. If, however, the question of law really arose in the case on the facts found, but the Chief Revenue Authority had however failed to "appreciate" that there was such a point, the High Court could in such cases exercise its power of control and direct the said Authority to make a reference

Grant of an application for directing a reference is purely discretionary with the High Court

Per Chatfield, C J and Venkatarama Aiyar, J—Interest on the prize amount taken by the Bankers as foremen in a chitty conducted by them is not admissible as a charge (F B)—

21 T L J, *388*

5. See also Sec. 32—

47 T L R, *253*
(=21 T L J, *485*)
21 T L J, *389*

REGULATION III OF 1097

(Government Land Assignment)

1 The plaint plot was recorded as Chira Poramboke during the settlement In 1098, plaintiff applied for registry of the land and sanction was accorded for such registry on 29-9-1098 under the Rules passed by the Government under Section 7 of the Land Assignment Regulation Levy of Vilayartham was ordered Objections were raised by certain inhabitants of the locality against the registry on the ground that the land in question was necessary for public purposes and these were rejected by the Tahsildar after due enquiry The Dewan Peishkar after local inspection, recommended the cancellation of the registry, which was set aside finally by the Dewan. The suit was for declaration of plaintiff's title to the property and for cancellation of the Dewan's orders setting aside the registry

Held.—A reference to the various clauses in Section 7 of the Land Assignment Regulation would indicate that interference with orders relating to assignment of land made by a competent authority prescribed under the Regulation and the Rules thereunder could be made in appeal or revision only in conformity with the Rules framed by virtue of the powers reserved in Government under this Section No powers are exercisable in this behalf independently of the Rules, for the same would have expropriatory results. The Rules framed under the power created under the statute have to be treated as a part thereof and it is a well recognised canon of interpretation of statutes that they are exhaustive so far as they go

The purpose of codified statute is that, on any point specifically dealt with by it, the law shall be ascertained by interpreting the language used If any remedy is given for the infraction of the provisions of any statute, it is not open to the Court to hold that another remedy not specifically provided for therein is available to the party aggrieved thereby

The powers under Rule 59 are, as is gatherable from the wording thereof, exercisable independently of the filing of an appeal and interference thereunder appears to be permissible even *suo moto* The two essential conditions necessary for enabling interference under this Rule seem to be (1) the decision must be due to a mistake of fact or the result of fraud or misrepresentation or passed in excess of the authority of the deciding officer, and (2) the interests of the Government or of the public are affected thereby

The mistakes of fact which would not include those relating to opinion or impression should be mutual for the exercise of the powers of revision under this Rule in asmuch as the fact that the interests of the Government or of the public are affected thereby, is alone insufficient to

justify such interference in the absence of informative circumstances set forth in Clause (1) of the Rule

The power of Civil Courts to interfere with orders passed under the Land Assignment Regulation and the Rules passed thereunder can be exercised only when the order is in breach of any completed agreement or where the land in respect of which the order is passed, is not a Government land as defined in Section 2 of the Regulation This would indicate that it is not open to the Court to sit in judgment over the authorities competent to pass any decision and examine the propriety of the order on its merits. Thus a declaration by the Dewan that the interests of the Government or the public require the reversal of the decision, would be conclusive in the matter, the Civil Courts not being competent to go behind the same

Held (on the facts)—The interference of the Dewan in exercise of his powers of revision under Rule 59 with the original order for registry was not justified, as the mistake of fact relied on for the purpose was clearly one of opinion or impression and not mutual and not therefore 'a mistake of fact' within the meaning of the said Rule— 46 T L R, 885
(=20 T L J, 844)

Fol —24 T L J, 100

2. Under Rule 58, Clause (1), of the Rules passed under Regulation III of 1097 *any person interested in the matter may appeal*

It is not perhaps easy in all cases to say with precision as to who is a person interested in the matter The expression *any person interested in the matter* is very general and was made designedly wide so as to cover all sorts of interests. A neighbouring land holder who had only a leasehold interest and used the plaint *thodu* for irrigating his lands is one *interested in the matter*

Under Rule 58 (1) limitation runs from the date of communication in the case of one who was no party to the original proceedings before the Thasildar, and in the absence of clear statutory provisions to the contrary, it would be monstrous to hold that an injured party was bound to appeal from a decision of which he had no notice

It has been held in several decisions in British India that where an appeal which is time-barred is heard and there are circumstances to justify the inference that the Court acting under Section 5 of the Limitation Regulation enlarged the time, it may be assumed that the Court did so act even though Section 5 is not referred to by the Court and there is no finding by it that sufficient cause existed

Rule 58 (2) says that the appellate authority may admit an appeal after the expiry of the period of limitation *provided he is satisfied* that the appellant had good and sufficient cause for not presenting the appeal within such period Whether in adopting the phraseology slightly different from that of Section 5 of the Limitation Regulation, the framers of the Rule had any particular object in view, it is not possible to ascertain The distinction however exists.

Where the appellant before the Division Peishkar admitted in his appeal memorandum that he had come up in appeal beyond 60 days from the date of the decision and the Division Peishkar proceeded to hear the appeal and eventually passed orders in favour of the appellant, it is not an unreasonable inference to draw that the Division Peishkar really excused the delay, if any

A party who pays Thadivila and Tharavila and gets a registry from the Thasildar knows or is presumed to know that the orders passed by the Thasildar are open to cancellation or modification by the superior revenue authority and if by virtue of the rules subsisting the superior revenue authority upsets the order of the Thasildar the party

cannot justly complain As long as the Statute and Rules make provision for appeals and revisions to the superior revenue authorities from the decisions of Thasildars, it cannot be said that there is a completed contract between the party and the Sirkar merely because, in pursuance of the Thasildar's order, Thadivila and Tharavila has been paid by the party —

48 T L R., *223*
(=22 T L J, *796*)

8. The rule of *caveat emptor* does not apply to the case of a Puduval registry The person in whose favour the registry is made is justified in acting upon the assumption that the Sirkar is competent to give him a good title, and seeing that he is not bound to make his own enquiry, he may have a right to insist that his title should be made good by the Sirkar when assailed by a third party and in case any deprivation happens, he should be compensated for the loss —

23 T L J, *793*

4. The plaintiff applied for registry of a poramboke adjoining his land The defendant claimed registry in his favour on the ground of earlier occupation and earlier application for registry The Tahsildar ordered registry in the name of plaintiff On appeal, the Division Assistant set aside the order of the Tahsildar and directed registry in the name of the defendant. The suit was for a declaration of title to the property and for cancellation of the registry

Held —Interference by the Courts with the orders passed under the Land Acquisition Regulation should be strictly based on statutory provisions and the Rules framed thereunder The scope for such interference is defined by Section 6 of the Regulation. Under the Land Assignment Regulation, the powers of a Civil Court to interfere with orders passed under the Regulation and the Rules passed thereunder arise only where the order is in breach of a completed agreement or where the land in respect of which the order is passed is not a Government land as defined in Section 2. This would indicate that it is not open to the Court to sit in judgment over the authority competent to pass any decision and examine the propriety of the order on its merits

Where there is no violation of the Rules and the Division Assistant bases his order on the Rule, a meticulous consideration of the reasons by which he arrived at his decision is not contemplated by the Legislature Declining to interfere in such a case is virtually giving effect to the provisions of the Regulation —

24 T L J, *100*

5 The plaintiffs obtained a registry of Puduval land on payment of Tharavila, etc, by order of Tahsildar, but on appeal, the Dewan Peishkar set aside the Tahsildar's order and ordered registry in defendant's name In revision the Peishkar's order was upheld by the Dewan

Held —There was no "completed agreement to assign" in favour of the plaintiffs within the meaning of Section 6 (*a*) of the Regulation, so as to enable them to question the registry in favour of defendants by way of suit The Tahsildar's order was not final and was subject to a right of appeal to the Dewan Peishkar and a revision to the Dewan The plaintiffs must be presumed to have known the fact that the Tahsildar's order was subject to modification or reversal by the higher authorities and in taking the registry from the Tahsildar, the plaintiffs necessarily took it at their own risk

Per Chakko, J —Even if the Dewan Peishkar's order in appeal was the result of misrepresentation made by the defendants, it was a matter of grave doubt whether the Civil Courts could interfere, since Section 6 of the Regulation strictly circumscribed the jurisdiction of the Civil Courts.— 24 T L J, *480*

REGULATION IV OF 1099.

(High Court)

1 The Head Sirkar Vakil presented a petition to the High Court invoking its inherent powers to take proceedings against the Editor and Publisher of a Newspaper called 'Probodhakan' for having published a scurrilous article in his paper tending to bring the Additional District Magistrate, Padmanabhapuram who disposed of certain summary cases arising out of the Suchindram Satyagraha movement into contempt as a Judicial Officer and also against the writer of the said article

The respondents to whom notice on the petition was issued by a Judge of the High Court sitting as a single Judge questioned the validity of such a notice by a separate petition and according to their prayer the case was heard by a special Bench of five Judges. They challenged mainly the jurisdiction of the High Court to deal with contempts of the subordinate judiciary

Held—The law has among others recognised two principal forms of contempts of Court. One is, 'any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority This belongs to the category known as "scandalising a Court or a Judge." The other is 'any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Court.

There is no specific definition of fair comment anywhere and it is in the nature of things impossible to define 'fair comment' in so many words. In each individual case the Court has to say whether a particular article or writing is or is not fair comment. In order that a comment may be fair the following conditions must be satisfied :—

(a) It must be based on facts truly stated

(b) It must not contain imputations of corrupt or dishonourable motives on the person whose conduct of work is criticised, save in so far as such imputations are warranted by the facts.

(c) It must be the honest expression of the writer's real opinion.

The action (for the scurrilous and unwarranted attack on the Magistrate) is taken not for redressing any private wrong done to the Magistrate but for the protection of the public who are subject to the jurisdiction of the Court from the mischief they will incur if the authority of the Court be undermined or impaired

The jurisdiction to punish for contempt stands on a peculiar footing, is somewhat anomalous and is not in all cases regulated by the Criminal Procedure Code

The High Court as a superior Court of Record has, apart from the provisions of the Penal Code or any other Regulation, inherent jurisdiction to punish contempts against itself committed outside the High Court and also has, in the exercise of its powers of superintendence and control over the subordinate Courts, Civil and Criminal, inherent powers to punish contempts of subordinate Civil and Criminal Courts committed outside those Courts. There is nothing in the High Court Regulation, the Penal Code, or the Criminal Procedure Code, which militates against this view To hold otherwise would obviously lead to most inconvenient results and would frustrate the very object for which Courts exist and ought to exist.

Newspapers have no greater or lesser rights than private individuals in the matter of criticising the acts or conduct of public men in their public capacity. As long as the criticism is fair, honest and made in the furtherance of public interests the critics are safe but once criticism oversteps its bounds and takes the

form of vile and scurrilous abuse the law will step in and demand satisfaction of the offending individual

It is not necessary that in the first instance the rule should be issued by a Division Bench especially in cases where the Court is exercising its inherent powers in the matter of dealing with contempts of Court To hold that a single Judge has no power would obviously lead to inconvenience

In law the disclaimer of any deliberate intention of ridiculing the Magistrate or exposing him or the administration of justice to contempt is held to be immaterial if the result of publishing the writing or article is to expose the Judge or Magistrate to ridicule and contempt *qua* Judge or Magistrate

Chakko, J—*Quaere* Whether in the matter of punishment, Section 359 of the Criminal Procedure Code may be taken as a guide.— **47 T L R** *176*
(=21 T L J, *424*).

2 See also Regn V of 1067,

Sec 326 — **46 T L R**, *203*
(=20 T L J, *940*)

" " Other Cases.—**21 T L J**, *1398*

REGULATION VI 1099
(*Reformatory Schools*)

The First Class Bench Magistrate's Court, Nagercoil, directed the detention in the Reformatory School of two youthful offenders, convicted before it The District Magistrate, Trivandrum, was of opinion that a Bench of First Class Magistrates was not a Court contemplated under Section 6 (2) of the Reformatory Schools Regulation and as such the order of the First Class Bench Magistrate's Court was *ultra vires*

Held—A duly constituted Bench of Magistrates including a First Class Magistrate was competent to direct the detention in the Reformatory School of youthful offenders convicted by it under Section 6 of the Reformatory Schools Regulation

But before making such direction, it is incumbent on the Court to make a preliminary enquiry and enter a finding as to the age of the youthful offender as required by Section 9 of the Regulation
48 T L R *938*
(=22 T L J, *1001*)

REGULATION II OF 1100
(*The Nayar*)

Section 2

1 *Per Paramesuaran Pillai, J*—The 'Veluthedathu Nayars are known and recognised as Nayars and they are governed by the Nayar Regulation II of 1100

The enumeration of the different classes of Nayars in Section 2 of the Nayar Regulation is not exhaustive According to the definition in Section 2, besides the different classes of Nayars enumerated therein, "others known and recognised as such" are also included within the term Nayar as used in the Regulation

A valid marriage under the Nayar Regulation is one which must have been "openly solemnised by the presentation of cloth to the female by the male."

Per Narayana Pillai, J—For the purposes of the Nayar Regulation any person is a Nayar who is known or (not *and*) recognised as such, if there is nothing repugnant in the subject or context —
47 T L R., *409*
(=21 T L J, *851*)

2 There is clear authority for the position that the barbers come under the category of "Nayar' as defined by the Nayar Regulation. Barbers are Nayars within the definition of Section 2 of the Nayar Regulation.— **22 T L J.**, *1200*

Section 3

For a valid marriage in accordance with the provisions of Section 3 of the Nayar Regulation of 1100, the presentation of cloth to the female by the male must be made with some publicity, though apparently the Regulation does not require, as a part of the solemnisation, those ceremonies and festivities which are customary

Although Section 3 is silent upon the point, it is still the law that in the case of a marriage between Nayars the presentation of cloth to the female by the male must be done with the intention to solemnise a marriage Such intention, may be freely inferred from surrounding circumstances But in a case where there is absolutely no evidence of an alleged marriage beyond the presentation of cloth, it may be that the intention to solemnise a marriage could be inferred from evidence of subsequent cohabitation (which does not necessarily mean, nor invariably imply, coition) or, since the western practice of husband and wife living together is not universal in Malabar, visits by the husband to the wife —

24 T L J, 521

Section 5

In an enquiry on a motion for divorce by a Nayar wife against her husband, the delegates erroneously thought that they were called upon to decide matters which could not be grounds for dissolution, *e g*, invalidity of marriage and incitement of the petitioner to adultery by the husband, and returned verdict accordingly But there was nothing in the charge to indicate that their opinion was invited on those matters and it was perfectly clear that the delegates knew the nature of the questions relating to cruelty and incompatibility of temperament (the real issues in the case) on which their opinion was invited. Their verdict clearly was that those allegations had been proved to be true

Held —Though the verdict returned by the delegates was one and comprised matters relevant and irrelevant, it must be construed as one containing separable findings of fact on the four distinct matters and as the verdict amounted to a finding that either or both the grounds of habitual cruelty and incompatibility of temperament were established, it would sustain a decree for dissolution of marriage 'Where a verdict has been given upon several distinct issues and the Court on motion for new trial is of opinion that the verdict cannot be disturbed as regards some of them and was incorrect on certain others, a prayer for a new trial could not be granted'

The charge delivered by the Munsiff in an enquiry in a matrimonial cause under the Nayar Regulation, should, as far as possible, be confined to the grounds actually alleged and on which relevant and admissible evidence was adduced The introduction of extraneous matter, either as regards the law on the question or the facts of the case or the evidence which may not be strictly relevant and admissible should be avoided, as the object of summing up is to place the clear issues of fact before the delegates with an enunciation of the principles of law governing the matter under enquiry, such as might help them to decide the issues of fact placed before them

It would be advisable so long as trained translators are not attached to our Courts, in cases in which the delegates empanelled are not conversant with English to frame the charge itself in Malayalam. This course would have the additional advantage of enabling the Appellate Court to see exactly in what manner the facts of the case were presented to them and their verdict was sought for and obtained.—

23 T L J, 659

Section 7

1 The Munsiff in charging the delegates in an enquiry for dissolution of marriage did not use such language as was intelligible to the ordinary layman and the questions for decision were not categorically put to them and this ultimately served more to obscure the issue than to enlighten the delegates as to the points on which they had to express an opinion Their verdict was also highly unsatisfactory for want of clear expression of opinion on the question of incompatibility of temperament

Held—The Rules 35 to 46 framed under Section 7 of the Regulation prescribe the functions of the Munsiff and the delegates and also the scope of interference in appeal Such kind of enquiry with the help of delegates, analogous to trial by jury elsewhere, is a novelty in procedure so far as this State is concerned, and that is the greater reason why the subordinate Courts should grasp thoroughly and apply with care the provisions regulating such enquiries particularly because they relate to domestic matters, a right decision of which will be essential for the welfare of the community concerned Such a caution appears to be necessary, if the case is taken as an illustrative example, for, the course adopted by the lower Court on account of the failure to conform to the law had, in the case, culminated in a failure of justice

On an enquiry in matrimonial causes, with the help of delegates under Chapter II of the Regulation, the Court, in a proper summing up, must formulate and specify simple issues for consideration and collate the evidence *pro* and *con* bearing upon the issues in order to assist the jury to arrive at the correct decision thereon A Judge in charging the jury should endeavour to speak in a manner simple and direct, The charge must not be involved and in extravagant language.

Where the verdict obtained from the delegates is incomplete and wanting in clearness, the Court should *ask* the delegates questions necessary to ascertain what their verdict is and record the answers and questions Where, therefore, *in an enquiry on a petition* for dissolution of marriage by a Nayar husband, on the ground of incompatibility of temperament, the charge as *delivered served more* to obscure the issue than to enlighten the delegates and the verdict obtained, simply said that it would be dangerous if the *marriage* was not dissolved

Held—The charge was defective and the verdict unsatisfactory These constituted substantial error or defect in the procedure or *investigation of the* case rendering it necessary for the appellate Court, in the ends of justice, to set aside the verdict and order a re-trial

Semble—Per Sivasankara Pillai, J—No doubt the law does not prescribe any particular form in which the jury ought to return the verdict and they are at liberty to deliver it in *any form* which they think fit But instead of being satisfied with what is called "a general verdict", it may perhaps be better if the *opinion* of the delegates is taken about the principal facts in respect of the grounds for dissolution.—

49 T L R, *949*
(= **23 T L J**, *512*)

2. The appeal was by a Nayar husband from the order passed by the Munsiff dissolving his *marriage*. *The order* was based on the verdict of a majority of the delegates.

The parties had agreed to the number of the delegates being 5 On some *occasions the* trial was conducted in the presence of 6 delegates, but throughout there were 5 of the same delegates present and when the verdict was given those 5 took part.

Held.—Merely because one additional delegate was present on some occasions

the verdict given by 5 of them who had been uniformly present throughout should not be rejected as unacceptable in law This is not a matter that would justify interference in appeal The decisions under the British Indian Code of Civil Procedure will be misleading since under Section 282 there should be a new trial if any juror be prevented from attending throughout the trial or absents himself, and his attendance could not be enforced The same difficulty would not arise if it was an assessor who was absent. (Sec Section 285).

The powers of the Court of appeal are narrow indeed as is evident from the proviso to Section 7, Sub-section (4), as well as Rules 46 and 47 passed under the Regulation

Section 7, Sub section (8) (a), has to be interpreted as contemplating the majority of those delegates who were present at the time when the verdict was delivered and not the majority of the number of the delegates selected by the Munsiff, some out of whom failed to make their appearance and participate in the enquiry This cannot constitute an illegality or such irregularity as had materially prejudiced either party and occasioned a failure of justice. – **24 T L J**, *451*

2. The District Munsiff trying a petition for dissolution of marriage under the Regulation is not competent to dispense with delegates wholly Enquiry and trial with delegates is a mandatory provision and no option is left to the Courts. Dispensing with them offends the spirit and principle of the special law —

24 T L J, *515*

Section 9

Both under the Nayar Regulation I of 1088 and II of 1100, a Nayar wife is entitled to claim maintenance from her husband but subject only to the proviso that she shall not be entitled to separate maintenance, *inter alia* if she refuses to live with her husband without just cause

Where, therefore, a Nayar wife claimed separate maintenance from her Nambudiri husband on the allegations, not of any ill-treatment to her but only of danger and annoyance from, the defendant's caste wife, which, however, were found not to be made out

Held—Though it was not improbable that there could be no cordiality among the two wives living in the same house, this by itself was not a just cause to live apart and claim separate maintenance. It could not also have been contrary to the sentiment of the community to which the plaintiff belonged, for a husband to have two wives, as the plaintiff voluntarily went to the defendant s Illom knowing there was already a wife there.—

21 T L J, *894*

Section 22

See Regn VIII of 1100 Or XLII, R 1 —

21 T L J, *562*

Section 25

See Regn. VIII of 1100, Sec 10 —

20 T L J, *1158*

Section 27.

Where in a suit for enforcement of a hypothecation bond executed by the Karanavan and other adult members of the Tarwad (consisting of minors as well), it was found that the bond was fully supported by consideration but there existed no Tarwad necessity as regards a portion of the consideration

Held.—Even though all the adult members of the Tarwad joined in the document, still the plaintiff, dealing as he was with a family containing minors, should have been particularly careful to have obtained satisfactory recitals in it. Plaintiff was in the circumstances not

absolved from making *bona fide* enquiries. No presumption of necessity could therefore be raised in his favour as regards the balance consideration

The question of presumption as to Tarwad necessity is one not free from difficulty In a number of cases an attempt has been made to define the exact position of a creditor lending money to the Karanavan of a Tarwad (The previous cases have been referred to and the conclusion arrived at in 19 T L J, 134) —

21 T L J, 1070

Section 39

1 *Per Narayana Pillai, J*—In interpreting the Nayar Regulation, a resort to the analogies of the Hindu Law does not appear justifiable

A right to partition is a statutory graft on the Marumakkathayom law The main guidance has to be sought for from the words of the Statute What Section 39 creates is a tenancy in common among the children and the wife The filing of a plaint for partition by one of them will not alter their rights *inter se* as they existed before the suit So, the word partition is used there in the sense of actual division. The word used is "partition" and not separation or division and would seem to denote the crystallization of an inchoate, indefinite right into definite tangible shares.

Under the Nayar Regulation, the break-up of corporate property rests with the Court, when the shares due to any one member is out of his reach due to the disagreement of other members. The member desiring to separate may move the Court to do what he cannot himself do, and till the break-up is effected by the Court no member can extricate himself from the trammels of corporate holding peculiar to the Marumakkathayam system Till then his creditors cannot reach his share, he cannot alienate it, and his rights on his death would relapse to the Tarwad without being inherited by his wife and children This is the purport of Section 39 The view of the law on this subject taken in 18 T L J, 747 requires re-consideration —

20 T L J, 736

Ref —48 T L R, 73 (=22 T L J, 227)

2. Proceedings of the Legislative Council cannot be referred to for interpreting the Sections of a Statute.

Per Chatfield C J, Joseph Thaliath, J Parameswaran Pillai, J, and Venkata Rao J—The expression "partition" is used in law not only to indicate the physical or *de-facto* partition or division of the estate by metes and bounds but also separation which means the severance of jointness

Per Chatfied C J, Thaliath, J and Parameswaran Pillai, J—"Until partition" in Section 39 can only mean until division of status which puts an end to survivorship, which is effected by a claim for partition being made as provided in Section 33

As the constitution of a Nayar Tarwad especially after the Nayar Regulation is similar to that of a joint Hindu family under the Mitakshara form no reason is seen why the rulings of the Privy Council that partition in a Mitakshara family is effected by the institution of a suit should not be applied to the Nayar Tarwads.

The filing of a plaint for partition effects a severance between the plaintiff and other members of the family and the share of the plaintiff in such a case is determined at the time of the institution of the suit

Venkata Rao and Narayana Pillai, J J, dissenting—Partition or division meaning separation in status is peculiar to Hindu Law There is no reason why (one of the two-fold) the meanings of the word partition' current in Hindu Law alone in preference to the universal, legal and common

meaning of the word should be imported to construe the word partition in the Nayar Regulation.

The words 'until partition' in Section 39 do not mean a separation in status by any unilateral declaration, including the presentation of the plaint The words must be construed as meaning a preliminary decree for partition or a division on the agreement of parties —

48 T L R, 73
(=22 T L J, 887)
Fol —48 T L R, 135
(= 22 T L J, 874)

6. The plaintiff, a junior member of the Tarwad of first defendant brought a suit for setting aside a lease deed executed by the latter in favour of a stranger Before his death, the defendant executed a release in favour of his wife and son alleging that he had effected a partition of the properties and that he had taken the plaint properties for his share. The wife and son claimed that by his declaration of intention to divide the properties, the first defendant had attained the status of division and that they were entitled to be brought on record The District Judge rejected their prayer

In the case, it was proved that there was an actual agreement come to between the parties that the properties should be divided and that the only thing which remained to be done was to actually carry out the partition by metes and bounds.

Held —The agreement of partition solemnly entered into between all the parties is a more cogent piece of evidence to prove the intention of the parties to divide than the filing of a plaint. The wife and son were therefore entitled to come in as legal representatives.

Per Ghulko, J —No principle of law could be found which says that a plaint in a suit may evidence a declaration of intention to divide but not an actual agreement between the parties to the same effect. It is now too late in the day to contend that a declaration of intention to divide on the part of one or more members even in a Marumakkathayam family does not effect a severance of interest —

48 T L R, 452
(=22 T L J, 1177)

Other Cases

1 *Per Parameswaran Pillai, J* —Where no necessity is mentioned in the document sought to be set aside by a junior member of a Marumakkathayam Tarwad, it is incumbent on the alienee to state in his written statement for what necessity the debt was incurred It is only then that the junior member can disprove necessity

Per Joseph Thaiath, J —It is the duty of the junior members to rebut the presumption of necessity in cases where consideration has been proved by the alienee, and it is their interest to see that specific issues are raised as to the particular necessities for which the debts were incurred As long as there are no issues raised with respect to particular necessities, they could not be disproved The matter would be different where the alienees failed to state the particular necessity after they have been required so to do "The benefit which the creditor derives from the presumption as to passing of consideration is that he need not in the first instance identify or prove which particular or concrete need of the Tarwad out of its many possible needs the loan was to meet, provided he had dealt with the Karanavan as such within the general scope of purposes of Tarwad management."

Per Narayana Pillai, J —When a junior member impeaches an alienation, he alleges absence of consideration and necessity In defence, the creditor pleads consideration and necessity If he says —'I paid consideration, as to necessity I know nothing, the dictum in 19 T L J, 154 applies, and the alienation has to be set aside So, the need for pleading necessity is on the part of the creditor The duty to specify it is also his. The simple

question is whether in the interests of pleadings and trial, he should not do so, before the issues are framed and the case is set down for evidence The answer is he should

Presumptions as a category form a branch of the law of evidence and come into play only if there is nothing to be proved Proof and the thing to be proved will not become identical When it is said that the creditor has a presumption of necessity in his favour, logically it means that he bears the burden to prove necessity, but by virtue of other facts established by him, he discharges such burden. So the burden of proving consideration and necessity is *really on* the creditor under Marumakkathayam law as under Hindu law The difference is that the Murumakkathayam law supplies a presumption as a method of proof This should not bewilder us as to the quarter where the burden lies. Therefore the creditor bearing as he does the burden should specify the necessity (F, B) —

20 T L J, *461*

Not ref —49 T L R., 409
(=23 T L J, 977)

2. The suit was for maintenance by the members of a Marumakkathayam Tarwad against the Karanavan. The questions which arose for decision were

(1) whether the whole of the net yield without reserving any portion of the same towards allowance to the Karanavan for management, could be distributed to all the members towards maintenance,

(2) what is the method to be adopted for fixing the rate of maintenance to adults and minors and

(3) whether the rights to maintenance of the first plaintiff were heritable on her death pending the suit.

Held.—(1) The earlier decisions of this Court, though recognising the right of the junior member of a Marumakkathayam family to be maintained according to the wealth and income of the Tarwad and the position of the member who claims it, held that he could not claim to have the whole surplus of the family income equally distributed among the members for their expenses But in view of the change in the consciousness of the community which has culminated in the passing of the latest Nayar Regulation and Ezhava Regulation recognising the right of members to individual partition in our State, the right of maintenance seems to have been more or less recognised on the basis of a proprietary right in the Tarwad properties In determining what amount is available for distribution as maintenance, the cost of management, the amount necessary for keeping up the dignity and social status of the Karanavan of the Tarwad in the eyes of the public, and also the social obligations that the Karanavan, as the head of the family, has to discharge, will have to be taken into account A margin will have to be allowed for such contingencies as the irrecoverability of the rent from lessees, the expenses in connection with the recovery of rent through Court, contributions made by the Tarwad to other Tarwads in accordance with its status and dignity, etc What has to be set apart for this purpose will depend upon the circumstances of each case. Considering the changes introduced in the community by the recognition of the right to individual partition, the social obligation attached to the Tarwad cannot be considered to be so numerous and so imperative as those devolving on them when the Tarwads were impartible

The ends of justice in the case would be met by allowing the Karanavan two shares over and above what he would be legitimately entitled to, on a distribution of the net yield for the purpose of fixing the rate of maintenance.

(2) In fixing the rate of maintenance, the method of making the allowance to an adult member equivalent to those of

two minors, as an ordinary rule of guid ance cannot be deemed to be improper or unreasonable. Of course in special cases, by reason of the heavy cost of education in these days and the necessity in some case to bestow greater attention on minors entailing a large expenditure, a differential treatment in apportionment may be considered necessary But such cases have to be dealt with as a departure from the general rule, the facts justifying which will have to be made out by the party claiming such special treatment

(3) The rights to maintenance up to the date of death of a deceased member are heritable, a suit with respect to the same cannot be considered to have abated on the death of the claimant His or her heirs as the case may be have the right to continue the litigation so far as the right to recover the amount that accrued due on this account up to the date of such claimant's death

Held further—A warrant of commission issued under Section 377 of the Civil Procedure Code of 1065 to assess the yield of the suit properties requires the commissioner to record what he saw and his inference therefrom and not to conduct a roving enquiry Even if it is considered that the commissioner has been authorised to record evidence on the matters covered by the warrant, it is incumbent on him to reduce the enquiries made by him to writing and incorporate it among the records submitted to the Court He is naturally expected to call Thadastars on either side and take statements from them or to have prepared a Mahazar reducing to writing what transpired at the time of his visit and what he actually noticed, and have the same attested by the parties.— 47 T L R., *117*
(20 T L J., *1900*)

3. Ordinarily three fourths of the gross produce multiplied by 8 1/3 might be taken to be the value of improvements. The gross produce must itself be arrived at after deducting one-fourth for Jenmikoor

The levelling of the land is mainly valuable in so far as it renders possible the subsequent planting with trees, but a greater benefit is obviously conferred by the man who renders the land suitable for planting trees and plants there than the man who merely plants a suitable garden with trees, as in the first instance the benefit conferred extends beyond the life of the trees then planted There seems to be no basis on which to exactly value this advantage and one-third of the cost of levelling may be allowed as a rough rule — 47 T L R, *138*
(=20 T L J, *1895*)

4. The right of a *bona fide* encumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate or for the benefit of the estate is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* and *de jure* title

A *de facto* guardian is competent to charge the estate of the minors provided the debt is supported by consideration and adequate necessity

An honest creditor who makes a *bona fide* enquiry as to the existence of necessity and acts upon representation made to him by the *de facto* guardian cannot be defeated simply because he is not able to prove that the money he lent was applied by the guardian for the particular necessity for which it was borrowed.— 21 T L J *474*

5. The right of junior members to a salvage lien in respect of Tarwad properties which they have saved from loss has been recognised — 21 T L J *526*

6. When the provisions of an agreement are clear, the subsequent conduct of the parties cannot be looked at in aid of its interpretation.

A permanent arrangement in a Tarwad to regulate the enjoyment of the properties may be modified on the agreement of all the members in the different branches.

Per Paramesvaran Pillai, J—The characteristic feature of an allotment of family properties for maintenance is that it is liable to redistribution in accordance with the altered circumstances of the family. Such allotment of family properties may be made by the Karanavan himself or as the result of a family compact. When such allotments of properties are made the properties cannot be resumed by the Karanavan without making other suitable arrangements for the members for whom such allotment has been made and such property is not liable to be seized in execution of a decree against the Karanavan

In the case of an allotment of properties for a branch or an individual member, the allotment is by its very nature temporary and the properties are liable to redistribution in accordance with altered circumstances of the family The Karanavan might resume the properties at any time, provided he makes other suitable arrangements for the maintenance of the allottees. The length of time during which the allotment has been in existence does not affect this right of the Karanavan The allottees have no such interest in the properties allotted as may be alienated by them and if any improper alienation is made by the allotees, the Karanavan or any other member of the Tarwad may maintain a suit for setting aside the alienation and recovering the properties on behalf of the Tarwad. If after an allotment for maintenance the Karanavan incurs debts for proper Tarwad necessity and the properties in his possession are not sufficient for discharging them, the creditors have a right to proceed against the properties in the hands of the allotees, though they are entitled to do so only after the properties in the hands of the Karanavan are exhausted. Any family arrangement which fulfils these conditions, must be treated merely as an allotment for maintenance. But, if by such arrangement, properties are assigned to Thavazhies or branches permanently and the only right which the Tarwad has over those properties is that they may be returned to the Tarwad if any of the branches or Thavazhies become extinct, it can, by no stretch of language, be called a maintenance arrangement.

The preponderance of authorities seems to be in favour of the view that all deeds by which permanent allotments of properties are made and intended to endure for all time should be treated as partition deeds even though there may be clauses in the deed inconsistent with that view such as, restraints on separate alienation by branches, or a provision that pattah should be taken jointly, or that renewals of Kanom properties should be taken in the name of common Karanavan and so on The principal feature of a partition deed is that the allotment of properties is made for all time to come, without any liability to readjustment to suit the altered circumstances of the family in future—

47 T. R. R., 497
(=24 T. L. J. 662)

Appl—22 T L J, 1272
Ref—22 T L J, 40
23 T L J, 1031

7 A Karanavan of a Marumakkathayam Tarwad is incompetent to enter into any speculative transaction beyond the scope of his ordinary duties. This is particularly so when the Karanavan enters into a partnership regarding the conduct of the speculative business.

Where therefore the Tarwad properties were sought to be made liable for money due from the Karanavan in respect of a motor service business conducted by him in partnership with the plaintiff

Held—The conduct of a motor business did not fall within the ordinary duties

of a Karanavan and was a highly speculative transaction and the plaintiff, if he should succeed, must allege and prove that the motor business was a Tarwad concern and that the other members of the Tarwad had consented to it

21 T. L. J., *1109*

8 While in the case of property belonging to a Marumakkathayam main Tarwad the presumption is against division and therefore, when it is alleged in respect of a particular property that it belongs exclusively to one branch of the main Tarwad the burden of proving such exclusive right is on him who alleges division, still when it is admitted that the Tarwad is divided the burden of proving that any particular item was not divided, but left in common, will be upon the party who sets it up

A recital in a document stating that an adjacent piece of land forming one of the boundaries of the property dealt with, belonged to a certain person other than the executant, is a statement against the proprietary interest of the person making it and is admissible in evidence against the executant as an admission. Though such admission does not amount to an estoppel still, it will, unless explained, be a very valuable piece of evidence against him —

21 T. L. J., *1122*

9. It is a well established rule of Marumakkathayam Law that the Karanavan alone is not competent to execute a deed of mortgage with a term. It is not correct to say that he has power to do so if it is manifestly advantageous to the Tarwad and the Anandaravars refuse to give their consent. For if this proposition is carried to its logical consequences it would follow that a Karanavan alone might sell Tarwad property provided it is advantageous to the Tarwad even though the Anandravars object to such alienation. But comment on this is unnecessary

Where however the mortgage with term though executed by the Karanavan alone is found to be supported by consideration and Tarwad necessity, it is competent to the Court, while declaring the term void, to give in favour of the mortgagee a charge on the property for the consideration proved and found binding (F B).—

21 T. L. J., *1127*

Fol.—22 T. L. J., 361.

10. Under the Marumakkathayam Law the consent, express or implied, of all the adult members of the Tarwad is necessary to validate a written agreement to sell immovable property The Nayar Regulation does not affect this because, in the absence of an express provision in regard to it in the Regulation, the ordinary Marumakkathayam law prevails.—

23 T. L. J., *23*.

11 If the arrangement is one intended to last for ever it must *prima facie* be construed to be a partition deed and any further provision contained in the deed which might militate against this conclusion has to be regarded as being controlled by these provisions and if any such condition or provision is opposed to public policy the Court must disregard it and refuse to give effect to it. If, on the other hand, the provisions indicate that the allotment of properties is to continue only for an indefinite length of time and there is nothing to indicate that it is intended to be permanent, such a deed cannot be regarded as anything more than an allotment for maintenance.

The fact that the devolution of properties allotted to one branch in the event of its extinction is specifically provided for does not by itself make the arrangement one which was intended permanent and to last for ever

Unless there are expressions which clearly or by necessary implication indicate that the parties intended the arrangement to continue for ever, it would not be reasonable to conclude that the right to re-adjust the said allotment was surrendered or extinguished. In

other words the use of definite expressions precluding the possibility of a re-adjustment must be regarded as a safe test for determining whether a document is a mere allotment for maintenance or a deed of partition

No definite and certain rule can be laid down for the construction of deeds of this nature A document is not to be construed with reference to authorities as to how a similar document was construed in other cases "Any ruling as to interpretation of a document can only be applied in its entirety to a document absolutely identical in language and in a case the several circumstances of which are substantially the same. Where these conditions are not satisfied, an appellant or respondent relying upon previous rulings of the Court and putting them forward as guides to the correct interpretation of the particular document in which the case under appeal actually turns can do nothing more than ask the Court to take into consideration the general principles which have been applied in similar cases and to derive from them whatever assistance it can towards arriving at a correct conclusion."— 22 T L J, 40

Ref —23 T L J, 1031.

12. The sale deed was set aside as it contravened the provisions of Section 19 of the Nayar Regulation of 1088 but it was found that the sale deed was fully supported by consideration and Tarwad necessity

Held —The consideration money should be made a charge upon the plaint property and the plaintiffs should be allowed to recover the property only upon payment of that amount —

22 T L J, 361

13. The question for decision was whether Exhibit A, Udampady of 12-10-1067, executed among the plaintiffs and defendants constituting two branches of a Nayar Tarwad amounted to a partition and not merely an allotment for maintenance The document was styled a "Bhagaudampadv" Its terms did not indicate that the parties intended or contemplated that the arrangement given effect to by it should at any future date be rescinded or altered in any manner It contained a provision however that each branch should celebrate its ceremonies separately and if it should be found difficult to conduct them with funds at their disposal the branches could alienate the properties allotted to them for such purposes as also for sudden emergencies, but such power of alienations would not extend to the execution of sale deeds. It provided further that the sales as well as the receipt of compensation from Government for lands assumed can be effected jointly by the senior members of the two branches only and that the properties, if any, purchased with the proceeds should be enjoyed by the branch which owned the properties sold or assumed The shares allotted to the branches had been ascertained *per stirpes* and not *per capita*

The lower Court held that Exhibit A was only an allotment for maintenance In appeal by the defendants

Held —Exhibit A was a deed of outright partition A careful consideration of the case law shows in the first place that this Court has considered that the style of the deed is of primary importance in such cases and that even if the deed is not styled a "Bhagapatrom" if the word "Bhagom" division is used in the deed the use of the expression should be regarded as of great significance. Secondly, if the operative provisions of the deed and the expressions used therein clearly point to such intention the addition of a restraint on alienation cannot be regarded as important and if the restraint is of a general and comprehensive character it may be held to be opposed to public policy and may accordingly be treated as invalid and inoperative —

22 T L J 453

Ref —23 T L J., 1031.

14. A course of conduct clearly indicating a *settled intention* to be divided in interest will effect division In the case of individuals, such an intention can be presumed more readily and easily by a course of conduct, even two or three instances *totally inconsistent with a state of union* being quite sufficient. The instances evincing a course of conduct on the part of the members of a Tarwad are but indications of their intention and when such intention is made obvious even in a short period of course of conduct it will be sufficient to infer division

There cannot be a clearer indication of the intention of the branches of a Tarwad to sever common interests and to remain separate than that afforded by each branch claiming and getting its own share of mortgage debts and value of improvements when they are received in respect of properties enjoyed by the Tarwad on mortgage

22 T L J, *624*

15 The preponderance of authorities seems to be in favour of the view that all deeds by which permanent allotments of properties are made and intended to endure for all time should be treated as partition deeds even though there may be clauses in the deed inconsistent with that view, such as restraints on separate alienation by branches, or a provision that Patta should be taken jointly, or that renewals of Kanom properties should be taken in the name of the common Karanavan and so on. The principal feature of a partition deed is that the allotment of properties is made for all time to come, without any liability to readjustment to suit the altered circumstances of the family in future.—

22 T L J, *1272*.

16. Defendants 1 and 2 and one R. were divided members of a Nayar Tarwad They inherited the property allotted as shares of their deceased mother and sister The plaintiff purchased second defendants' share of the inherited property and sued for partition. The defence of the contesting defendants was that the property inherited by defendants 1 and 2 was taken by them as members of a Marumakkathayam Tarwad with all the incidents of Marumakkathayam law attaching thereto, and until partition the undivided share of a member in such property was not liable to be sold

Held—According to the ordinary principles of Marumakkathayam Law, the brothers being divided, they would take not as joint tenants, but as tenants in common.—

22 T L J, *1357*

17 Though it is a well recognised principle of Marumakkathayam law that a gift to or purchase in the name of the eldest son by a father is presumed to have been a Makkathayam for the benefit of the children, any presumption as regards an acquisition in the name of a younger son must in any event be much weaker than the case of an acquisition in the name of the eldest son. Each case must be regarded in the light of the circumstances of that case.

Where it was found, among other circumstances, that (1) the document in question in the name of the younger son was in terms a sale deed, (2) that he was in possession during the life-time of his eldest brother, and (3) an acquisition was also made in the name of another son :

Held—The acquisition under the document in question in the name of the younger son was only for his exclusive benefit.—

23 T L J, *223*.

18. Admissions are not conclusive proof of the matters admitted but they may operate as estoppels (Section 31 of the Evidence Act)

The express admission of a party or an admission implied from his conduct is evidence and strong evidence against him, but he is at liberty to show that any such admission was misunderstood or untrue

and he is not estopped or concluded by it, unless it has had the effect of altering the condition of some third person. Similarly the admission in the answer of a party in a previous suit did not preclude him in a later suit, from pleading that the statement in such answer was false and intended as a fraud on a third party Not only the persons making the admissions, but also those who claim under such persons are free to go behind admissions in order to prove the true state of affairs,

Where the question was as to division or non division as between two Sakhas of a common Tarwad and the admission of one Sakha Karanavan as to non-division appeared artificial and did not reflect the real facts which were clearly established otherwise by unimpeachable evidence, and, besides, did not affect the possession of the properties or the management of the two Sakhas.

Held —The admissions as to non division could not be relied on for deciding the question in controversy —

49 T L R., 207
(23 T L J, 879)

19 A gift by a Marumakkathayee to his wife or children is, no doubt, presumed to be for the benefit of all of them But if he makes separate gifts in favour of the children of his wife through a former husband and through himself respectively, either set of donees will not be entitled to the properties gifted to the other

Quære —Whether a follower of Marumakkathayam law makes a gift of property to his wife and children by him, she having already children by a former husband living, the donees do not take the property as a Tarwad or Thavazhi property, but take it as ordinary shares, that is to say, as tenants in common

Where the plaintiffs laid claim to the acquisitions in the name of the first defendant on the basis of his membership in their sub-Tarwad, as the eldest son of their father and his management of the sub-Tarwad, but it was found that first defendant was only their step-brother, had resources of his own and his management was but vague and indefinite and there was no proof connecting the first defendant's acquisitions with the management

Held —The principle of Section 88 of the Trusts Act, i e that advantages gained by an agent using his position as such may be claimed by the principal, did not apply in the circumstances of the case — 23 T L J., 844

20 In a partition deed in the Tarwad of plaintiffs and first defendant, it was provided that certain debt should be discharged by first defendant, and that, if on account of his default, the properties allotted to plaintiffs were proceeded against and they should be compelled to discharge them, such loss would be realisable from the first defendant and the properties allotted to him On the first defendant failing to discharge one of the said debts, the properties allotted to plaintiffs were attached and they were compelled to discharge the debt They, therefore, brought the suit for recovery of the amount paid by them, from the first defendant and the properties allotted to him

Held (by majority) —The partition deed created a charge in favour of the plaintiffs over the properties allotted to the first defendant, and the plaintiffs were entitled to recover the amount due from them

The contention that a contingent charge was not known to the law could not stand A present charge might be validly created so as to operate in future even if it was made to depend on a liability which might be future and was contingent.

In the case, it could be assumed safely that the intention of the parties was that the loss accruing to one co-sharer should be recovered from the properties allotted to the defaulting co-sharer Whatever

may be the correct view in regard to deeds of another nature, the provisions in a partition deed should be regarded as giving effect and expression to the dominant intention of the parties which was to effect perfect equality of division

The further contention that a charge could not be recognised as the properties said to have been charged with the liability were not specified also could not stand The properties charged under the partition deed could be identified with reasonable certainty They were the properties allotted to the first defendant's share and manifestly intended to be charged with the liability

Narayana Pillai, J—A charge on immovable property amounts to an interest in immovable property and is enforceable against a *bona fide* purchaser without notice of the charge (F B)—

49 T L R, 318
(*23 T L J, 466*).

21 *Held* (by a Full Bench)—Sankaran Karthavu's case (40 T L R, 151) was not correctly decided

Ordinarily speaking, the term property includes both movable and immovable property But, if movable property were included in the term "property" used in Section 19 of the Nayar Regulation of 1088, the management of Nair Tarwads would practically come to standstill It is therefore difficult to believe that the Legislature meant to include movable properties also to be subject to the restriction imposed by Section 19

One of the fundamental principles of construction of documents as well as statutes is —'The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further' 'An argument drawn from an inconvenience, it has been said, is forcible in law, and no less, but rather more, force is due to any drawn from an absurdity or injustice When the language of a statute, in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity or the absolute intractability of the language used The rules of grammar yield readily in such cases to those of common sense'

Seeing the great inconvenience, nay, the absurdity of interpreting Section 19 as restricting the sale, &c., of movable properties belonging to a Tarwad, it has to be held that the Legislature never meant to include them Also the fact that the subsequent Nayar Regulation of 1100 did not include movable properties in the restrictions imposed might be taken as an indication of the intention of the Legislature in enacting Section 19 in the prior Regulation (F B)— *49 T L R, 176*
(*23 T L J, 504*)

22 In the case of Marumakkathayam Tarwads, if it is once admitted that certain members had community of interest

at one time, but lost it subsequently by *separation of interest*, the burden of proof that they had had community of interest always lies on those that set up separation If it can be proved that either by actual division or by consistent course of conduct of the members of the Tarwad in the matter of separate living, enjoyment of properties, execution of documents and separate performance of ceremonies, the members of the different Thavazhis clearly intended to remain separate, it has to be inferred that the Thavazhis are divided from one another.

Held (on the evidence) —The plaintiffs belonging to one Thavazhi had not become separated from the main Tarwad —

23 T. L. J., 767

23 The acquisitions in question of comparatively large value were made in the first defendant's name at a time when he was the Karanavan of his Sakha Tarwad though only a junior member in the main Tarwad There was no conflict involved in the case between the first defendant and the Tarwad as a whole, and it was not shown that the first defendant had any independent source of income at that time

Held —The acquisition must be presumed to be Makkathayam property common to the sub Tarwad of the first defendant and the other children. But this was only a presumption and could be rebutted

In the case, it was held on the evidence in the case of the subsequent conduct of the first defendant and the probability of the funds for the acquisitions having been advanced by the father of the first defendant, that the presumption had not been rebutted —

23 T. L. J., 854

24. On proof of the advance of consideration, a presumption of necessity arises in favour of a *bona fide* creditor who deals with the Karanavan as such. The mere inability of the creditor to state the specific or concrete necessity for the alienation, much less the omission to set it forth in the pleadings or specify it when examined as a witness, ought not to deprive him of the benefit of such presumption

Where, therefore, the evidence in the case clearly established that the plaintiff-creditor advanced money to the first defendant who was the manager of the family fully believing that money was needed for the necessities of the first defendant's Illom and there was absolutely no reason to suspect that the first defendant was acting against the interests of the family and there was also evidence that the family income was just sufficient for its ordinary needs and that it would become necessary for the family to borrow money if unusual or extraordinary necessities were to arise

Held —In the circumstances, it was not just or reasonable to hold that the plaintiff's omission to state and prove the specific necessity for each of the several documents in his favour, was evidence of bad faith or that his claim to realise the money advanced from the Illom properties was unsustainable on that ground

The views stated by Venkitarama Iyer., in 19 T L, J, 134 and Narayana Pillai J, 19 T L J, 1044 following a passage in Pandalai Justice's judgment in 4 T L J, 289—that it would not be enough if the creditor was aware of the necessitous condition of the Tarwad and had advanced consideration to the Karanavan 'acting as such', but he should when asked, be prepared to state the specific or concrete necessity for the alienation in his favour, and on failure to do so, he is bound to fail—Discussed and disapproved (F B) —

49 T L R., 409
(=23 T L J, 977)

25 The deed styled an 'Udampady' and registered as such while conveying the properties in the schedule appended thereto in favour of the executees contained provisions to the following effect (i) that the properties should be enjoyed by the executant till his death, (ii) that all

properties then under his control and not included in the deed and also those which might belong to him thereafter should go exclusively to the persons specified in the deed, and (iii) that the right of revocation was reserved with the executant The question arose whether the instrument was a deed of settlement or a Will

Held —The deed construed as a whole embodied an conveyance *in presenti* and therefore a settlement

In coming to this conclusion, the Court observed that the absence or presence of a power of revocation could not by itself indicate the nature of the document And simply because the power of revocation was reserved, the instrument could not be called a Will, that the settlement of after-acquired properties could not be really regarded as conclusive of the matter whether the deed was a settlement or a Will, that the document as a whole must be read and in doing so, the name though not conclusive, by which the document was called must also be borne in mind (F B)— 23 T L J, *1015.*

26 Under a document styled Nischayapatrom, properties were allotted to the different branches of an undivided Tarwad separately, such allotments being more or less of an enduring character Limited powers of alienation were conferred on some of the members, but at the same time care was taken to see that the properties were not frittered away by independent dealings, and the hold of each branch over the properties given to the other two was maintained intact in order to prevent them from being lost to the Tarwad, Provision was also made for averting revenue sales of the properties from negligence of the branches in possession. All alienations not expressly authorised by the document were declared invalid Rules were also laid down for the maintenance of a common Kalary and performance of the ceremonies connected therewith by all the branches and also for conducting Thalikettu in the Tarwad.

On a question of construction

Held (per curiam) —The document read as a whole constituted only a maintenance allotment and not a deed of partition

Per Sivasankara Pillai, J—In construing the document it may not be profitable to rely upon other documents which, themselves ambiguous in their nature, had become the subject-matter of judicial decisions, though the legal principles enunciated in such pronouncements may be of utility for purpose of guidance, However that be, the intention of the parties to a document must be gathered from the words, and when such words are definite and unambiguous, the Courts should not travel outside the words.

The employment of the nomenclature 'Nischayapatrom,' is a consideration in favour of the view that the document is a maintenance allotment and not a division.

Unless there be decisive provisions in family Udampadis pointing to division, the indivisibility of the Tarwad will be maintained wherever it is possible. The decision of the question depends in each case according to its own circumstances

It is possible in a deed of allotment to give properties to several branches, but at the same time impose restrictions on the right of alienation, for the benefit of the Tarwad as a whole Such restrictions cannot be considered to be repugnant to the interests created in favour of the branches.

Quaere —Whether the permanency of the allotments in a family Udampady is a test conclusive of partition (F B)— 23 L. T J., *1031*

Ref —24 T L. J, 295

27 In some old decisions, it was laid down that separate residence, performance of ceremonies, enjoyment of properties, payment of tax and independent execution of documents extending over many years would be indicia of division,

but as the law developed the length of the period during which such state of things should have continued, became contracted so much so that a culmination was reached in *Easwaran V Narayanan* (24 T L R, 187) wherein Sadasiva Iyer, C J, observed that as regards the question whether two persons or two branches were or were not divided in interest, a course of conduct *clearly* indicating a *settled* intention to be divided in interest would effect division "There is no magic in any particular number of years and provided the intention to remain thereafter in a state of division without joint ownership is indicated by even a single very clear transaction in which the branches or the recognised heads of the branches have taken part, and if that transaction can be taken as approved by all the adult members of both branches by the surrounding circumstances and by their not having tried to set it aside for a reasonably long time, a state of division might safely be found"—

24 T L J, 74

28 According to the principles of Hindu law, where the co-parceners in a joint Hindu family come to partition and divide the joint property, with the exception of a portion of it, they are, in the absence of indication to the contrary, tenants-in-common with reference to the excepted property. As regards property left out by mistake in division, the rule of the Hindu law has been applied to Marumakkathayam Tarwads and the application of divided status in relation to a property purposely left in common has also been recognised —

24 T L J, 80

29 The question as to the liability of Tarwad properties in respect of debts arising from a chit transaction started by the Karanavan of the Tarwad with the co operation of some junior members. There was evidence that the adult members of the Tarwad had admitted that the chitty was started for and on behalf of the Tarwad and that the money received by the foreman either as prize money or as chitty subscriptions had passed into the hands of the Karanavan and had been utilised for Tarwad purposes There was also no allegation that the statements of the adult members had been brought about by fraud or collusion or other invalidating circumstances It was argued, however, on behalf of the minor members of the Tarwad, that they had a right of questioning the liability for the debts and reliance was placed on the principle of Hindu law that so far as the minor members of a joint Hindu family are concerned the managing member and all the adult members together could not start a new business so as to make the entire family liable for debts arising out of it

Held—Though there is no doubt that there is great deal of risk involved in carrying on a chitty, unless the foremen act unwisely or without due care, the risk or probability of loss is inconsiderable In this view, it is very doubtful whether a chitty can be called a speculative transaction or placed on the same footing as a commercial or bussiness venture Further it may be to the benefit of the Tarwad to start a chitty and save the Tarwad properties from being sold Also alienations by the Karanavan and adult members have been upheld if they are to the benefit of the family as distinguished from mere defensive purposes

In the circumstances, therefore, the adult members of the Tarwad validly represented it and their statements were binding on the minor members so that the liability of the Tarwad could not be questioned — 24 T L J, 206

30 Under a document styled Nischayapatram, properties were allotted to the two branches of a Nayar Tarwad separately The reason for the execution of the deed is said to be the physical

incapacity of the first and second executants to manage the whole Tarwad. A portion of the main house and the properties in item 1 are set apart for common purposes. Provision is made for the separate maintenance of the several executants. Limited powers of alienation were conferred on some of the members but care is taken to see that when alienations are necessitated to obtain more money than is necessary to pay off debts all the adult members should join in such documents. Renewals are to be taken in the joint names of the senior male members of both the branches. If it is found that any of the properties have been left out by mistake, when they are found they should be taken by the members of each branch in equal shares and held by them subject to the conditions regarding enjoyment and the performance of religious ceremonies imposed in the Udampady There are two significant omissions in the deed, namely, absence of provision to effect mutation of names in respect of the properties in favour of the allotees and there is also no provision that the allotment under the deed is to endure for ever

Held—The document construed as a whole constituted only an allotment for maintenance which while giving independence within limits restricted the activities of members towards the doing of acts which would effect a permanent severance of community of interest and not a deed of partition.

In interpreting a document an inference should not be drawn from isolated passages of the document but the document as a whole should be looked into. There is an equally important principle and that is when the document has bearing on the intentions of the parties, the customs, habits and sentiments usually current among the classes or communities to which the parties belong should be taken into consideration. In interpreting a document words and expressions should as far as possible be given the natural meaning they ordinarily bear and no interpretation ought to be accepted which reduces the purport of the document to an absurdity

In construing a document it may not be profitable to rely upon other documents which themselves ambiguous in their nature, had become the subject-matter of judicial decisions, though the legal principles enunciated in such pronouncements may be of utility for purposes of guidance The intention of the parties to a document must be gathered from the words and when such words are definite and unambiguous the Courts should not travel outside the words. Unless there be decisive provisions in family Udampadies pointing to division, the indivisibility of the Tarwad will be maintained wherever it is possible 24 T L J, 895

31 The right of a Tarwad to impeach an alienation by the Karanavan or a debt incurred by him or a decree obtained against him has been recognised as vesting in the junior members of the Tarwad subject to this limitation that if the Tarwad had been once allowed a reasonable opportunity of showing their non efficacious character, then after the *bona fide* exercise of such opportunity, the Tarwad would thereafter be precluded by the law of *res judicata* from re-agitating the same matter once again. Such opportunity may be utilised in a suit either as plaintiff or as defendant or in execution proceedings.

Where in a suit by some junior members for declaration that their Tarwad was not liable on a hypothecation bond executed by the Karanavan and a decree and execution proceedings on basis thereof, it was found that certain junior members of the Tarwad had been parties to the decree, that they were not guilty of any fraud, collusion or misconduct in the obtaining of the decree but that the hypothecation bond was not supported by consideration or necessity.

Held.—The suit was barred by *res judicata*. Even the finding that the bond was

unsupported by consideration and necessity could not help, for, the obtaining of the decree in the previous suit on the ground of perjured evidence will not, standing alone, afford a cause of action for a suit to set it aside

For the decree to be vacated on the ground of fraud there should be a fraud extrinsic or collateral to everything that had been adjudicated upon, but not one that had been and must be deemed to have been dealt with by the Courts. The test is whether there is a fraud practised in relation to the proceedings by which the defendant in the original action was prevented from placing his case before the tribunal Until this is found the Court has not arrived at the stage when it can investigate the question whether the original suit was a false suit or not

The jurisdiction to impugn a previous decree on the ground of fraud must be exercised with care and reserve and strict proof must be insisted on in regard to those facts which the law requires a plaintiff to make out before he will be entitled to relief. Vague and general allegations are insufficient by whatever procedure it is sought to overthrow a judgment on the ground of fraud

A Vakil's general powers in the conduct of a suit include the abandonment of an issue which in his discretion he thinks it inadvisable to press. Where the Vakil in the primary Court for the appellant reframed from pressing an issue though vital, the appellant could not be permitted to re-open it, as if the finding on such issue did not exist — 24 T L. J., *862*

32. The provision of Section 25 of Regulation I of 1088 were applicable only to such suits which could be brought against the Karanavan of Tarwad not only as such but otherwise also, i. e, independent of and without reference to his position as Karanavan and were not intended to govern those suits which cannot be brought against a Karanavan except as such or which could be brought against him only as such. The Section no doubt requires proof of the fact that the Karanavan was sued in his representative capacity but that does not mean that he ought to have been described as such in the plaint It must be a question of fact in each case and if the facts of the case indicate beyond doubt that the Karanavan was in reality sued in that capacity that would be sufficient to indicate that the decree was obtained "in a suit against the Karanavan as such" within the meaning of Section 25.— 24 T L J *825*

33 See also—
Regn II of 1077—Other cases.—
48 T L R., *183*
(=32 T L J., *91*)
„ III of 1094—Other cases —
20 T L J, *481*
48 T L R, *1*
21 T L. J, *859*
21 T L. J., *1195*
„ VI of 1100, Art 9 —
47 T L, R, *822*
(=21 T L J, *808*)
„ VIII of 1100, Sec 10—
23 T L J, *274*
„ Sec 40 —
47 T L R, 77
(=20 T L J, *1196*)
„ Or XXI, R. 13.—
20 T L J, *497*
„ Or XXII, R. 9 —
48 T L R, *441*
(=23 T L J *1*).
„ Or XLV, R. 1 —
46 T L. R., *205*
(=20 T L J., *1087*).

REGULATION III OF 1100.

(The Eashava)

Sections 28—31.

Sections 28 to 31 of the Eashava Regulation deals with Tarwad properties which include all the properties that possessed

the incidents of Tarwad property on the date the Regulation came into force. The scheme of the Regulation is to render all property owned by Eazhava families partible except in the cases of families and individuals exempted by the Notification under Section 33 of the Regulation. Properties, though acquired by a Makkathayam gift or inherited as such before the date of the Regulation had all the incidents of Tarwad property attached thereto, so far as the members of the sub-Tarwad to which they belonged are concerned As such they constituted Tarwad property within the meaning of Sections 28 to 31 of the Regulation —

20 T L J, *551*

Section 30.

The expression "claim an out-right partition of the property" in Section 30 of the Eazhava Regulation can only mean "claim to have that share determined" The only interpretation that can be put upon Section 30 is that, on the coming into existence of the conditions mentioned in Sections 29 and 30, an individual member becomes entitled to a definite share in the Tarwad property which he might claim from the other members. But until he claimed it, his interest will not become separated from the rest of the family and when he claimed it, his interests became separated and his share became heritable.

Reading Sections 29 to 31 together, there can be no doubt that when outright partition is claimed, the person claiming it becomes divided in status from the rest of the family and entitled to his individual share. In this view, it must be held that, by the filing of a plaint which is the best mode of claiming a partition, the plaintiff becomes entitled to his separate share, and on his death it passes to his legal representatives. The analogy of he Full Bench ruling in 18 T L J, 747 under the Nayar Regulation is applicable to the Eazhava Regulation.—

20 T L J, *173*

Other Cases.

1. So far as the rule of law applicable to the Misravazhi Eazhavas is concerned, there could be no doubt that the principles relating to the Marumakkathayam system of inheritance are wholly applicable to them except with reference to the variations therefrom recognised by the judicial pronouncements of the High Court

The right of the children to a moiety of all the self-acquisitions of the deceased has been recognised irrespective of the time of acquisitions.

The widow and children are also entitled to a moiety in his separate properties which cannot be technically said to be his self-acquisitions (F B) —

46 T L R, *140*
(=20 T L J, *286*)

2 The suit was for partition in an Eazhava Tarwad Two children being born within less than 7 months after the filing of the plaint, it must be presumed that the mothers of the children were *enceinte* at the time of the filing of the plaint For various purposes of the law an infant *en ventre sa mere* is considered and treated as a person in existence. The children impleaded must *prima facie* be deemed to have been persons in existence at the time of the filing of the suit and their impleading is necessary for a proper disposal of the suit — 47 T L R, *136*
(—21 T L J, *544*).

3. Where, in an Eazhava Tarwad, following the misradayam system of inheritance, the paternal uncle conveyed certain properties in gift, to the children of his deceased elder brother, directing the Karanavan of the sub-Tarwad constituting the donees to take out patta for the properties and further specifically referred in the deed of gift, to instructions

left by the brother, as the reason for the gift

Held—The donees held the property as sub-Tarwad property and had no separable interest therein as tenants-in-common, which could be attached in execution at the instance of the creditor of any one of them— 21 T. L. J., *958*

4 In a suit for partition of properties comprised in a deed of gift executed by two Ezhava brothers in favour of their children by a common wife, expressly providing that the donees shall enjoy jointly (ഏകഭോഗമായിട്ട്) it was contended that on the analogy of the principle of Pathni Bhagom, applicable to the parties under their customary law, by virtue of which the children by one wife would take a share equal to that of children of another wife, it should be assumed that the intention of the donors was to gift the properties separately to each group of children as virtually constituting two sub-Tarwads

Held—It was not possible to hold that in construing the gift in question, the analogy even if be valid, can be of much use, in the face of the express provision in it for joint enjoyment. As the donees were members of the same family, it was perfectly clear that the desire of the donors was to gift the properties to the whole body of donees as members of, or as constituting a joint family Such deeds should be construed with due regard to the customary law of the parties and the intention and desire which would ordinarily be entertained by them in making the gift. It had to be inferred therefore, in the circumstances, that the donors intended that the donees should take the properties as members of the sub Tarwad and for the benefit of the whole sub-Tarwad— 24 T. L. J., *561*

5 See also—
Regs. VIII of 1100, Or XXI, R. 86— 24 T. L. J., *1101*.

REGULATION VI OF 1100
(Limitation)

Section 5

1 There is no rule or enactment extending the operation of Section 5 of the Regulation to an application to set aside the dismissal of a suit for non compliance with the order to furnish security for the costs of the suit The Court has, therefore, no power to admit the application when it is presented after the expiry of the period of limitation prescribed— 20 T. L. J., *89*

2 Wrong advice given by a Vakil's clerk would be effective in combating delay under Section 5 provided the party had not been negligent and had acted in good faith. Resort to Vakil's clerk and faith in his advice may be an error of judgment. But an error of judgment is not the same thing as absence of good faith— 16 T. L. R., *117*.

3 The appeal was first filed in the District Court within 29 days of the date of the decree and it was pending in the District Court till 27-12-1105 when it was discovered that it should have been filed in the High Court and it was returned for presentation to the High Court, on that date The appeal was presented to the High Court 29 days later An application to excuse delay was also put in. It was contended that Sections 5 and 14 (3) of the Limitation Regulation would apply to the case

Held—If Section 5 alone applied, it would have been incumbent on the appellant to have filed his appeal in the High Court without avoidable delay after it had been returned by the District Court. This was not done. Section 14 (3) could not help the appellant as the Section did not apply to appeals. Paragraph (1) of the Section deals with saving of time as regards suits and paragraph (3) as regards

applications. There is no confusion in the Limitation Regulation between applications and appeals.— 23 T L J, 366

4 See also Art 166—48 T L R, 67 (—22 T L J, 816)

Section 6

A decree (Exhibit D) was obtained by first defendant on 27-1-1087 against a minor with the second defendant on record as his guardian The minor became a major in Makaram 1095 and died in Edavom of the same year This suit was filed on 2-1-1098 by the mother of the minor as his legal representative to set aside Exhibit D and for other reliefs on the ground that the second defendant was not the guardian in fact On the plea of limitation set up by the defendant, it was argued for the plaintiff that as the minor could have filed his suit within three years of the date of his attaining majority if he had lived, the plaintiff as his legal representative should have under Section 6 (1) of the Regulation the same period in which to sue. The question was whether a suit brought by the legal representative of a deceased minor within the time allowed for such a minor if alive by Section 6 (1) would be barred -

Held.—The suit was not barred

The term 'he' in 'he may institute the suit' in Section 6 (1) corresponding to Section 7 (1) of the Regulation of 1062 includes not only the person under disability but his legal representative as well

Per Chatfield, C J—Totally different considerations may prevail as regards an assignee from the minor though even here there is much to be said for the extension of the rule in his favour also.

Per Parameswaran Pillai, J—The contention that the expression "a person entitled to institute a suit", in Section 6 Clause (1) includes also his legal representative, has much force, for according to general principles of law the personality of the deceased is continued in his legal representative and so whatever rights a person may have including a right of suit will survive to his legal representative (F B)—

47 T L R., 816 (=21 T. L J., 505)

Section 8

See Art. 9— 20 T L. J., 907.

„ Regn VIII of 1100, Sec. 58— 46 T L R, 415 (=20 T L J, 1053)

Section 10.

1 The plaintiff and her husband's brother executed a sale deed on 25-12-1079 for Rs. 980 in favour of the defendant. Out of the consideration for the sale deed Rs 800 was reserved with the defendant for payment to the plaintiff for her maintenance. Till Kanni 1094, the defendant maintained the plaintiff with the interest on the amount reserved In 1098 the defendant endorsed a promissory note in favour of the plaintiff The plaintiff filed the suit within 3 years of the endorsement of the promissory note for amounts due to her minus the amount covered by the promissory note. The defendant contended that the suit was barred by limitation

Held—Meeting the plaintiff's expenses out of the money entrusted to the defendant was a continuous discharge and a consequent acknowledgment of the debt due to the plaintiff. On the date of the endorsement of the promissory note there was a settlement of accounts and the endorsement evidences a written acknowledgment of the liability The suit is brought within 3 years of it. Even otherwise the entrustment of the money to the

defendant for a distinct purpose earmarked, constitutes an express trust to which Section 10 of the Regulation applies.— 24 T L J., *390*

2 See Art 97— 22 T L J, *1181*.

Section 12

1. Though the copy of a decree in a case was obtained by one of the parties therein, another person on the party array can file that copy for the purpose of an appeal In such a case, the person who prefers the appeal can get credit for the time usually allowed for obtaining a copy of the decree. 43 T L R, *71* (=21 T L J, *1358*).

2. The only remedy open to an aggrieved party under Section 44 of the Guardian and Wards Regulation is an application by way of revision An order made under this Regulation is final and shall not be liable to be contested either by suit or otherwise It excludes every remedy by suit or any other proceeding except the remedy under Section 568, Civil Procedure Code of 1065

Under Section 12, Clause (5), of the Limitation Regulation, time can be deducted only if the proceedings relied upon for the purpose of obtaining exemption were carried on in good faith Good faith is a question of fact which has to be decided with reference to the facts of each case. In this case the appellant cannot be said to have any *bona fides* in applying for a review, since no review lay against any order passed under the Regulation.

The expression "defect of jurisdiction" as laid down in Section 12 of the Limitation Regulation does not cover such mistakes as the prosecution of an appeal which does not lie at all in any Court "Defect of jurisdiction" means a defect in the particular Court where the former proceedings were instituted and not an inability shared by the Court in common with all other Courts to entertain the proceedings, The Section applies if the proceedings are capable of being sustained in the sense of being granted in conformity with law by some Court In this case the review being not maintainable in law it cannot be said that it was dismissed for defect of jurisdiction within the meaning of Section 12, clause (5)— 24 T L J, *750*

Section 14.

1 Where a suit is instituted in a Court which is found to have no jurisdiction, and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first

The omission of the definition of 'good faith' in the Limitation Regulation of *1100* does not alter the meaning of 'good faith', as the effect of the omission is to render the definition of 'good faith' mentioned in the General Clauses Regulation applicable to the provisions of the Limitation Regulation.

Good faith is more or less a question of fact It is gatherable from the facts and circumstances of each case. The motive of the party whose good faith is impeached is regarded as a factor in the determination of questions arising under Section 14 of the Limitation Regulation.— 20 T L J, *129*,

2. The defendant had with him some chitty money due to D, and this was purchased in Court sale by the plaintiff in execution of a decree obtained by him against the said D's heirs. In that suit the defendant was impleaded simply because he had money belonging to D, and the suit as against the present defendant was dismissed on the ground that it was premature and that he was an unnecessary party. The present suit for enforcing the Court sale was dismissed as being time barred.

Held —In prosecuting the prior suit the plaintiff cannot be said to have been prosecuting with due diligence another civil proceeding founded on the same cause of action as the present within the meaning of Section 14 of the Limitation Regulation

Cases like the failure of a suit on the ground that it is not maintainable or that it discloses no cause of action or is premature are not covered by Section 14 as the suit fails not for defect of jurisdiction or other cause of a like nature but because the suit is misconceived —

47 T L R, *370*
(=21 T L J, *635*)

3. Where the decree in question was sought to be set aside in regular suit filed in the Munsiff's Court and the suit was allowed by the Munsiff, but dismissed by the High Court and there was no injunction passed by the Munsiff at any time restraining the execution of the decree

Held —The period during which the suit to set aside the decree was pending in the Munsiff s Court cannot be excluded for purpose of computing the period of limitation for the execution of the decree. Section 14 (3) of the Limitation Regulation could not be relied on by the decreeholder as it was in terms inapplicable —

22 T. L. J, *666.*

4. The plaintiffs sued for cancellation of a mortgage deed on the ground *inter alia* that it was unsupported by consideration and Tarwad necessity The date of the document is 4-10-1091 and the suit was filed in the Shertallai Munsiff's Court on 8-10-1103, on the date of the re-opening On account of the Court recess the action could not be commenced just on the day when the 12 years from the date of the alienation expired On 29-1-1104 the Munsiff passed an order for return of the plaint for presentation to the proper Court as the subject-matter of the suit exceeded in value the pecuniary jurisdiction of his Court and the plaint was actually returned on 19-1-1105 and it was presented to the Alleppey District Court on 25-1-1105 At the instance of the first defendant the question of limitation was tried as a preliminary issue and decided against him This order is sought to be revised

On a preliminary objection that the revision petition is not sustainable

Held —Interlocutory orders might form the subject of revision if the matter they relate to stands by itself and in which the ends of justice would be defeated if the power of revision were not exercised. "The word 'case' in Section 89 of the Civil Procedure Code is wide enough to include an interlocutory order and the words 'records of any case' used in the Section includes so much of the proceedings in any suit as relate to interlocutory order " The function of the High Court when it exercises its revisionary powers is essentially to act in aid of justice and the question in each case will be whether in the interests of justice the High Court should disturb the order of the subordinate Court that is brought up in revision Applying this test this is a fit case where the Court should not refuse to exercise the powers of revision since the question of limitation has been tried and decided and if the High Court determines that the suit is time-barred then that will be sufficient to put an end to the whole litigation thereby saving much trouble and expense to both parties and in that way subserving the ends of justice.

Held also —Under Section 14 of the Limitation Regulation VI of 1100, the time during which the suit was pending in the Munsiff s Court has to be excluded and in doing so under Explanation 1, the day on which the proceedings therein ended shall also be counted The question is whether time began to run against the plaintiffs from 29-11-1104 when the order was passed or from 19-1-1105 when the plaintiffs got back the plaint. The time that elapses between

the order for returning the plaint and the actual return thereof can be excluded under Section 14 unless it is specifically pleaded and proved that the delay in taking back the plaint was due to the default of the plaintiff If such contention is raised and substantiated, the Court is bound to consider the propriety of the exclusion of the interval between the date of the order for presentation and of the actual return of the plaint

In considering what is a reasonable time under Section 14, Clause 2, that may be requisite for going from the Court in which the suit was first instituted to the Court in which it is *re* instituted, each case must be decided on its particular circumstances It would be inappropriate to adopt the period fixed in an ancient precedent as an inflexible standard for each and every subsequent case without regard to the variation in the facilities for locomotion —

24 T L J, *818*

5. Section 14 of the old Limitation Regulation (which is applicable to the case) clearly mentions applications as well as suits. (*Vide* Proviso 3 and Explantion 1 to Section 14) Section 14 applies only to cases where a Court itself decides that it is unable to entertain a suit for want of jurisdiction or other cause of a like nature and has no application to a case where the plaintiff himself withdraws the suit on discovery of some technical defect which would involve a failure,—

24 T L J, *833*

6 See also Sec 5 — 23 T L J, *366*
Art 166.— 20 T L J, *856*

Section 15

1. In the case of an attachment of a decree before judgment it is manifest that the decree attached ceases to be executable and in effect the attachment amounts to an injunction staying execution for the time being. The period during which the attachment was in force should be excluded under Section 15 of the Regulation — 47 T L R, *407* (=21 T L J., *722*).

Ref -24 T L J, 584

2. An application for execution was presented on 15-6-1099 praying for arrest of the judgment-debtor and attachment of his properties The judgment-debtor was arrested and produced in Court but was released by the Court on his application for stay pending decision of his appeal against the *ex-parte* decree. For failure to apply for further steps, the execution form was struck off on 30-6-1099 On 25-1-1105, the decree-holder applied for further steps in continuation of the application of 15-6-1099 The question was whether the application of 15-6-1099 could be deemed to have remained undisposed of

Held —The order striking off the application of 15-6-1099 cannot be held to be a judicial order disposing of the application The release of the judgment-debtor was ordered not on account of any default of the decree-holder but because the Court thought fit to stay execution pending decision of the judgment-debtor's appeal All further proceedings prayed for in the application were in effect stayed by the order of the Court The principle of Section 15 of the Limitation Regulation is not confined to cases of direct stay but also applies to orders which indirectly but very proximately and effectually cause a stay, and in determining whether the execution has in effect been stayed by an order of the Court its substance, not merely the form, should be looked at

Held further —Since the execution of the decree had been suspended through no act or default of the decree-holder, he had a right to ask the Court to revive and carry through the execution proceedings which had been suspended. This right could be exercised by means of a proper application to that effect made within three years from the date when

the right to make it accrued, that is to say, from the date on which the obstacle to the progress of execution proceedings was withdrawn.

Held further—Even assuming that the latter application was filed more than three years after the obstruction was removed, it could not be deemed to be time-barred For if an execution application is pending, a subsequent application is not an application under Article 165, but an application asking the Court to continue the proceedings on a pending application Further, Article 165 governs only applications for the exercise of powers or doing of acts which the Court is not bound to do *suo motu* —

21 T L J, 748

Section 16.

1 Four years after confirmation of sale in Court auction, an application was made for delivery of possession of the property purchased *Prima facie*, the application was barred under Article 164 of the Limitation Regulation, which provides only a period of three years from the date the sale becomes absolute, for an application for delivery of possession. But it was contended that the time during which an application to set aside the attachment of the property prior to the sale and the appeal against the order thereon was pending should be excluded in computing the period of limitation for the application and the provisions of Section 16 of the Regulation were invoked in support of the contention

Held.—There was no proceeding to set aside the sale, but only an application to have the attachment cancelled The latter proceeding can by no stretch of language be called a proceeding to set aside the sale. After the sale was confirmed there was nothing to prevent the respondent from applying for delivery of the property —

20 T L J., 686

2. Appellant, who was the assignee of a hypothecation deed dated 4-11-1088 in respect of 3 Survey Numbers obtained a decree thereon and purchased the properties for 14 000 fanams and odd at a Court sale in execution of his decree on 11-12-1099 The sale was confirmed on 11-1 1100. On 12-1-1101 he applied for delivery of possession of the property purchased by him. This application was rejected eventually for non-payment of process fees. He renewed his application on 24-1-1105 The question arose whether the application was not barred by limitation. The appellant contended that his application must be held to be within time by reason of the pendency of another suit filed on 2 1-1101 by a subsequent hypothecatee on a deed dated 23-4-1090 in respect of 13 items of property including the three Survey Numbers covered by the deed of 11-11 1088 The appellant was impleaded as a defendant in this suit but there was no reference to the decree obtained by the appellant or the execution sale in his favour The suit was decreed on 14-12-1102 under which the appellant was declared entitled to a priority over the 3 items, to the extent of 11945 fanams and a further declaration was made that the plaintiff in the suit would be entitled to recover such balance of the decretal amount therein from these items as might remain due after sale of the other items under the decree. The other properties were sold in auction on 22-10-1104.

Under these circumstances it was argued that the suit filed by the later hypothecatee, would amount to a proceeding to set aside a sale, within the meaning of Section 16 of the Limitation Regulation

Held.—Though as a subsequent mortgagee, the plaintiff in the latter suit had a right in law to redeem the appellant, this right could not in any way be considered to affect the claim for exclusion of the period during which the latter suit was pending by reason of the fact that the prayer in

the suit to which the present appellant was a party, was not for such redemption

In the nature of the later decree which allowed the appellant a priority only for a lesser amount than his sale price, it cannot be said that he was not justified in waiting till the sale of the other properties in execution of the latter decree on 22-10-1104

The proceedings till the date of such sale must therefore be considered to fall within the purview of *Section 16* and the period between 2-1-1101 and 22 10-1104 has to be excluded under the Section The application of the appellant was therefore within time — 46 T. L R *310*

Section 19

1 *The appellant first applied for* execution on 14-11-1096, which was dismissed for non payment of the full process fee on 2-12-1097 A second application for execution was filed on 13 11-1105 which was *prima facie* barred But on 13-11-1099 the plaintiff-respondent filed an application for execution in which the decree sought to be executed by the appellant is admitted It was contended that admission in the execution application amounts to an acknowledgment under Section 19

Held —Where the existence of the decree is admitted and an application is made for execution of that decree so far as it is in favour of the plaintiff, it is tantamount to an acknowledgment of liability in respect of such decree under Section 19 of the Limitation Regulation read with Explanation 4, as well as Article 53, clause (9), of the old Limitation Regulation — 22 T L J, *997*

2. In a suit for recovery of the amounts due under four promissory notes, the statement in the last of the promissory notes in order of time that it was executed "ഇതിന്മേലുള്ളതിൽ പു ഒ" amounted to a valid acknowledgment which saved the three prior promissory notes from the bar of limitation —

22 T L J, *990*

3 *The suit was to redeem* a mortgage of 1002 The plaintiff alleged that a reference to a sub-mortgage of 1029 contained in Exhibit C, under *which the* first defendant's father redeemed the said sub-mortgage amounted to a valid acknowledgment of liability sufficient to save limitation

Held —Section 19 of the Limitation Regulation requires that an acknowledgment of liability in respect of such *property or right* must be made in writing signed by the party against whom such property or right is claimed or by some person *through whom he derives title* or liability or by some person who is either by operation of law or contract entrusted with the general management of the affairs of the family.

No inference can be drawn from the expression "കാലവർദ്ധനവെയ്ക്ക പാടത്തെ ഒന്നു കരമായതു വസ്തു ഒരു ഒ ഇല്ലാതാവിലേക്ക" nor can this reference be treated as descriptive of the contents of the sub-mortgage of 1029 Neither primary nor secondary evidence of the sub-mortgage of 1029 has been given.

It is not unusual, in this country for a mortgagee to execute what is in effect a sub-mortgage without acknowledging his liability as a mortgagee. But the sub-mortgagee may treat the document as a sub-mortgage as his mortgagor held only mortgage right — 22 T L J. *876*

4. *The suit was by a prized subscriber* against a foreman to recover the prize amount with interest after deducting the subsequent instalments. As the *suit* was filed more than three years after the termination of the chitty, it was sought to save limitation by relying on two entries in the chitty Kykanakku which are as follows.—

Amount paid on 17-3-1098 is Rs 10-16-8

Amount paid on 21-3-1099 is Rs. 6-8-0

Held —The requisites of a valid acknowledgment are laid down in 15 T L J, 361.

'There are various rulings to show what constitute a valid acknowledgment The writing said to contain the acknowledgment must import the existence of liability The existence of the jural relationship of the creditor and debtor must be clear in its face. The legal consequences or the ordinary and natural result of the writing in question should be to attach to it the liability to pay But it must be clear from the acknowledgment that the debtor admitted that the debt was still subsisting The person making the acknowledgment must consciously admit either by express words or by necessary implication that there is an existing liability in respect of the identical right which is afterwards claimed by the plaintiff'

The entries in the present instance do not fulfil these conditions The Kykanakku does not show what amount remains due to the plaintiff even if the whole of it is read. That depends on the fact that the chitty had been prized which is not shown in the Kykanakku. It is clear therefore, that limitation is not saved by Section 19

On the contention that Section 21 of the Regulation would apply

Held —In the present case all we have is an acknowledgment for payment of certain amount of money There is nothing to show that it is intended to be a payment towards interest on payment of a part or whole of the principal except by reason of extraneous evidence. For this reason, the disputed entries referred to, do not save limitation under Section 21. The British Indian decisions cannot be relied on as Section 20 of the Act of 1908 differs in important particulars.—

22 T L. J., 396.

5 The suit which was filed in 1099 was for redemption of a sub-mortgage of 1036 executed by R, For saving limitation, the plaintiff relied on an acknowledgment contained in Exhibit A (25 12-1049) executed by the sub mortgagee in favour of a stranger mortgaging his rights under the sub-mortgage. Exhibit A contained the following words "The properties which have been obtained by me on *Adavu Otti* from R. and are being enjoyed by me" Among the documents handed over at the time of Exhibit A as title deeds there was an *Adavu Otti* of 1036.

Held —Exhibit A contained a sufficient acknowledgment The recital in Exhibit A that the property was obtained under an *Adavu Otti* and that such a document dated 1036 was being handed over obviously as the title deed amounted to an admission that the executant held the property under an Adavu Otti of 1036 and therefore it was liable to be redeemed — 22 T. L J, *1095*

Ref —23 T L. J., 947

6. The endorsement on a sale deed to the effect that the vendee under it presented it for registration does not amount to an acknowledgment of the mortgage recited in the sale deed, under Section 19 —

22 T. L J., *990*

7 The ground of exemption from limitation must be clearly set out in the plaint. The plaintiff could not take advantage of any ground of exemption from the law of limitation which has not been set up in the plaint The plaintiff could not be allowed to rely on a statement in the written statement of the defendant to get over the bar of limitation

Under Section 19 of the Limitation Regulation, the only operative acknowledgment is one that admits or imports any liability in respect of the right or property claimed in the suit.

The expression 'ചാണകക്കുഴിക്കൽ പുര' is merely descriptive of the land dealt with

and does not *per se* import any liability to be redeemed The other clause "ഞാൻ പ്രമാരിയോട് എഴുതി വാങ്ങിച്ച അനുഭവിച്ചുവന്ന നിലങ്ങളിൽ" &c also does not import an acknowledgment of an existing liability to be redeemed

Admission of a document in evidence in the Appellate Court is illegal, where no reasons are recorded for the same. It is the duty of the Appellate Court where additional evidence is admitted to allow the opposite party an opportunity to adduce rebutting evidence —

23 T L J, 446

8. The plaintiff relied upon Exhibit J as a valid acknowledgment The wording in Exhibit J was—"ഉടൻ കൊച്ചുറിയിൽ നാലായി കണക്ക തീരുമ്പോൾ വല്ല സംഖ്യയും വരുവാനുണ്ടെങ്കിൽ വാങ്ങിയും. ഒട്ടുകുവാനുണ്ടെങ്കിൽ ഒടുക്കിയും പ്രമാണം വാങ്ങിക്കൊള്ളണം.":

Held—Exhibit J amounted to an acknowledgment of liability. An un-, conditional acknowledgment implies a promise to pay, and the same meaning attaches where there is an acknowledgment of a right to have the accounts settled, and no qualification of the natural inference that whoever is the creditor shall be paid when the condition is performed by the ascertainment of the balance in favour of the claimant

An acknowledgment of liability, should the balance turn out to be against the person making it, is a sufficient acknowledgment.— **23 T L J, 784**

9 The judgment-debtor applied to be adjudicated insolvent The petition was dismissed for default. Thereupon the judgment-debtor applied for restoration of the dismissed petition It was contended for the decree-holder that execution of the decree was saved from the bar of limitation by the acknowledgment contained in the restoration petition of the judgment-debtor

Held—An application for restoration of a petition dismissed for default was merely an application that a certain petition dismissed for default might be restored It could not be deemed to be a repetition or acknowledgment of everything contained in the prior application. The appellant had to stand or fall by the restoration application quite independently of the original petition in insolvency If so, unless the restoration application itself contained a sufficient acknowledgment within the meaning of Section 19 of the Limitation Regulation the appellant was out of Court The restoration application itself contained no such acknowledgment It followed therefore that the appellant's application for execution was barred— **23 T L J, 879.**

10. A co-mortgagor sued another co-mortgagor who had obtained a release of the entire mortgage right, for redemption of his share of the property after 50 years of the mortgage but within 50 years of the release The release deed clearly stated that the executant who was in possession had acquired the mortgage interest in the property by taking an assignment of the original mortgage and was surrendering the mortgage right and handing over the title deeds, *viz.*, the mortgage and assignment deeds.

Held—Though the period for redemption available to the plaintiff began from the date on which the original mortgage became redeemable and not from the date of its redemption by the defendant co mortgagor, and the relief claimed was on that account out of time, still in view of the acknowledgment contained in the release deed, the suit was not barred As the person in possession under the mortgage, the executant of the release was fully competent to acknowledge liability to be redeemed and the redeeming co-mortgagor put himself into the position of the *mortgagee as regards* that portion of the mortgaged property which represented the interest of the other co-mortgagor

The statement in the release (relied on as acknowledgment) was not merely descriptive but amounted to an admission of liability as required by Section 19 of the Limitation Regulation

Held further.—The failure of the plaintiff to set forth the acknowledgment as a ground in the plaint for exemption from limitation did not preclude him from relying on the acknowledgment, inasmuch as the facts that formed the basis of the claim had been referred to in the plaint and the cause of action for the suit had been stated to arise on the date of the release The plaintiff had thus substantially complied with the provisions of Order VII, Rule 6.— 22 T. L. J., 647

11 The defendant's father executed in favour of the father of the plaintiff a registered debt bond (Exhibit A) on 26-1-1094, the debt being payable after the expiry of five years. The suit was for the recovery of the amount due and it was filed on 30-10-1106. To save limitation a letter dated 30 10-1095 was relied upon in the plaint as an acknowledgment but this being obviously after the expiry of the period of the limitation, proved unavailing and so the District Munsiff dismissed the suit as barred by time. The correctness of this decision is not challenged The plaintiff appealed and then produced certain documents and the District Judge being satisfied that there existed sufficient materials by which the plaintiff could be saved from the bar of limitation, allowed the plaint to be amended so as to put forward payment of interests as a ground of exemption and accordingly set aside the lower Court's decree and remanded the case for trial and decision afresh. From this order the defendant has filed this special appeal.

Held—The only ground of exemption from limitation bar alleged in the plaint is the acknowledgment contained in the letter. Under Order VII, Rule 6, Civil Procedure Code, the plaint must show the ground upon which exemption from limitation bar is claimed and according to decided cases a plaintiff cannot take advantage of any ground of exemption which had not been set up in the plaint. It is however open to the Court in appropriate cases to allow amendment of the plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation even though it was not mentioned in the plaint as originally drafted and the power of amendment may even be exercised by the Appellate Court

There is no warrant for the view that for an acknowledgment to be valid, it should be made after the maturity of the bond in respect of which the acknowledgment was made Section 19 of the Limitation Regulation is not capable of such a restrictive interpretation What it requires is that the acknowledgment of liability should be made before the *expiration of the prescribed period of limitation* Hence even though the right of suit under the bond arose only after the date of the letter relied upon as acknowledgment, it would have sufficed to satisfy the provisions of Section 19, and enabled the plaintiff to succeed in case the suit was filed before the expiration of the period of limitation.

Under Section 21 of the Limitation Regulation, the interest on the debt should be paid by the person liable to pay the debt, whereas in this case, the *receipts show payment to the debtor by the creditor*. This does not satisfy the provisions of the Regulation. In British India, the payment of interest need not be evidenced by writing. (See Section 20 of Act IX of 1908). The decisions of this Court are clearly to the effect, that mere appropriation by the creditor of a portion of the Michavaram on account of interest due on a debt does not amount to payment of interest evidenced by writing, so as to give a fresh starting point for limitation. If there be a writing of some kind by the

debtor, though it does not specify that the payment was on account of interest, evidence *aliunde* is allowable to establish for what purpose such payment had been made. Section 21 therefore is imperative that the fact of payment should appear in the handwriting of the judgment-debtor, with his signature affixed, though it is not necessary that there should be mention in the writing itself that the payment was on account of the interest. Giving the most liberal construction to the receipts now before Court, it is difficult to see in them any mention of payment of interest by the debtor to the creditor on account of the plaint bond The receipts on the contrary disclose transactions of quite a different kind, namely, payment by the *creditor to* the debtor. In such circumstances it is *obvious* that the plaintiff cannot succeed if he be allowed to take his stand upon these receipts.— 24 T L J, *759*

12. See also.—
Art 53 — 24 T L J, *1*
Regn VIII of 1100,
Or VI, R. 4.— 24 T L J, *509*

Section 20

1 The suit was for redemption of property held on mortgage The defendant pleaded limitation. A Purakkadom was proved in the case in which *there was* an express reference to a prior mortgage and an *undertaking to redeem* the property on payment of the mortgage amount and the amount received under the Purakkadom

Held.—The Purakkadom gave a fresh starting point of limitation. It afforded evidence that the parties treated the mortgage as being alive and in force. The expression "before the expiration of the period prescribed" in Section 20, clause (1), could not necessarily imply that evidence to prove affirmatively what the period available was should be given. — 23 T L J, *435*.

2. The defendants' Tarwad enjoyed the suit properties under a deed executed by the plaintiff Devaswom In suit for renewal it was contended by the defendant that the deed was not a kanom but a redeemable mortgage, and that the suit was barred by limitation

Held—Inasmuch as the deed contained no provision for renewal or payment of renewal fees and it was not proved that renewal fees were ever paid and received, the deed was only a redeemable mortgage.

The period for redemption of the suit *mortgage was 50 years from* the date of the mortgage. Limitation was not saved by certain receipts for michavaram filed by the plaintiff because the receipts were unregistered and therefore insufficient under Section 20 (2) — 24 T L J, *621*.

Section 21.

See Sec 19— 23 T L J, *393*
24 T L J, *759*

Section 22

No express authority was conferred on a partner to acknowledge debts on behalf of the partnership, but it was not contended that the acknowledgment was not made in the course of and for the purposes of the business

Held.—Clause (2) of Section 22 of the Limitation Regulation (1062) does not provide that in order to make an acknowledgment effective for the purpose of saving limitation, it is necessary that the partner making it should have had express authority to make such acknowledgment It would be sufficient if there is evidence to prove that the acknowledgment was made by the parties concerned in the conduct of such business.

What is required to render such an acknowledgment valid and effective is evidence not merely that the person who made the acknowledgment was a partner,

but also that the acknowledgment was made in the course of and for the purpose of the business There would in such cases be implied authority to acknowledge debts.— 47 T L R, 60
(=21 T L J, 65)

Section 24.

1 The suit was against the Sirkar for declaration of the plaintiff's title to, and recovery of, the plaint property on the allegation that the Sirkar, instead of issuing pattah in favour of the plaintiff, wrongly included the property as Poramboke

Held,—Under Article 109 of the Regulation, which was the Article applicable, the suit had to be brought within 6 years of the date when the plaintiff obtained knowledge of the 'wrongful' act. There was no 'continuing wrong' within the meaning of Section 24 which gave the plaintiff any cause of action *de die in diem* — 21 T L J, 1035

2 See also Art 109— 21 T L J, 919

Section 27.

It was found that the plaintiffs have been enjoying a right of way from a date long anterior to 1053 till up to 1072, but that since 1072 the defendants have been disputing the right of way and the plaintiffs have been enjoying it ignoring such dispute. Upon this finding it was urged in special appeal that the plaintiffs could not be given a decree, as under the last Clause of Section 27 (1) of the Limitation Regulation the period of 20 years prescribed therein should be taken to be "a period ending with 2 years next before the institution of the suit wherein the claim to which such period relates is contested."

Held—Section 27 had no application to the facts of the case, and the plaintiffs had to be held to have acquired the right by prescription.

Section 27 would not bar a suit based upon prescription resulting from long and ancient enjoyment of an easement The provisions of the Limitation Regulation are neither prohibitory nor exhaustive but only remedial and they do not exclude or interfere with the acquisition of rights otherwise than under them —
46 T. L R., 119
(= 20 T L J, 150)

Ref—23 T L J, 714

Section 29.

Suit to recover the amount of paddy due under a hypothecation bond. Under the law in force at the time of the execution of the bond, the period of limitation for the enforcement of the claim was 6 years. Under the Limitation Regulation of 1100 the period, however, was extended to 12 years. Though the new Regulation was in force at the time of filing of the plaint, the right to recover the debt had become barred under the law of limitation in force, before the new statute came into force.

The question was, whether the law of limitation being only one affecting the procedure and practice in Courts the law at the time of the institution of the suit alone was applicable

Held—The remedy would clearly be covered by Section 7, Clause (*b*), of the General Clauses Regulation which laid down that where any Regulation repealed any other, such repeal would not revive *anything* not in force, or existing at the time at which the repeal took effect. The remedy by way of suit to enforce a debt was clearly not existing on the date the Limitation Regulation of 1100 came into force. The expression *thing* occurring in the above Section would include the remedy referred to above. After such remedy had become extinguished by virtue of a repealed statute during the period it was in force, it would not be open to a party to resort to the identical remedy on the strength of

the repealing statute on the ground that the period of limitation had been extended thereby.

Held also —Section 38 of the Limitation Regulation of 1062 would apply to a right for damages on account of breach of contract also. That the effect of Section 28 of the Limitation Regulation of 1062 corresponding to Section 29 of that of 1100 was, that so far as the right to recover possession *of the property* was concerned the same would become extinguished on the expiry of the period prescribed under the statute The use of expression *any property* would indicate that it may be either movable or immovable The possession contemplated under the Section may be either actual, or physical, or legal or juridical In cases such as an action for enforcement of debts or other personal actions, the remedy would be extinguished but not the right The creditor had the right to enforce his claim by any means other than filing of a suit.—

20 T L. J., *1988.*

Article 9

1 The plaintiffs had been brought on record in O, S No 825 of 1092 as the legal representatives of their father who was the defendant in that case As they were minors, a guardian had been appointed to represent them but the guardian took no part in the suit or the execution proceedings which followed it As a result a decree was passed in O S. No. 825 not only against the hypotheca but also against the plaintiffs personally The present suit O S. No. 435 of 1099, was to set aside the decree in O. S No 825 and the sales in execution of the said decree, held in 1094 and 1095

At date of the present suit, the plaintiffs had not all attained majority but more than a year had elapsed since the first plaintiff became major It was contended on behalf of the defendant, that the suit was barred by limitation under Article 8 of the Limitation Regulation II of 1062, which provided for one year from date of sale.

Held —Gross negligence of a guardian *ad litem* is a good ground enabling the minor to seek to have the decree set aside but it would not make the decree nullity If a decree is thus *prima facie* valid until set aside, the same applies to sales in execution of that decree which would be valid *subject to the right* of the plaintiffs to sue for their being cancelled

Per Chatfield, C J (Joseph Thaliath J dubitante) —Since the right set up on behalf of the plaintiffs was a joint right and the first plaintiff could not by himself surrender that right before his brothers attained majority, Section 9 of the Limitation Regulation II of 1062 would apply so as to prevent time from running against any of the plaintiffs until all attained majority

The High Court, however, upheld the execution sales but set aside the decree in O. S No, 825 so far as it imposed a personal liability on the minors.—

20 T L. J., *907*

2. In a suit to set aside a sale deed as wanting in consideration and Tarwad necessity, defendants 1 to 3 pleaded *inter alia* the bar of limitation on the ground that they had obtained title to the property in question under a Court sale in execution of the decree in O. S. No. 661 of 1084 against the plaintiffs' Karanavan which had been confirmed more than a year before date of suit. The plaintiffs in replication alleged that the decree in O. S No. 661 did not bind the Tarwad and that the execution proceedings therein were tainted by fraud.

Held —(1) The replication amounted to a prayer that the Court sale should be set aside

(2) The suit was barred under Article 8 (a) of the Limitation Regulation of 1063, inasmuch as it was brought more than a

year after the confirmation of the Court sale.

Under Article 8 (*a*) of the Regulation of 1062, a period of one year is allowed from the date of confirmation for a suit to set aside a sale in execution of a court decree brought on any ground whatever other than that the judgment-debtor, his family or his Tarwad, had no right, title or interest in the property sold Article 8 has been held to be applicable even in cases where the judgment-debtor is only a junior member of the Tarwad

The terms of Article 8 (*a*) would appear at first sight to preclude the application of Article 78 [=Article 83]. It would seem that Article 8 (*a*) contains the more specific directions and Article 78, the more general ones so that according to the accepted canons of construction Article 8 (*a*) should be applied rather than Article 78.

(3) Even assuming that Article 78 applied, the necessary allegation of fraud was neither made nor found in the case.

(4) The plaintiff cannot ignore the Court sale and succeed in their suit in respect of the other reliefs claimed

Under Section 313 [=Order XXI, Rule 91] of the Civil Procedure Code, the certificate of sale granted by the Court has, as regards the parties to the suit and persons claiming through or under him, the effect of vesting the title to the property sold in the purchaser from that date The sale of Tarwad property in execution of a decree in which the Tarwad has been insufficiently represented is not void but only voidable at the instance of the members of the Tarwad A judicial sale is not a nullity merely because it is vitiated by some irregularity but should have been set aside within the time allowed by law.— 47 T L R, *822*
(=21 T L J, *808*).

Fol —24 T L J, 734.

3. The suit was by a junior member of a Marumakkathayam family to set aside a sale of Tarwad property in execution of a decree obtained by the first defendant against the second defendant on a hypothecation bond The hypothecation was concurrently found to be supported by consideration and necessity In second appeal it was argued that though the suit was brought within one year of the Court sale it was barred as the Court sale could not be set aside without setting aside the decree in execution of which the sale was held, and as six years have elapsed since the decree was passed

Held—The suit was not barred A fresh cause of action arose when the plaintiff's right was invaded by the sale. The fact that the first cause of action was barred by limitation did not affect his right to bring a suit on a subsequent cause of action

The expression 'any ground' in Article 8 (*a*) of the Limitation Regulation (old) was wide enough to include the ground of the decree itself being invalid —
22 T L J, *1943*

4. The suit was for cancellation of a decree obtained against the Tarwad of the plaintiff and the Court sale had in pursuance of it on the ground that the decree was obtained without impleading the proper representatives of the Tarwad as required by Section 25 of the Nayar Regulation of 1088

It was contended for the defence that the suit was barred by limitation under Article 9 of the Regulation as it was brought more that one year after confirmation of the Court sale.

Held,—The wording of Article 9 of the Regulation was different from that of the corresponding Article of the British Indian Act. All suits to set aside a Court sale on any ground other than the grounds stated in Article 9 of the Regulation had to be brought within one year The plaintiff was bound, under the circumstances of the case, to sue for the cancellation

of the Court sale whatever other reliefs he might have prayed for —

24 T L J, 734

Article 10

See Regn. VIII of 1100, Or. XXI, R. 61— 48 T L R., 409
(=22 T L.J, 1314)

Article 49

The plaintiff based his cause of action on "account stated" and relied on an alleged entry which recited "that the amount claimed was due to the plaintiff as per account settled in respect of deposit made by him towards my trade on several dates and taken by me for the purpose of securing him interest on such investments," but the entry was neither signed nor written by the person sought to be made liable

Held—The volume of authority was in favour of the view that a transaction of the nature in question gave rise to an action in law The limitation for the suit commenced from the date of entry as to accounts stated and not on the respective dates of the several deposits which contributed to the final adjustment and that Article 49 would apply —

24 T L J 188

Article 50

See Art. 95.— 49 T L R., 74
(=22 T L J, 1360).

Article 53

When money is payable on demand and nothing further said, it is payable at once and without demand, and limitation begins to run at once. In the case of a debt as soon as the day of payment arrives the default of the principal debtor is complete and the surety apart from special stipulation, is immediately liable to the full extent of the obligation without being entitled to notice and the reason of the rule is that it is the surety's duty to see that the principal debtor pays his debt Although *prima facie* a sum payable 'on demand' is payable forthwith and the words 'on demand' are superfluous in each case, the question whether or not the parties intended that the words should be treated as an integral and operative part of the agreement depends upon the true construction of the agreement into which the parties entered

There is a direct authority of this Court on the question of limitation in the case of contract of guarantee and indemnity There may be varying periods of limitation as regards the principal debtor and surety Even if the creditor had allowed his claim against the debtor to become barred the surety does not become discharged from liability

The statement of accounts signed by the principal debtor which amounts to an acknwledgment of the debt by him and serves to keep the debt alive as against him does not keep the remedy alive as against the surety

It has always been the law that unless a contrary intention appears a guarantee to or for a given person or number of persons will *prima facie* not cover debts incurred to or by such person or persons and others. Any variation made without the surety's consent in the terms of the contract between the principal debtor and the creditor discharges the surety as to transactions subsequent to the variance When a contract is varied in a substantial particular it is not for the Court to say that the surety who undertook the burden of original contract must or ought to have undertaken the burden of the contract as subsequently varied

In the case where a surety gives a continuing guarantee limited in amount to secure the floating balance from time to time due from the principal debtor to

the creditor and the floating balance exceeds the limited amount, the guarantee is as between the surety and the creditor to be construed as applicable to such part only of the debt as may be co extensive with the amount of the guarantee.

If a bond or guarantee is given by a surety to secure the re-payment of advances of money to the principal debtor provided such advances do not exceed in the whole, at any one time a certain limited amount the proviso protects the surety from being answerable beyond the amount named but will not avoid the obligation if the advances go beyond it, unless that result clearly appears to have been contemplated by the parties.— ..

24 T L J., f.

Article 56.

See Sec 19.— 22 T L J, 897

Article 70

The decree-holder brought the judgment-debtor's properties to sale in execution for the whole decree amount without giving credit to a payment out of Court. The properties were delivered over to the auction-purchaser

Held—The cause of action for damages for breach of the implied contract of indemnity arose on the date of dispossession by delivery and not on date of Court sale.

The aggrieved judgment-debtor has in these cases two courses open. He may either sue on the breach of the contract to certify the payment, in which case, his cause of action would arise on the presentation of every new application for execution, or he may wait until he is actually damnified and then sue for damages for the breach of the implied contract of indemnity (as in the suit)

Article 68 of the Limitation Regulation applied to the latter case and under that Article, the plaintiff cannot be said to be actually damnified by the mere fact of the Court sale, because even though the title in the property passed by the Court sale, the purchaser might not further execute the decree and divest the plaintiff of possession in which case the plaintiff would not be damnified —

22 T L J, *1404.*

Article 72

1. The test to be applied to find out whether an account is mutual, open and current under Article 72 is, that the nature of the transaction should be such that there is a possibility of the balance being shifted from one side to another If the nature of the dealing shows that the liability has been on one side only, the payment made by the party being always in discharge of that liability there could be no mutuality as contemplated in this Article even though there has been an excess payment on some occasions resulting in the shifting of a balance in his favour.

The expression "reciprocal demand" occurring in the Article has reference only to the possibilities of occasions for demand It is only in the nature of a definition, not intended to postulate that there should be reciprocal demands in fact.— 46 T L R., *223*

2. To attract the provisions of Article 72, it is essential that (1) there should be accounts between the parties, (2) such accounts should be open, current and mutual, and (3) there should have been reciprocal demands between the parties.

An open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise consisting of a series of transactions. When there has been no formal settlement and no balance struck, the account will be open within the meaning of the Article.

A current account is an open account between two or more parties or an account

which contains items between the parties from which the balance due to one of them is or can be ascertained

Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those of items on one side only though made up of debit and credit "Mutual account means not merely where one of the two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account. I take the reason of that distinction to be that, in the case of proceedings at law, where each of two parties has received and paid on account of the other, what would have to be recovered would be the balance of the two accounts, and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments, a position of the case which to say the least, would be difficult to be dealt with at law Where one party has merely received and paid moneys on account of the other, it becomes a simple case. The party plaintiff has to prove that the moneys have been received, and the other party has to prove his payments, The question is only as to the receipts on one side and the payments on the other and it is a mere question of set off, but it is otherwise where each party has received and paid". (I. L. R. 55 Cal 575).

Whether there has been mutuality or not has to be determined with reference to the particular facts of each case. It will have to be decided whether the nature of the dealings shows that each party to the account has extended credit to the other on the faith of an admitted indebtedness and has intended to enforce the liability of the other to himself. Of course, the shifting of balance may ordinarily be taken to be the test, but the same cannot however be treated as conclusive. Its absence by itself cannot warrant an inference of the accounts not being mutual Even where the balance has occasionally shifted to the other side when it has generally been in favour of one cannot warrant the transaction being held to be mutual within the meaning of the Article, if from its nature there is not a possibility of the balance so shifted The test to be applied is that the nature of the transaction should be such that there is a possibility of the balance being shifted from one side to another If the nature of the dealings shows that the liability has been on one side only, the payments made by the party being always in discharge of that liability, there could be no mutuality as contemplated in this Article, even though there has been an excess payment on some occasions resulting in the shifting of a balance in his favour

It is not necessary for the purpose of the Article that there should be an actual demand by either party, The expression 'reciprocal demand' occurring therein has reference only to the possibilities of occasions for demand It is only in the nature of the definition not intended to postulate that there should be reciprocal demands in fact — 20 T L J., 781

Com —22 T L J., 431

3. Article 72 of the Limitation Regulation applies only in cases of mutual, open and current accounts with reciprocal demands.

An account is "open" when the balance is not struck or though struck is not accepted or acknowledged to be correct by the parties concerned. It is "current" when it has been going on as a continuous account between the parties And for "reciprocal demands" to exist there should be transactions which create obligation on one side, those on the other being merely complete or partial discharges of such obligations. —

20 T. L. J. 491.

4. Article 80 of the old Limitation Regulation applied only to mutual

accounts between merchants and traders Although the word 'trader or merchant' is not defined anywhere in the Regulation, the expression "merchants and traders" was always construed liberally The expression could not have been used in the restricted sense in which it is used in popular language

There is nothing in law to prevent the parties from treating the accounts as open and current, even after the striking off of a balance. Whether the parties really intended to treat the accounts as mutual, open and current after striking a balance or signing the accounts settled, would be a question of fact to be determined in each case.

In every case, the Court has to see whether it is only a case of debtor and creditor or a case of mutual obligations which will in the ordinary way result in enforceable liabilities on either side.—

23 T L J, *1127*

Article 83.

See Article 9 — 47 T L R, *922*
(=21 T. L. J, *903*).

Article 92.

See Article 95 — 49 T L R., *74*
(22 T L J, *1360*)

Article 95

The plaintiff, as superior mortgagee of Michavaram periodically due from certain land, obtained a decree for redemption in O S. No. 1247 of 1095 against the prior mortgagee, the 14th defendant. The Munsiff's decree in the suit, O. S. 1247 was in favour of the plaintiff and dated 26-6-1099. The 14th defendant preferred appeal and special appeal to the District and High Courts respectively against the said decree but without success. The suit was filed by the plaintiff on 17-12-1103 after the decision in special appeal, *inter alia*, for recovering from the 14th defendant Michavaram for the period 1096-1098 wrongly collected by him In answer to the plea of bar by limitation, the plaintiff contended that Article 109, the residuary Article, applied to the case and he had six years' time from the date of the special appeal decision in O S 1247 The lower Court dismissed the suit holding that either Article 50 or 92 was applicable

Held—(*Per curiam*) (1) Neither Article 50 nor Article 92 was applicable Article 50 related to suits for *money* only while the rent in question was presumably paid in kind and so received

(2) Article 92 was inapplicable since the plaintiff was not the mortgagor nor was there any re-entry on the mortgaged property

(3) Article 95 governed the case and the suit against the 14th defendant was accordingly barred Though Article 95 was commonly applied to suits for mesne profits as against trespassers, it could not be gainsaid that it would be applicable for recovery of profits wrongly received by another, to which other more specific Articles were clearly inapplicable. Suits by mortgagees or lessees fell within its scope and the words 'wrongly received' in the Article meant only that the profits should have been received under a claim or title that cannot be legally substantiated

Per Venkata Rao, J, (*Chatfield, C J*, leaving the question open)—There was nothing to prevent the Courts in this State from recognising and applying established equitable principles under which a cause of action may be suspended during the pendency of a litigation instituted for establishing the right or title on which it is based. The plaintiff's cause of action must accordingly be deemed to have been suspended during the pendency of the litigation which established his right to redemption.

The starting point for limitation, however, must be the date of the decree of the first Court, which decreed the plaintiff's right. For the mere fact that the defendant unsuccessfully appealed to superior Courts would not postpone his right or prevent the running of time against him — 49 T. L R. 74

(=22 T L. J, 1360)

Article 97.

1 The plaintiff obtained a decree against E. on a promissory note, and in execution of that decree, purchased the right of E. to recover the amount reserved with defendant under a sale deed executed by E to the latter for discharge of the debt under the said promissory note

Held —The suit was in effect one for unpaid purchase money and under Article 91 of the old Limitation Regulation, had to be brought within three years from the time fixed for completing the sale or the date of its acceptance.

Even if Article 96 should be held to be applicable there was nothing unreasonable in holding that the breach of contract occurred and the cause of action arose on the date of the sale deed as no time was fixed in it for performance of the contract — 21 T L. J., 784

Not Fol —21 T L J, 1118

2. The first defendant vendee, from whom money was due to the plaintiff vendor as balance sale consideration, executed a further sale of the property in favour of the second defendant with a direction to pay off the plaintiff, the amount due to him On the failure of the second defendant to do so, the plaintiff filed this suit for recovery of the money after the lapse of the period prescribed under Article 91 of the old Limitation Regulation (which governed the case)

Held —The plaintiff could not claim exemption from the operatin of the Limitation Regulation by virtue of Section 10 inasmuch as there was no express trust as required by the Section. It would be a dangerous doctrine to hold that every purchaser of property into whose possession the property may pass by a subsequent sale is a trustee for the vendor merely because the purchase money or a portion of it remains unpaid by the original purchaser — 22 T L. J 1181

3. See Art. 104.— 21 T. L. J, 1118

Article 103.

See Art 53 — 24 T. L. J., 4.

„ Regn. III of 1094, Other Cases. 22 T L J, 1277

Article 104

1, The suit was by a vendor of immovable property for recovery of balance of purchase money reserved with the vendee under a registered sale deed of 28-8-1094 to be paid to the vendor himself On the contention of the vendee that Article 91 of the old Regulation applied even as regards personal liability and the suit was in consequence barred

Held —As regards the liability of the purchaser personally, the Article applicable was Article 96 and not Article 91 in that the suit was one not for the enforcement of the vendor's lien, but for damages for breach of contract in writing registered. There is no difference at all between the case of reservation for payment to a stranger and that to the vendor himself —. 21 T L J, 1118

2. The rule, in the case of a sale, that the vendor cannot be presumed to give a warranty of title in respect of the properties sold by him does not apply to the case of a Kanom. In the latter case the analogy is more to that of a mortgage and the Jenmi like the mortgagor, is bound to secure to the Kanomdar possession of the properties demised and there is an implied

covenant that the Jenmi has a title to convey,

A Kanomdar is therefore entitled to recover the entire Kanom amount, if by reason of a defect of title in the Jenmi, he is unable to get possession of some of the properties demised and consequently incurs a substantial diminution of his security

A suit of this kind can be brought within six years from the date of the arising of the cause of action

Where the Jenmi, first defendant, filed a suit against a stranger to establish his title in respect of certain properties he had demised on Kanom in favour of the plaintiff and was unsuccessful and a suit was brought by the plaintiff Kanomdar against the Jenmi for recovery of the Kanom amount within six years of the decision of the primary Court in the suit filed by the Jenmi :

Held—Article 96 of the old Regulation is applicable to the facts of the case because an implied warranty of title can be inferred, The plaintiff's suit was within time. 22 T L J, 658

3. K executed a debt bond in favour of P stating in the first part of the bond that he had agreed to purchase a journal and two printing machines and accessories and that he was executing the bond for the amount of the sale consideration therefor K brought the suit for recovery of compensation for the breach of the agreement of sale.

It was contended for the defence that the suit was time-barred The argument was that Article 104 of the Limitation Regulation was applicable only to a case where the registered instrument evidenced the contract which formed the foundation of the claim, and not to a case of the kind in question in which the instrument was not intended to be or regarded as primary evidence of the contractual relation between the parties. The mere reference in the instrument to the agreement would not suffice to attract the operation of the Article inasmuch as the obligation could not be regarded as arising out of the terms of the instrument itself or under the law, by force of the provision of a statute

Held (Overruling the defence contention) —It was clear from the terms of the bond that the agreement of sale and purchase was referred to as the basis of the liability created under the bond and that was sufficient to make Article 104 applicable to the suit The following observation in 25 Madras 55 might be cited in support of a liberal construction of the Article "If the oral agreement or contract of sale which immediately preceded the actual sale be also reduced to writing, as is very often the case, in the deed of sale itself which is registered, the case might be different and Article 116 would govern it"

Held further—Though the words "expressed or implied" found in Article 103 were not found in Article 104, they might be read with that Article also

Held further—Article 104 was applicable to cases where the instrument was signed by only one party

Held further,—Where the deed did not itself evidence the registered agreement between the parties as in the case of sales mortgages and leases, a suit to enforce implied agreements arising out of it under the Transfer of Property Act would be governed by the Article

Held further—The rule with regard to the measure of damages in a case of the kind in question was as follows—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered as arising naturally, i. e., according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation

of both parties at the time they made the contract, as the probable result of the breach of it (E B.)— 23 T L J, 995.

4 A sale deed in favour of the defendants reserved a portion of the money with them to be paid to the plaintiffs, vendors, after the encumbrances were cleared, and at the same time imposed a personal liability on the defendants to pay interest on the amount in the meanwhile In a suit for recovery of the interest defaulted for a period of more than six years, the defendants-vendees contended (1) that the *failure of the vendors to discharge the* encumbrances within a reasonable time, disentitled them to sue for interest, (2) that interest beyond six years of suit was not recoverable as being barred by limitation, and (3) that personal liability could not be imposed on some of the vendees who were minors. It was found as a fact that there had been no avoidable delay on the part of the vendors, seeing that only one of the encumbrances still remained to be cleared and the vendors had been making *bona fide* efforts to satisfy the vendees by offering to furnish security Also, the vendees had not made ready or set apart the *principal amount due*

Held.—(1) The principle that if one of the contending parties causes the other to commit a breach of one of the conditions of the contract, the party at fault could not take advantage and exact the *penalty for the breach*, did not apply to the facts of the case Besides, no equitable considerations came into operation so as to give relief to the vendees on account of loss to them from keeping the purchase money in their hands as dead capital The vendees were therefore bound to pay interest on the money reserved

(2) The interest sought to be recovered stood on a footing different from the unpaid purchase money and did not constitute a charge on the property, because under the terms of the sale deed, the vendees had only a personal liability for the arrears The Article of the Limitation Regulation applicable is therefore 104, and the plaintiff would be entitled to recover only the arrears of the interest that had accrued within six years previous to the suit

Though there was no distinction between unpaid purchase money and the interest thereon with regard to the period of limitation governing suits for their recovery, there was nothing to prevent the separation of the interest from the principal and constitute it the object of personal liability only

Quaere—Whether a suit to enforce payment of unpaid purchase money as against the property was governed by Article 119 or 109

(3) No personal liability could be imposed on the minor vendees who remained minors even at date of suit because a guardian could not contract in the name of a ward so as to impose on him a personal liability— 23 T L J, 1151

5. Defendants 2 to 6 executed a mortgage deed in favour of the first defendant on 8 8 1099 wherein the amount due from the former to the Karanavan of the 7th defendant under a promissory note was reserved with the first defendant The latter *failed to pay this amount* and as the 7th and 8th defendants who had the right from the payee of the promissory note were about to file a suit for that amount, defendants 2 to 6 paid up the amount On 16 8-1102 these defendants assigned their right to plaintiff who sued to enforce the vendor s lien and to recover the amount and also to recover damages from the first defendant. The first defendant *inter alia* contended that the suit was barred

Held.—Since the breach was of a contract embodied in a registered document the period of limitation was 6 years under Article 104.— 24 T. L. J., 706

6 See also Art 97 —
21 T L J, 784

Article 105

Where a promissory note was executed which was payable on demand, after six months, it was held that the note was an 'on demand promissory note' with the restriction that the note could not be sued upon until the expiration of six months from the date of the note and that after that date no demand was necessary to give the plaintiff a cause of action

The expression 'on demand' has received a technical meaning in relation to Negotiable Instruments as distinguished from other instruments so much so that the law is that in the case of a promissory note payable on demand no demand is necessary before an action is brought for the recovery of the amount due and limitation runs not from the date of the demand but from the date of the note

When once the intention to postpone the right of suit is made clear, the question to what date the right has been postponed must be decided with reference to the language of the instrument It is now well-recognised that in transactions connected with the law merchant, e g, in the case of bills of exchange and promissory notes, etc, the expression 'on demand' has acquired a technical meaning and that no demand is necessary before action If the parties really wish to make it as part of their bargain that in a promissory note or other negotiable instrument a demand should be made as a condition precedent to constituting a cause of action they can perhaps do so by clear explicit terms. The circumstances connected with the transaction may also in some cases make it clear In the absence of such express words or circumstances clearly indicating that the parties intended that an express demand should be made by the creditor before action is brought no demand is necessary to maintain an action on a promissory note made payable on demand 48 T L R, 230 (=22 T. L. J., 689)

Article 109.

1. The suit for non-liability for Nervarom and Melpathy is for a declaration of non-liability of a recurring demand. Under Article 109, the period of limitation for a declaratory suit is 6 years from the date on which the right to sue accrues. The right to sue in the case of a recurring demand arises at each point of recurrence At each threat or demand by the Sirkar the plaintiff would have a cause of action to sue.

The suit may also be viewed as one to establish a periodically recurring right to remission under the Settlement Proclamation or as a suit for relief in respect of a continuing wrong, in which case Article 118 or Section 24 would apply Melpathy is a charge on land, while Nervarom is no such charge, Nervarom being purely a personal cess should be viewed as abolished.— 21 T L J., 913

2 A Syrian Christian wife sued her husband for arrears of maintenance for 12 years and for future maintenance but it was found that for 30 years before the suit she had lived separate without justification and her refusal to accept the present offer of the husband to live with him was based only on a simulated apprehension of danger

Held.—The rules of Hindu Law as to maintenance to a wife, consonant as they are with the general principles of jurisprudence, may with propriety be applied to Christians, for, differences in religion and caste are immaterial in a matter of this kind. Among Hindus as well as Christians, marriage creates a special status from which springs the rights and duties of married people as such, one of which being the duty of the husband to maintain the wife provided she in her

turn, discharges her marital obligations Nothing will justify a Hindu wife in leaving her home except such violence as renders it unsafe for her to continue there or such ill-usage as would be termed cruelty in an English Matrimonial Court It is not suggested that the customary law of the Syrian Christians is different. Applying the rule of Hindu Law as to grant of separate maintenance, nothing could be decreed to the plaintiff either on account of past or future maintenance

The Article of the Regulation applicable to a case of recovery of arrears of maintenance by a Syrian Christian lady is the residuary Article 109 and not Article 116 which refers only to a Hindu or a member of a Malabar Tarwad — 24 T L J, 291.

3 The plaintiff is the daughter of one deceased C by his wife, the deceased A. Since her death, he married 4th defendant and the defendants 1 to 3 are their children The deceased C had possession of the Stridhanam amount (800 Rasis or 2000 Fs.) due to the said A Besides, he was also in possession of Br Rs. 100 given by the father of A in lieu of utensils and ornaments He has been retaining possession of the same as a trustee for the said A and the plaintiff. He died in Vrischikom 1099 and till his death, he was willing to give over the above amounts to the plaintiff The defendants were asked to pay it, but they have not complied with the demand. The 1st defendant contends that the suit is barred by limitation.

The trial Court decreed the suit in favour of the plaintiff But on appeal the District Judge reversed the decree of the trial Court and dismissed plaintiff's suit on the ground that the suit was barred by limitation

Held —The question for decision is which is the Article of the Limitation Regulation applicable to the present case In *Mathulla Louis V Eapen Rosa* (6 T L J, 464) it was held that in a suit for the recovery of Stridhanam brought by a Syrian Christian woman the Article applicable would be either Article 122 or Article 100 (old Regulation) corresponding to Articles 133 and 109 of the new Regulation. It was not however, definitely decided as to which of the Articles applied Article 122 (133 of the new Regulation) is not applicable as the application of that Article to the case of Stridhanams like the present would lead to evident anomalies and inconveniences. For instance a case may be imagined of a woman marrying paying Stridhanam and living with her husband, say for a period of 40 or 50 years. In that case if Article 133 of the Regulation applies, the woman or her heirs lose all their rights to the Stridhanam amount since under that Article the period of limitation prescribed for a suit to recover the deposit is thirty years from the date of deposit In enacting Article 133 of the Regulation the Legislature could not have intended to bring about such an anomalous result although a literal reading of the Article may lead to such a result. Of course for the purposes of this case it has to be assumed that the deceased C was a "depository" within the meaning of Article 133 since opinion is divided on the question whether money is movable property for the purposes of Article 133 of the Limitation Regulation or whether a person with whom "money" is deposited can be said to be a "depository" Article 133 of the Regulation was not intended to cover cases like the present and the result of applying the Articles to cases of Stridhanam like the present would lead to manifest injustice and anomaly.

In the absence of any specific Article, the residuary Article (Article 109) must apply

There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.— 24 T L J, 754.

4. See also —
Sec 24.— 21 T L. J, *1035.*
Art 95— 49 T L. R., *74*
(=22 T L J, *1860*)
„ 104.— 23 T L J, *1151*
„ Regn VIII of 1100
Or XXI, R 90 — 21 T L J, *1360*

Article 114

An after-born son may impeach an unauthorised alienation by his father, he can do so till the period for a suit by the then existing sons to set it aside expires and not afterwards.

Rights which have become vested at birth could not be taken away by a subsequent enactment of the Christian Succession Regulation (F B) —
49 T L R., *180*
(=23 T L J, *908*)

Article 116

See Article 109 24 T L J, *281*

Article 118

See Article 109— 21 T L J, *918*

Article 119

1. - A suit by an usufructuary mortgagee who fails to obtain possession of the mortgaged property is governed by Article 109 of the Regulation of 1062 corresponding to Article 119 of the Regulation of 1100

When neither the assignor nor the assignee of a mortgage had possession of the property mortgaged, they have only a charge and suit by either of them for the mortgage amount is governed by 12 years' limitation and not by the 50 years' rule.—
48 T L R, *354*
(=22 T L J, *1127*)

2 See also Art. 104 —23 T L J., *1151*
„ Regn. VIII of 1100, Or 2, R. 2.—
24 T L J, *17*

Article 120.

See Regn III of 1094, Other Cases.—
23 T L J, *1049*

Article 122

Even the true owner has to surrender possession of property if he finds himself in the trap of estoppel mutually available to the mortgagor and mortgagee but it is open to the mortgagee to show that the mortgagor's title was extinguished subsequent to the creation of the mortgage.

Adverse possession by the mortgagee against the mortgagor during the currency of the mortgage is a thing unheard of in law and for this matter the mortgagee's transferees are not in a better position since ordinarily the transferee takes only the place of the transferor and does not modify his position by the mere transfer The possession of the transferee is not in itself hostile to the mortgagor till the latter had notice of the nature of the possession asserted by the transferee

Where a mortgagee has transferred the property mortgaged as if he was the absolute owner a suit by the mortgagor against the transferee should under Article 111 of the repealed Limitation Regulation, be brought within 12 years of the transfer only if the transferee had no notice of the limited rights of his transferor

Quaere -Whether under the corresponding Article 122 of the new Limitation Regulation absence of notice as above is essential - 22 T L J, *1154.*

Article 123.

See Regn. VIII of 1100, Or II. R 2. -
24 T L J., *17.*

Articles 130 and 132.

1 Where the plaintiff sued for the recovery of the plaint property with arrears of rent on the basis of a Kanom deed

obtained from the Jenmi, and the defendants were the original Uralers of the Devaswom and were enjoying the plaint property under a Kanom from 1071, and asserted permanent rights of occupancy

Held—A denial of the right to recover possession on the ground of the property being held under a permanent occupancy right is a sufficient disclaimer under Article 132 of the Limitation Regulation

Held also—Adverse possession can be operative even with respect to limited interests.— 20 T L J 925

2. The suit was for redemption of a mortgage which was found to include the disputed properties also. The 6th defendant was in possession thereof and he set up adverse possession

Held.—If Article 119 is applicable to the facts of the case, the burden of proof is undoubtedly upon the plaintiff to make out possession within 12 years. If, on the other hand Article 121 applies to the facts of the case, the 6th defendant has to make out when his possession became adverse to the plaintiff and that he has been in such adverse possession for more than 12 years. Article 119 applies to cases where, the plaintiff, while in possession of the property, has been dispossessed and sues for recovery of the lost possession. The suit is not of that character The suit is for redemption of a mortgage which has been found to include the disputed properties also The 6th defendant is now found to be in possession and he sets up adverse possession. That is not a case of dispossession of the plaintiff and therefore Article 119 cannot apply to the case.

If in addition to the digging of pits watering and fencing the tenant has to incur extraordinary expense in raising the level of the land in order to make it fit for plantation, there is no reason why he should be denied compensation for it. The question whether the work done is what is ordinarily expected of a planter of cocoanut trees like digging of pits, watering and fencing or whether it is an extraordinary one which has been necessitated by the peculiar nature of the soil, is a question of fact which must be decided according to the circumstances of each case.— 24 T L J, 80

Fol—24 T L. J., 301

3. In a suit by a co-sharer for partition and recovery of his share but framed as one in ejectment, the defendant pleaded adverse possession on the ground only, of the plaintiff's non-participation in the enjoyment of the property.

Held—Though the suit was framed as if it were one for ejectment, Article 132 applied and accordingly the burden lay on the defendant to prove that his possession was adverse at a certain date before suit. And till a co-sharer had definite knowledge of an actual, visible, exclusive, open and hostile possession, set up by another co-owner, adverse possession will not run in favour of the latter — 22 T L. J, 905

4. The plaintiff in the case based his suit for recovery of possession from defendants 1 and 2 on two grounds—(1) an oral lease and (2) his mortgagor's title. The defendants denied both these grounds, and in addition pleaded acquisition of title by adverse possession. The plaintiff proved his title but not the oral lease. The lower Court, applying Article 130 dismissed the suit on the ground that the plaintiff had not proved possession within 12 years of the suit. The plaintiff appealed

Held (By majority).—The falsehood, if any, in respect of the lease should have no repercussion on the truth of the plaintiff's case in other respects. The title set up by the plaintiff was found, and the original title pleaded by the defence was not found. The suit should fail, if at all on the ground of limitation or adverse possession according as Article 130 or 132 applies. Article 130 has no application in the absence of the dispossession of the

party in possession, and it does not apply because the defence did not admit the possession of the opposite party at any time The burden lay on the defendants under Article 132 to make out the plea of adverse possession put forward by them

Per Chatfield, C J, (contra)—Where, as in the case, the plaintiff did not allege that while he was in possession of the land he was dispossessed or discontinued his possession but contended that he had given permissive possession to the defendant, *e g*, by granting him a lease if the lease was accepted then no question of limitation would arise But the lease might be found to be untrue. In fact if any advantage was to be gained by making such allegations, it may be taken as granted that a false lease would always be alleged in every case in which the plaintiff seeks to recover immovable property in the possession of another Such a result is not desirable The position, therefore, must be the same as if the plaint contained no allegation of the lease. In some cases it might be that the plaintiff might succeed on the strength of his title alone But where the defendant was in possession of the plaintiff's land, such possession should be accounted for and where the only way in which it could be accounted for was that the defendant had dispossessed the plaintiff or the plaintiff's predecessor in title or had occupied the land after the discontinuance of possession by one of them, then there was no reason why the plaintiff's suit should not be governed by Article 130 (F B),— 23 T L J, *412*

8 Among co-sharers there can be an extinguishment of right by adverse possession but it is clear law that till a co-sharer has definite knowledge of an actual, visible, exclusive, open and hostile possession set up by another co-sharer, adverse possession will not run in favour of the latter. Mere silent possession of properties by one co-sharer, however exclusive or long continued, cannot be treated as adverse to the other co-sharers. In order that it may have the effect, there must be a repudiation by the person in possession of the title of the co sharer or some notorious act amounting to an ouster or exclusion of the co-sharer brought home to the latter But a violent expulsion of a co-sharer is however not necessary to constitute adverse possession

On the question in issue as to whether according to the customary law governing the community of Malayali Velans (potters), sons and daughters inherit as equal shares, it was held that the decision in *Padmanabhan V Narayanan and others* (18 T L R., 106) was relevant as an instance of the "assertion and exercise of a right" under Section 13 of the Evidence Act and could be referred to as evidence of a weighty character as to the consciousness of the parties concerned regarding the existence of the rule in question— 24 T L J., *147*

Article 133

See Article 109— 24 T L J *754*

Article 137.

Article 137 is very wide and its operation is by its wording not restricted to any particular class of suits by the Sirkar and this is so for very proper reasons for, the Sirkar is charged with a very important trust for the benefit of the community of which it is the representative and its right should be fully protected

Where, therefore, the rights of the debtor become vested in the Sirkar whether by assignment or operation of law, the Sirkar has a period of 50 years under Article 137 within which to sue for the enforcement of such rights. But a debt which is already statute barred on the date the Sirkar derived the right, will not be revived inasmuch as the claim of

the Sirkar being only a derivative right must stand in the same situation as its principal — 21 T L J, 672

Article 149.

Under Article 149 of the Regulation of 1100 (Article 136 of Regulation of 1062), the period of limitation is thirty days from the date of decree or where the summons was not personally served on the defendant, when the applicant has knowledge of the decree The service in the case was a substituted one on the appellant's refusal to accept service as required by Order V, Rule 17 of the Code of 1100 (Section 76 of the Code of 1065) Such service could not be treated as a personal service within the meaning of Article 149 — 20 T L J 355

Article 151

1 The grant of leave by the Court to institute legal proceedings against a Receiver need not necessarily be in express terms. It may also be implied If there appears an intention on the part of the Court that its Officer should be made a party to a suit or other proceedings, such intention will suffice. The cause in which a Receiver is appointed is the cause wherein the application for obtaining leave should be filed

A sale of property in the possession of a Receiver conducted without the leave of the appointing Court, is not void but only voidable

Where property in the possession of a Receiver appointed in a case was sold in execution of a decree in another case on 14-8-1105 and duly delivered to the auction purchaser, and the Receiver by application filed on 12-11-1105 called in question the validity of the execution sale and applied for redelivery :

Held.—The application of the Receiver filed after 30 days of the sale was barred by limitation under Article 151 Article 165 was not applicable to the case (F B) — 23 T L J, 714

Ref —24 T L J, 654

2 See also Regulation VIII of 1100, Order XXI, Rule 87 —

47 T L R, 403
(=20 T L J., 1284)

Article 159.

See Regn VIII of 1100, Sec 115 —

21 T L J, 159

Article 162

See Regn. VIII of 1100, Or. I, R 10 —

20 T L J 1242

Article 164

1 In the course of the execution proceedings in the case, a general order for delivery of items 1 to 8 was passed on 18-3-1104 Item 6 was not however delivered since strangers were in possession but the warrant for delivery was directed only against the defendants in the case. A fresh application for delivery was filed by the auction-purchaser on 4-6-1104. The Court ordered notice to the correct address of the persons in possession on 15-10-1104. As this order was not obeyed, the application for delivery was dismissed on 26-12-1104. On 8-1-1105, the auction purchaser once again petitioned for delivery but the lower Court rejected the petition as being out of time. In appeal by the auction-purchaser before the High Court

Held.—(1) The order for delivery dated 18-3-1104 was not effective in law inasmuch as it was not directed against the persons in possession.

Delivery in execution has to be directed by a judicial order A general order for delivery, without specifying the persons in whose occupancy the property is and from whom the delivery of the property has to be effected is not one passed in

strict compliance with the requirements of Order XXI, Rule 92.

(2) The order of dismissal on 26-12 1104 cannot be deemed to be a purely ministerial order inasmuch as it had been occasioned by the default of the auction-purchaser to produce process fees for issue of notice.

The crucial test for determining whether a later application is a continuation of an earlier one is to see whether the interruption in the decree holder's proceedings was not occasioned by any fault of his own but either by the successful objection of a judgment-debtor or by third parties or by some obstacles interposed by the Court.

(3) Even though the sale became absolute under the old Limitation Regulation it is the law in force on the date of the application for delivery, *i e*, the new Limitation Regulation that has to be applied The right to present an application within a particular period after the happening of a future event which in the present case will be an order passed upon a prior application constituting a step in-aid of execution in the *nature* of the law cannot be deemed to be a vested right in law

(4) Therefore, the appeal was incompetent.— 20 T L J, *1116*

2. See also Or XXI, R. 89.— 24 T L J, *388*

Article 165.

See Sec. 15.— 21 T L J., *748*
" Art. 151 — 23 T L J, *714*
" Regn. VIII of 1100, Sec. 40— 21 T L J., *1048*

Article 166

1. A decree was passed against two defendants, one of whom appealed and filed also a petition for stay of execution pending the decision of the appeal. Stay being ordered, a surety executing a security bond declaring that he would be fully liable for any decree that may be passed against the 1st defendant and would not claim that the 1st defendant should be proceeded against in the first instance Ultimately the appeal was dismissed on 11 12 1098 On 2 4-1102, an application was made under Section 109 of the Civil Procedure Code, to execute the decree against the surety An objection was raised by the surety that the application was barred under Article 166 of the Limitation Regulation. No steps had been taken against the surety prior to the present application Steps had however been taken against the 1st defendant and if this were taken into consideration as the starting point for limitation, then there is no defence open to the surety The surety contended that the previous applications would only save time against first defendant and not against himself and that the application was barred under Article 166 of the Limitation Regulation

Held —The application against the surety is not barred by limitation.

Per Venkata Rao, J,—Explanation (1) to Article 166 is not exhaustive and the subsequent application against the surety in a suit of this nature would be governed by Clause 5 of Article 166 though it may not fall within the ambit of the latter part of that Explanation as the decree sought to be executed against the surety is the decree in the suit which under the provisions of Section 109 of the Civil Procedure Code may be "executed against the surety in the same manner as against the judgment-debtor"—

46 T L R, *132*
(=20 T L J, *880*)

2. The decree in the case was passed on 14-2 1095 An application for succession certificate to establish the petitioner's right to execute the decree was dismissed on 9-8-1096. His suit therefor was decreed on 17-3-1098 and the appeal against it was dismissed on 24-2-1099. The first application for execution was filed on 23-2 1102,

Held—The application for execution was barred, since it was competent for the decree-holder to have made an application within time, for execution of the decree, even though no relief could have been granted to him as he could not file a succession certificate—20 T L J., *855*

3 The decree was passed on 15 6-1090 On 2-4-1098 the decree holder filed an application for execution praying that notice under Section 244 (=Order XXI, Rule 20), C P C, be issued to the defendants and after such notice, for attachment and sale of properties mentioned in the schedule attached to the application On 30-4-1098 the Court ordered notice under Section 244 Process fee was not paid by the decree-holder for issuing the notice and therefore the execution application was struck off the file on 21-5-1098 The present application was filed on 8-12-1101 for execution

On the question whether it could be treated as a revival of the prior application

Held—(1) Inasmuch as the first prayer in the prior application was for notice under Section 244 and without such notice the other prayers in the application could not be granted the Court could not proceed owing to the default of the plaintiff in the payment of the process fee, there was no reason why the order of rejection dated 21-5 1098 should not be treated as a judicial order

The law does not require that when a process is ordered by the Court a special order should be passed for payment of the process fee When an order is passed by the Court, it is the duty of the decree-holder to see that every thing necessary for carrying out the order is done by him

(2) The present application was, therefore, a substantive application and cannot be treated as a revival or continuation of the prior application— 21 T L J, *411*

4. An application to execute the decree was filed along with which process fee was deposited Subsequently however the application was rejected on the ground of non payment of process fee The next application was more than three years after the rejection On the question whether the order of rejection is a judicial order or only a ministerial one,

Held—The order was only a ministerial order as there was no default on the part of the decree-holder nor was it shown that he had notice and was given an opportunity of being heard before the application was rejected

The order would be a judicial one either if it was due to the default of the decree-holder or if though not due to such default he had had notice and had been heard before it was passed—

22 T L J, *900*

6 The period of six years provided by Article 166 cannot apply to a decree or order which is *not actually registered* Article 166 speaks of a decree actually registered and not of a decree which ought to have been registered but was not actually registered either owing to the fault of the Court or of the decree-holder The words in the second column of the Article are 'where a certified copy of the decree or order has been registered' To apply the Article to a decree which has not in fact been registered but which ought to have been registered is in effect to add to Article 166 words which are not found in the Article. To apply the Article to a decree or order not in fact registered but which in the opinion of the Court ought to have been registered but was not actually registered owing to the fault or neglect of the Court or any one else is in effect not to interpret the law but to legislate

Held.—A decree, though in respect of immovable property, could not be deemed to be a registered decree within the meaning Article 166, if as a matter of fact it was not registered on account of non-payment of the registration fee (See Rule 790

of the Civil Courts Guide) The time prescribed for an application to execute such decree is only three years as in the ordinary case.— 23 T L. J., *823*

6 The order of a District Court, to which an appeal was wrongly presented, returning the appeal to the appellant, for presentation to the proper Court cannot be said to be 'a final order or decree' within the meaning of Article 166, clause (2), of the Limitation Regulation

The order contemplated in the Clause is one which disposes of the appeal on the merits in some form and not simply one which intimates to the party that the appeal should be filed elsewhere

The time during which such an appeal was pending in the District Court cannot be deducted under Section 5 of the Regulation for computing the period of limitation — 43 T L R., *67*
(=22 T L J, *316*)

7. Where an appeal against several respondents had abated as against one of them by reason of his death before the institution of the appeal and the legal representatives of the deceased respondent sought to execute the decree of the lower Court, which had in the circumstances become final, against the appellant, after three years of its date but within three years of the appellate decree

Held —Execution was not barred. Article 166 (2) of the Limitation Regulation should be construed literally or grammatically It would apply even if the decree sought to be executed was in no manner imperilled by the institution of the appeal — 22 T. L. J., *577*

8. Though a portion of the decree has alone been reviewed, the period of limitation for execution of the other portions runs nevertheless from the date of disposal of the review application and not from the date of the decree.—
20 T L J., *1076*

9 Both under Clause (5) of Article 166 of the Limitation Regulation of 1100 and Clause (4) of the old Regulation of 1062, the date of the order passed on the application has to be treated as the starting point for computing the period of limitation allowed for the purpose

The expression "in accordance with law" in Article 166 (5) should be taken to mean that the application, though defective in some particulars, was one upon which execution could lawfully be ordered. If the omissions were such as to make it impossible for the Court to issue execution of the decree, it should be held that such application was not in accordance with law '

What the law requires is a substantial compliance with the requirements of the Code, the Court having in each case to determine whether there has been such a compliance or not When the Court does not reject an application on account of any defect, and proceeds to deal with the application duly, it should be taken that this discretion has been exercised in favour of the decree holder When once an application is accepted, it must be treated as one presented in accordance with law, whatever may be the defect.—
20 T L. J, *1*

10. The expression "at a certain date' in Clause 7 of Article 166 would include a case where the direction is for payment within a particular period, for, a date capable of being made certain by the computation of time provided for payment is as certain for the purpose of the Article as a specific date entered in or provided for in the decree itself —
21 T L. J., *1365*.

11 Plaintiffs 1 and 2 obtained a decree for redemption on 12 2 1093 To cancel this decree a suit was instituted on 9-8-1093 and it resulted in a decree on 28-5-1097 under which the right of redemption was restricted to one-half of the property Application for execution having been made on 21-6-1101, the question arose whether the application was not barred.

Held —The application was barred The second decree could not be construed as an amendment of the original decree Clauses 1, 2, 3 and 4 of Article 166 make reference to the date of the decree or order, the date of the final decree or order of the appellate Court, and the date of the decision passed on review respectively, so that the frame of the Regulation would make it appear that the amendment contemplated by clause (4) should be the result of a proceeding taken in the suit itself and not in a regular suit In regard to a suit there is specific provision in the Regulation, namely, Section 15, Clause (1), which allows exclusion of the time during which the institution of a suit or the making of an application was stayed by injunction or order The mere pendency of the suit would be insufficient The word "amendment" in Article 166, Clause (4), must be taken in its technical sense, namely, the amendment of a decree as provided by the Civil Procedure Code The argument that when a variation is made of the decree in consequence of another suit, there would be "amendment" of the decree for the purposes of this provision is far-fetched,—

25 T L J, 859

12. An application for execution was filed on 10-1-1104 praying for attachment of decree and of property for which schedule was filed. The Court passed an order for attachment but since the process fee was not paid the application was dismissed Another application was made for issue of notice to second defendant and for attachment and sale of properties the particulars of which were to be intimated later on. It was contended that the second application was a revivor of the earlier application

Held —Where the application has been granted by the Court and is subsequently dismissed for default of the decree holder the order finally disposes of the application,

When the Court orders payment of process fee it is not necessary that the Court should fix a time limit within which the process fee should be paid If there is a general rule of law defining the period within which the payment has to be made to save the application from dismissal the non-payment within that period clearly constituted default, justifying the dismissal of the application In such cases, a subsequent application for further steps must be by a fresh application which cannot be regarded as an application to revive a pending one or to continue steps already taken.

Two conditions will have to be satisfied to make out that a later application is a continuation of an earlier one, *viz*, (*a*) that the previous application should have been dismissed for no fault or default on the part of the decree-holder (*b*) that the subsequent application must be similar in scope and character to the previous one. None of the applications in the case except the seventh which had been disposed of once for all, gave descriptions of the properties intended to be attached and the specification of the judgment debtor's interest therein as required by Order XXI, Rule 11 of the Code. The application therefore was materially defective and incapable of execution.

Unless it is made clear in a pending application of a prior date that the decree-holder applied for attachment of specified

properties and the present application was simply to enforce the steps in respect of those identical properties, there is no occasion for revivor —

24 T L J, 313

13 An application for execution by an assignee of a decree is a step in aid of execution even though the assignee is refused recognition by the Court ultimately At the time the application was made he was the proper person to execute the decree — 24 T L J, 370

14 See also Article 109 —

24 T L J, 881

Other Cases

1 There was no dispute as to plaintiff's title to plaint property The defendant's case was that the property was being used for cutting manure for wet lands and was thus used by himself and his ancestors

Held—Such stray acts of user could not amount to an act of enjoyment or taking possession of land constituting adverse possession The acts of enjoyment alleged could be regarded only as evidencing a fugitive and intermittent if not permissive enjoyment and would not support a plea of possession adverse to the true owner The rule applicable to ordinary cases of ejectment (*viz.*, proof of possession of plaintiff within twelve years prior to the institution of the suit) could not be regarded as applicable in such a case.—

21 T L J, 55.

2. The suit of 1097 was filed for discharging the mortgage liability of the first defendant under his mortgage, document of 998 The defence set up the plea of limitation. In answer thereto, the plaintiff relied on an acknowledgment contained in Exhibit B, a sub-mortgage deed of 1043 and on the judgments Exhibits A and D in an earlier suit O S. No. 503 of 1081, on the basis of Exhibit B, in which a contention that Exhibit B was not a valid acknowledgment was repelled by the Courts

Held—There was nothing in Exhibit A or D which could save the suit from limitation. Strictly speaking there could be no acknowledgment signed by the party in Exhibit A or D It cannot also be said that they had the same effect as an acknowledgment The ruling in 22 T L R, 157 was inapplicable, as no case of adverse possession was set up by the defence And indeed a mortgagee cannot plead adverse possession as against his mortgagor, how notoriously and to the knowledge of the mortgagor he may set up title adverse to the mortgagor A mortgagee may however plead that a suit for redemption is barred by limitation. Assuming for the purpose of argument that Exhibit B was a valid acknowledgment, still, the suit having been filed more than fifty years thereafter, must be held to be barred — 21 T L J, 1068.

3 It is impossible to regard the order dismissing the application for execution as a judicial order since it does not appear from the diary that the Court did even pass an order for proclamation on the decree-holder's application If the Court did not pass an order for proclamation it was not possible for the decree-holder to pay any process fee Hence the order striking off the application for execution is merely a ministerial one and therefore the application must be deemed to have been pending — 22 T L J, 856

4. In execution of a money decree the properties of the judgment debtor were sold subject to the condition attached to the sale certificate that on the judgment-debtor or his heirs depositing the amount in Court the properties were to be surrendered by the auction-purchaser

Held.—A reasonable interpretation had to be put upon the condition. It could not mean that the judgment-debtor or his heirs were at liberty to come in and claim the properties at any time disregarding

the law of limitation. The auction purchaser's possession was adverse to the judgment-debtor and where the auction purchaser had been in possession for the statutory period of 12 years the judgment-debtor's rights became barred —

22 T L J., *1180.*

5. It cannot be affirmed as a general proposition of law that a person in possession of land under a tenancy or occupancy title can by a mere assertion of proprietary right in a judicial proceeding and the lapse of 6 or 12 years without that assertion having been successfully challenged, obtain a title as an under-proprietor of the lands.

All that was maintained in the former suit was the non-payment of the dues under the kanom from its inception and as a consequence the loss of the Jenmi's right to the property in question There was nothing like an overt repudiation of the Jenmi s title. Mere non-payment of rent will not enable a tenant to plead adverse possession —48 T L R, *959*

(=22 T L J, *1193*)

6. The suit for redemption of a mortgage of 972 was brought after 50 years of the mortgage. But in 1043 a suit was instituted by the plaintiff for renewal fees and a decree was obtained by him

Held—The effect of the decree was the same as an actual renewal of the mortgage because equity treated that as done which ought to have been done, and this renewal brought the suit within time —

22 T L J., *1876*

7. The question was whether the plaintiff was estopped from contending that the suit property was a registered holding inasmuch as he agreed to pay and did pay Thanathu Chitta tax The Sirkar relied on two petitions presented by the plaintiff before the Revenue authorities admitting his having paid the tax and offering to pay tharavila for the land The said petitions did not admit that he came into possession for the first time that he offered to pay the tax , on the other hand, they showed that he made the offer because he was threatened with loss of the land. The plaintiff had proved possession for over 12 years and from long before the tax was levied on him

Held—In the circumstances, the burden lay heavily on the Sirkar to prove that the plaintiff was not in adverse possession. The fact that the plaintiff offered to pay Thanathu Chitta tax, when he was threatened with eviction did not debar the plaintiff from setting up independent possession It was also no evidence on the side of the Sirkar that the plaintiff was in permissive possession.—

23 T L J, *187*

8 The father of the first plaintiff in the suit had executed a sale deed to the third defendant and another in which provision was made for payment of some money to the first plaintiff for her Stree dhanom The question arose whether the first plaintiff who was not a party to the sale deed had the right to sue

Held—The ordinary rule is that a person who is not a party to a contract cannot enforce it in a Court of law But this has its exceptions, one of which is where, under a contract, a benefit is conferred on a person and one of the parties to the contract constitutes himself a trustee thereunder in respect of the benefit so conferred, the person on whom the benefit is conferred may sue upon that contract though he is not a party to it

On the question of limitation it was held that such suits were governed either by Article 122 or 100 — 23 T L J, *876*

9 Where a vendee undertook to pay the vendor's creditors, but defaulted and a suit was brought to recover the amount

Held—The period of limitation began to run from the date when the agreement to pay part of the purchase money to the vendor's creditors became impossible of performance

The *terminus a quo* was not the date of the execution of the sale deed but the date on which the contract was deemed to have been broken, *viz.*, the date when either there was a repudiation of the liability under it or when the contract had become impossible of performance on account of the vendor's debt having been satisfied —

23 T L J., *487*

10 The decree-holder could not execute the decree or sell any of the properties independently of the receiver appointed by the Court and who was in possession A court-sale by a decree-holder of a property in the hands of a receiver appointed by the Court is invalid The period during which the receiver was in possession of the property should be excluded —

49 T L R., *438*
(—23 T L J, *700*)

11 The question was whether an amendment of the plaint after expiry of the period of limitation could be allowed

Held —Where the plaint is amended with the permission of the Court, the suit must be taken to have been instituted on the date of the original plaint and not on the date of the filing of the amended plaint.— 23 T L J, *788*

12. Where the dispute is between the owner of the equity of redemption and persons in possession who derive title under the mortgage sought to be redeemed, the question at issue is exclusively one between mortgagor and mortgagee. As between them neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption, if the parties are otherwise entitled to redeem —

23 T L J, *1045*

REGULATION VIII OF 1100.

(The Civil Procedure Code)

Section 2 (2)

1 An order merely refusing to stay execution does not come within the scope of the definition of the word 'decree' in Section 2, Clause 2, of the C P C and is not, therefore appealable To be considered to be a 'decree' under the said Clause, the order in question, though within the scope of Section 40, should also conclusively determine some matter in controversy between the parties to the suit.—

29 T L J., *508*.

Fol —23 T L J, 508.

2. In the Civil Revision Petition against an order dismissing an appeal for the appellant's failure to deposit the respondent's costs, a preliminary objection to the maintainability of the petition was taken on the ground that the order of dismissal was a decree, as conclusively determining the rights of the parties

Held.—The order dismissing the appeal was neither a decree nor an appealable order The order did not fall within the definition of "decree" in Section 2 which provided that decree meant the formal expression of an adjudication which so far as regards the Court expressing it conclusively determined the rights of the parties with regard to all or any of the matters in controversy in the suit. The order in this case did not determine the rights of the parties with regard to all or any of the matters in controversy in the suit inasmuch as the Court rejected the appeal and did not deal with the merits of the controversy between the parties.—

21 T L J., *996*.

3. Where two decrees are in conflict, the rights under the later should prevail —

21 T L J, *1106*.

4. See also Section 40.—

21 T L J., *1176*.

Section 2 (12)

1 Where a decree allowed two years' mesne profits and said nothing about interest thereon

Held—The true effect of a decree which grants mesne profits and says nothing about interest is that such a decree carries interest on such mesne profits. Under Section 2 (12) of the new Civil Procedure Code, even when a decree merely awards mesne profits, interest on those profits can be claimed by the decree-holder

When the decree grants mesne profits and is silent about interest, the usual rate of interest awardable is 6 per cent and interest may be calculated at that rate.—

37 T L R., *69*
(=20 T L J., *1155*)

2 A junior member of a Tarwad obtained a decree setting aside certain alienations and directing recovery of possession of the properties with mesne-profits. He then assigned away the decree as regards mesne profits.

Held.—The decree relating to mesne profits enured for the benefit of the Tarwad, and the junior member was not competent to assign it away From Order XX, Rule 12, and the definition of mesne profits in Section 2, it was clear that a decree for mesne profits was only part of a decree for possession, and as such only the person entitled to recover possession of the property could, in law, be entitled to recover the mesne profits. The decree for recovery of possession was obviously one given on behalf of the Tarwad If so, the decree relating to mesne profits also must be deemed to have been given for and on behalf of the Tarwad.—

23 T L J, *362.*

3. The final decree in a case passed while the old Civil Procedure Code was in force, provided for the recovery by the plaintiff, of immovable property in defendant's possession with past and future mesne profits and directed the executing Court to assess the value of defendant's improvements and the mesne profits payable by him The lower Appellate Court acting on the definition of mesne profits in the new Civil Procedure Code which had come into force at the time of its order, held that the defendant was not liable for the excess profits which arose from the improvements made by him

Held—(1) The provisions of the new Code could not be applicable, because the question involved was not a mere matter of procedure but a right vested in the decree-holder under the decree

The definition of mesne profits in the British Indian Civil Procedure Code excludes from the calculation any increased rents and profits due to improvements made by the person in wrongful possession because he could not claim compensation from the rightful owner either by way of mitigation of damages or otherwise This consideration might not arise in Travancore where compensation is allowed to a person in wrongful possession and even trespassers are granted such relief Nevertheless our Legislature has adopted the definition in the British Code and embodied it in the new Code This however would not justify its application in cases which arose while the old Code was in force

(2) The measure of mesne profits is not what the plaintiff had lost but what the defendant got out of the property or might with reasonable diligence have made by his wrongful possession

(3) The plaintiff, under the decree in the case, obtained the right to recover mesne profits as it was at the date of recovery, irrespective of the fact that a part of it arose from improvements made by the defendant while in wrongful possession.—

24 T L J, *851.*

Section 8

1 Etymologically Kudumbaporuthy means the provision for the support of a

family Such a grant may be for past services, or for future services or for both Huzur Order No 595 of 14 10-1014 published on page 470 of Land Revenue Manual, Vol V, shows that alienations of Kudumbaporuthy lands on receipt of consideration were recognised by Government and the lands thus alienated were registered in the name of the alienee after subjecting the same to what is known as Otti-Vilakkam process The registry of such lands in the hands of an alienee raises the presumption that the grant in that instance was for past services.

There are two distinct varieties of Kudumbaporuthy grants— (1) Those granted for meritorious past services and dignity and (2) those granted for future services.

The bar in regard to the cognizance of a suit when it relates to Service Inams, does not apply where the Inam was granted for past services. That is what Section 7-A of the old Civil Procedure Code says, now enacted as Section 8 in the new Code

The defence plea being in ouster of the jurisdiction of the Court, the burden to make it out is on the defence—

47 T L R., *40*
(=20 T L J, *1855*)

2 The suit was to recover arrears of Thiruppuvarom charged on certain Era yili lands, from the first defendant—Sirkar, who had collected the same from the Pattadars, defendants 2 and 3, The Sirkar contended (i) that the suit was not maintainable without Government sanction under Section 8 and (ii) that the Thiruppuvarom had been set off by them towards Acheet Palisa Melpathi cess owed by the Pattadars. The Chitta for the properties did not show that the cess was charged thereon

Held.—(1) Inasmuch as the suit related only to a part of the assessment on the land which had been directed by Government to be paid to the Jenmi and therefore, not to any benefit arising directly out of the land, Section 8 did not apply. The Government having impliedly given sanction to recover the dues, if they fell into arrears by suit in Civil Courts, were further debarred from raising the plea of want of sanction. (2) There was nothing to show that the cess in the case was charged on property Nor was the cess by its very nature a charge upon land It must therefore be deemed to be a personal cess, within the meaning of Section 26 of the Settlement Proclamation and so abolished under the provisions of that Section.— 21 T L J, *968*

3. The defendant's father obtained an invalid sale in his favour of the plaintiff's rights over Kandukrishi lands from a person purporting to act as his guardian when in fact he was not Without being induced by suppression of facts or misrepresentation the vendee produced it before the Government and on the strength of it Government chose to grant him pattah. Though the plaintiff's prayer to set aside the sale and registry and for recovery of the plaint properties, was rejected, he was allowed the alternative relief for recovery of the sale consideration

Held.—Though there was fraud perhaps on the plaintiff, it would not follow that the registry from Government was obtained by fraud. It is open to the Sirkar to grant registry to whomsoever it pleased

It cannot be contended that by merely proving fraud as against himself the plaintiff can seek to set aside the registry which the Sirkar was competent absolutely to grant or withhold from any one whether or not his claims were just and proper

The fact of the purchase having been duly brought to the knowledge of the authorities, it was for them to make enquiries and satisfy themselves as to the facts connected with the transaction.

The granting of sanction by Government can be deemed only to have the

effect of removing the prohibition contained in Section 8 It is open to Government to rectify errors and grant redress whenever necessary and possible and it is open to it to take away such properties from any person if it deems fit to do so without assigning reasons therefor and more especially when justice can be done as between two rival claimants. But it is a very different thing to say that a Civil Court can compel the Government to recognise the rights of one or other of such claimants.

Possession having been obtained under the sale deed it is not open to the defendants to deprive the plaintiff of the sale consideration merely by contending that the sale was invalid (F B)—

48 T L R, 262
(22 T L J., 813)

5. Section 8 does not prohibit execution proceedings being taken against Kandukrishi properties. There is no express or implied prohibition in the Civil Procedure Code itself which can be deemed to be applicable to execution proceedings in respect of such lands.

It has been ruled repeatedly that the Kandukrishi tenant is only a tenant-at-will under the Crown. But even so it cannot be held that it is not an estate unknown to law or that it creates no right or interest at all. A tenant-at-will has a right which is recognised by the law and is available against all the world except the landlord and even as against him his position is not like that of a mere tenant by sufferance, for, while the former has its origin in a contract of letting (express or implied) the latter cannot arise by contract and is in fact only 'a mere fiction of the law to prevent what would otherwise be an act of trespass' A tenancy-at-will thus clearly gives rise to reciprocal rights and liabilities.

The above being the correct position in regard to tenancies-at-will generally, the position is stronger in respect of Kandukrishi tenants, for such tenants are, according to the traditional policy of the Crown of not capriciously disturbing possession, left to enjoy Kandukrishi lands for generations and their rights have except so far as regards the liability to eviction at the will of the Sirkar been always regarded as valuable property

In the absence of any statutory provision to the contrary, it must be held that the Kandukrishi tenant has an interest in the lands which is saleable within the meaning of Section 52, C P C

The above view would be quite correct and proper even under the latter part of Section 52 (1) inasmuch as the Kandukrishi tenant is not one without any right of disposal over such lands. Under the present Civil Procedure Code the only restriction regarding the enforcement of rights arising under leases and mortgages of Kandukrishi Pattom lands had been removed and there is at present nothing to prevent such transferees from enforcing deeds executed in their favour by the holder of Kandukrishi lands. It is therefore impossible to hold that the Kandukrishi tenant holds the lands as a mere tenant-at-will with no power of disposal at all over them (F B)—

48 T L R, 383
(22 T L J, 998)

5. The sanction of Government is necessary for a suit for recovery of Kandukrishi land — 23 T L J, 855

Section 9.

1. The jurisdiction of the High Court to pass an order staying proceedings in suits pending in subordinate Courts in which the same matter is in issue as in the appeal before it, cannot be questioned It may be deemed to be a direction to the lower Court to carry out the provisions of Section 9 of the Code, made in the exercise of its inherent power to prevent an abuse of process or a multiplicity of trials.—

20 T L J, 950,

2. "The mere fact that one issue is common in two suits would not necessitate the stay of subsequent suit. The words "matter in suit" occurring in Section 9, mean the entire matter in controversy in the case."— 21 T L J, 687

3. Section 9 of the Code of 1100 is slightly different in language from the *corresponding Section 8* of the old Code and is, if at all, wider in scope While the matter in issue and the relief in the previous and subsequent suits should be *identical for the operation of* Section 8 of the old Code, identity of relief is no longer a condition for the stay of proceedings But even under the new Code, the *existence of some issues common to two* suits is not enough to suspend proceedings in the subsequent suit The words "matter in issue' have reference to the entire *subject matter in controversy* —

21 T L J., 998

4. See also Sec 115.— 21 T L J, 422

Section 10

1 The suit is for arrears of Michavaram and renewal fees. The defendant contends that as the plaintiff is not a Janmi, the tenure under which he holds the property is not a Kanapattom demise but a redeemable mortgage. Therefore, the plaintiff is not entitled to claim renewal fees.

The plaint properties are held on Karaima by the plaintiff's family from the Navayikulam Devaswom They were demised by the plaintiff's family in 1048 on Marayam Otti to a third party whose rights have been acquired by the defendant. In 1086 the plaintiff's family sued the defendant and obtained a decree for arrears of Michavaram and renewal fees relating to a prior period The first issue in that suit was "whether the plaintiff is entitled to obtain renewal fees? Whether he has obtained the Janmom right over the plaint properties from the Devaswom?" This was decided in favour of the plaintiff

The contention for the plaintiff is that the decree in the prior suit operates as *res judicata* against the defendant as in that suit it was decided that a Karaima-holder is a Janmi and that the plaintiff was entitled to enforce a renewal It is answered for the defendant that the prior suit was decided upon a pure question of law which has been over-ruled by subsequent decisions and that, therefore, the decision in that suit, though binding upon the parties so far as the actual subject matter of that suit was concerned, cannot operate as *res judicata* in the present suit in which the subject matter is different.

Held (By the Full Bench Joseph Thalath and Narayana Pillai, JJ, Parameswaran Pillai, J dissenting)—The decree in the prior suit operated as *res judicata* in the present suit and therefore, the plaintiff's claim for renewal fees had to be allowed

Per Joseph Thalath, J—In any case in which it is found that the matter directly and substantially in issue in the former suit and has been heard and finally decided by such Court, *the principle of res judicata* is not to be ignored merely on the ground that the reasoning, whether in law or otherwise, of the previous decision can be attacked on a particular point.

Per Parameswaran Pillai, J—An erroneous decision on a question of law cannot operate as *res judicata* in a subsequent suit unless the subject matter in the two suits is the same.

The question whether a Karaima-holder has or has not all the rights of a Janmi is a pure question of law

Per Parameswaran Pillai and Narayana Pillai JJ.—The construction of a document is not a pure question of law, but a mixed question of law and fact, and therefore, even though a wrong construction was put upon a document in a previous

suit, that will operate as *res judicata* in a subsequent suit,

Per Narayana Pillai, J.—The question whether the expression "Karaima" ought to be interpreted as equivalent to a sale or not is a pure question of fact (F B.)—

46 T L R, *183*
(=20 T L J., *397*)

Ref—47 T L. R., 282.
(=21 T L J., 271).
20 T L J, 1158

2 According to plaintiff, the suit property formed part of his registered holding, the first defendant denying it The plaintiff obtained a decree in O S No 250 of 1089 for recovery of the lease-hold with arrears of rent against the first defendant and got delivery of plaint property through Court under a Kychit The first defendant was alleged to have trespassed on the plaint property In O S No 250 of 1089 the said defendant denied the lease and contended that a canal to the east of plaintiff's admitted holding was wrongly included in the claim and that he was not bound to surrender the same. An issue was framed on it, and the finding was to the effect that the canal formed a portion of the registered holding of the plaintiff and that the same was included in the plaint lease. The question was whether the finding would operate as *res judicata*. It was contended on behalf of the defendant that the finding as regards the inclusion of the canal in the plaintiff's holding and that it formed a part of the lease-hold could not operate as *res judicata* as the prior suit was bassed on lease while the present suit was based on title

Per Venkatarama Iyer, J—*Held*—The question of the extent of the property comprised in the lease was directly and substantially in issue, a decision whereof having been essential for the disposal of the claim of the plaintiff. The fact that the previous suit was one based upon lease and that the present suit was one on title could not affect the binding nature of the findings in this question in the prior suit. The decree of the prior suit was clearly based upon the finding on this question. As such it would clearly operate as *res judicata* 20 T L J, 797

3. Where the Court expressly stated that a consideration of a particular matter was unnecessary, the rule pointed out in *Mahammed Ismail* v. *Sherfutullah* (I. L. R 57 Cal 872) that if the parties proceeded to trial on several issues, and the Court, at their invitation, decided them, the determination of one of which would have been sufficient for the disposal of the suit, and the Court did not expressly state upon the decision of which of the matters so dealt with, its decision was based, the decision on all the points would operate as *res judicata*, would have no application

A decision in a prior suit that the issue between the parties was barred by *res judicata* is in itself one which operates as such in a later suit

The matters in issue dealt in Section 10 may be either issues of fact, issues of law, or mixed questions of fact and law In the nature of the wording of Section 10, a distinction cannot be drawn between questions of law and questions of fact And previous decisions thereon cannot be declared as not operating as *res judicata* even if erroneously decided.

One of the tests to be applied is whether the matter in question was directly and substantially in issue in a prior case. The matter decided may have been in issue between the parties, even though the cause of action, the subject matter, and the reliefs claimed are different in both the suits. The matter should have been alleged by one party and denied either expressly or by necessary implication by the other Even if it was not distinctly raised the provisions would apply if, *in substance* the matter was in issue between the parties.

Only the Karanavan and the senior Anandaravan of each of the branches

together can represent the Tarwad in suits, and decisions without all of them on record cannot validly bind the Tarwad

The question whether a course of conduct, so far as two branches in a Tarwad are concerned, makes out division or not has to be decided with reference to the intention of the parties.—

20 T L J, *1158*

4 Aravakasom dues cannot be claimed by a non-Malayala Brahmin Jenmi Aravakasom being dues payable on the occasions of six important religious ceremonies in a Namboodiri Jenmi's house and are payable if and only the ceremonies take place, they could not be claimed by non-Malayala Brahmin transferee of the land

An erroneous adjudication on a point of law would operate as *res judicata* in a subsequent suit only if the matter was directly and substantially in issue in the prior suit and not otherwise. The decision in the prior suit must be regarded as conclusive only in regard to the subject matter of that suit In the case of suits for rent and other recurring liability, the causes of action for suits for successive periods are different. In the case of such suits, for the doctrine of *res judicata* to apply, it will have to be shown that the question of right or liability not merely for the period in the previous suit but that for all times or once for all was directly and substantially in issue and was tried and determined If a direct issue was raised on the point and decided, the decision would be *res judicata* in respect of any suit for a subsequent period If the decision falls short of that requisite and if the general question was gone into and decided merely for the purpose of deciding that the right or liability for the period involved in the suit, then the issue was raised not directly and substantially, but collaterally and incidentally.

In regard to the reduction of Michavaram by reason of the enhancement of Sirkar tax, the lower Court's order that the Jenmi and the tenant should be liable for such enhancement in equal shares is held just and reasonable—

37 T. L R, *288*
(=21 T L J, *271*)

5 The plaintiffs in the suit alleging that the plaint properties were outstanding on mortgage, from their Tarwad, sought to recover an one-fourth share to which they were entitled The contesting defendants, resisted the suit on the ground that the mortgages relied on by the plaintiffs are fraudulent and not proved to exist The plaintiff sought to establish the truth of the mortgages by means of a decree in a prior suit, instituted by the defendants for redemption of the same mortgages and recovery of their one-fourth share. It was contended that, the rule of *res judicata* would apply and that the defendants were concluded by the prior decree

Held —The finding as to the reality of the mortgages relied on should be deemed to have been decided between the parties thereto, but it is not possible to go further and to hold that this rule of *res judicata* would be applicable as between the defendants in that suit also. The test to be applied in such cases is mutuality.—

21 T. L J., *278*

6 In the absence of a definite issue and a clear finding on a question *inter se* the co-defendants which the Court considers indispensable to grant the relief claimed by the plaintiff, the decision in a previous suit (wherein the plaintiff and defendant were co-defendants) will not operate as *res judicata*.

The general rule that there is no contribution between joint tort-feasors is not an inflexible rule. This rule has been held to be confined to cases where the person seeking redress, must be presumed to have known that he was doing an unlawful act. It has also been held that the rule

does not apply to a case where the party seeking contribution was a tort-feasor only by inference of law.—

46 T L R., 451
(=21 T L J, 401).

7 Courts of Law may by legislative or other action of the civil power, be given particular powers or duties in reference to any questions arising in relation to particular churches, and save in so far as such powers and duties extend, all religious bodies are regarded by the Courts of law as in the same position in respect of the protection of their rights and the sanction given to their respective organisations Any rules they may adopt for enforcing discipline within their body will be binding on those who *expressly* or by implication have assented to them But the law does not blindly exclude the jurisdiction of Courts on that account Where a religious or other lawful association has not agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, the decision of such tribunal *shall be binding when it* has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not has proceeded in a manner consonant with the principles of justice. The maintainability of a suit in such cases, therefore, depends on the question whether the special tribunal or association has acted within its authority, or in conformity with natural justice

[In the case, the Metropolitan was made the special tribunal under Exhibit A (an Udampady) But the defendants (appellants) made a decided attempt to throw off the yoke of the Metropolitan and denied his authority to decide. Further the dispute between the parties became complicated by a Magisterial pronouncement which could be set aside only by a Court of Law Therefore the contention by the appellant that the plaintiff should apply to the Metropolitan and not to a Civil Court was rejected, and the jurisdiction of the Court was held not to be ousted]

A S 126 of 1100 related to the disallowance of a part of the claim, that is to say, the portion which the plaintiff claimed on account of services which he could have rendered to the parishioners, had he not been prevented from doing so by the action of the defendants It was found that the plaintiff in spite of the action of the defendants continued his duties till he was prevented by the Magistrate Further the items claimed were in the nature of voluntary contributions varying in amount according to the capacity of the party contributing

Held,—The plaintiff was not entitled to compel others to contribute funds for his support so that he may continue on such contributions.

Where it appears to an appellate Court that there are two decrees arising out of the two suits heard together or raising the same question between the same parties, or arising out of two appeals to a subordinate Appellate Court, and only one of such decrees is brought before it in appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of *res judicata*, or at all, by reason of his failure to appeal from the decree which does not prejudice him —

21 T L. J, 1200

8. A gave the schedule property on mortgage first to B, then to C and then to D C sued to redeem B, making A also a party—defendant, but withdrew the suit admitting that the mortgage sued on was barred by limitation. D then brought the suit to redeem B. It was

contended for the defence that the judgment in the prior suit operated as *res judicata* so far as the present suit was concerned

Held —The admission made by the prior Melottidar (C) could not bind the mortgagor (A) who did not claim under him and therefore could not bind the subsequent Melottidar (D) — 21 T L J, *1308*

9 Where a portion of the plaint survey number had formed the subject matter of a prior Land Acquisition Reference and the Court of Reference decided that the title rested in the Devaswom represented by defendants 2 and 3 and not in the first defendant and the decision had not been appealed against

Held —The first defendant was barred by *res judicata* from re-opening in a subsequent suit, the question of title to the whole survey number The fact that only a particular portion of the plaint property was involved in the Land Acquisition proceedings did not matter inasmuch as the real question for determination before the Court of Reference, was whether the first defendant had title to the plaint survey number of which the land acquired formed a part.— 22 T L J, *66*

10. The suit was filed by the plaintiff's Tarwad to redeem 61 items of properties said to be held by the first defendant, the Thuravoor Devaswom, under a mortgage of 1038 evidenced by Exhibit B, copy or counter part of a mortgage deed of that year The first defendant impugned the genuineness of Exhibit B In a prior suit by the second plaintiff, a junior member of the plaintiffs Tarwad, for redemption from the first defendant of one of the plaint items on the basis of his separate ownership thereof, the Courts had held that Exhibit B was genuine The plaintiffs contended that this prior decision was *res judicata* in the suit on the question of the genuineness of Exhibit B

Held (Repelling the plea of *res judicata*) — In the prior case the plaintiffs' Tarwad was not a party to the suit nor did the Tarwad now claim under the second plaintiff who instituted that suit. The second plaintiff who was the plaintiff in the former suit was not now litigating under the same title as in the former suit The subject matter of the two suits was not also the same Under the circumstances, two of the important conditions laid down in Section 10, in order that the former suit may operate as *res judicata*, had not been satisfied.

Though the former judgment did not operate as *res judicata* it was admissible in evidence under Section 13 of the Evidence Act But it could not be treated as conclusive evidence — 22 T L J, *999*

11 "A decision liable to appeal may be final within the meaning of Section 10 until the appeal is perferred But once the appeal is filed the decision loses the character of finality and what was once *res judicata* becomes *res sub judice*, i.e, matter under judicial enquiry The appeal destroys the finality of the decision and it is the latter decree that should be looked to, to determine the question of *res judicata* "

Where, therefore, in answer to the plaintiff's allegation that Exhibit IV, sale dead, was executed without consideration and in fraud of creditors, the defendants *inter alia* pleaded *res judicata* by reason of Exhibit XII judgment of the District Court in a prior suit to which both were parties, holding that Exhibit IV was valid, but the High Court in appeal from Exhibit XII decree had proceeded to decide Exhibit XII suit irrespective of the fraudulent nature of Exhibit IV.

Held —The plea of *res judicata* was not available to the defendants in this suit.

The provisions of the Code of Civil Procedure as regards the granting of leave to amend the plaint are very wide and can always be used if the ends of justice require it and unless the application is found

to have been made in bad faith or is unsustainable on certain well-recognised grounds a Court would be acting properly in allowing amendment. That this power could be allowed in appeal or even in second appeal is also well established Where, therefore, a plaintiff has framed his suit, *bona fide* believing that consequential relief is not open to him and that he is entitled to a declaration the Court would be justified in allowing him to amend the plaint even in appeal so as to include a prayer for recovery of possession also

A suit to set aside a summary order passed by the Execution Court does not require additional court fees merely because the plaintiff also prays for recovery of possession.

The Proviso to Section 53 of the Transfer of Property Act can be pleaded only by *bona fide* transferees for consideration.

S V and M to whom the suit properties originally belonged executed a sale thereof Exhibit IV, in favour of K without consideration and in fraud of their creditors. K gave a hypothecation bond Exhibit N N, in favour of P P assigned his right to S by Exhibit O O In execution of the decree which S. obtained against K the properties were sold and purchased by the first defendant. The second defendant was a purchaser *pendente lite* from the first defendant. The plaintiffs in the suit who claimed under a court sale in execution of a decree obtained by a creditor of S V and M impugned the first defendant's title as obtained in pursuance to a scheme devised with the object of saving the properties from the creditors of S V and M It was found as a fact that Exhibit O O and the execution proceedings though ostensibly taken by S were in fact taken without *bona fides* at the instance of the first defendant and that though Exhibit N N was executed for consideration it was taken by P with knowledge of the real character of Exhibit IV

Held.—Though as a matter of law the Proviso to Section 53 was not restricted in its application to the first transferee, the second defendant could not, in the circumstances, plead protection under the Proviso.

(2) It could not be contended that the first defendant's purchase in court sale should be declared to be void only as against the present plaintiffs The question was which of the two conflicting titles should be recognised and this had to be answered in favour of the plaintiffs.—

22 T. L J, *1027*

12. The plaintiff's Tarwad sued for redemption of 61 items of property said to be acquired by the first defendant, the Thuravoor Devaswom, under a mortgage of 1038, Exhibit B being a copy or counterpart of the mortgage deed One of the items comprised in the mortgage was brought to sale under another decree and was purchased by the second plaintiff, a junior member of the plaintiff's Tarwad He instituted a suit in his individual capacity against the first defendant for redemption of the properties on the basis of the mortgage evidenced by Exhibit B which was held to be genuine. The first defendant impugned the genuineness of Exhibit B The plaintiffs contended that the question of the genuineness of Exhibit B had become *res judicata* by virtue of the original decision

Held—The plea of *res judicata* was unsustainable and was therefore repelled

In the prior case, the plaintiff's Tarwad was not a party to the suit nor does the Tarwad now claim under the second plaintiff. The second plaintiff who was the plaintiff in the former suit is not now litigating under the same title as in the former suit. The subject-matter in the two suits was not the same. Under the circumstances, two of the conditions laid down in Section 10, C P C, in order that the former suit may operate as *res judicata* have not been satisfied.—

48 T. L. R., *878*

13. *It was contended that the 3rd defendant was debarred from raising objections to the execution of the decree in the suit on the ground of omission to appear and object when steps were taken by the decree-holder on former occasions. But the 3rd defendant disclaimed all knowledge of the decree-holder's prior applications*

Held—Unless it is proved satisfactorily that the 3rd defendant had notice of the prior applications of the decree-holder and was made aware of the nature of the steps applied for, her objections cannot be rejected on the ground that they were barred by *res judicata*.

The rule of *res judicata* when applied to adjudications in execution proceedings must be qualified in the following manner, namely, "if it is to serve as a rule of justice, equity and good conscience"—

23 T L J, 38

Ref - 24 T L J, 770

14. The defendants executed a promissory note to and received a certain sum from the plaintiffs Deducting from this amount certain payments made by them, the plaintiffs sued for the balance due The defendants contended that the suit was barred by *res judicata* as the plaintiffs' prior suit upon current account was dismissed as being barred by limitation The lower Court dismissed the suit The plaintiffs' prayer that the plaint in the suit might be treated as an application for review of the judgment in the prior suit was also rejected by that Court Hence, the plaintiffs' Revision petition

The question resolved itself ultimately into this. Was the promissory note the sale transaction between the parties, *i. e.*, was the note intended to embody the agreement between the parties? That would be the case if when the advance was made, the promissory note was passed by the borrower to the lender, or if for a pre-existing debt the promissory note was passed on the undertaking that the previous obligation was put an end to or regarded as having been discharged If however the circumstances are different, the original obligation must be regarded as in abeyance and if the promissory note becomes unenforceable, there is no reason why the creditor should not sue on the original liability— 49 T L R, 329

(=23 T L J, 135)

15 In cases of alienations of Tarwad properties made by the Karanavan, singly or with the junction of the other members of the Tarwad, the law has all along recognised the right of the junior members to impeach them, but when such opportunity has been once utilised in a suit either as plaintiffs or as defendants, the Tarwad would be barred by such adjudication unless it be shown that it was the result of fraud or collusion between the alieness and the junior members concerned This, however, implies a decision on the merits, but a mere dismissal of a suit for default in appearance so far as could be seen, has not been given similar efficacy in its operation on a subsequent suit It will be an undue restriction of the rights of the Tarwad as recognised at present, if it be laid down that if one of the members sued to set aside an alienation, and allowed the case to fail for default which very often may be the result of fraud or collusion, then the other members would ever after be precluded from instituting another suit for the same relief

Where a prior suit by a junior member to set aside an alienation by the Karanavan was dismissed on the merits even though his Vakil had retired from the case for want of instructions and the decision was relied on as *res judicata* in a subsequent suit by another junior member in respect of the same subject matter

Held—Inasmuch as it was the duty of the Court in the prior case to deal with the case under the provisions of the law

relating to default of appearance the decision has to be treated as dismissing not on the merits but for default of appearance It is the substance that must be looked into and not the words of the judgment — 23 T L J, 274

16 The properties in dispute which had been hypothecated under a bond of 1088, were sold in court auction in execution of a decree in O S No 2022 of 1094, passed on foot of the hypothecation bond and purchased by the plaintiff, a stranger. In the suit by the plaintiff for declaration of title to and possession, the defendants, in support of their rival claim, contended *inter alia*, that the plaintiff's claim was barred by *res judicata* by reason of the decision as regards the title of the hypothecator in a suit O S No 562 of 1089 filed against the hypothecator and others and was besides affected by the rule of *lis pendens* by reason of the litigation in the said suit (O S No 562) Neither the hypothecator of 1088 nor the plaintiff was party to the suit O S No 562

Held (Rejecting the defence contentions) —

(1) (a) The hypothecatee was not bound by the decision in O S 562 relating to the properties hypothecated to him since the suit was instituted after his hypothecation and he was no party thereto

(b) The plaintiff got by the auction sale the right, title and interest of the hypothecator and hypothecatee as it stood at the date of the hypothecation, and not merely as it stood at the time of the Court sale. There is a difference in this respect between a sale in execution of a money decree and sale under a mortgage decree.

(c) The plaintiff's claim, therefore, was not barred by *res judicata*.

(2) Inasmuch as the hypothecation on which the decree in O S No 2022 of 1094 was obtained was of a date prior to the plaint in O S No 562 of 1089 and the hypothecatee was not implicated in the latter suit, *lis pendens* could not affect the hypothecatee The plaintiff's auction purchase in O S No 2022 was not therefore affected by *lis pendens* by reason of the litigation in O S No 562

"The doctrine of *lis pendens*, which has been applied in this country to sales *in invitum* as well as voluntary alienations, might have application if the equity of redemption of the mortgagor was capable of being separately dealt with by a mortgagee, under a decree for sale on the mortgage. But in this country, the mortgagee's right to the property and the equity of redemption of the mortgagor are not to be separated as if they are distinct entities in law with reference to the same property"— 23 T L J, 826

17 The plaintiff in the case originally filed a joint suit O S No 78 of 1095 for setting aside the decree in O S No 215 of 1084 and for consequential reliefs against different sets of individuals based on distinct causes of action On the contention of the defendants that the suit was bad for multifariousness, the Court ordered the suit being split up regarding the separate reliefs sought for The main prayer for setting aside the decree in O S No. 215 was retained as O S No 78 of 1095, and the separate prayers against the different persons were re numbered separately with a common issue as to the validity of the decree in O S No. 215. This suit O S No 164 of 1102 was one so re-numbered O S No 78 of 1095 was decided against the plaintiff, and the finding therein as to the validity of the decree was incorporated as part of the decree in O S 164. Plaintiff did not file an appeal from the decree in O S No 78 but attacked the finding in this appeal from O S No 164 of 1102 On the contention of *res judicata* raised by the respondent

Held—It could not be argued that in spite of the splitting up of the original suit, O S 164 should be regarded only as a sub-suit and that the decree in the two suits must be deemed to be a joint one so that the failure to appeal from the decree in O S No. 78 of 1095 could not bar the present appeal ' After the splitting up of the original suit, the several suits must be regarded as independent suits No doubt they might be termed connected suits inasmuch as at least one issue was common to all the suits And as no appeal was preferred against one of the decrees, the appeal against the other decree so far as the common issue was concerned was barred by *res judicata*

Where a petition to set aside an *ex parte* decree on the ground that summons on the defendant (minor) was not properly served, was rejected with the observation that the service of the summons was proper and that if the minor was prejudiced by fraud or misconduct on the part of the guardian he might have his remedy by a separate suit, and in the separate suit so filed, the question of proper service of summons was *also* sought to be re-opened

Held -As the particular ground had been ruled out by the prior order, a fresh suit on the same ground was not competent— **23 T L J, *896***

18. A suit was filed as against trespassers and was dismissed on the defendants' proving possession as mortgagees A subsequent suit for redemption on the basis of the mortgage is not barred either under the provisions of Order II, Rule 2, or under Section 10 of the Code

Order II Rule 2 applies only when the cause of action in the subsequent suit is the same as in the previous suit It is immaterial that it might have been open to the plaintiff to unite the two causes of action in the same suit.

Unless it is established that the claim made in the subsequent suit was such as could have been put forward along with the claim in the prior suit as a ground of attack, it cannot be held that it was such as 'might' and 'ought' to have been put forward in the prior suit within the meaning of Explanation 4 in Section 10 Where the two claims are, as in the case, mutually destructive so that they could not have been joined together or put forward in the alternative in the prior suit, the Explanation to Section 10 does not apply and the subsequent suit is not barred— **23 T L J, *1092***

19 In a suit for redemption of a lease, the defendant set up a Kanom right and also a claim for compensation for improvements The Munsiff allowed redemption and awarded certain amounts as value of improvements. The plaintiff and the defendant both filed appeals to the District Court, the plaintiff for reduction of the value of improvements, the defendant for upholding the Kanom right As it happened, the appeals were not heard together but the plaintiff's appeal was first taken up and allowed On the defendant s appeal being taken up later on, it was argued for plaintiff that it was barred by constructive *res judicata* and accordingly the appeal was dismissed The defendant filed this special appeal

Held—The rule of constructive *res judicata* was inapplicable to the case and the defendant's appeal was wrongly dismissed on that ground

There is a difference between the procedure in a suit and in an appeal, for while in a suit the defendant is bound to put forward all pleas in his written statement, the respondent in an appeal has under the Code firstly the right of regular appeal against the decree of the lower Court so far as it is against him and secondly the right to object to that part of the decree by filing a memorandum of objections under Order XL, Rule 21 The Code does not make it obligatory that such a memorandum should be filed in

the opponent's appeal itself The reasonable view, therefore, seems to be that if, in ignorance of the fact that he had filed an appeal against the decree, the Court disposed of his opponent's appeal, that decision could be regarded only as a disposal of the matter arising in that appeal and not as a decision correcting and incorporating the decision of the lower Court and thus amounting to a decision finally disposing of the entire suit—

24 T. L J, 288

20 The father and mother of the plaintiff filed a prior suit, O S No 526 of 1092 for the recovery of rent for 1091 and 1092 from 21st defendant in the present case on the allegation that he was a lessee in possession. The latter contended that lands had been reserved for certain religious purposes and that the plaintiffs could claim only their share of the balance remaining after meeting the expenses required for those purposes.

In the present suit, the plaintiffs prayed for the cancellation of the decree in O S 526 of 1092 and partition of plaint lands and recovery of possession with mesne profits.

It was argued that the suit was barred by *res judicata*

Held—The finding in the prior suit (O S. No 526 of 1092) cannot be regarded as *res judicata* as it was not a conclusive adjudication on the main question for decision in the present suit All that the Court had to decide and did decide was whether the defendant was liable for the entire rent or part of the rent

If the question of title was in issue in its entirety it would be a matter that was directly and substantially in issue in that suit But if the issue in the former suit did not cover the entire question, in other words, it fell short of going to the very root of the title and was confined only to some of the incidents of it, the question of title would be only collaterally or incidentally in issue.— 24 T L J., 341

21 The order of a competent Court on an application for execution has the effect of *res judicata* even though that decision was passed upon an *ex parte* application, provided that the opposite party was given an opportunity to appear, but a mere *ex parte* order in favour of one party without an opportunity being offered to the opposite party to put forward his objection if any on the particular point involved in the subsequent order, does not operate as *res judicata*. To conclude the parties, the previous order must have been passed on contest Two conditions therefore are essential There must be notice and it must be sufficient to give information of the nature of the relief sought in the execution application

The appellant, as the assignee of the decree in the case applied for recognition of assignment and after notice to the judgment debtor was recognised as such. The judgment debtor subsequently filed application stating that the decree had not only been satisfied but that he had overpaid the decree holder even antecedent to assignment, that the excess amount should be ordered to be restored and that in the circumstances the order recognising the assignment should be vacated. On the appellant's plea of *res judicata*, it was found on the facts, that though the decree-holder had filed several execution applications miscalculating the amount due under the decree and the judgment-debtor had remained quiet without questioning the correctness of the calculation, still no express notice of the amount claimed had been served on the judgment-debtor and no specific order had been made adversely to him The document of assignment was silent as to the amount that still remained due, the execution application by the assignee—decree-holder to recognise the assignment did not state any particular amount as being due and the notice to judgment-debtor regarding the recognition concerned itself only with the question of the assignment of the decree

Held (In the circumstances) —The judgment-debtor was *not* prohibited by the order recognising the assignment from claiming the excess amount received by the decree-holder Even if there was miscalculation in the execution *applications* and this was left unquestioned by the judgment-debtor, because no express order had been passed determining the amount as still remaining unsatisfied under the decree, there was *no estoppel* as against the judgment debtor And except that the decision could affect the assignee in the manner that it implies an adjudication that his assignment was waste paper and that he could make no pie out of it, it could not be said that he would be damnified if the original decree-holder was called upon to make the reimbursement—

24 T L J, *770*

22. *See also Regn II of* 1100,

Other Cases.— 24 T L J, *362*

Section 12

1 A decree was passed by the Anjikaimal Court against Thirumanasery Illom which had properties both in Cochin and Travancore. Defendants 1 to 8 were members of Thirumanasery living in Cochin while defendants 9 to 14 though Thirumanasery were residents in Thodupuzha and formed a separate branch, and the properties in Thodupuzha were ear marked for the Travancore branch The decree was sought to be executed against defendants 9 to 14 and properties in Thodupuzha. The 10th defendant while admitting his membership of Thirumanasery Illom objected that so far as the decree extended to the members of that Illom resident in Travancore, and to properties in Thodupuzha, the decree was passed without jurisdiction and therefore was unexecutable

Held —The jurisdiction of a foreign Court is territorial and attaches upon all persons either permanently or temporarily resident within the territory while they are within it but it does not follow them after they have withdrawn from it

Foreign decrees may be attacked in execution on any of the grounds mentioned in Section 12 C P C

A judgment-debtor proceeded against in execution of a foreign decree *need not resort to the foreign tribunal* to get rid of the decree but may object to it in the domestic Court that proceeds to execute it— 48 T L R, *424*

(=23 T L J, *27*)

2 The suit was to set aside the alienations by a widow, of plaint property which was reserved to plaintiffs by a compromise petition in a suit between the plaintiffs and defendants in a foreign Court The suit was dismissed on the ground that the title to the Travancore properties could not pass under the compromise petition since it was not a registered instrument

Held —The compromise petition formed part of the foreign decree, and the defendants had failed to show that the foreign decree could not be relied on for the reasons mentioned in Section 12 of the C P C. So, taking Sections 12 and 13 of the C. P C, together, it has to be held that the decree of the foreign Court was conclusive as to any matter thereby directly adjudicated between the parties.—

49 T L R, *46*

(=23 T L J, *200*)

Section 15

See Sec. 19.— 48 T L R, *176*

(=20 T L J, *1034*)

Section 19.

1. The plaintiffs sued the Dewan of Travancore in the Trivandrum District Court for recovery of monies alleged to have been illegally levied from them in respect of some properties held by them in the Ranni Pakuthy The defendant, the

Dewan of Travancore, raised among others the plea that the District Court of Trivandrum had no jurisdiction to entertain the plaint This preliminary issue was heard by the District Judge and decided against the defendant In revision it was held

The claim in the present case would not fall under Clause (*e*) or (*d*) of Section 15, inasmch as the plaintiffs do not complain of any wrong to or pray for a declaration of right in respect of any immovable property

The Dewan is an officer of the Government of Travancore and certainly resides at Trivandrum Under Section 64, C P C, a suit instituted against the Dewan of Travancore is as effective as one instituted directly against the Government of Travancore The said Section directs that such suits should be instituted not against the Government but against the Dewan Under Or VII, Rule 1, the plaint shall contain the name, description and place of residence of the plaintiff as well as of the defendant, so far as particulars can be ascertained as regards the latter The Code, therefore, contemplates a place of residence for all plaintiffs and defendants. Under Or XXVII, Rule 3, in the case of a suit by or against the Dewan, the name, description and place of residence of the plaintiff or defendant need not be inserted since it shall be sufficient to insert the words 'The Dewan of Travancore" But there cannot be any objection to describe the Dewan of Travancore as residing at Bhaktivilas in Trivandrum The suit can therefore be instituted in Trivandrum though the cause of action arose elsewhere **46 T L R**, *176*
(=**20 T L J**, *1034*)

2. Under Section 19 of the Code, leave for instituting the suit might be obtained even after the institution of the suit— **28 T L J**, *956*

Section 31.

1 In contribution suits, interest at the rate of twelve per cent could not be decreed inasmuch as the claim was not for money lent or wrongfully withdrawn, but an equitable claim to recover money paid by the plaintiff to protect his own interets also The reasonable rate of interest claimable is six per cent— **21 T L J**, *58f*

2. Where the decree in the case (passed before the new Civil Procedure Code came into force) provided for future interest at a certain rate without mentioning a limit

Held —The decree-holder cannot realise in execution, as future interest, an amount exceeding half the principal

At the time the decree was passed the Court had, by virtue of Section 21 of Regulation IV of 1010, no jurisdiction to award any higher amount as interest and though the decree was silent as regards this it must be construed as containing that provision. Now the Court has such a jurisdiction but the Court which has to exercise that jurisdiction is the Court which passes the decree, the execution Court having no power to alter it— **21 T L J**, *1033*

Ref —**24 T L J**, 338

3. Apart from the question whether Section 31, C P C, is applicable to mortgage suits, the usual rule is to adopt the contract rate, except where it is excessive, inequitable or illegal in regard to interest awarded from the date of suit to the date of decree — **22 T L J**, *342*

4 An application in a Court in British India to transfer a decree for execution to a Court in Travancore has to be regarded as an application for execution or for some step in-aid of execution even though the transfer when made might not have all the consequences of a transfer under Section 39 of the Civil Procedure Code of

1908. No doubt, the Court which transfers the decree to the Court in Travancore should not have become *functus officio* by reason of the decree having ceased to operate owing to the effect of the Law of Limitation in British India, but this is a matter in which the Courts in Travancore have to come to their own conclusion

A Court which passed the decree has power even after transferring the decree for execution to one Court, to transfer it subsequently to another, even though the first (transferee) Court has not forwarded a certificate of non-execution.

A Court in Travancore executing a decree of a British Indian Court transferred to it for execution, cannot by virtue of Section 31 (3) of the Civil Procedure Code allow the decree-holder to recover more than the principal amount adjudged, by way of future interest Though Rule 197 (4) of the Civil Courts' Guide requires that full effect should be given to the terms of the decrees received from British India, in respect of interest, the rule-making power of the High Court, so far as this question is concerned, is that conferred by Section 2 of Regulation IV of 1061 re-enacted as Section 38 (*a*) (2) of the present Code of Civil Procedure and it is expressly stated in this enactment that part IX of the Code does not relate to such rules. It is doubtful, therefore, whether they have statutory effect in so far as they are inconsistent with any express provision of the Code.

(The question as to the effect of a provision in the foreign decree for more than 9 per cent future interest was left open) —

43 T L R, *331*
(=22 T L J, *981*)

3 The defendant obstructed the plaintiffs from withdrawing from Court certain amounts to which the plaintiffs were entitled, by setting up contentions which, in the event, were found untenable, and the plaintiffs claimed interest on the amount as damages for the delay caused by the defendant's obstruction

Held.—*Per Narayana Pillai, J (with whom Chatfield, C J, concurred on reference)* —The plaintiff was not entitled to interest as damages.

Per Narayana Pillai, J —The unqualified proposition in its wide range that interest may be recovered as damages in any case in equity is not entertainable Interest depends on contract express or implied or on some rule of law allowing it If there is no contract, allowance of interest can be made only as matter of law

Per Chatfield, C J —There is no doubt a great deal to be said for making a person responsible for interest, on amounts which he has prevented another from drawing by raising untenable contentions. But this is a matter more for the Legislature than for the Courts

Per Joseph Thaliath, J (contra) —In cases eminently deserving of compensation the Court can award interest as damages acting on the principle of equity, justice and good conscience, by virtue of Section 18, Sub-section (c), of the Civil Courts' Regulation In cases of this kind interest is not awarded as such but allowed as damages. The loss of interest sustained would be the proper measure of damages.—

43 T L R, *168*
(=22 T L J, *886*)

6 The suit was for recovery of money due on a bond (Exhibit A) hypothecating certain land in Thamarakulam Pakuthy which had been demised by the Travancore Government in 1907 to the Avadhani family for the purpose of establishing a factory for manufacturing salt. The bond was executed in favour of the plaintiff's assignor, the Imperial Bank, by the first defendant and his deceased brother, the father of defendants 2 to 7 In the agreement of demise between the Government and the first defendant's father, there was a condition to the effect that no alienation or transfer of the right of manufacturing salt on the lands specified in

the schedule shall be valid unless ratified by the Government and that if the party making the alienation or transfer failed to report the same within one month, such alienation or transfer shall be null and void

On the contention of defendants 2 to 7 that the plaint bond was null and void as being an alienation in contravention of the terms of the agreement

Held —Though it was possible that difficulties might be created in the event of Government refusing to accept or register Exhibit A, such difficulties need not be anticipated At any rate it was *not open* to the transferor to claim that the transfer could have no effect until recognised Apart from this, the words in Exhibit I that unless reported within one month an alienation or *transfer* should be null and void meant that it should be null and void against the Government and not as against the transferor The object of the clause was to protect the proprietory interest of the Government and not for any other public purpose. In this it differed from *alienations or transfers* of licences under the Abkari Regulation It is not also possible to apply those provisions of law which prohibit the alienation of rights in property in the interests of a particular class of land owners.

Where under the suit bond the principal amount was to be paid in four three-monthly instalments, and there was a further provision that interest on the bond amount for the first *three months* was due at the rate of 10½ per cent, and that thereafter, as default was made in paying the first instalment, at the rate of 12 per cent, and interest due at the end of each *period* of three months should be added to the principal and thereafter would carry interest in that capacity and it was contended that the provisions were penal and offended against the Rules relating to the rate of interest awardable under Section 31 C P C

Held —The contention was unsustainable. *There was no reason* for treating the provision as to interest as a penalty and even if it were so treated, it would be open to the Court to award the full amount under the agreement (F B) —

49 T L R, *451*
(=23 T L J, *400*)

7 If a legal liability for the payment of the amount is upheld, it is but proper that interest should also be allowed from the date *on* which the amount accrued due.— 23 T L J, *1055*

8 Interest at the contract rate should be allowed for the period between the date of suit and date of decree unless there are equitable grounds for *holding* otherwise.— 24 T L J, *218*

9 The decree-holder in the case sought to recover in *execution*, an amount in excess of the sum due under the decree on the ground that the decree had been varied by the undertaking given by the judgment-debtor that future interest at 12 per cent *might be recovered* from him The decree was passed when the old Code was in force and the agreement *was entered* into after the new Code came into force. It was contended that such an agreement was enforceable

Held —Under the new Code such an *agreement is* not enforceable in execution. Agreements entered into when the old Code was in force between the *parties* in the course of execution proceedings could be enforced by the execution Court in virtue of para 2 of Section 254 of the Code. But that provision has however been *omitted* in the new Code.

The decree must be construed as having been passed in accordance with the law then in force and the executing Court has no power to alter it. Hence the decree-*holder* is entitled to realise as "future interest" *i. e.*, interest from date of suit to date of realisation *only* a *moiety* of the principal amount as allowed by the old Code and not anything in excess of that

amount as provided by Section 31 (3) of the new Code — 24 T L J, 588

10 See also —
Section 2 (12) — 47 T L R 69
(20 T L J, 1155)
Order XXI, Rule 61 —
48 T L R., 409
(=22 T L J, 1314)

Section 32

1 In execution of the decree in O S No 54 of 1100 of the Quilon District Court, certain properties were attached and the petitioner before the High Court put in a claim which, after due investigation, was rejected by the lower Court In the course of the claim proceedings, the petitioner-claimant applied for a com mission for examination of certain wit nesses residing in Jaffna in Ceylon The costs of that commission amounting to Rs. 350 alleged to have been spent by the counter petitioner towards Vakils' fees, etc, were awarded to him by the lower Court as costs

Held —The costs of a commission are in cidental to the suit or appli ation within the meaning of Section 32 and the Court has therefore jurisdiction to make such order as it thinks fit in regard to the costs of that commission

Rule 440 of the Civil Courts' Guide refers to the conduct of the petition in the Court in which it was presented It cannot include cases where witnesses have to be examined on commission in a foreign Court where the Vakil cannot appear and the Vakalat does not contemplate his appearance. In such a case, if a party has necessarily to engage a Vakil to examine witnesses on commission, there is no reason why he should not be allowed the fee paid to the Vakil as costs of the application.

The scale of fees due to the Vakil must be determined on the same principles as will be adopted in Jaffna and in the absence of any such principle, a reasonable fee commensurate with the amount of work done, must be fixed by the Court

Quaere —Whether a separate Vakil's fee would be allowable if the commission was issued to any other Court in Travancore (F B) — 46 T L R, 53
(=20 T L J, 157)

2. Although the Section relating to costs vests a great deal of discretion in the Court in the matter of granting or refusing costs to a party, it has to be remembered that the discretion is a judicial discretion to be exercised on legal principles, not by chance medley, nor by caprice, nor in temper It is worth repeating the general rule—that costs shall follow the event, unless the Court, for good reasons, otherwise orders. This rule means that a successful party is entitled to costs unless he is guilty of misconduct or unless there is some good cause for not awarding costs to him — 22 T L J, 311

3. In a suit for redemption of a mortgage, the lower Court deprived defendants 5 and 6 of costs *on the sole ground* that there was a dispute as to the title to the mortgage money between defendants 1 to 4 and defendants 5 and 6

Held,—There was no sufficient ground for depriving the mortgagee of his costs

As a general rule, a mortgagee is entitled to costs in the absence of any misconduct or any other conduct which, in the opinion of the Court, disentitles him to the expenses. It is difficult to define the kind of misconduct which would disentitle a mortgagee of his costs in a redemption of suit as the whole thing would depend on the circumstances of each case. There may be misconduct of many sorts, for instance, there may be misconduct in commencing the proceedings or some miscarriage in the procedure or vexatious mode of conducting the proceedings or other misconduct which would induce the Court to refuse costs,

but where there is nothing of the kind, the rule is plain and well settled. The misconduct which would disentitle a mortgagee of his costs must be exceptional in its circumstance— 23 T L. J., 880.

4. Costs are always a matter of discretion with the Court trying the suit, and unless the appellate Court is satisfied that the lower Court has exercised its discretion perversely, arbitrarily or unjustly, the Appellate Court would be loth to interfere. Further, an Appellate Court will not and ought not to interfere with an order of costs passed by a subordinate tribunal in the exercise of its judicial discretion unless a question of principle is involved —

42 T L. R., 43
(=23 T L J., 615)

5. The plaintiff purchased some lands and sold a portion out of it to the defendant under a sale-deed in which the defendant was directed to pay off a debt owed by the plaintiff On the defendant's default to pay, the creditors to whom the money was due obtained a decree against the plaintiff The suit was by the plaintiff for recovery of the decree amount in the aforesaid suit with interest and costs of that suit It was contended that even if the defendant were liable to pay the amount recited in the sale-deed, he should not be made liable for the costs of the suit

Held —Even in the absence of an indemnity clause, a plaintiff in such circumstances could recover the costs of the suit where the suit was occasioned by the failure of the defendant to pay

23 T L J, 708

Section 33

1. It cannot be doubted that when a suit is instituted on the basis of a mortgage a right to immovable property is directly and specifically in question and that the *lis pendens* continues up to the date of sale and delivery of possession.

Where during the pendency of a suit or execution proceeding based on a mortgage, the holder of a money decree brings to sale the mortgaged property and the same property is resold in execution of the mortgagee's decree, the earlier sale does not avail against the subsequent sale but is affected by the doctrine of *lis pendens*.— 22 T L. J., 745

2. Where, subsequent to a decree in favour of the plaintiffs, certain junior members, for future maintenance charged on *all* Tarwad properties, the third defendant filed a suit for partition and obtained orders dividing his share in *some* of the properties and for possession thereof, and the plaintiffs applied for execution of the maintenance decree as against the properties allotted to the third defendant as above and also the properties as regards which the partition suit was still pending —

Held,—Inasmuch as there had been a final adjustment of rights as regards the properties in third defendant's possession, they were not liable under the maintenance decree, but the other properties continued to be liable for maintenance due until final orders were passed with regard to them — 23 T L J, 852.

Section 35.

See Sec. 31 — 42 T L R., 861
(= 22 T L J 961)

Section 38-A.

1. It is a well established rule that in a personal action against the subject of one State, a decree passed by a foreign Court *in absentem*, he not having submitted or contracted to submit to its authority, either expressly or impliedly, is by international law a nullity Not to the Courts of the State in which the cause of action has arisen, nor in case of contract to those of the *locus solutionis*, should resort be had by the plaintiff, but to the

Courts of the State in which the defendant resides, the Courts of the latter State having jurisdiction in all personal actions.—
23 T L J, *1184*.

2 See Sec 12 — 48 T L R, *424*
(=23 T L J, *27*)
„ 40 — 20 T L J, *743*

Section 40

1 The properties in dispute were purchased in Court auction on 30-3-102 by the appellant in execution of a hypothecation decree in O S No. 926 of 1099 of the Principal Munsiff's Court, Kottayam The properties, however, were involved in O S No. 78 of 1096, Kottayam District Court. That Court had appointed a receiver on 6-12-1100, who was in possession of the properties. The receiver however resigned his office on 31-12-1100 and another receiver was appointed some months after the Court sale of 30-3 1102. The lower Court set aside the sale on the short ground that at the time of the sale, there was a receiver appointed by the District Court of Kottayam in regard to the properties purchased by the appellant

Held —It is well-settled that property in the hands of a receiver is exempt from judicial process except, of course to the extent permitted by the appointing Court Therefore such property, though subject to a paramount judgment, cannot be sold under execution without the leave of the Court; and a purchaser of such property at an execution sale buys at his peril, for the sale may be cancelled upon an appropriate application to the execution Court.

On the resignation of the receiver, the possession of the properties cannot be held to have reverted to the parties to the suit. Such properties as the receiver was in possession of should be presumed to have continued in *custodia legis*.

Strictly speaking, Order XXI, Rule 87, was not applicable to the facts of the case. This Rule is only one of the many provisions for setting aside a Court sale Apart from that, valid grounds may be available for setting aside a Court sale, and such cases would fall under Section 40. The absence of a finding on the question of substantial loss could not affect the validity of the order under appeal —
46 T L R, *49*
(=20 T L J *153*)

Ref —23 T. L J, 700

2 No words occur in Section 40 of the Civil Procedure Code which would warrant the restrictions to its applicability as regards questions between representatives only to disputes between parties arrayed on opposite sides. The determination of the right to execute would palpably relate to the execution, discharge or satisfaction of the decree and it would therefore be repugnant to all canons of interpretation of statutes to import into clause (3) expressions which would tend to limit, restrict or enlarge the scope of its applicability The provisions of the Code of 1100 have not effected a change in the law as it existed under the Code of 1065

The Civil Procedure Code does not require a notice to the decree-holder for attachment of a decree. An order to attach without specifically directing that the amount under the attached decree would be available for the satisfaction of the decree in the case in which the attachment is ordered is sufficient to effect a valid attachment.—
46 T L R., *390*
(=20 T L J *718*).

3. Proceedings were taken in a foreign Court on the strength of a decree transmitted from Travancore for purpose of execution. On an application for stay of execution in the foreign Court, pending appeal from the decree

Held.—The application was incompetent. The stay of execution contemplated in Order XL, C P C., is clearly with reference to the proceedings in the Courts in

Travancore Of course, the execution Court in Travancore could withdraw decrees transmitted to foreign Courts for execution in appropriate cases, on the strength of orders issued by the appellate Court, to them — 20 T L J, 742

4. The appellant who was admittedly not a party to the decree and who had not been impleaded in execution as a legal representative of any of the judgment-debtors contended to be deemed to be a constructive party under Section 40 to the suit competent to intervene in execution

Held —In *determining the question* as to whether any person is a representative under Section 40, two tests seem to be applicable, *viz*, whether any portion of the interest of the decree-holder or the judgment debtor, which was originally vested in one of the parties, has by the act of parties or by the operation of law vested in the person who is sought to be treated as representative and secondly if there has been a devolution of interest, whether so far as such interest is concerned, that person is bound by the decree

The consistent view taken in this matter by the High Court would indicate that the Court has not been in favour of the applicability of the principle enunciated in 40 T. L. R. 151 to the class of cases other than those in which the particular question that arose from the facts in that case is involved

Junior members of a Marumakkathayam Tarwad can intervene in execution and object to the same by applications under Section 40 only in cases where they are parties to the decree or they have been impleaded as legal representatives of parties on record after their death In other cases their rights are co-extensive with those of strangers. They cannot to be deemed to be either parties or representatives as contemplated in Section 40 C P C

It is a well recognised rule that a judicial decision could be taken to be an authority for the proposition actually decided in the case. In understanding the express questions that were decided in a case, it must be remembered that the generality of an expression made should not be intended to be an exposition of the whole law but as governed and qualified by the particular facts in which the expressions are found The pronouncements made in a case could not be quoted for a proposition that may seem logically to follow from it or by having recourse to rules of analogy or logic.

47 T L R, 77
(=20 T L J., 1196)

5 When the Court has passed an order calling upon a decree holder to do an act which is essential for taking further proceedings and he refuses or omits to do that act, the Court is empowered to dismiss the application on the ground of such default Such power is vested in all Courts as they are not bound to wait indefinitely till the person who has moved it for redress, chooses to take action.

When the decree-holder fails to pay process fees for the issue of a warrant for the arrest of the judgment debtor within eight days, the Court is empowered to strike off the application for execution and a subsequent application for further steps must be made by a fresh application which cannot in such circumstances be regarded as an application to revive a pending application or to continue steps already taken on such application.

Civil Circular No 20 of 1079 provides that when a warrant for the judgment-debtor's arrest has been returned unexecuted the matter should be intimated to the decree-holder or his Vakil and a time should be fixed for the taking of further steps. The rule in Article 250 of the Civil Courts' Guide is clearly an enabling provision and the right conferred on the decree-holder is that of moving the Court for issuing the warrant again without payment of Court fee and the intention

obviously was only to take away the right after the expiry of the short period fixed

Civil Circular No 20 of 1079 cannot be regarded as having been repealed in *toto* by Article 250 Article 250 does not provide specifically for rejection of the petition in case the decree-holder does not apply within the period enumerated there in and it is only reasonable to conclude therefore that the decree-holder may move the Court later on by a separate application and the Court would then have a discretion to grant or refuse the prayer —

46 T L R, *473*
(=21 T L J, *85*)

Ref —34 T L J, 313

6 In execution of the decree in O S No 76 of 1087, the plaintiff, who was the 3rd defendant in that case raised objection to the attachment of certain properties on the ground that the properties belonged to the Tarwad, The present defendant who was the plaintiff in that case contended that the objection to the attachment was a claim petition under Section 275 of the old Code (=Or XXI, R 56) and was barred by limitation as it was preferred beyond 45 days and the Execution Court accordingly dismissed the so-called claim petition The suit was to set aside that order and to establish the title of the Tarwad The defendant contended *inter alia* that the suit was not maintainable since the plaintiff was a party to the decree in O S, No 76 and that the question of attachment should have been dealt with under Section 238 old (=Sec. 40).

Held —By the principle of estoppel by pleading the defendant was not at liberty to defeat the plaintiff by starting inconsistent pleas at successive stages. —

21 T L J, *165*

7 The appeal was against the order of the lower Court by which it confirmed the election of the respondents as trustees under the provisions of the scheme framed in the suit regarding the management of certain trust properties. The scheme contemplated a reference to the Court for a decision in regard to objections to nominations and so on and conferred a power on the Court to confirm the elections but did not provide for an appeal On preliminary objection as to the competency of the appeal

Held —(*Per Venkata Rao, J, Thakath, J not expressing any opinion*)

(1) The question of appealability turned on the decision whether the order related to an executable direction in the decree.

Merely because the Court is invested with certain powers regarding the carrying out of the scheme, an order passed by it in the exercise of such powers would not necessarily become appealable

(2) The order relating to the election of trustees, though in the exercise of the power vested in the lower Court under the scheme, cannot be regarded as a matter arising in execution under Section 40, and therefore, no appeal lay

Per curiam —Inasmuch as the proceedings of the lower Court were, in any event, judicial proceedings the High Court had power to interfere in revision but in the circumstances of the case such interference was not called for —

Though as a general rule, a trustee cannot acquire an interest on trust properties, a person already in possession of trust property as lessee is not on that ground alone ineligible for appointment as trustee.

21 T L J, *546*.

Affir — 48 T L R., 185
(=22 T L J., 1)

8. The maintainability in execution of applications for cancellation of sales on the ground of fraud has been consistently upheld here as well as in British India,

The old Code maintained a three-fold distinction between cases of material irregularity and those of fraud for purposes of cancellation of sale, *viz*, (i) when fraud was established no question of substantial injury arose, (ii) the period of limitation governing an application for cancellation of a sale on the ground of fraud was three years whereas, the period governing and application based on the ground of irregularity was 30 days and (iii) the decision on an application for cancellation of sale on the ground of fraud operated as a decree subject to a first appeal and second appeal, while the adjudication on an application founded on allegation of irregularity operated as an order subject to a first appeal only. So far as the High Court is concerned applications under Section 308 (old) have been all along treated as one under Section 238 Under the recent amendment in the Code of 1950 the only category of cases that could come under Order XXI, Rule 87, consists of those where the same is sought to be set aside on the ground of fraud in the matter of publishing or conducting the sale. All applications for the cancellation of sale on the ground of fraud in other matters will have to be dealt with under Section 40 (=Section 238 old)

'Fraud' in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed and are injurious to another, or by which an undue or unconscientious advantage is taken of another There are some other elements which must necessarily exist before a party can be said to be defrauded In the first place, it is essential that the means used should be successful in deceiving If the other knows the truth and sees through the artifices and devices used, there could be no fraud Secondly, there could be no fraud without an intention to deceive the motive being quite immaterial. Thirdly there must be damage to the party deceived Fraud is a conclusion of law and as such it is essential that the things done constituting the fraud, must be distinctly and accurately stated The fraud alleged must be set forth specifically, in particular and in every detail, so that the person who is charged therewith may have the opportunity of knowing the case he has to meet and to shape his defence accordingly It is an acknowledged rule of pleading that where fraud is alleged against a defendant, the plaintiff must set forth the particulars of the fraud he alleges and cannot be allowed to go beyond his own statement of his case

Inadequacy of price (in proclamation) by itself cannot amount to fraud Such inadequate price could have been given in the proclamation innocently Unless it is clearly shown that the under-statement of value prevented or scared away intending bidders, no plea of fraud could be sustainable in such matters.

Application for the reliefs of this kind could not be treated as being intended for setting aside the sale under Section 308, but as matters falling under Section 238 relating to execution, discharge or satisfaction of the decree contemplated therein Article 152 of the Limitation Regulation (old) governs such cases.—

21 T L J., *1048*

9 The appeal is against an order passed in the execution proceedings in O. S. No. 38 of 1101 of the Quilon District Court, dismissing the application put in by the appellants for stay of the court sale of the properties proclaimed for sale, on the ground that they had already filed an application on the insolvency side of the same Court to adjudge the judgment-debtor in the case an insolvent

Held,—The order appealed against is clearly not one falling under Section 40 nor is it an order under Section 108, relating to restitution. It is not a decree as defined in Section 2 (2) of the Code. The

right of appeal is a creation of the Statute and the same could not therefore be invoked unless the decision sought to be vacated can be brought under any one of the categories of cases in which such a right has been expressly conferred by the Statute

The order in the present case does not fall within the purview of Sections 76,79 and 82 of the Code No appeal therefore lies against the order —

21 T L J, *1175*

10 In a suit on behalf of a Village Trust, a scheme was settled under Section 72 of the C P C The appeal is against an order passed by the District Judge on the respondent's petition directing the old Trustees to produce in Court all the accounts, moneys and other village properties in their hands for being handed over to the new trustees. The scheme decree contained provisions for the rendering of accounts by the trustees but did not provide for the interference of the Court in the matter of election of trustees.

On a preliminary objection being raised that a scheme having been framed by the Court there is no executable decree and hence no appeal lies from the order,

Held (*Per Chakko, J, Joseph Thaliath J agreeing*) —The part of the decree relating to the production of the accounts was executable and therefore the appeal was maintainable under Section 40 C. P C Even if the appeal was not competent, the appeal may be treated as a revision petition and disposed of by way of revision.

Although, no doubt, the decree in a scheme suit is in general declaratory in its nature cases are easily imaginable in which in a scheme as finally framed there may be inserted a provision or provisions which may be capable of execution and which are intended to be executed Whether a particular provision is so enforceable in execution is always a question of fact depending on the interpretation of the decree.

Per Venkata Rao, J.—The maintainability of the appeal depends on the question whether or not the order related to an executable direction in the decree The order relating to the election of trustees though passed in the exercise of the power vested in the Court could not be considered to be a matter arising in execution and the appeal was therefore incompetent

There was also no jurisdiction to interfere in revision with the order of the lower Court in the case on its merits the reason being that under the scheme decree no power was reserved in the Court to accord sanction to, or withhold sanction from the election of trustees by the general body of villagers

The order of the lower Court was passed without jurisdiction and interference in revision must be only in order to point out the error (F B)—

48 T L R., *185*
(=22 T L J., *1*)

11 In the case of a decree against some members of a Marumakkathayam Tarwad who have executed a document the other members of the Tarwad must have one opportunity of questioning the consideration and necessity for the document

The junior members of a Marumakkathayam Tarwad are not as such, entitled to intervene in execution and contest the validity of a decree based on a hypothecation of Tarwad properties unless they have been brought on the record as the representatives of the deceased Karanavan, the judgment-debtor.

The junior members must be regarded as either constructive parties to the decree or they must be strangers to it. If they are parties to the decree they have the right to attack it by means of an appeal or possibly other methods but should not be allowed to challenge its validity in execution. If they are strangers

to the decree they can challenge its validity but only in one of the methods recognised by the Civil Procedure Code

Strictly speaking no contention as to the validity of the decree should be raised in execution under Section 40 C P C, but it is not possible to return to this strict position without disturbing a current of decisions by which the Courts of this State have built up a system of procedure allowing the junior members impleaded in execution as legal representatives to raise such a contention. Hence no occasion arises for extending the breach in the rule (F B)— 48 T L R., *137* (=22 T L J, *816*)

12. If the decree-holder takes in execution land not included in the decree or in excess of the decree, the judgment-debtor's remedy is only to apply under Section 40 and a separate suit for that purpose will not lie,— 22 T L J *818*

13 Where property has been wrongly delivered in execution of a decree, the remedy of the aggrieved party is to move the Execution Court, and a separate suit does not lie — 22 T L J *823*

14 The defendant undertook by a compromise petition dated 7-12-1104 to pay to the plaintiff through Court, a sum of Br Rs. 140, within six months from that date in complete satisfaction of the plaint claim In the event of default the plaintiff was at liberty to realise the entire plaint amount in execution The petition was presented in Court on 8-12-1104 The decree was passed in terms of that petition on 10-12-1104 On 10-6-1105 the defendant deposited Br Rs. 140 in Court for payment to the plaintiff

The plaintiff drew this amount and contended that the deposit was beyond time and so he was entitled to claim the full plaint amount

Held.—The defendant had substantially complied with the compromise decree and nothing more was due to the plaintiff in the light of its provisions.

The question whether the stipulation for the payment of the whole amount without heed to the remission allowed, is a penalty and as such should be relieved against in execution was left open — 48 T L R. *154* (=22 T L J, *419*).

15. The respondent who is the auction-purchaser is a stranger to the decree The decree is based upon a hypothecation bond executed by the defendants 1 and 2 to the plaintiff in 1091 Item No 3 in the schedule attached to the decree was purchased in Court auction by the respondent on 3-4-1095 at 6500 fanams. He deposited the whole of that amount in Court on 12-4-1095 The third defendant who had no right over the said item No. 3 deposited the said amount and commission in Court and applied to have the sale set aside The High Court eventually ruled that the third defendant had no right to deposit the said amount and commission in Court and to have the sale set aside While the appeal was pending in the High Court, the High Court ordered the third defendant to offer security for 6 per cent on the amount deposited by the respondent in Court for one year Accordingly the third defendant produced a surety who executed a security bond as per the order of the High Court The surety is therefore liable for one year's interest. Owing to the third defendant's obstruction the property was not delivered to the respondent The respondent got delivery of the property only on 26 1 1099 The defendants 1 and 2 and the third defendant are therefore liable for the loss caused to the respondent in the shape of means profits or interest for the period between 12-4-1095 and 26-1-1099 He therefore prayed for interest at 12 per cent on the said amount for the said period The third defendant opposed his prayer on the ground that the respondent (auction-purchaser) could not seek and obtain any relief in the execution Court

The Court below allowed the respondent 6 per cent interest by way of damages

The Judge held that no appeal lay from the order of the Munsiff, as the parties to it were not parties to the decree

Held—The third defendant not being a surety though there was one who had become a surety for him, Section 109 of the Code, did not apply, The money claimed by the decree-holder was not payable under the decree For that reason also this was not a question arising under Section 40 The special appeal as such must therefore fail, but for that very reason it was clear that the Execution Court had no jurisdiction to grant this relief to the auction-purchaser—

22 T. L J, *425*

16 Where the principal and interest accrued due under a hypothecation bond Exhibit C was hypothecated under Exhibit A and the holder of Exhibit A got decree thereon and purchased all the rights under Exhibit C in Court auction

Held—The further interest which accrued under Exhibit C subsequent to the date of Exhibit A, also passed to the purchaser in execution

A hypothecation is a simple mortgage and a mortgage involves the transfer of an interest in immovable property In the absence of a different intention expressed or necessarily implied on the transfer of a debt the securities therefor and the interest accruing due thereon are to be taken as also transferred under Section 8 of the Transfer of Property Act—

22 T L J, *841*

17. When the respondents prayed the Execution Court to re-examine the decree itself on the allegation that the decree was liable to be set aside and the case re-opened on the ground of fraud and collusion

Held—The attempt to re-open the decree did not fall within the scope of Section 40, and unless the application was one of that description the Court would have no jurisdiction to direct the petitions to be treated as suits under Clause 2 of that Section

The Execution Court could not go behind the decree It must take the decree at its face value It could enquire whether the Court, as evidenced on the face of the decree by seal and signature, was a properly constituted Court competent to pass the decree, but it need not enquire, having satisfied itself of the competence whether it was a decree which the Court ought to have passed For such an enquiry it would obviously be necessary to go behind the decree— 22 T L J, *1005*

18 In the face of Section 40 (2) it is not permissible to a Court to dismiss a suit merely on the ground that the remedy of a plaintiff is by way of execution Ordinarily such irregular suits should be converted into execution proceedings by the original Courts and if this is omitted to be done, it is open to the Appellate Court by virtue of Section 35 to make good the omission— 22 T L J, *1014*

19 A dispute between rival decree-holders is not a matter within the purview of Section 40

Where an assignee—decree-holder appealed against an order for rateable distribution in favour of holders of decrees against the original decree-holder, who had placed attachments on the decree after the assignment

Held—The appeal was incompetent—

22 T L J., *1264*

20 An order staying execution of a decree pending the disposal of an application to certify satisfaction of the decree debt is not appealable, as it does not determine any question relating to the rights and liabilities of the parties with reference to the relief granted by the decree.

It cannot be laid down that merely because an application has been made to certify satisfaction of a decree, execution

should necessarily be stayed The Court has a discretion in the matter and should exercise that discretion on proper grounds. It should examine carefully the petition for recording satisfaction and see whether a probable case is stated in the petition In doubtful cases, it would do well to examine the petitioner before passing the order— 23 T L J 508

21 Before properties sold in Court auction were delivered over to the auction purchaser (plaintiff), an agreement was come to whereby plaintiff agreed to give the judgment debtor time till 30 7-1101 to pay up the sale consideration and get back the property failing which the plaintiff was at liberty to recover the property in execution of his decree The judgment debtor (first defendant) in the action, having failed to carry out the terms of the agreement, plaintiff brought the suit for recovery of plaint items The first defendant among other pleas contended that the suit was not maintainable and that the plaintiff's proper remedy was by way of execution proceedings

Held—The Limitation Regulation only provided the period of time during which a suit must be brought and did not confer a right of suit where none existed Merely because Article 126 provided for a period of limitation for a suit 'by a purchaser in execution of a decree,' it did not follow that every purchaser in execution of a decree obtained a right to maintain a separate suit. There were cases in which it was clear that an auction-purchaser could maintain a separate suit for recovery of possession and Article 126 of the Limitation Regulation was intended only to provide for such cases:

Held also—The decree-holder did not cease to be a party to the suit within the meaning of Section 40 C P C, merely because he had become the purchaser of the property in auction The question relating to delivery of possession was one relating to the satisfaction of a decree, since a decree could not be said to be satisfied until the decree-holder had either obtained the sale proceeds or possession of the property which represented the money for which he obtained his decree— 49 T L R, 380 (=23 T L J, 586)

22 The plaint property was subject to three hypothecations on different dates The respondent plaintiff was the second hypothecatee while the appellant, 3rd defendant, was the third hypothecatee The third defendant first filed a suit on the third hypothecation without impleading the two other hypothecatees and in execution purchased the property and obtained delivery. The first hypothecatee then filed a suit on his first hypothecation without impleading either plaintiff or third defendant and had the Court sale conducted on the basis of his decree, but the third defendant, in possession, discharged the decree by deposit in Court of the decree amount and commission While the first hypothecatee's decree was being executed, the plaintiff filed a suit on his second hypothecation impleading both the first and third hypothecatees, obtained decree, purchased the property himself in Court auction and sought delivery from the third defendant At the instance of the third defendant, however, the proclamation schedule in the plaintiff's execution proceedings was amended and the auction sale took place subject only to the charge created by the first hypothecation deed and the decree based thereon. The third defendant therefore objected to delivery in favour of the plaintiff without discharge of the first hypothecatee's rights to which he had been subrogated The Court below held that the third defendant could not resist delivery on the basis of the claim urged by him The third defendant appealed

Held (on preliminary objection as to maintainability of the appeal)—The appeal was maintainable inasmuch as the

third defendant's application to the Court below was made before actual delivery and therefore the matter fell clearly within the competence of the Court in execution and all questions arising between the decree-holder—auction-purchaser and the judgment-debtor or his representative till possession was delivered over to the auction-purchaser would fall within Section 40 of the Code.

Held further on the merits, allowing the third defendant's appeal:—In the matter of adjustment of the rights of rival mortgagees in execution proceedings, the Courts in this State, as Courts of equity, should take into consideration the equities of the parties before them and mete out substantial justice by passing appropriate orders The one important fact to be borne in mind in these matters, is that by adopting the principles of equity, the decree-holder should not be substantially prejudiced In the case, the application of the respondent to be put in possession was really an attempt to redeem the property He was justly bound to discharge the prior encumbrance more particularly as he had sold the property subject to the prior charge. If the appellant was directed to file a fresh suit, it was not unlikely that he would be met with the plea of limitation. In the circumstances, therefore, a direction that the respondent should deposit the amount mentioned in the proclamation schedule, as due on the first encumbrance, for payment over to the third defendant was only just—

23 T L J, *741*

23. The hypothecatee of the decree in O S. No. 494 of 1082 applied to be impleaded in execution proceedings in the place of the original decree-holders but was opposed by the decree-holders in two suits who had attached this decree. Their objection *inter alia* was that the hypothecation of the decree was unsupported by consideration The lower Court upheld the rights of the hypothecatee but made them subject to the claims of the other decree-holders. In appeal filed against this order by the hypothecatee, a preliminary objection was raised that the appeal was incompetent.

Held:—The order appealed against does not fall within the purview of Section 40 of the Code, and is not, therefore, appealable— 24 T L J, *114*

24. The power conferred by the proviso to Section 40 of the Code, to convert a suit into an application in execution, is subject to one important condition, *viz*, that the suit must be filed within the period of limitation allowed for applications under Section 40 A suit could not therefore be treated as an execution application where the effect of doing so would be to prejudice the defendant in his plea of limitation.— 24 T L J, *475*

25 The suit was to avoid an attachment placed on Tarwad properties, in execution of a decree obtained against two junior members only of the Tarwad and was filed by another junior member who had been impleaded in the execution proceedings as legal representative of one of the judgment-debtors. On the defence contention that the question should be agitated in execution and not by separate suit.

Held:—There being no decree against the Tarwad nor any impleading of the Karanavan, either in the suit which give rise to the decree or in the execution proceedings, this fresh suit to protect the Tarwad interests was not incompetent If there is a decree against the Karanavan of a Tarwad and the junior members are impleaded in execution as legal representatives, they ought to object in execution proceedings if they want to raise an objection to the execution against the Tarwad The test in such cases is in what capacity is the representative impleaded— 24 T L J, *555*

26 The suit is for cancellation of the execution proceedings in O S No. 581 of 1094 and the sale in which they culminated and in the alternative for recovery of damages. The decree in O S No 581 of 1094 was passed against the Karanavan of the plaintiff and the plaintiff was impleaded in execution as the legal representative of his deceased Karanavan

Held—The suit so far as it is concerned with the claim for the cancellation of the sale has to fail The permissible course for the plaintiff is to agitate the question of the validity of the sale in the execution Court itself and not by a regular suit A suit will lie to set aside a decree and a sale held in execution of such decree when both the sale and the decree are impeached on the ground of fraud, but no remedy is open by a separate suit to the judgment-debtor even though by fraud he may have been kept from knowledge of the execution proceedings until after the confirmation of a sale improperly obtained

In the case of non-payment of money undertaken by the defendant on behalf of the plaintiff, no matter what amount of inconvenience was sustained by the plaintiff, the measure of damages is the interest on the money only, and all other damage sustained by him as the result of the breach is remote.— 24 T L J 777

27 See also—
Sec 2 (2) — 20 T L J, 502
„ 48 — 23 T L J, 709
„ 109 — 23 T L J, 391
Or XXI, R. 13 — 20 T L J 497
„ R. 64.— 22 T L J, 888
38 T L R., 359
(=22 T L J., 1058)
22 T L J 1317
46 T L R, 406
(=23 T L J, 702)
„ R. 87 — 46 T L R., 267
(=22 T L J, 632)
„ R. 99 — 21 T L J 1329

Section 41.

1 Where an execution application was barred by limitation but execution had been ordered to proceed after notice to the judgment-debtor, it is not open to him in a subsequent application for execution to contend that the former application was barred by limitation Such contention must be considered to have been waived

Per Narayana Pillai J,—The time limit in Section 41 is capable of extension on the ground of the force and fraud of the judgment-debtor If therefore, the judgment-debtor keeps quiet on the receipt of a notice to take steps on an execution application beyond 12 years and the Court passes an order in favour of the decree-holder, the judgment debtor cannot be permitted to go behind that order at a later stage, for the objection, if any, raised at the proper stage might have been met by the decree-holder on the ground of his opponent's force or fraud —

21 T. L J, 881

2 On 4-7 1101 the decree-holder presented an execution petition in the Munsiff's Court in which he asked for permission to bring on record the legal representatives of the deceased first defendant, for the appointment of a guardian to the legal representatives of the first defendant, for the issue of a warrant to the third defendant and for proclamation and sale of the attached property This application is execution petition No 1317 of 1101 On this application notice was issued to the proposed guardian. The guardian accepted the notice on 16-7-1101. Nothing further appears to have been done in connection with application No 1317 While this application was pending, for some reason or other which is not apparent, the decree-holder on 9-12-1101 presented another fresh application (No. 2124) containing the same identical prayers as were contained in application No. 1317 This application was however dismissed

on 23-3-1102 for the default of the decree-holder in the payment of process fee. The decree-holder therefore on 24-4-1102 put in an application (No 492) praying that the application No 2124 of 9-12-1101 might be revived The third defendant objected on the ground that the application was barred as 12 years had already elapsed after the passing of the decree

Held—(1) The contention that at the moment when the decree-holder put in his application of 9-12-1101 (No 2124) containing the identical prayer contained in prior application (1317) of 4-7-1101, he must be deemed to have waived his right to proceed with the application of 4-7-1101, cannot be accepted The decree-holder had done every thing he was obliged to do in connection with the application of 4-7-1101 It remained for the Court to issue futher orders. If the Court had issued further orders as it ought to have done probably the application of 9-12-1101 would not have been made A party cannot be penalised for the acts or omissions of the Court

(2) There was no estoppel of the decree-holder in the circumstances. The contention that the order on the application of 24-4 1102 (No 492) precluded the decree-holder from applying for further execution on the ground of *res judicata*, cannot be given effect to. The application of 24-4-1102 was merely an application to revive the application of 9 12-1101 and all that the Court was bound to do was to decide whether it could be so revived The Court rightly or wrongly decided that it could not be so revived as the prior application was dismissed for the default of the decree-holder in the payment of the process fee. There was no obligation on the part of the decree holder to set up the ground of the pendency of application No 1317 in support of his application No 492 No doubt the principles of constructive *res judicata* is very often applied by way of analogy to cases of execution but it would be pushing the doctrine to absurd lengths to apply the principle to circumstances like the present.

(3) The application of 4-7-1101 must be deemed to be still pending and, therefore, there was no bar of limitation —

21 T L J, *759*

3 The decree was passed on 19-3-1095 An application for sale of the property of the judgment debtor was filed on 12-1-1105 but it was stayed by order of Court on 19-1-1105 Subsequently an application for the arrest of the judgment-debtor was filed and that was *rejected* on 22-12-1107 The last application for execution was filed on 10-1-1108, for steps against other properties and not against the property proclaimed for sale in 1105 It was contended that so long as the application dated 12 1-1105 remained undisposed of, any similar application for the same relief must be regarded as a continuation of that application, and not as a fresh one

Held —The question whether the subsequent application is only ancillary to the previous application or is a fresh one within the meaning of Section 41 of the Code depends on the circumstances of each case and though formerly there was a conflict of opinion among the British Indian High Courts regarding this matter, it has been authoritatively ruled that where during the pendency of an application for execution against one property, a subsequent application for execution against other properties is filed, the second application will be deemed to be a fresh application and if it is filed more than 12 years after the decree, it will be time-barred under Section 41 The application of 10-1-1108 was therefore a fresh application within the meaning of Section 41 and as it was filed more than 12 years after the date of the decree, it was time-barred — **24 T L J, 66**

4. A judgment-debtor who had not objected to an execution application of

which he had notice, though it was made after the statutory period of 12 years from the date of the decree and had allowed the Court to pass an order to the effect that it was within time, cannot at a subsequent stage turn round and say that execution is barred, without vacating the order previously passed adversely to him — 24 T L J, 656

5 In O S No 13 of 1091, the 3rd defendant was given a decree for costs against the 3rd plaintiff, the present appellant The decree was passed on 19-6-1093 The last application in execution within 12 years of the decree was made on 10-6-1105 in the Trivandrum District Court and in it the 3rd defendant prayed that the decree might be transferred to the District Court of Quilon for execution. That application was allowed The papers were received in the Quilon Court on 9-11-1105 and on the same day the 3rd defendant (respondent) applied for execution of his decree The 3rd plaintiff put in an objection alleging that the application for execution was barred under Section 41 of the Code. The lower Court allowed execution to proceed

Held—The application of 9-11-1105 cannot be deemed to be a revival or continuation of the former application of 10-6-1105 The former application was merely for a transfer of the decree although it was incidentally mentioned in that application that the applicant intended to execute the decree. When the application for transfer was granted that application spent itself and there was nothing further to be done. The two applications are quite different in their scope and character and the later application can in no sense be regarded as a revival or continuation of the earlier application The application of 9-11-1105 is barred by the 12 years rule under Section 41 of the Code — 24 T L J, 764

6. See also Or XXI, Rule 55 — 20 T L J, 898

Regn VI of 1100, Art. 166 } 21 T L J, 411

Section 43

The question arose whether an alienee of the judgment-debtor was his legal representative

Held—He could not be regarded as the legal representative of the deceased as he was not entitled to represent the estate of the deceased

The term "legal representative" has been used to meet the circumstances of a certain event, namely, the passing of the property the subject of the litigation on the death of the deceased judgment-debtor to his successor and to include such successor either to his estate or to the property in suit The legal representative must be one to whom property passes on death — 23 T L J, 801.

Section 44.

Section 44 enables the Court to allow execution of its decree by attachment and sale of any property Order XXI, Rule 62 lays down that a Court executing a decree *may* order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree shall be sold and that the proceeds of such sale, or a sufficient portion thereof shall be paid to the party entitled under the decree to receive the same. The word *may* in the Section has to be construed to be of a mandatory character If the conditions set forth in the above Rule, viz., the placing of an attachment on the properties by the Court before which a motion for sale is made, and the validity of the property in question to sale are held to be satisfied the application for sale of the same cannot be refused on some whimsical grounds by the Court, it being obligatory on the Court to order the sale in such cases.

If after publication in the manner prescribed in Order XXI, Rule 65 (1) read along with Rule 52 (2) bidders are seen to be not forthcoming means to secure a larger publicity should have been directed to be adopted The drastic method of exonerating the attached properties from liability for the decretal amount is clearly unjustifiable.— 20 T L J, *894*

Section 45.

The impleading of a legal representative of a deceased defendant would indicate that he is placed on record as the custodian of the assets of such deceased person or a person interested in such assets which may have to be proceeded against in execution of the decree that may be passed in the case The extent of the liability of the legal representative will have to be determined by the application of the principles underlying Section 45 of the Code, corresponding to Section 248 of the Code of 1065, whether his impleading is made before decree or only in execution. The imposition of a personal liability in a decree on legal representatives of defendants originally on record impleaded during suit in such capacity is clearly unjustifiable— 20 T L J, *1191*

Section 47

1 The judgment-debtor in the case was granted mohsul on the strength of a bond executed by the third respondent as surety by which he undertook to produce the judgment-debtor on all days fixed for appearance while on mohsul and in default, to pay the decree amount. While out on mohsul, the judgment-debtor escaped from custody On the decree-holder applying for execution against the surety :

Held—(1) The security bond cannot be deemed to be one executed or taken under the provisions of Section 47, clause (5), since the taking of security before ordering that the judgment-debtor should remain in the custody of an officer of the Court was not contemplated by the Section.

(2) The bond in question was unenforceable inasmuch as the judgment-debtor received no real benefit under the order of the Court, as a person on mohsul was to all intents and purposes as much under the control of the Court as one detained in the Civil jail and also because the surety was called upon to give an undertaking which he could not fulfil —

22 T L J, *383*

2 In the case of a breach of the conditions of a surety-bond executed under Section 47, Clause (4), the Court has power either to direct execution to proceed against the surety or to commit the debtor to the civil prison. The Court can do only either of this but cannot do both. If in exercise of its power, the Court directs the debtor to be committed to the civil prison, it becomes *functus officio* and can not thereafter turn against the surety All that the Court has got to do is to indicate by its order which course of action it proposed to take. When a Court has passed an order committing the debtor to prison it has done all it has to do. The payment of the subsistence allowance is a stop depending entirely on the decree-holder and when he has paid it, it does not require a further order of the Court to take the debtor to the jail The committing of the debtor to the civil prison does not mean actual incarceration in the civil jail, for however short a period. Hence the surety ceases to be liable even though the debtor happens to be released because of the non-payment of the subsistence allowance by the decree holder —

23 T L J, *518*

3. Where a surety-bond executed for purposes of enabling a judgment debtor under arrest to file an insolvency application contained an undertaking merely

for the production of the judgment-debtor *simpliciter* if he failed to apply for a declaration of insolvency within a month and on the judgment-debtor's failure to apply accordingly, the surety produced him before Court

Held—The surety was entitled to be released from any further liability under the surety-bond In the absence of an absolute undertaking of the wider obligation contemplated in Section 47, Clause (4), the surety could not be charged beyond the precise terms of his engagement

Per Chakko, J—Even if a security bond was one strictly within the letter and spirit of Section 47, Clause (4), there was nothing in the provisions of the Code to prevent a surety from coming forward at any time within the period specified in the bond and asking the Court to relieve him of any further liability, under the bond A security bond under Section 47 is in the nature of continuing guarantee and the surety is entitled to produce the judgment-debtor before the Court and request it to absolve him from further liability under the bond But the production of a judgment-debtor at a time when it is impossible for the Court or the decree-holder to take any steps to have the judgment-debtor taken into custody does not amount to his appearance when called upon to appear and the surety will not be discharged thereby—

49 T L R., *438*
(=23 T L J, *773*)

Fol 24 T L J, 792

4. A process server executing a warrant of arrest, has merely to take the judgment-debtor into custody and produce him before Court if he finds that the judgment-debtor could not or would not pay the entire decree amount He can release the judgment debtor if the whole decree debt is paid to him but when only a portion of the decree-debt is paid it is for the Court to exercise its discretion whether it would give the judgment-debtor further time to pay the balance The process server has no discretion to release the judgment-debtor in such a case even if the decree-holder agrees to such a course.—

24 T L J, *111*

5 A surety bond under Section 47, Clause 4, of the Code contained the usual undertaking that the judgment-debtor would file the insolvency petition within one month and for his production whenever the Court called upon the surety to produce the judgment-debtor Within a month the surety produced the judgment-debtor in Court and applied to be discharged from any further liability under the bond, the judgment-debtor having meanwhile filed the insolvency petition and there was no difficulty for the Court to arrange for taking the judgment debtor into custody when or immediately after he was so produced

Held—The eventual dismissal of the insolvency petition owing to the default of the judgment debtor did not fix any liability on the surety under the bond, because there was no duty on his part to see that the judgment-debtor pressed his petition in insolvency to a successful termination.

The security bond under Section 47 is in the nature of continuing guarantee and the surety is entitled to produce the judgment-debtor before the Court and request it to absolve him from further liability under the bond unless the production of the judgment-debtor was at a time when it was impossible for the Court or the decree-holder to take any steps to have the judgment-debtor taken into custody If the decree-holder was not present when the judgment-debtor was produced in Court, notice could have been sent to him to appear on a certain day The Court could have adjourned the matter pending the appearance of the decree-holder and meanwhile if necessary asked the sureties to produce the judgment-debtor on the day

fixed for the appearance of the decree holder— 24 T L J, 792

Section 48

A judgment-debtor arrested in execution and let out on mohsul to enable him to pay the judgment debt may, even after expiry of the mohsul period, apply under Section 48, Clause (4), of the Code, to be released from arrest for applying to be declared an insolvent The Section does not say that the judgment-debtor should express his intention to apply to be declared an insolvent as soon as he is brought to Court under arrest Looking to the spirit of the provisions, it does not seem that a judgment-debtor should be made to forego the right given to him, under the Section because of an endeavour, perhaps quite honest, made by him to settle the claims of the decree-holder.

An order directing the arrest or detention of a judgment-debtor made in execution of a decree, is to be treated as an order under Section 40, and therefore, is appealable Section 82, Clause (g) does not conclude the matter—

23 T L J, 709

Section 52.

1 In the case of a sale where the vendee has not paid the price, the vendor has a property in the price, which can be attached under Section 52, clause (e) It is not a mere right to sue but is an ascertained sum of money

In general, whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other a debt is said to exist between the parties. If on the other hand, the demand be of uncertain amount, it is not a debt but a claim for damages.—

20 T. L. J., 904

2 The plaintiff and 2nd defendant were members of an undivided Variyar family and the plaint property which belonged to the Manampoor Devaswom had been demised to the plaintiff's family as Karaima for the performance of certain services to be rendered to the Devaswom The 1st defendant obtained a decree for money against the defendant in O S No 706 of 1083 on the file of the Attingal Munsiff's Court and in execution thereof he attached the plaint property, brought it to sale and purchased it himself on 17-8-1097 The suit was to set aside the decree and execution proceedings The Courts below held that the plaint property was held as Karaima for services rendered to the Devaswom, that it was therefore inalienable and could not be sold in execution of the decree obtained by the 1st defendant

Held —In the case of Service Inam Tenures, they are, by their very nature, inalienable and the holders for the time being, have therefore, no disposing power over them as is contemplated by Section 52 of the C P C They can, therefore, neither be alienated voluntarily nor by operation of law such as by Court sale —

46 T L R., 59

3 It was contended by the defendant that Pushpanjali dues were gratuitous payment in the nature of honoraria and thus non-attachable

Held —The question is whether the amount in question has become due to the defendant, apart from the theory on which the payment is founded and fictions disguising the motives for the payment. If the amount is not due to the defendant, there is nothing to attach and the defendant cannot complain of the attachment In such a case the party who proposes to make the payment can withhold it on the ground that such party is under no obligation to discharge the debt due from the defendant. If on the other hand the money has become due to the defendant, there is no provision of law which exempts the amount in question from attachment.— 21 T L J., 89.

4 See also—
Sec 8— 46 T L R, 983
(=22 T L J, 968).
Regn I of 1090—46 T L R, 808
(=20 T L J, 1032)
47 T L R, 114
(=21 T L J, 817)

Section 55

Under Section 55 of the Code, it is the Court of the superior grade that has to conduct the proceedings where more than one Court has placed an attachment upon properties belonging to the same judgment-debtor The right of the attaching creditors under the decrees of the other Court is for moving for a rateable distribution of the assets realised by sale, by virtue of the provisions of Section 59 of the Code Section 52 enables a party aggrieved by an order allowing rateable distribution to be paid to a person not entitled to the same to sue such person to compel the refund of such assets The scheme of this provision is rather to enable the Judge as a matter of administration to distribute the prize according to what seems at the time to be the rights of parties without importing a conclusive adjudication on those rights which may be subsequently readjusted by a suit

The question of fraud with respect to the decree of one of the attaching creditors could not appropriately, be gone into by the executing Court

The according of leave to the attaching decree-holder of the Superior Court to bid at the auction and to credit his decretal amount towards the purchase money contravenes Order XXI, Rule 68 and Rule 185 of the Civil Courts Guide and consequently could not be allowed. It is incumbent on the Court to insist upon the production in Court of the purchase money except with reference to those relating to the items of properties over which a charge had been created under the decree. The sale amounts with respect to those items could be given credit to towards the amount under the decree
20 T L J, 458

Section 57

It was contended in appeal for the defendant-appellant that since the title of the respondent-auction purchaser would arise only on the confirmation of the Court sale, the lower Court was not justified in appointing a receiver on the application of the auction-purchaser at that stage (i e., before the confirmation of the sale)

Held (*Per Narayana Pillai, J.*)—The contention evidently overlooks Section 57 of the Code of 1100 which says that where immovable property is sold in execution of a decree and such sale has become absolute the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute In this respect the present Code has modified the law as it existed before its enactment Now a Court sale passes title subject to defeasance on certain specified grounds. The result of an execution sale is that the judgment-debtor ceases to have any interest in the property and the same passes to the purchaser An auction purchaser is entitled to claim profits and accretions and has to put up with any loss or deterioration from the date of the sale.
21 T L J, 1289
Ref—22 T L J, 750

Section 58.

1 The prohibition regarding the maintainability of suits contained in Section 58 would probably not apply to a defence that the certified purchase in Court auction has been made benami on behalf of the person setting up the same or his predecessor in interest.

For the purpose whether the evidence supports the plea of benami set up in a

case the source of the funds for getting the sale may be a material factor, though this cannot be considered to be the sole determining criterion, the question being always one of intention This intention has to be gathered from a consideration of the whole evidence in the case

" "

When property is standing in the name of a person, the burden of proof is on him, who contests that person's title to make out that the transaction on which such title is based, is *benami*

The circumstances that a former owner of properties continued to pay the tax for those properties even after their delivery in pursuance of a Court sale in execution of a decree against such owner cannot *per se* militate against the transfer of possession expressly referred to in the delivery list, for such payment will not by itself create title. Such payment cannot also be held sufficient to conclusively make out the continuance of possession with the former owner

Under Section 7 of the Limitation Regulation of 1100 the time during which the period of minority continues has to be excluded for purpose of limitation In this respect the law here is different from that in *British India*, for under the Limitation Act (in force there), exemption is allowed only where the disability existed at the time when a right of action first accrued There is no provision in British India corresponding to Section 7 suspending the period of limitation even after it had begun to run by reason of the disability of the plaintiff or the applicant

A Proverthicar's report does not belong to the class of documents, which could be admitted in evidence without proof *alsunde* as it could not be deemed to be a public document as contemplated in Section 74 of the Evidence Act.—

46 T L R., 415
(=20 T L J., 1053).

2 The plaintiff and defendant obtained different decrees against the same Company The defendant entered into a contract with the plaintiff, that he would purchase in Court auction building, etc, of the Company and that the proceeds thereof would be distributed between them in proportion to their decree-amounts, with a view to avoid other decree-holders coming in for ratable distribution. The plaintiff brought a suit based on the contract The defendant contended that the suit was barred by Section 314 old C P C (new C P C Section 58) and that the contract on which the suit was based was unenforceable and illegal as being opposed to public policy

Held—There is very weighty authority for the view that a suit based on a prior agreement to purchase and reconvey is not a suit of the nature contemplated by Section 314 As the Section is aimed at secret purchase, it can relate only to *benami* purchases as such. When the plaintiff sues for conveyance to him of the property on the strength of a contract antecedent to the Court sale, he does not dispute the title obtained under the purchase but admits it and prays for transfer to himself Unless the plaintiff's claim is based on an alleged *benami* purchase his suit would not fall within the scope of Section 314. The plaintiff's prayer in the suit is only for a proportionate discharge of his claim against the common debtor, out of the assets, which had passed to the defendant under the Court sale.

So long as the validity of the claim of the parties was indisputable their desire to take steps to prevent avoidable loss was justifiable and any agreement which they entered into with that desire and for that purpose cannot be regarded as mischievous or opposed to public policy The suit is therefore maintainable and is not obnoxious to Section 314.—

46 T L R., 309
(=22 T L J., 868).

Section 59

1 The order requisitioning the transfer of the amount by the attaching Court could not constitute receipt of the amount within the meaning of Section 59 In the case, the Court in custody of the amount and the Court which had to pay the amount in execution were not the same. The amount could be said to have been received by the executing Court only when a cheque had been actually received there from the Court in whose custody the amount originally was The provisions of Order XXI, Rule 50, with respect to attachment of property in the custody of another Court could not apply in determining the date on which such property might be deemed to have been received by the Court executing the decree Under the Section, the assets have to be actually received in Court, and only those who make applications for ratable distribution after that date could be refused reliefs in that behalf — **46 T L R**, *4* (=20 T L J, *928*).

2. The decree-holder in O S No 39 of 1102 on the file of the District Court, Nagercoil, obtained a decree for money against the defendants 1 to 4 in the suit as the representatives of their deceased father Money was due to the decree-holder in that suit from the father and after his death, a suit was brought against his sons, the defendants 1 to 4, and a decree was obtained against the assets of the father. Subsequent to this, the revision petitioner obtained a money decree in O S No. 2068 of 1102 in the Additional Munsiff's Court of Nagercoil against the second defendant personally in his individual capacity On the strength of this decree the present petitioner applied for ratable distribution of the money realised in execution of the decree in O. S No. 39

Held—It cannot be said that the decree obtained against defendants 1 to 4 as legal representatives of their father and the decree obtained against second defendant alone personally, in his individual capacity are decrees against the same judgment debtor within the meaning of Section 59

It cannot be laid down as a hard and fast rule that in no case will the High Court interfere in revision merely because a separate remedy is provided by law Cases are easily imaginable in which it would obviously be for the advantages of both parties that the High Court should interfere in revision instead of driving the parties to the expense and trouble of an original suit In certain cases to refuse the remedy by way of revision would work considerable hardship and even injustice In such cases unless there is something in the Statute which either expressly or by necessary implication prohibits the party from applying in revision to the High Court, the High Court will and ought to interfere

Whether the case is a fit and proper one for interference in revision is always a question depending on the circumstances of each case — **22 T L J**, *13*

3 Certain movables belonging to the defendant in O. S No 262 of 1105 were attached before judgment and sold by the Court to avoid loss and waste On the suit being decreed the plaintiff applied for payment out of the sale proceeds, towards his decree but as the movables had been attached before judgment in another suit O S No 386 of 1105 against the same defendant, the plaintiff was allowed to draw the same only on the strength of a security bond providing for refund into Court. The suit O S 386 was subsequently decreed and the decree-holder in *O S No 386 applied for ratable distribution* of the sale proceeds.

Held—The amount in question could not be said to be 'assets realised within the meaning of Section 59, either on the date of the sale of the movables because the sale was not in execution or on the date of the payment to the

decree-holder in O S No 262, since such payment was only pursuant to his security bond and not on the strength of any execution application And as no order had been passed transferring the fund in Court to the credit of the decree in O S No 262, the rival decree-holder was entitled to apply for ratable distribution and for that purpose to compel the bringing back of the amount into Court —

22 T L J, *356*

4. It is no doubt true that ratable distribution can be allowed under Section 59 only where the decrees under execution are against the 'same judgment debtor' In the case the applicants for ratable distribution have, all of them, obtained decrees against the same judgment-debtor The origin of the debt which culminated in the decree cannot make any difference Neither would the assets made liable under the decree, provided they belong to the judgment-debtor, make any difference There was no case of the bankruptcy of the foreman The money due from the subscribers belongs to the foreman in such circumstances. The foreman does not represent the subscribers in the normal nature of the chitty scheme —

22 T L J, *788*

5. Where property subject to two encumbrances, is sold in Court auction to satisfy the first encumbrancer, two courses are open to the subsequent encumbrancer not impleaded in the suit on the prior encumbrance He could ignore the sale and seek to sell the property subject to the first charge or he could accept the sale as proper and apply under Section 59 (1), Clause (*c*) On such application under Section 59 and acceptance of the proceeds of the sale, the subsequent encumbrancer must be deemed to have admitted the propriety of the sale and his claim over the property being satisfied *pro tanto*, he cannot have any right to sell the property over again subject to the first charge. The fact that, instead of applying under Section 59, he attaches the surplus proceeds and gets the same paid to him by the Court does not make any difference. For in such cases the amount received by him must be regarded as having been paid to him under the provisions of Section 59 (1), Clause (*c*) — 49 T L R., *305*

(=23 T L J, *59*)

6 The revision petitioner decree-holder obtained decree for money against the first defendant who was a Proverthikaran, and in execution, applied for attachment of his security deposit in the Pathanamthitta Taluk Treasury A certain amount was accordingly attached There were two other attachments of the amount in execution of the decrees in O S No 1669 of 1102 and O S No 374 of 1103 of the Quilon Munsiff's Court about which some correspondence ensued and eventually on 12-7-1107, Rs. 250 odd was transferred to the credit of the Court that issued the attachment order, and communication to that effect was received in that Court on 14-7 1107 On 20-7-1107 certificates arrived from the Quilon Court in connection with the above two cases and on 30-9-1107 the two decree-holders applied for ratable distribution. The lower Court allowed the money to be ratably distributed

Held (in revision)—It has been held more than once that five conditions should be fulfilled so as to enable a decree-holder to participate in the assets under Section 292 of the Code of 1065, one of the conditions being that the decree-holder's application for execution of his decree to the Court which held the assets should have been made prior to their realisation. Though in some respects there is variation between the Section of the old Code and Section 59, the corresponding provision of Regulation VIII of 1100, these conditions are even now applicable so that unless all those conditions are fulfilled, no ratable distribution can be permitted. The receipt of the assets by the Court virtually took

place when the adjustment was made in the account

Money in the custody of a public officer attached under Order XXI, Rule 50 of the Code and paid into Court are assets available for ratable distribution —
25 T L J, *107*

7 See also Sec 55 — 20 T L. J, *488*

Section 65.

1 The Judge cannot modify the language of a Statute or add to or take away from its terms to bring it in consonance with his own views as to what is right or reasonable If the language in a Statute is clear, Courts have not to look to the consequences however inconvenient or even mischievous they may be. In such cases, the suffering citizen has to appeal to the law giver, the Courts having only to expound the law as it is. The argument of *ab inconvenienti* could be availed of by the Courts only where the meaning of a Statute is obscure

Tested in the light of the above principles, it is clear that the Legislature has laid down the service of a notice of the kind indicated in Section 65 before the period prescribed therein, as a condition precedent to the institution of a suit against the Dewan of Travancore The necessity of such a notice is not restricted to any particular class of suits, or to those wherein certain kinds of reliefs only are claimed A restrictive construction of the kind cannot be made in view of the unambiguous wording of the Section.

The intention of the Legislature is that in the case of suits against the Dewan of Travancore a notice is imperative whatever may be the nature of the act upon which the action is founded The expression "purporting to be done' has no reference to such suits. In the case of public officers, a notice can be insisted on only if the act on which the suit is based is one purporting to have been done by them in that capacity

The power of striking off a party on record conferred on the Court by Order I, Rule 10, Sub-rule (2), should not be exercised arbitrarily but only judicially, i e, only in cases where the presence of such party on record is considered unnecessary by the Court with due reference to the facts alleged and the reliefs claimed in the suit The exercise of this power with a view to defeat an express provision of the Statute as required now is clearly not permissible — 46 T L R, *494*
(=20 T L J, *1104*)

Ref —48 T L R, 37 (=22 T L J, 122)

2 Where in a suit against the Sirkar by the three plaintiffs having distinct interests in the suit property, it was found that the notice of suit was sent only by the first plaintiff's husband along with the plaintiffs 2 and 3

Held —The notice of suit was inadequate as regards first plaintiff but adequate as regards plaintiffs 2 and 3 The fact that a reference was made in the notice to a claim by the first plaintiff's husband who had not joined in the suit would not invalidate the notice as regards the second and third plaintiffs —
22 T L. J, *1077*

3 Notice of suit issued to the Sirkar did not give the names of the plaintiff or plaintiffs, their residences or descriptions but simply mentioned that it was issued on behalf of the villagers or Oorukars of a particular street

Held —There was no sufficient compliance with the requirements of Section 65 of the Code. The object of the Section is to give the Government an opportunity of settling the claims, if so advised, without litigation, but this object could not be achieved since the names of the plaintiffs, their residences and descriptions had been withheld The result of holding the notice to be sufficient would be to compel

the Government or the Dewan to speculate or ascertain by enquiry perhaps of a laborious kind who the possible plaintiff or plaintiffs might be.— 23 T. L. J., 787.

2. See also Regn V of 1095, Sec 48 — 48 T. L. R., 87.
(=22 T. L. J., 122)

Section 68

Originally in England, a very strict view was taken as to the conditions in which an interpleader suit might be brought But since the passing of the Common Law Procedure Act 1860, greater latitude has been allowed so that it is now possible in England for a party to sue even though he does not admit that the full amount claimed by the defendants or some of them is due and even though the rights claimed by the defendants may not be co-extensive The principles underlying that Statute may be followed here in so far as they are not inconsistent with our Statute law

Where the plaintiff, in an interpleader suit has made a calculation as to what is due to one or other of the defendants and has brought it into Court, the mere fact that he may have, by a miscalculation, deposited an amount somewhat less than what was actually due will not prevent him from maintaining the interpleader suit. Section 68 does not seem by the words thereof to render it necessary that the parties should be agreed as to the exact amount due in respect of the debt, provided that there is no doubt as to the identity of the debt. To hold otherwise would be to permit a defendant in an interpleader suit to defeat the suit by pleading that he was entitled to a few annas more than what was admitted by the plaintiff Having placed the object of the suit before the Court, the proper course for the plaintiff to adopt is to leave it to the defendants to fight out their claims without himself taking part in the controversy He ought not to give the impression of siding with any one of the claimants as against the other —

22 T. L. J., 468.

Sections 72 & 73.

1. When reliefs like the removal of trustees, appointment of new trustees, and settlement of a scheme are prayed for by two or more persons acting on behalf of the public, the sanction of the Dewan is indispensable.

If the suit is not a representative one, as where one trustee sues a co-trustee for accounts, no sanction may be necessary.—

20 T. L. J., 722.

2. If the Court's aid is sought for to make the allocation the provisions of Section 73, clause (c), must be deemed to be applicable irrespective of the question as to whether the allocation has to be decided for the first time by the Court or whether such allocation has been already decided upon by the parties concerned

"Further or other relief" in Section 72, clause (h), must be read with the previous clauses, and prayers which are more or less *ejusdem generis* with the reliefs set forth in the preceding seven clauses alone, could be brought within the purview thereof

Government sanction under Section 72 was mandatory for, in the Code of 1100, a specific provision has been made in Section 73, whereby, suits claiming any of the reliefs specified in Section 72 were declared not liable to be instituted in respect of any trust, as is referred to in that Section except in conformity with the provisions of that Section save as provided by the Religious Endowments Regulation III of 1079.

(The rule in 30 T. L. R., 91 is no longer applicable, as the same was decided under the Civil Procedure Code of 1065, and as the statutory prohibition considered necessary for creating a bar to such suits, is

that decision, has been expressly provided for under the new Code) —

20 T L J, *1188.*

3. The suit was filed by a villager of Kalkulam for rendition of accounts and for recovery of money and movables alleged to have been misappropriated by the defendants while the latter were trustees of the Pillayar Temple. The 1st defendant contended *inter alia* that the suit was not maintainable without the sanction of the Dewan under Section 72 C. P C The lower Court overruled this contention. On revision by the 1st defendant

Held.—In deciding a matter relating to the jurisdiction of the Court to entertain a suit, the Court should base its conclusions on the allegations contained in the plaint and unless it is clearly proved that the facts alleged bring it within any of the restrictive provisions of the Code, the Court should ordinarily adopt the view that the suit is maintainable. Each case has to be decided on a construction of the pleadings and a careful consideration of the facts of that case.

In dealing with the scope of Section 72, the question mainly to be considered is the nature of the reliefs sought. A suit instituted under Section 72, must be one in which it is sought to obtain a direction of the Court for the further and better administration of the trust. The character of the plaintiff's suit is the deciding factor and it must be determined by considering the allegations in the plaint —

21 T L. J, *85*

4. The suit was brought by certain villagers to remove the members of the Managing Committee who were looking after the affairs of the village and was filed before the new Civil Procedure Code came into force. On objection raised by the defence, that the suit was not maintainable without the Dewan's previous sanction as required by Sections 72 and 73 of the new Code

Held —The old Code applied, and the Dewan's sanction was not essential Before the enactment of the new Code, parties had a right to bring suit of the present nature without previously getting the Dewan's sanction. Such vested rights could be taken away only by express provisions in the Statute subsequently passed The general presumption that rules of procedure have retrospective effect is not applicable to cases of this kind —

22 T L J, *787.*

5 The defendant founded a trust which partook of the characteristics of both a Mutt and a religious and charitable institution under a deed of declaration executed by him Provision was made for the worship of Iswara and Ganapathy and for the feeding of Sadhus from out of the properties set apart The plaintiff who was already a Sanyasin was to be the head and Karmakartha of the institution, but the defendant reserved during his life-time the right of supervision and carrying out things necessary for the advancement of the institution and in this behalf to frame rules as may be found necessary in furtherance of the trust. Subsequent to the effectuation of the trust, however, the defendant purported by another deed to nullify the original deed of trust, not only as regards the power of the plaintiff but also the very object of the trust The present suit was for cancellation of the subsequent deed and for declaration of title to and possession of the properties dedicated and for incidental reliefs

Held.—Sanction of the Government under Section 72 of the Code is unnecessary for the institution of the suit, for even if it were a public charity to necessitate such sanction, the suit must be for one of the reliefs specified in Clauses (*a*) to (*h*) of that Section. The Section governs only suits for vindication of the rights of the public in public charitable trusts, and has no application to suits for vindication

of plaintiff's rights of management and getting possession for management of the trust properties.

The composite character of the institution founded, did not make the endowment invalid The trust cannot also fail on the ground of uncertainty

The trust constituted under the deed of endowment was of a public character For ordinarily a Mutt is a public endowment and one spiritually developed as the plaintiff could be expected to benefit the public that may chance to come under his influence The provision for feeding the Sadhus which may mean Sanyasins and the poor was another test of the public character of the endowment

The subsequent deed executed by defendant which had the effect of nullifying the original deed of trust was without authority The defendant could not have anything more than the rights of a founder of a religious and charitable institution, the plaintiff being the accredited trustee. In such cases the defendant had no power of revocation for in the absence of fraud, undue influence and misrepresentation, if a valid dedication has once been completed there would be no power in the donor to revoke it The relieving of the plaintiff of his functions was even by itself, beyond the authority of the defendant. The proper course then was to bring a suit for the removal of the trustee and for other appropriate reliefs and not to take the law into his own hands.—

24 T L. J., *166*

Section 74

1 An attachment is not operative against the whole world The transfer of a property under attachment is voidable only against claims enforceable under the attachment. The expression 'claims enforceable under the attachment' has been judicially interpreted as meaning 'claims legally enforceable under the attachment', and to see what was so legally enforceable, recourse may be had to the decree. An attachment is a restraint placed on alienations by the decree-debtor If the property attached does not belong to the decree-debtor the judgment-creditor can have no claim enforceable against it pursuant to the attachment, and the rightful owner can certainly alienate it—

46 T L. R, *256*

2. On the question of the jurisdiction of the Court to appoint a receiver in a suit brought on a hypothecation bond

Held —The preponderance of authority appears to be that, where there are arrears of interest or where the hypotheca has fallen in value, a receiver may be appointed by the Court to take possession and manage the hypotheca—

23 T L J, *230*

3. The issue of an interim attachment is a very extraordinary remedy to be sparingly used in exceptional cases. It is a very unwholesome practice to grant interim attachment as a matter of course merely for the asking without seriously considering the question whether the circumstance of the case do justify the granting of such an extraordinary remedy as an order of interim attachment. 23 T L J, *466*

4. In a suit for declaration that the plaintiff was not the legally wedded husband of the first defendant and that the second defendant was not born for the plaintiff to first defendant, the plaintiff contested the correctness of an order for maintenance already passed against him, by the Magistrate in proceedings under Section 366 of the Criminal Procedure Code (which order had been upheld in revision by the High Court) Pending suit the plaintiff applied to restrain the defendants from executing the order for maintenance they had obtained but the primary Court dismissed the application, *in limine*, relying in 18 T L J, 694.

Held.—Though it was possible to accept the contention of the plaintiff that the

existence of the order for maintenance was not a bar to restrain the execution of the same, on a civil suit being filed and that therefore the Court below would have done well to consider the plaintiff's application on the merits, still, inasmuch as it was clear that the equities were in favour of the defendants and that the plaintiff had not made out a *prima facie* case, the order of the lower Court could not be interfered with — 24 T L J., 527

5 Once the appointment of a Receiver is perfected, though it does not affect the title of strangers with paramount rights, unless they are in possession or have those rights expressly protected by the order, they must obtain leave of the Court before dealing with the property and in the case of other strangers leave is even more necessary Such leave must be the leave of the Court which made the appointment

Where the lower Court passed an order for delivery in favour of a purchaser in Court auction, but a Receiver had been appointed over the property by another Court, prior to the order for delivery though subsequent to the Court auction

Held (in revision by the Receiver).—The lower Court committed an irregularity which the High Court in its discretion ought to correct — 24 T L J, 654

6 The plaintiff was appointed receiver *pendente lite* of property sought to be recovered by him in the suit, but on his failure to carry out the conditions imposed by the Court, he was removed from office and thereupon he appealed

Held.—The appointment as well as the dismissal of a receiver is a matter which rests entirely in the discretion of the Court But a person chosen thus, should as a general rule be wholly disinterested in the subject matter of the suit One of the parties to a cause shall not be appointed receiver, without the consent of the other party unless a very special case is made out — 24 T L J., 705.

Section 76.

1 The correct position in respect of the question in what cases an application to set aside an *ex parte* decree is competent notwithstanding the fact that an appeal was preferred and had been disposed of is this —

(1) Where a defendant against whom an *ex parte* decree is passed, applies to set it aside and at the same time prefers an appeal from the decree, the original Court ceases to have any jurisdiction in the matter

(2) Where the *ex parte* decree has been confirmed or otherwise disposed of in appeal, the original Court has no jurisdiction to deal with such applications *even* though they were made before the appeal was filed

(3) The same principles will hold good *even* though another party to the suit it is that has filed the appeal, if the decree is an indivisible one.

(4) If, however, the decree can be treated as composed of different parts, and the portion appealed against can be said to be quite independent of those likely to be in controversy, by reason of the re-opening of the *ex parte* decree so far as the defendant was concerned, the original Court will have jurisdiction to deal with the matter — 20 T L J, 485

2. Costs of witnesses summoned but not examined cannot be charged against any party

The competency of an appeal to treat the lower Court decision as wrong for the purpose of costs, while allowing the decision on the main point of dispute to stand, is doubted — 21 T L J, 269

3. *Per Narayana Pillai, J*—Generally speaking, it is undesirable for an Appellate Court to interfere with a finding of

fact especially where the issue is straight and simple or to differ from the trial Court which sees and hears the witnesses and the view of the trial Judge as to the credibility of the witnesses should not be put aside on a mere calculation of probabilities by the Appellate Court No doubt the doctrine should not be made a fetish of and where the question does not depend upon witnesses' demeanour, but upon inference from facts the Appellate Court is as good a judge of facts as the trial Court If all that the appellant can show amounts only to nicely balanced calculations which lead to nothing more than an equal possibility of the judgment on either the one side or the other, being right, he cannot succeed —

21 T L J, *1082*

4. At the present day, it is almost a truism to say that in all cases in which the evidence is conflicting, it is the duty of a Court of appeal to have great regard to the opinion formed by the Judge in whose presence the witnesses gave their evidence as to the degree of credit to be given to it,

If all that the appellant could show is a nicely balanced calculation which leads to the equal possibility of the judgment on either the one side or the other being right, the appellate Court should not interfere with the verdict of the trial Court —

23 T L J, *790*

5 In a civil case as opposed to a criminal trial, the appellate Court must be convinced before reversing a finding of fact by a lower Court that the finding is wrong. The burden of showing that the judgment appealed from is wrong lies upon the appellant If all he can show is nicely balanced considerations which lead to the equal possibility of the judgment on either the one side or the other being right, the appellant does not succeed — 24 T L. J, *518*

6. When an appeal attacks the exercise of discretion by the original Court in the matter of either allowing or withholding an injunction, before the appellate Court will interfere in favour of the appellant, he must satisfy such Court that this discretion has been improperly exercised,— 25 T L J, *696*

7 See also Sec 40 — 21 T. L J, *1175.*

Section 77

In a suit for partition the Court below first passed a preliminary decree reserving consideration of some items to a future stage. Subsequently, it passed a second preliminary decree also incomplete as it provided for supplemental proceedings for the determination of the rights of the parties in the items left over for future consideration Finally it entered judgment containing such determination In appeal against this judgment which constituted a supplemental preliminary decree, it was contended by the respondent that the appeal was not maintainable, on the ground that it was neither a preliminary nor a final decree

Held —The appeal was maintainable since in appropriate cases more preliminary decrees than one may be passed by a Court and the Civil Procedure Code did not prohibit such a course.—

22 T L J, *504*

Section 78.

In redemption suits, none except the parties to the mortgage or their representatives in interest should be impleaded ordinarily, and as a rule no question of the title of a third party should be allowed to be raised There is no distinction between suits for redemption and suits for sale as regards joinder of parties.

In the case, in the appeal preferred to the lower Appellate Court by a defendant, question of misjoinder raised by the first issue in the trial Court was dropped and

the Appellate Court was invited to consider the question of title irregularly raised

The lower Appellate Court *suo motu* raised the question of misjoinder after it was purposely dropped by the party against whom it was decided by the original Court, set aside the decree of the trial Court and remanded the suit for decision *de novo*

Under Section 78 of the Code, no decree shall be reversed and the case remanded for appeal on the ground of misjoinder, error or defect not affecting the merits of the case or the jurisdiction of the Court.

Where a party to a redemption suit joins issues on the question of title which does not legitimately arise for consideration and takes the chance of a decree in his favour, he cannot be permitted to veer round and nullify the effect of the pronouncement against him by a belated resort to the irregular way in which the issue was brought up for decision—

20 T L J, *423*

Ref—20 T L J, 601

Section 79.

1. *Per Narayana Pillai, J*—A second appeal on a question of fact will not be precluded where the finding of fact is based on a misconception of what the evidence is or on evidence materially misread and misunderstood—

20 T L J, *133*

2. An inference from facts admitted or proved may under certain circumstances be a question of law, but is not necessarily a question of law, and where the conclusions arrived at by the Court below is one which hinges upon a balance of evidence produced in a case the said conclusion *is* one of fact and not of law—

20 T L J, *524*

3. A point not raised in appeal, cannot be permitted to be raised in special appeal. New points even of law cannot be raised in second appeal, when they were not taken in appeal unless good grounds are shown for their omission—

21 T L J, *255*

4. In general, the High Court will not interfere with the concurrent findings of fact unless there has been a miscarriage of justice or that any principles of law or of procedure have been violated in the Courts below The expression 'miscarriage of justice' means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all An inadequate appreciation of the evidence in a case does not amount to a miscarriage of justice.

"The rule is a rule as to concurrent findings and not a rule as to concurrent reasons."

It has been the uniform and long standing practice of the High Court not to interfere with findings of fact arrived at *concurrently by two Courts* and this uniform and long standing practice cannot be interfered with unless it can be shown that the practice is *manifestly unjust* or contrary to law— 21 T L J, *578*

5. To uphold a concurrent finding of fact all that is necessary is that the Courts below should concurrently find on the *question of fact* and not that the reasonings of the Courts below should be concurrent. The Courts below might come to the same conclusion on a *question of* fact but by a different process of reasoning. None the less the conclusion is a concurrent finding of fact. In other words "the rule is a rule as to concurrent findings and not a rule as to concurrent reasons"— 23 T L J, *537*

6. Granting that there was room for a different view were the *case heard as a* first appeal, it by no means followed that the course was so free as that in second appeal. Section 80 precluded a second

appeal except on the grounds specified in Section 79 An erroneous finding of fact was a different thing from an error or defect in procedure and there was no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be, provided the Appellate Court had before it evidence proper for its consideration in support of its finding — 22 T L J, *898*

7 See also Sec 40 — 21 T L J, *1175*

Section 82

1. No appeal lies from an order dismissing on the objection of the defendant, the application of a person to be brought on record as a legal representative of the deceased plaintiff even when there is no rival claimant to be brought on the record as the legal representative —

21 T L J, *1184*

2. On an application to set aside a Court sale, the Court passed the following order "The auction sale will be set aside provided the amount due to the decree-holder is deposited in Court within two weeks, failure whereof will cause the dismissal of the petition with costs to the decree-holder' Failing to satisfy the condition imposed by the lower Court, the appellant preferred the appeal against the order

Held —The order was not appealable as it was only a conditional order The test in determining whether an order is final or conditional is whether on failure of the condition prescribed the rejection of the petition follows automatically or whether any further order has to be passed. In the former case it is final, in the latter it is conditional In the case the petition did not stand dismissed automatically A fresh order had to be passed.—

21 T L J, *1173*

3. The decree in the case comprised 4 items of properties. When execution was commenced by the decree-holder, the second defendant petitioned to the Execution Court that defendants 1 to 3 had executed a sale deed to fourth defendant in respect of item No 4 reciting payment of a portion of the decree amount and that item No 4 should first be sold and only for the balance could the other items be proceeded against This petition was allowed However, at the time of the sale, either by a mistake or owing to ignorance of the prior order, items 1 to 3 were sold The second defendant instead of applying to set aside the sale on the ground of irregularity preferred an appeal to the District Court against 'the order *implied in allowing the bid of the properties*' and filed along with the memorandum of appeal a copy of the auction list and the appeal was allowed and the sale set aside

Held —Under the provisions of Section 82 and Order XLII, which provide for appeals against orders, an Appellate Court will have jurisdiction to question an auction sale in execution proceedings only when an appeal is preferred against an order passed by the Court executing the decree either under Order XXI, Rule 86 or Rule 87 Of course any order falling under Section 40 has the force of a decree and is appealable in spite of the provisions of Section 82 or Order 42, but the act of accepting the bid by an auction purchaser (as complained against in the case) did not involve any of the questions contemplated by Section 40 The appeal before the District Court was not therefore competent and should have been dismissed

On the contention that the appeal memorandum filed in the District Court might be treated as an application for cancellation of the sale

Held.—Though a plaint filed in a Court may be treated as an application for execution in certain circumstances and *vice versa*, there was absolutely no rule of law empowering the Court to treat an appeal

memorandum presented before one Court as an original application made to a subordinate Court — 22 T L J., *695*

4. No appeal lies from an order deciding the question of the jurisdiction of the Court to entertain a suit

The order of the District Judge dismissing the appeal would not fall under any of the appealable orders enumerated in Clauses *(a)* to *(h)* of Section 82. Even if it did under Clause (2), second appeals against orders of the first Appellate Court are not allowed Order XLII enumerates 27 cases where appeals are permitted. The order in question did not fall under any one of them There also, no provision is made for second appeals,— 23 T L J, *875*

5. See also,—

Sec 40 —	21 T L J, *1175*
„ 48 —	23 T L J, *709*
Or XXXIX —	46 T L R, *30* (=20 T L J, *667*)
Or XLII R 1 —	21 T L J, *562*

Section 85

See also Sec 40 —	22 T L J., *1014*
Or I, R. 10 —	20 T L J, *117*

Section 88

When a suit was dismissed for want of succession certificate, but the plaintiff had failed to obtain it in the form that he wanted until after the dismissal of the suit.

Held —The Court had jurisdiction to entertain an application in review on the ground of 'discovery of new and important evidence' 21 T L J, *600*

Section 89

1. The revision petition was preferred from an order of the lower Court allowing the transposition of the revision petitioner who was originally the 6th defendant in the case and thereafter made the third plaintiff therein, back to his position in the array of defendants. After the passing of the above order and before the filing of the revision petition, the suit had been disposed of by the lower Court

Held —The order of the lower Court had become merged in the decree and could not be interfered with in revision. The matter would have been different in case the decree had been passed after the filing of the revision petition — 20 T L J, *168*

2. Where discretion is vested in subordinate Courts, the revisional powers of the High Court could be invoked only where the discretion is exercised capriciously or arbitrarily, or in a judicially unsound manner, or where the Judge concerned does not address himself to the facts set out in the affidavits and decides the matter independently of the same The fact that the High Court would have arrived at a different conclusion in the matter would not justify interference. The test in such cases is 'has discretion been exercised after appreciation and consideration of such facts as are relevant and after application of the right principles to those facts.' If a discretion is exercised under these conditions and a certain conclusion is arrived at, that conclusion will be an exercise of discretion judicially sound — 20 T L J., *171*

3. In a suit for accounts a prior order had been passed directing the trial of certain issues only for purpose of passing a preliminary decree. Subsequently the Court directed the trial of certain other issues also as necessary for the purpose. But the trial of the latter case was really unnecessary for the purpose:

Held —The subsequent order was revisable by the High Court, though the matter concerned was of an interlocutory nature.— 23 T. L. J., *999*;

4 See also Sec 59 — 22 T. L J., 18.
Or VI, R. 17 — 21 T L J., 994.
23 T L J., 1193
Or XLV, R 4.— 24 T L J 606
Regn VI of 1100,
Sec 14.— 24 T L J., 818

Section 97.

No doubt, the Court can permit the examination of witnesses on commission only in compliance with the provisions of the Civil Procedure Code. But the contention that examination on commission is the exclusive privilege of purdah ladies seems to be over restrictive

Where the lower Court, with knowledge of the prevailing social practice, allowed the examination on commission of an old Hindu lady obviously belonging to a well-to-do family but with no pretensions to culture

Held —The High Court would not interfere in revision — 23 T L J., 426

Section 100

1. The conditions of exemption from arrest under Section 100 may be enumerated as follows —"The party must first satisfy the Court, ordinarily by statements made on affidavit, that his attendance in the Court or tribunal is *bona fide* in relation to the matter pending before that Court or tribunal, secondly, that the Court or tribunal which he attends has jurisdiction in the matter pending before it, or the party believes in good faith that it has such jurisdiction, and thirdly, that he should be exempt from arrest during such period as is reasonably required in going to the tribunal from his ordinary place of residence in attending that tribunal and in returning from it to the ordinary place of residence whence he came."

Where there is no case or matter pending before the Court, Section 100 cannot be invoked to claim immunity from arrest — 22 T L. J., 784.

2. The judgment-debtor was arrested in execution of the decree when he went to Court for producing stamp-sheets for getting a copy of the decree to enable him to file an appeal from the decree

Held —The arrest was illegal as it offended the provisions of Section 100, Clause (2), of the Code

The judgment-debtor had not waived his objection to the legality of the arrest by applying for and getting mohsul to enable him to raise funds to meet the decree-debt, as there could be no waiver in the case of an illegal act

Section 100, Clause (2), of the Code did not contemplate that any *judicial* matter should be pending before the tribunal but only *any* matter The application for copy of the decree was a matter pending before a *tribunal* within the meaning of Section 100, Clause (2), of the Code and was not a matter in which the office alone was concerned — 24 T L. J., 564.

Section 105.

1 The Court has no power under Order IX, Rule 9, to restore an execution application dismissed for default The Rule applies only to suits and not to execution proceedings.

Section 105 of the Code does not make the procedure prescribed in Order IX, Rule 9, applicable to execution proceedings. The proceedings spoken of in Section 105 include original matters in the nature of suits, such as proceedings in probates, guardianships and do not include execution.— 20 T. L. J., 621.

2. Where on the dismissal for default of an application to set aside an *ex parte* decree, the defendant filed a petition to restore the prior application and that petition also was likewise dismissed and the defendant appealed

Held—In the light of the provisions of Order IX and Section 105 of the Code, no appeal lay— 24 T L. J., *698*

3. See also—

Regn. I of 1080—36 T L R., *995* (=20 T L J, *1022*)

„ IX of 1060— 22 T L J, *496*.

Section 108.

1. Where a party to the suit has drawn an amount from Court in excess to what he was entitled to under the decree in the suit, he should not be allowed to retain a benefit which under the decree he could not claim

Section 108 of the Civil Procedure Code does not exhaust the powers of the Court regarding restitution of benefits wrongfully obtained by parties to the suit. Even though an application for restitution does not strictly come within the purview of Section 108, the High Court may entertain an application under its inherent powers— 20 T L J, *927*

2. The Court cannot be powerless to give effect to its decrees. Under Section 108, the Court has the power to order such restitution to be made as is necessary to place the parties in the position they were in before the wrong decree or order was passed.

Such a power is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all the parties involved

One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression *the act of the Court* is used, it does not mean merely the act of the primary Court or of any intermediate Court of appeal, but the act of the Court as a whole from the lower Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.—

23 T. L. J., *848*

3. In execution of the decree in the case, the property of the judgment-debtor was sold in Court auction and purchased by a stranger The appellant who obtained a private sale of the property from the judgment-debtor subsequent to the Court auction, paid the decree-holder out of Court and applied under Order XXI, Rule 86 (1), to set aside the sale on deposit of 5 % commission only The lower Court dismissed this application It also allowed ratable distribution out of the sale amount in Court in favour of another decree-holder who had made due application therefor The order refusing to set aside the sale was however reversed in appeal, and thereupon the appellant applied, by these proceedings for restitution of property from the auction purchaser On the contention of the auction-purchaser, that before restitution was ordered, he should be refunded also the amount paid out to the applicant for ratable distribution

Held—The appellant occupied the same position as that of the judgment-debtor and was liable to all the equities in favour of the auction-purchaser because he had purchased the property after it was sold by Court, and after application for ratable distribution had been made and also paid the purchase money directly to the decree-holder, and not to the Court. He was therefore bound to make good to the auction-purchaser the money applied to the benefit of the judgment-debtor, in so far as another decree against the latter had been satisfied— 24 T. L J, *575*

4. By the decree in O S No. 76 of 1091, the 15th defendant mortgagor's title was declared and the decree obtained by the plaintiff in this suit was set aside. The 15th defendant applied for re-delivery of the properties of which he had been dispossessed in the course of the execution proceedings in the case. The lower Court dismissed the application

Held.—It may be that the provisions of Section 108 of the Code are not applicable

to the application in question inasmuch as the decree in the case has not been varied or reversed in appeal But the powers of the Court to order restitution are not restricted to the cases contemplated by Section 103 It is inherent in the general jurisdiction of the Court to act rightly and fairly, according to circumstances towards all parties in the case The Court has inherent power to see that its process is not abused As it is perfectly clear that the 15th defendant was unjustly deprived of his property, the Court had inherent power to order restitution with due regard to the circumstances of the case in order to avoid hardship to him— 24 T L J, 857

5 See also Sec 40— 21 T L J, 1175

Section 109.

1 It is not necessary to issue notice to the surety before ordering execution to proceed against him in a case where the surety has undertaken in the surety bond executed by him to produce the judgment-debtor before the Court on a particular date and has committed breach of that provision— 20 T L J, 887

Ref—22 T L J, 614.

2 A surety executed a bond undertaking to discharge the decree amount in case the defendant judgment-debtor's appeal in the District Court failed The District Court allowed the appeal but the High Court reversed that decision. The point for decision is whether the surety is liable under the bond for the decree-amount as per High Court decree

Held—Though the bond in the case no doubt refers to the appeal filed in the District Court by the defendant, it does not specifically provide for the discharge of any liability by virtue of a decision passed by *that* Court but states generally that in the event of that appeal going against him the surety undertakes to satisfy that decree. The proceedings in second appeal being only a continuation of the proceedings of the first appellate Court there seems to be nothing unreasonable in holding that as there was no specific reference to a decision of the first defendant's appeal by that Court itself, the liability could not be determined with reference to that decision alone but would depend on the ultimate decision of the case Hence the surety continues to be liable under the provisions of the bond inasmuch as the case was ultimately decided against him.—

48 T L R., 129
(=21 T. L J, 1024)

3 The defendants in the suit who were ordered to furnish security failed to produce the same, and the lower Court thereupon ordered warrant to the surety The surety in appeal contended that as no valid notice had been issued against him, he had not been guilty of any default

Held—The proviso to Section 109 requires that before ordering execution to proceed against the surety the Court shall give notice to the surety as it deems sufficient The notice referred to in this proviso is not a notice requiring him to act in conformity with the surety bond but notice to show cause why execution should not proceed against him

Sufficient opportunity should be given to the surety to comply with the terms of the bond before execution is ordered to proceed against the surety The Court ought to have issued fresh notice to the surety before ordering execution to proceed against him— 22 T L J, 891

4. Where during the pendency of a claim petition, in respect of certain buffaloes which had been attached in execution as belonging to the first defendant, one of the judgment-debtors, the respondent, was entrusted with the custody of the animals, on his executing a surety bond by which he undertook to produce them before Court, after the termination of the enquiry,

according to the directions of the Court, and in the event of failure to be liable for the entire decree amount, but he failed to produce them accordingly and steps were therefore ordered against him for realisation of the decree amount and the surety claimed exoneration on account of the contract becoming incapable of performance owing to the death of the buffaloes subsequently

Held—The surety having defaulted to produce the animals in Court either after the termination of the claim enquiry or after notice by Court to do so, he was responsible as a bailee in default, under Section 161 of the Indian Contract Act for the subsequent loss of the animals.

Though the surety bond provided for liability for the entire decree amount on forfeiture, the surety was liable only for the portion of the decree for which the first defendant was liable because the buffaloes had been attached as belonging to the first defendant and for the realisation of the amount due from the first defendant under the decree.—

22 T L J, 614

5 The surety appellant in the suit, had undertaken to pay the decree amount in the event of the suit being decreed The primary Court dismissed the suit, but in appeal the suit was allowed. On execution being directed against the surety, he contended that with the dismissal of the suit in the primary Court, his liability had ceased and that the subsequent reversal by the Appellate Court will not revive the surety's liability

Held—The proceedings in the Appellate Court are but a continuation of the proceedings in the trial Court, and the Court of appeal or revision when it comes to a finding of its own really finds what the trial Court should have found if it was acting correctly and legally as observed by the Madras High Court in 1917 Madras Weekly Notes at p 321 The terms of security bond in the case are not limited in their operation to the decree of the trial Court— 22 T L J, 770

6 The first defendant sued the plaintiff-Sirkar for cancellation of the order of confiscation of his cart and bulls passed by the Customs Officer He also applied for and obtained an injunction restraining the Sirkar from disposing of the cart and bulls till disposal of the suit In pursuance of this order, the second defendant executed a security bond in favour of the Court and took charge of the cart and bulls. The suit was eventually dismissed, but the second defendant did not produce the cart and bulls before the Court Thereupon, the Court assigned the security bond to the plaintiff Sirkar, and the latter sued for recovering from the second defendant the amount of damages fixed in the security bond

It was contended for the second defendant that the decree in the prior suit could have been executed against him without the necessity for a suit which was therefore excluded under the terms of the Civil Procedure Code

Held—Though under Section 109, it might be possible to recover the amount in the surety bond, this would at most be an enabling provision, and there was no bar against a suit on the bond under Section 40 of the Code.— 23 T L J, 391.

7 Where a surety made himself liable for mesne profits in the event of the appellate decision being unfavourable to defendant but the Appellate Court passed judgment remanding the case for trial *de novo* and disposal according to law and ultimately the original Court decided against the defendant

Held—The surety was discharged by virtue of the appellate judgment The decision of the subordinate Court after the order of remand cannot be said to be a continuation of the proceedings in the Appellate Court Nor can it be said that the ultimate decision of the primary

Court was a decision passed under the direction of the superior Court —
24 T L J, 273

3 See also—
Sec 40 — 22 T L J., 423
Or XXI, R. 2 —48 T L R, 405 (= 22 T L J., 1252)
Regn VI of 1100 Art. 166 } 46 T L R., 122 (=20 T L J, 230).
Vol VI, P 1522 — 45 T L R, 477 (=20 T L J, 505)

Section 112.

1 The Court has no jurisdiction to extend time when it has ordered that the petition will stand dismissed, if the petitioner fails to deposit money in Court within a fixed period — 23 T L J., 988

2. When a Court by its decree orders a party to make a payment or take certain action within a specified time and provides that certain detrimental consequences shall follow in the event of non-compliance, the Court itself has no jurisdiction to extend the time save on an application for review Such a decree is a final decree and cannot be deemed to be an interlocutory or preliminary decree, as the Court has no judicial function to perform in respect of the complete disposal of the suit

Section 112 of the Procedure Code does not apply to a period of time fixed by the decree itself.— 20 T L J, 419

Section 115

1 The powers under Section 115 are uncontrolled by the other provisions of the Code. Irrespective of such provisions, the Court has to decide with reference to the facts of the case whether the exercise of such powers is necessary in the interests of justice and whether an omission to do so would result in an abuse of legal process. These powers have to be exercised sparingly and could not with propriety be invoked to do anything which would be contrary to law or to help any party to evade the performance of anything required of him by law "It is certainly desirable that the provisions of the Section which gives inherent powers to the Court should be applied with the greatest caution If a party is absent from the Court when he ought to have been present and cannot give any satisfactory reason for his absence, then there can be no particular ground for the Court to exercise its inherent powers in his favour so as to interfere with the rights of third parties, such as an auction-purchaser, which have come into existence owing to his default " No order *ex debito justitiae* can be held to be permissible in cases where the party is clearly guilty of laches. The power under Section 115 being of an exceptional and discretionary nature, no one can as of right claim the exercise of such powers. The Court has to decide whether the facts in a particular case are such as to justify the exercise of such powers Of course, the party can move the Court for a reconsideration of the question. But to say that the party is entitled as of right to seek such powers being exercised does not appear to be competent in the nature of the powers themselves.

Where a plaint is rejected under Order VII, Rule 11, it cannot be restored to the file by an application for restoration. The appropriate remedy is an application for review (under Order XLV, Rule 1,) of the Order under Rule 11 which is a decree.—
20 T L J, 59

2. The decree in the case directed recovery of properties from the *defendants* with mesne profits. The plaint relief was only for recovery of mesne profits in regard to items 1 to 3 from such of the defendants as were in possession of the same. The 9th defendant had been impleaded as in possession of item 4. The decree was passed on 16-12-1102. On application for review, filed by the 9th defendant on 12-1-1104, the Court below

rectified the decree so far as it made the 9th defendant liable for mesne profits from items 1 to 3 On the contention of the plaintiff-appellant that the review application of the 9th defendant was not maintainable as having been presented out of time

Held—Though as one for review the application of the 9th defendant was out of time in view of the express provisions of Article 159 of the Limitation Regulation of 1100, the order appealed against was supportable as proper, treated as one passed in exercise of the inherent jurisdiction of the Court The lower Court acted rightly in rectifying the mistake it had committed

The inherent powers under Section 115, C P. C are exercisable in appropriate cases irrespective of the existence or otherwise of other remedies under the Code— 21 T L J, *159.*

3 The junior member may claim to be representative of the party inasmuch as the property proceeded against had passed to her by operation of law and by partition among the members of the family,

On the contention that as no specific provision of the Code provided for refund the jurisdiction that was invoked was the inherent jurisdiction of the Court, and that orders passed on that inherent jurisdiction were not appealable

Held—An appeal would not lie as an appeal from an order, but where the order passed fulfilled the definition of a decree under the Civil Procedure Code, there was no reason why an appeal should not lie as an appeal from a decree—

21 T L J, *193*

4. The Court has inherent powers to consolidate suits in appropriate cases. The power to consolidate is inherent in the Court where the suits are pending—a power which even the High Court cannot ask that Court to call into play

Similarly it is imperative that no Court shall proceed with the trial of any suit in which the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties. (See Section 9)— 21 T L J, *422*

5 Appeals wherein the petitions to implead the representatives of a deceased respondent were dismissed must fail as being improperly constituted In such cases there would be a danger if the appeals were heard as against the surviving decree-holders in that there would be two contradictory decisions in the same suit and it would be difficult to give effect to both.

The inherent powers of the High Court should not be used to save parties from the result of their own laches. The extraordinary powers of the Court should be exercised with the greatest care and only in cases where otherwise justice would not be done or where there would be an abuse of the process of the Court—

48 T L. R., *196*
(=22 T L J, *1081*).

6 In spite of the prayer in the plaint that the decree in the case should be passed in favour of the second plaintiff, the Court by oversight gave a decree in favour of the first plaintiff, the second plaintiff did not seek to rectify the mistake when the case went up to the first and second Appellate Court, but adopted the decree as correct On the basis of that final decree in first plaintiff's name, the creditors of the first plaintiff placed an attachment on the decree. Thereafter, the second plaintiff moved the High Court to alter the decree as one in second plaintiff's favour

Held—Though under Sections 115 and 116, errors that have crept into the judgment by oversight could be rectified in exercise of the inherent powers of the Court, still the amendment sought for in the case did not fall within the provisions of the above Sections. Even assuming

that the Sections did apply, the amendment could not be allowed inasmuch as the vested interests of third parties would be affected thereby.—

49 T L. R., *478*
(=23 T L J *814*).

7. The plaint in O S. No. 126 of 1105 was rejected on '21-2-1105 for non-payment of the deficit Court fee The plaintiff-revision-petitioner applied for restoration of the suit and the Court on 7-7-1105 ordered the petitioner to pay the deficit Court fee as a condition of restoring the suit to file The plaintiff paid the Court fee and the suit was restored to file The High Court in revision held that the trial Court had no jurisdiction to restore the suit. The plaintiff petitioner therefore applied for refund of the deficit amount paid by him The lower Court rejected the application.

Held.—One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. In exceptional cases where it is necessary for the ends of justice or to prevent the abuse of process of the Court, the High Court should apply the inherent powers of the Court under Section 115 of the Code Court fees paid under the orders of a Court which had no jurisdiction to order the payment ought to be refunded The result of holding to the contrary would be to permit the act of the Court to injure the plaintiff.—

24 T L. J, *499*

8. See also—

Sec. 9 — 20 T L. J, *680*
„ 108.— 20 T L. J, *927*
24 T L. J., *357*
Or VI, R. 17 — 20 T L J, *137*
Or. IX, R. 13.— 20 T L J, *725*
21 T L. J., *331*.
47 T L. R, *155*
(= 21 T L J, *808*).
47 T L. R., *321*
(=21 T L. J., *754*).

Section 116.

1 On the question whether amendment can be ordered where the errors in the judgment or decree has been caused by an accidental slip or omission made not by the presiding Officer who wrote the judgment or the Court Officer who prepared the decree but by the person who drafted the plaint for presentation to the Court

Held —Such a jurisdiction existed and amendment could be ordered under Section 116 if it was made out that the error to be rectified was in the nature contemplated under that Section.—

21 T L. J, *961*

2 In execution of a decree for recovery of leased property, the plaintiff applied to amend the description of the property by inserting the correct survey number and extent, alleging that owing to an oversight the survey number and extent were wrongly entered in the plaint and that the mistake was continued in the decree The defendants did not object to the amendment, but some others who were not parties to the decree, did

Held —The executing Court had the power to make the amendment. Persons who were not parties to the suit, had no right to be heard on the question of the amendment — 23 T L. J, *739*

3. See also—

Or. I, R 10— 20 T L J, *117*
„ VI, R. 17 — 20 T L J, *137*

Section 117.

If an appeal is presented against a person who is dead at the time of presentation, the Court may permit the cause-title to be amended and the legal representative substituted, if it is satisfied that there was reason to excuse the delay in making the application.—

23 T L. J., *976*.

Order I, Rule 1.

1 Two debtors jointly liable under a chitty transaction, applied on a single petition to be adjudicated insolvent

Held.—The provisions of Order I, Rule 1, were applicable and the only test in such cases is to see whether the right to relief arises out of the same transaction or not. In the present case, the right to relief arises out of the same transaction or at any rate out of the same series of transaction— 20 T L J, *981*

2. One of two joint promisees can institute a suit on the contract making his co-promisee a defendant only if the latter, after notice, refuses to become a plaintiff

A joint decree may be passed in favour of two joint promisees even though one of them is a defendant.— 21 T. L J, *1188*

Order I, Rule 9

The language of Order I, Rule 9, is imperative and forbids the dismissal of the suit even where the non-joinder is deliberate.

The powers of the Court to implead parties are very wide under Order I, Rule 10, and such powers may be exercised even in revision in appropriate cases.—

22 T L J, *571*

Order I, Rule 10

1. In execution of a decree for partition, disputes arose between the parties, and one of the parties appealed against an order passed therein by the Munsiff, and in the appeal memorandum the appellant entered the names of the original plaintiffs, 1 and 2, alone who were both dead on that day as parties-respondents. On discovery of the mistake at a later date he applied for amending the cause-title of the appeal memorandum by inserting the names of the heirs of the plaintiffs as respondents by way of substitution, by invoking the aid of the provisions of the Civil Procedure Code, Order I, Rule 10, read with Sections 35 (2) and 116

Held—It is not proper for the Appellate Court to direct a substitution of parties or the impleading of additional parties on record, in cases like the present The view taken in 36 T. L R., 117 does not call for reconsideration.

To the contention that the appeal was but a continuation of the proceedings in the original Court and that the necessary corrections could be made in the cause-title under the provisions of the Civil Procedure Code

Held.—This right appears to be fallacious, as unless the proceedings in appeal have been initiated by an appropriate petition or appeal memorandum, the Appellate Court cannot be considered to have *seisin* in the matter and unless such *seisin* is had, the Appellate Court cannot exercise any of the powers conferred upon it as such under law

In cases where the real party intended to be impleaded was the person whose name is now sought to be entered in the appeal memorandum, the description in the original appeal memorandum being a mistaken one, it is open to the appellant to seek the aid of the Court to rectify such slip or error and to amend the cause-title under Section 116 of the Code The same also applies to cases where the Court on presentation of the appeal found out on a comparison of the cause title in the appeal memorandum with that in the decree appealed against, that a deceased man alone had been impleaded as a respondent at the time of presentation and returned the appeal memorandum for the curing of the defect

Held further—The right of substitution or addition of parties could be exercised only when the plaint standing as such, could be treated as a valid one A plaint with a deceased man alone entered as the defendant would be virtually one without

any defendant. In such a case, the provisions relating to substitution or addition of parties are not applicable.—

20 T L J 118

Not. fol —23 T L J 973

2. Order I, Rule 10, sets out considerations that should weigh with the Court in the matter of joinder of parties. The admissibility or otherwise of an application by an intervenor to be brought on record has to be determined with respect to the provisions of the Code on the subject. The Court is enabled, under Order I, Rule 10, sub-rule 2, that the name of any person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit to be added In such cases, the Court has to examine whether there is anything which cannot be determined owing to the absence of the applicant or whether such applicant will be prejudiced by his not being brought on the record

Normally the plaintiff as the master of the litigation has the right to choose whom to litigate and the matters upon which an adjudication has to be made. Of course, if in the nature of the pleadings, the presence of any person on record is necessary, for a complete and effectual decision of the matters involved, the Court has the right to order such person being brought on the record, even though the plaintiff does not agree thereto. The introduction of parties into a suit in cases where their presence is not essential for the determination of the questions arising on the pleadings is not permissible. This is all the more not allowable in cases where the plaintiff objects to such introduction. The principles set forth above have to be taken to control the observations made in 9 T. L. R., 60, as these considerations are made imperative by the statutory provisions on the subject.—

20 T L. J., 599.

Ref.—48 T L R., 34
(=23 T L J, 649).

3. In a mortgage suit where the relief claimed is the sale of the porperties mortgaged, none but the parties to the transaction and those claiming under them should as a rule be impleaded, It is irregular and confusing to join as parties in a suit to enforce a mortgage persons who set up adverse claim to the mortgaged properties. This ruling of the Privy Council has been followed in Travancore as settling the law on the question of impleading in mortgage suit except in exceptional circumstances.—

20 T. L. J., 601.

4. The plaintiff claimed plaint property as having come to him in a family partition. The first defendant, another member of the family, also got properties at the same time. Subsequently it was discovered that there was an excess in the measurements of the registry in favour of the family, and the plaintiff applied to have this registered in his name. The Sirkar registered the excess land as Puduval in the name of the defendant who also had applied In a suit to recover the excess from the first defendant, plaintiff contended that the suit amounted to one for cancellation of patta and the Sirkar was a necessary party.

Held—The Sirkar is only a desirable party and not a necessary party

It may be desirable to make the Sirkar a party in the interests of the defendants as the latter may then expect that the Sirkar as their vendor will undertake to prove its title to deal with the land or they may at least have the advantage that, in the event of its being found that the Sirkar had no title, this finding would be binding on the Sirkar in a suit filed to recover the purchase-money paid by the first defendant. But it is not the duty of the Court to intervene in order to secure this advantage to the defendants.

[The Sirkar has the same rights in disposing of its lands as other owners and the Courts will not consider the propriety of its actions in selling or giving a particular plot to one of several persons who wish to buy it, though in certain situations of trust it may be held that the registry of land to A may enure to the benefit of B Where however the Sirkar sells land which in fact has already been alienated, such a sale can have no more legal effect than a similar sale by a private party, and it is not necessary for the previous purchaser to seek to set the subsequent registry aside.]—
20 T L. J, 609

5. Ordinarily in the case of suits on mortgages, leases, &c., only the parties to the transaction need be on the record In a mortgage suit, the subject of controversy is only the jural relation between the mortgagor and the mortgagee. The title to the property mortgaged is generally outside the ambit of such controversy, since it is implied by virtue of the reciprocal estoppel binding on the parties to the transaction. Neither of them is free to dispute the title of the other Even the true owner will be compelled to surrender in a redemption suit if he has got entrapped in such estoppel

It is irregular and confusing to join as parties to a suit to enforce a mortgage persons who set up adverse claims to the mortgaged properties. One exception to the general rule is where a stranger to the mortgage transaction when impleaded in a mortgage suit raises no objection or drops his objections to being entangled in such a concern and takes the chance of a decree in his favour, but on finding the verdict is against him asks the Court to remove him from the party array so as to render the pronouncement against him nugatory. The question of irregular impleading does not affect the jurisdiction of the Court, but only constitutes a breach of the rules regarding the frame of the suit.

The expression "questions involved in the suit" (Order I, Rule 10) does not include any claim which can possibly be put forward by any body to the property involved in the suit It was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim and does not wish to prosecute any. A plaintiff should not be compelled to fight a case which he did not bring before the Court

The wide discretion conferred on Courts by Order I, Rule 10, is subject to well-recognised principles. In the first place, parties cannot be added so as to alter the nature of the suit Secondly, no person can be added as a party unless he sought to have been joined and has not been so joined or without his presence the suit cannot be completely decided Thirdly, parties should not be added in a suit for rent or other reliefs based on a contract so as to transform it into a complex title suit, though questions of title may arise incidentally for investigation. Fourthly, it is an elementary proposition that, if the plaintiff relies upon a transaction in support of his title, the defendant is entitled to impeach its validity by way of defence The defendant in such circumstances need not be allowed to bring in a a new ally to fight the plaintiff

'Proper parties' are those whose presence renders the decree more effectual.

In limine observed Issue as to whether a party should be impleaded is irregular, since the question of non-joinder or misjoinder should be disposed of before the issues are framed.—Rule 66 of the Civil Courts' Guide.— 20 T L. J, 612.

Ref —48 T L. R., 34
(=22 T L J, 649).
22 T L. J, 1154.

6. In a case where the senior member of a Tarwad has been impleaded (merely) because his presence was necessary as such in a suit on behalf of the Tarwad, and it could not be said that any relief was

claimed against him, upon his death nothing could be deemed to have passed on to his legal representatives. The presence of the next senior members of the Tarwad was, if at all, necessary for enabling the Court effectively and completely adjudicate upon and settle the questions involved in the suit.

The provision for abatement contained in Section 352 of the Code of 1065 and Order XXII, Rule 4, of the Code of 1100 have to be applied only in cases where any relief is sought for against a particular defendant

If a party is placed on record purely as a *pro forma* party the rules relating to abatement contained in the Code could not with propriety be applied

The proper course would be to direct the impleading of the representative under the provision of Section 28 of the Code of 1065, corresponding to Order I, Rule 10, of the Code of 1100 The time limit prescribed for impleading the legal representative of a deceased defendant under Article 147 of the Limitation Regulation of 1062, corresponding to Article 162 of the Regulation of 1100, would not apply —

20 T. L. J, *1842*

7 Jurisdiction is given to the Court under Order I, Rule 10, to transpose a defendant as plaintiff But such a course would not be permitted if the result would be to change the nature of the suit If the defendant, whom it is proposed to make a plaintiff claim under title adverse to the plaintiff already on the record then a suit with him as plaintiff would be a suit of a different nature.

Where therefore the second plaintiff and second defendant who were impleaded as legal representatives on the death of the first plaintiff claimed under the same Udampadi, but the only difference between them was that neither trusted the other.

Held —The transportation of the second defendant as an additional plaintiff could *not be objected to as improper* —

21 T L J, *1094*

8 In a suit by the plaintiff, vendor, for recovery of balance sale consideration reserved with the defendant, vendee, to be paid to the plaintiff by a certain date, the defendant pleaded a set off of the amount due under a decree on a prior hypothecation bond not mentioned in the sale deed and applied to implead the hypothecatee, decree-holder, as an additional party to the suit. The sale deed contained a covenant against encumbrances and set apart certain *properties* as security therefor and it was not the defendant's case that the security so provided was insufficient The defendant had not also sought to implead the plaintiff in the prior suit on the hypothecation bond The plaintiff denied the hypothecatee's claim and resisted his impleading

Held,—(1) The prior hypothecatee is not a necessary party to the suit for purchase money wherein the plaintiff does not seek any relief against him and he need not therefore be impleaded

(2) It is a well known principle that no plaintiff shall be forced to fight a party with whom he does not want to enter into a conflict.

No doubt, the powers of the Court under Order I, Rule 10, though wide are not limitless.

(3) According to Section 55 (5) (*b*) of the Transfer of Property Act a vendee may retain out of the purchase money the amount of any incumbrance on the property existing at the date of sale only in the absence of a contract to the contrary A covenant in a sale deed whereby the vendor agrees to answer for all incumbrances known and unknown is such a contract.— 46 T L. R., *84*

(=22 T L. J., *649*)

9. Normally no plaintiff should be forced to fight a person with whom he

wishes to be at peace. Order I, Rule 10, is intended to apply only where either one or other of the parties makes an application to the Court or the Court itself is of opinion that some other persons ought to be brought into the proceedings, in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit

(The decision of the case depended, a good deal, on the construction of a document of 1870 and it was found that the addition of other persons as parties to the suit would not facilitate the interpretation of that document) —

22 T L J, 791

10. The plaintiff, revision petitioner prayed for revision of the lower Court's order impleading the third defendant as additional plaintiff in the suit. On a preliminary objection being raised to the effect that the lower Court's order being one appealable under Order XLII, Rule 1 (1), the revision petition is incompetent and that the remedy of the petitioner is by way of appeal to the District Court.

Held—There is no express provision regarding the transpositions of parties from one side to another, but this power has always been exercised by Courts under Order I, Rule 10 (2) If, therefore, the order must be regarded as one passed under Order I, Rule 10 (2), an appeal against it lay under Order XLII, Rule 1 (1)

Interference in revision would not be justified in these circumstances —

22 T L J, 905

11. The provisions of Order I, Rule 10, do not warrant the impleading of third parties claiming adversely to the parties to the suit as instituted. Under Order I, Rule 10, only such persons can be impleaded whose presence on the record is necessary to enable the Court to decide questions arising between the parties to the suit and not all questions that may arise in future.— 22 T. L. J., 1096.

12. If one of several defendants is proved to have died before the institution of the suit, no question of abatement arises. In such circumstances, the Court may proceed against the other defendant or defendants alone if the suit is maintainable in that form and if the Court thinks that the legal representatives of the deceased defendant are necessary parties, it may proceed under Order I, Rule 10, to implead them after giving leave to the plaintiff to amend the plaint if such leave be applied for — 23 T L J., 410.

13. See also —

Sec 65 — 46 T L. R, 404 (=26 T L J, 1104)

Or I, R. 9 — 22 T L. J, 671

„ VI, R. 17 — 20 T L. J., 137.

Regn. I of 1092 — 47 T L R, 868 (=24 T. L. J., 1014),

„ III of 1094 Sec 28 } — 23 T L J, 1881

Order 1, Rule 13

Where, in a suit for renewal and arrears of Michavarom in respect of an alleged kanom demise, the defendant denied the jenmom rights of the plaintiff but the written statement did not take any objections as to the non-joinder of the Sirkar nor was the point taken in the appeal memorandum filed by the defendants before the lower Appellate Court

Held.—The objection as to non-joinder was not taken at the earliest opportunity and must therefore be deemed to have been waived The fact that on the date of the written statement and on the presentation of the appeal before the District Court there was the ruling in 11 T L. J., 87 which decided that in cases like the present the Sirkar was neither a necessary nor a desirable party and the fact that at the time of the argument in the District Court a later ruling in C. R. P 406 of 1104 (3 T L. J., 328=19 T. L. J., 183) held that in the particular circumstances of that case the Sirkar was a desirable party, cannot

make any difference inasmuch as the provisions of Order I, Rule 13, appear to be mandatory In the circumstances, the objection as to non-joinder was not one which arose subsequently within the meaning of Order I, Rule 13.

Of course the Court could *suo moto* or on the application of a party at any stage of the suit add any person as a party to the suit whose presence the Court thought necessary for the proper disposal of the suit. But this did not appear to be such a case — 22 T L J, 776

Order II, Rule 2

1 The plaintiff in the case filed O S No. 1002 of 1092, in effect, for declaration that he was the real beneficiary under a mortgage executed by first defendant in favour of second defendant and with a prayer in the nature of a claim for damages. He obtained the declaration prayed for and then instituted this suit O S No 591 of 1103, for recovery of the properties with means profits or in the alternative, of the mortgage amount with interest on the allegation (accepted by the Court) that there was an understanding to pay the mortgage amount or give possession after the first defendant got delivery of the properties in execution This suit was filed after 12 years of the mortgage but within 12 years of the date of first defendant's getting possession On the pleas raised by the defence that the suit was barred (1) under Order II Rule 2 of the Code and (2) by limitation,

Held —The present suit being founded on the declaration granted in the former suit, was quite different from the former one, and the causes of action in both cases were essentially different. Order II, Rule 2 of the Code merely required that every suit should include the whole of the claim arising from the same cause of action and not that every suit shall include every cause of action or every claim which the plaintiff had against the defendant. There was therefore no bar under Order II, Rule 2

Seeing that the plaintiff did not get possession ordinarily there will be only 12 years' period for the plaintiff to sue for the mortgage amount In the case the plaintiff's case is (and that has been accepted by the Court) that the understanding was that the assignment was to be executed and the properties given to the plaintiff on first defendant getting possession of them through the execution Court. That being so the Article of the Limitation Regulation applicable for recovering possession of the properties is 133 which provides a period of 12 years from the time when the mortgagor's right to possession determines. It it is significant that the starting point is not specified as the date of the mortgage deed and this circumstance is indicative of the intention of the Legislature. The Article has been so interpreted as to mean that a mortgagee is entitled to possession as against the mortgagor immediately upon the execution of the mortgage, *in the absence of agreement to the contrary* If therefore the mortgagor has contracted to hold possession till a particular date or the happening of a specified contingency, then the time will begin to run only from that date or time of the contingency happening And since the first defendant was out of possession at the date of the mortgage and contracted to give possession to the plaintiff when he recovered the property in execution, the suit filed within 12 years of the date of recovery was not barred by limitation

The plaintiff not having got possession of the mortgaged property, the time within which he should sue for the money is 12 years. The relevant Article of the Limitation Regulation applicable is 116 which says that 12 years' period starts from the time when the money sued for becomes due. The first defendant within the reasonable time of the recovery of the properties should have surrendered them

to the plaintiff and as he failed to do so, he rendered himself liable to pay the plaintiff the mortgage amount, on failure to do which the cause of action arose. Looked at from this standpoint, the plaintiff having come in within the statutory period, his claim for the mortgage money is within time.— 24 T L J, 17.

2. A relief, claimed in the alternative in the plaint was beyond the pecuniary jurisdiction of the trial Court on the basis only of the erroneous valuation given therefor by the plaintiff The plaintiff subsequently withdrew the relief with permission of Court. It was contended in appeal from the decree ultimately passed allowing the suit that the Court was not competent to allow the withdrawal inasmuch as to start with, it had no jurisdiction over the suit

Held —The contention as to competency was not sustainable. The plaintiff was in the circumstances entitled to amend the plaint and if an amendment of the kind was made, the suit would be within the jurisdiction of the Court. The powers of a Court in the matter of amendment of pleadings are wide so long as the nature of the suit is not altered. And all that had been substantially done in the case was an amendment of the plaint by relinquishment of one of the reliefs.

Per Raman Tampi, J —Even if the relief was beyond the pecuniary jurisdiction of the Court so that the Court had no jurisdiction to try the suit, still under Sub-clause 2 of Order II, Rule 2, it is open to the plaintiff to relinquish any portion of the relief so as to bring the suit within the jurisdiction of the Court, but in a future suit this relinquished claim cannot be agitated There is nothing in Order II, Rule 2, which should hinder any person in abandoning any portion of his claim It says the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. The language of the Rule is clear and reading into it what is not obviously contemplated by it (*viz*, that the relinquishment ought to be made before the filing of the plaint and not after the filing of it in Court) is unwarranted. The proper view to take is that the Court is not entertaining the suit with the abandoned claim, but that the effect of an amendment of the plaint by abandoning a portion of the claim, is in substance, as if the suit had never been commenced in respect of such claim.

Where an instrument of transfer provided for payment out by the transferee of the maintenance expenses of the transferor during his life-time and it could be inferred from its terms that the payment was to be from the income of the property

Held —The transferor was entitled to a charge on the property for the maintenance amount provided for and that any one claiming under the transferor was bound by such charge—

24 T. L. J., 895.

3. See also Sec 10— 23 T L. J, 1093.

Order III, Rule 1

The Civil Procedure Code itself provides that in certain matters the party himself has to apply personally The most familiar example is an application *in forma pauperis* The law says that in such matters the party has to appear in person. Except in such matters where express provision is made for a personal application by the party himself, Order III, Rule 1, gives ample powers to the Vakil to make applications to the Court on behalf of the party An application to set aside an *exparte* decree need be signed by the Vakil alone, duly authorised to act There is no rule which enjoins the application to be signed by the party as well — 20 T L. J., 298

Order IV, Rule 1.

See Regn. V of 1067,
Sec. 233 — 46 T L R., *127*
(=20 T L J, *247*)

Order V, Rule 15

1 The conditions laid down in Order V, Rule 15, have to be fulfilled before a service is deemed effective under the said Rule In the first place, the Rule is applicable only where the defendant cannot be found A perfunctory enquiry on the part of the serving officer will not do. An honest endeavour should be made to effect a personal service of the summons. Secondly, the Rule can be resorted to only in the absence of an agent empowered to accept service of summons. Thirdly, a service would be futile unless made on an adult male member of the defendant's family Fourthly, such member of the family should be one residing with the defendant. These requirements should be strictly carried out.— 20 T L J, *509*

2. Under Order V, Rule 15, when the defendant cannot be found and has no agent empowered to accept service of summons on his behalf, service may be made on any *adult* male member of the family of the defendant who is residing with him, excepting a servant. The Court in the matter of service of a summons does not take into account the female members of a defendant's family, and does not rely upon the presumption that they will take steps to inform the defendant of what takes place in his absence. So the provision in the Section limiting the nature of the persons empowered to accept summons vicariously to adult males, is based upon reasons of policy and has to be respected —
23 T L J, *877*

Order V, Rule 19.

The summons in the case was served by affixture. The process peon swore an affidavit stating the circumstances under which the service by affixture was substituted for personal service but the Court before proceeding to judgment *ex parte* did not make a declaration that the summons had been properly served as required by Order V, Rule 19

Held —It would have been better if the Court had complied with the provisions of the Rule completely and the omission was only an irregularity which did not vitiate the judgment

(As the irregularity had not in any way prejudiced the defendant, the *ex parte* decree was not set aside)—
22 T L J, *640*

Order V, Rule 24

In enacting Rule 24, Order V, the Legislature has effected a remarkable change in that the new 'Rule deliberately omitted the words— "or service may be effected in such other manner as the Court may determine"—which found a place in Section 84 of the old Procedure Code The Rule as it stands leaves the Court no discretion in the matter Under the Rule, the Court is bound to send the summons by the post — 20 T L J., *309*

Order VI, Rule 4

When a party desires to press a claim to relief upon the ground of fraud, the fraud must be pleaded and particulars of fraud alleged must be specifically set out This rule is made obligatory by Order VI, Rule 4 of the Code. The Court is then bound to pin down the party to the particular aspect of fraud he has presented because it is a well known rule of law that a charge of fraud must be substantially proved as laid and that when one kind of fraud is charged another kind cannot, on failure of proof, be substituted for it.

In order to sustain a promise to pay a barred debt it is not essential that the party making the promise *should know full*

well that he was entering into an agreement to pay a debt which he was not legally bound to pay and that he was renouncing the benefit of a provision of law made for his protection. For under Section 25 of the Indian Contract Act, it is the debt and not a sum of money in consideration of the barred debt that the promisor should refer to and there is nothing whatever in the Section to indicate that the promisor should do more than promise to pay a debt of which the creditor might have enforced payment but for the law of limitation of suits. The words are not "a promise to pay a sum of money in consideration of a debt" nor does the Section refer to the knowledge of the promisor

Though it has been held that if a debtor signed an acknowledgment through inadvertence, that did not amount to an unconditional acknowledgment from which a promise to pay could be inferred, still it should be noted that there is a distinction between an acknowledgment and an express promise It is one thing whether an acknowledgment made within the period of limitation is sufficient and quite another whether an acknowledgment made even after the period of limitation had expired is sufficient to form the basis for an action on the ground that it implied a promise to pay— 24 T L J, 509

Order VI, Rule 5

1 It was contended for the appellant that the lower Court did not exercise its discretion properly when it rejected the appellant's prayer for permission to file an additional written statement.

In overruling the appellant's contention, it was held that the following observations in 5 Moore's Indian Appeals, P 290, were applicable to the case.—"The leave to file a supplemental answer is stated to have been given under Section 5, Regulation IV of 1793, which is certainly in very general terms, but it is much to be regretted if the practice of the Court be such as to warrant what has here taken place, if a defendant, after having put in an answer stating facts which are within his own knowledge, or which he has the full means of ascertaining, may afterwards, on finding that he has no defence as the case stands, do what the defendant here has been permitted to do, if he is at liberty, without any affidavit of the circumstances, without any explanation of the nature of the error which has been committed, or in what it has originated, or what is the correction to be made, or what the omission to be supplied, to make a totally new case, and state facts at direct variance with the statement in the first answer, and of course completely change the issue in the cause"—

42 T. L. R., 256
(=23 T L J., 1950).

2. See also Or. VII, R. 11—
21 T. L. J., 259.

Order VI, Rule 7

The provisions of Order VI, Rule 7, have to be liberally construed and applied by Courts. An amendment of the pleadings can be allowed at any stage of the proceedings when the sole result of the refusal would be to drive the plaintiff to a separate suit, to avoid which is one of the principal objects of the much wider rule as to amendment which has been introduced in the new Civil Procedure Code. —
20 T L. J., 91.

Order VI, Rule 15.

See Regn. I of 1074, Sec 185—
22 T. L J, 19.

Order VI, Rule 16.

See Or VI, Rule 17.— 20 T L. J 147

Order VI, Rule 17.

1. A plaint in a suit for redemption of a mortgage was allowed to be amended so as to include an alternative prayer for *compelling the defendant to accept* a renewal in case the mortgage sued on was found to be irredeemable. The question arose whether such amendment could be properly allowed

Held—Such amendment was allowable The frame of the suit after amendment would only amount to the claim of alternative relief upon the same cause of action It is a well-recognised rule that the Courts ought to be very liberal in granting amendments, though it has to be remembered that no party can without leave of Court be allowed to amend his pleadings. Wide and comprehensive powers have been allowed under this rule to the Court, empowering it to grant leave to amend the pleadings at any stage, whenever it is considered necessary It is worthy of note that the wording of Section 49 of the Code of 1065 has been amended by the omission of the Proviso that amendments should not be allowed to convert a suit of one character into one of another and inconsistent character, At *present*, the Court is empowered to allow either party to alter or amend his pleadings in such manner and as it thinks just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

Where the lower Court has exercised a discretion vested in it, the High Court would not interefere in revision unless the exercise of such discretion has been perverse or palpably unsupportable.

The amendments of pleadings are either voluntary, that is, where a party seeks to amend his pleadings as contemp ated in Order VI, Rule 17, or compulsory where the Court *suo motu* or upon the application of the parties directs it to be made as in the case of Orders under Order I, Rule 10 and Order VI, Rule 16 There may be amendments of pleadings also as contemplated in Sections 115 and 116 of the Code— 20 T L J, *157*

2. (1) Where the original admission is due to negligence, carelessness or accidental error, amendments of pleadings will always be allowed, unless allowing the amendment will place the other party at a disadvantage for which he cannot be adequately compensated by costs.

(2) Amendment should not be allowed when a claim or relief was deliberately omitted.

(3) An amendment of pleadings must be allowed where it is necessary for the purpose of determining the real questions in controversy between the parties.

(4) Amendments should be refused when the application for amendment is not made in good faith and the application is made at such a late stage of the case that if granted the plaintiff may be injured, because the defendant would without notice raise a totally different and inconsistent case which the plaintiff has not sufficient opportunity to meet

(5) An amendment should be refused, where it is such as will materially alter or transform the nature of the suit

(6) Leave to amend pleadings should be refused where the amendment is merely technical or is immaterial

However late the application to amend the plaint may be, unless the Court has reason to believe that it is made in bad faith and with a view to over-reach or gain some unfair advantage over the opposite party, leave ought to be granted as sufficient compensation can always be granted by ordering the petitioner to pay the costs of the suit to the opposite party. Therefore delay would not by itself be a sufficient ground for rejecting such petition.

The circumstance that defendants may be deprived of the right to plead limitation cannot by itself be considered a good ground for refusing leave to amend the plaint

Though the restriction that the amendment sought for should not change the character of the suit was recognised in Section 49 of the old Code, the provisions of Order VI, Rule 17, of the present Code have removed it and the power of the Court to allow amendment is no longer controlled by any such express rule. Nevertheless even under the present Code it has been recognised as a salutary rule of practice that amendments should not be allowed which would entirely change the nature and scope of the suit

47 T L R, 888
(=22 T L J, 48)

3 Where the plaintiff after applying for amendment of plaint more than once, applied once again for the amendment and the lower Court rejected the same

Held—Inasmuch as the amendment sought for related to the identity of the property in dispute, which was not quite clear, the plaintiff should in the interests of justice, be allowed one more opportunity to amend the plaint

Circumstances are easily imaginable in which the High Court has to interfere even in cases where the remedy by way of appeal may be open to a party—

21 T L J 994

Reld.—23 T L J, 1193

4 As a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings where the amendment will occasion no injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order

Mesne profits are in the nature of damages which the Court may mould according to the justice of the case.—

22 T L J, 376

5 It was contended for the counter petitioner that the revision petition (against order of the Munsiff refusing amendment of pleadings) was not maintainable, as the petitioner might object to the lower Court's order which was purely interlocutory in character in appeal against the final decision

Held—The powers of the High Court in revision being very wide and intended to be exercised whenever the ends of justice required it, there seemed to be no good ground for holding that an order of this nature was not open to revision. Where unnecessary hardship and multiplicity of proceedings might be avoided thereby, interference in revision would be justified

Amendment might be allowed unless the Court thought that the application was not made in good faith or after unusual delay If by allowing the amendment in the case, the scope of the enquiry might be restricted and time saved, the Court by granting leave to amend would certainly be furthering the ends of justice.—

23 T L J, 1193

Order VII, Rule 6

1 Where the ground of exemption from limitation required to be specifically mentioned as required by Order VII, Rule 6, was the Court recess intervening, the Court is entitled under Section 57 of the Evidence Act to take judicial notice of the vacation

The mere failure of the plaintiff to state the ground of exemption would not necessarily entail a dismissal of the suit, as the Court of first instance is in such case bound to allow an amendment of the plaint save in exceptional circumstances.—

20 T L J, 446

2 See also Regn VI of 1100, Sec. 19—

23 T L J, 446
23 T L J 947
24 T L J, 769

Order VII, Rule 11.

1 The rejection of a plaint is made mandatory under Rule 11 of Order VII only if the plaint does not disclose a cause of action. It does not require the extreme measure to be adopted in a case where the other essentials as to the statement as to when the cause of action arose is not contained in the plaint If it is found defective in this respect, the procedure prescribed in Order VI, Rule 5, of the Code will have to be followed It is only when a cause of action is clearly made out not to exist that there will be justification for resorting to an extreme penalty referred to in Order VII, Rule 11 (*a*) For determining this the whole of the plaint will have to be examined

The expression 'Cause of action" has not been defined in the Code It means "every fact which is necessary for the plaintiff to prove in order to succeed in his suit, and everything which if not proved gives the defendant an immediate right to judgment must be part of the cause of action" It does not comprise every piece of evidence which is necessary to prove such facts, but every fact which is necessary to be proved to entitle him to a decree It refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour

The import of the expression "disclosing a cause of action" should be the same as that of allegation not showing a cause of action occurring in Order XXXIII, Rule 5, of the Code, explained in the order in C. R, P No 306 of 1100 (19 T. L J, 684.)

It has been held that a cause of action means a good subsisting cause of action capable of enforcement in Court and calling for an answer and not barred by limitation or any other Law—

21 T. L J, *250*,

2. See also Sec. 115.— 20 T L J. *62*

Order VII, Rule 18.

The rejection of the copies of Court records, on account of their belated production, cannot be considered justifiable, as the Court has to use its discretion in matters of this kind, in spite of the provisions of Order VII, Rules 14, 15 and 18, and Order XIII, Rules 1 and 2 of the Civil Procedure Code "Even where the Rules of exclusion apply and the documents cannot be filed without the leave of the Court, that leave should not ordinarily be refused where the documents are official records of undoubted authenticity which may assist the Court to decide rightly the issues before it"—

20 T L J, *581*

Order VIII, Rule 2

As a general rule, a person by taking or acquiring security of a higher nature in legal operation than one he already possesses, merges and extinguishes his legal remedies upon the inferior security or cause of action. But for this purpose, the superior security must be co-extensive with the inferior security and between the same parties

The sub-mortgagee, like any other transferee of the mortgagee, takes subject to the accounts between the mortgagor and the mortgagee at the date of the sub-mortgage, and he will be affected by dealings between the mortgagor and mortgagee until the mortgagor has had notice, actual or constructive, of the sub-mortgage Any payment made by the mortgagor to the mortgagee, to be good against the sub-mortgagee need not be made in money, it may be made in any manner which is equivalent to payment, for instance, by delivery of goods, or by a release founded on a fair and *bona fide* arrangement. In any event, the mere crediting of an earlier mortgage debt as part of the consideration for a subsequent mortgage would not amount to a discharge or settlement of the first claim either by payment

or valid adjustment so as to affect the interest of the sub mortgagee

There is no rule that a defendant impleaded in a mortgage suit, as a subsequent encumbrancer or the purchaser of the equity of redemption, is bound to set up as a defence that he has also a paramount title. If, in such suit his priority was not sought to be displaced, he will not be precluded from raising the question of his priority in a subsequent suit of his own

A sub-mortgagee cannot be deemed to be bound by a decision in a suit to which he was not a party, if his claim has arisen long before the institution of the suit —

46 T L R, *239*

Ref—22 T L J, 163

Order VIII, Rule 6

1 The suit was for recovery of principal and interest under a hypothecation bond In respect of one of the plaint items the 5th defendant had obtained a decree, That decree had allowed him to recover that property on deposit of Rs. 704 and it had also allowed him to recover mesne profits and costs. The plaintiff sought to enforce the claim against the said amount The 5th defendant contended that under the above-mentioned decree he had the right to set off the amount ordered to be deposited against the amount of mesne profits and costs due to him under that decree, and as the latter exceeded the former there was no amount at all to be deposited and plaintiff could not obtain any relief at all in respect of that amount

Held—In equity he was entitled to such a set off — 20 T L J, *886*

2. On account of mutual dealings a balance of Rs 40 and odd with interest was claimed by the plaintiff from the defendant The defendant contended *inter alia* that nothing was due from him to the plaintiff and that Rs. 130½ would be due to him from plaintiff On this amount the defendant paid the necessary Court fees. An application filed by the defendant to convert the Small Cause Suit into a regular Civil Suit in view of the counter claim set up in defence was rejected by the lower Court

Held (In revision)—Plaintiff's claim ought to have been tried as a Small Cause, and the defendant's cross claim as a regular suit. There is nothing objectionable in such split procedure since a written statement urging a cross demand has the same effect as a plaint in a cross suit A Court exercising Small Cause jurisdiction in addition to its regular jurisdiction is not the same as a Court exercising nothing but Small Cause jurisdiction.

There is nothing to forbid Civil Courts invested with Small Cause jurisdiction, the trial of a counter-demand exceeding Small Cause jurisdiction —

20 T L J, *1196*

3. In the plaint, the value of improvements had been set off towards arrears of rent due for the years 1089 to 1095 which were obviously time barred

Held—Such a right was available for the land-lord The right of the land-lord who sued for recovery of property with arrears of rent to set off such of the arrears as were time barred against the value of improvements has been recognised by the Court — 20 T L J, *1286*

4. The first defendant committed breach by omitting to discharge the encumbrances on the property sold by him to the plaintiff Similarly the plaintiff failed to pay up the debt due to a stranger though undertaken by him and the first defendant had to discharge the said debt with interest In the plaintiff's suit to recover damages the defendant pleaded that the rents and profits from the land received by the plaintiff should be debited and that the plaintiff was answerable to him for the interest on the debt which should be set off against the damages

Held—A right of set off exists where there are cross demands arising out of one and the same transaction or where they are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit, in a case to recover money due under a contract made between the plaintiff and the defendant

The distinction between recoupment and set off is as follows —

In recoupment the defendant's claim must arise out of the same transaction as the plaintiff's and no balance can be certified for the defendant but the defendant's claim may be for liquidated or unliquidated damages. In set off the claims are independent, the cross claim should be for liquidated damages and the defendant can have a balance certified in his favour

Only a set-off provided for in the Civil Procedure Code need be taxed for the purposes of Court fees.—

47 T L R, *848*
(=21 T L J, *592*)

5 Under Order VIII, Rule 6, the defendant may claim to set off all amounts which were not barred at the date of suit This rule is applicable only to legal or statutory set off under the Code.

A counter-claim can be decreed only if it was not time-barred at the time that it was put forward

"The distinction between set off and counter claim has an important bearing on the question of limitation, for if the Statute of Limitation is pleaded to a defence of set off, the plaintiff, in order to establish his plea must prove that the set off was barred when the plaintiff commenced his action, it is not enough to prove that it was barred at the time when it was pleaded In the case, however, of a counter-claim it is enough for the plaintiff to prove that the counter-claim was barred when it was pleaded"

No hard and fast rule can be laid down in regard to the applicability of the rule as to the equitable set off The validity of the claim will depend on and have to be decided with due regard to the equities of each case— 21 T L J, *639*.

Ref,—22 T L J, 781

6 *No set off can be pleaded under the* Civil Procedure Code in respect of an amount due to the first defendant not from the plaintiff but from his assignor

It does not appear from the rulings in 15 T L R, 133 at 142 and 18 T L J, 671 at 682 that the High Court held that a charge was created over the chitty assets in favour of non-prized subscribers.

In the light of general principles governing transfer of actionable claims it would be open to the first defendant to set up equities in his favour if they were in existence at the time of assignment

22 T L J *674*

Ref—23 T L J, 1231

7 The suit was for recovery of an amount due under a hypothecation bond, Exhibit A, executed by the first defendant in favour of the first plaintiff for the balance consideration for an assignment of a mortgage right. The first plaintiff was himself an assignee of the said mortgage right and had executed a hypothecation bond, Exhibit I, in favour of his assignor, for almost the identical amount due under Exhibit A The first defendant was not made aware of the liability under Exhibit I, at the time she got her assignment but still discharged the same, on subsequent requisition by the first plaintiff On the date of the present suit the claim under Exhibit I was barred and so the first defendant claimed an equitable set-off of the amount she paid for getting discharge of Exhibit I as against the plaint claim. It came in evidence that the first plaintiff was the first defendant's legal adviser and that the first defendant had acted according to his advice right through.

Held—No hard and fast rule can be laid down as to the applicability of the rules of equitable set-off and the validity of the claim will depend upon and have to be decided with due regard to the equities of each case, and judged in every way the first defendant had a very good case for the equitable set-off she claimed —
22 T L J 781.

8. No barred claim could be pleaded as a legal or equitable set-off on the principle that the amount was not a legally recoverable one There is an exception to the rule in cases where accounts have to be taken between the parties, such as mortgage suits, suits by trustees, and suits where there is a fiduciary relationship between the parties in which a counter-claim though barred could be pleaded as set-off, A lessee could not set up a counter claim barred by limitation by way of set-off against the lessor — 49 T L R, 376
(=23 T L J, 919).

9. The claim to set-off must be in respect of an "ascertained sum of money" as provided in Order VIII., Rule 6, of the Code What may be found due after settlement of accounts cannot be held to be an ascertained sum within the meaning of the above cited provision. The question whether it is proper to compel the defendant in a case to resort to a separate suit cannot be determined by any general rule, but depends upon the facts of each case The power of the Court in regard to this matter is of a discretionary character, and has to be exercised on general principles of equity

Whether the set-off pleaded be legal or equitable, Court fee has to be paid.

There is no absolute prohibition of the alienation of the corpus of endowed property, but only a discretion is vested in the Court for appointment of a receiver for paying up the debt from the rents and profits, and if such a course be an impracticable one, then the properties themselves could be proceeded against.—
24 T L J, 436

Order IX

1 The provisions relating to dismissal of suits for default do not apply to execution proceedings.— 20 T L J, 727

2 When the decree-holder applied for proclamation, notice was issued to the second defendant. On the date of hearing, the second defendant did not file objection but applied for time The decree-holder's prayer for issue of proclamation was allowed Thereon, the second defendant applied for cancellation of that order alleging that he was prevented by illness from filing objections in time But the Court rejected this petition also. Hence the appeal.

Held—No appeal lay because Order IX of the Code did not apply to proceedings in execution.

The second defendant advanced his claim to priority in the suit itself and the Court negatived his claim The contention was raised that the matter being one of adjustment of equities between the parties, it was not within the competence of the trial Court to decide it It should have been left for decision to the executing Court.

Held—The trial Court was competent to decide that matter as the claim was not for adjustment of equities, but for the recognition and enforcement of an interest in property which the second defendant desired the Court to declare —
23 T L J, 886

3. See also Or XVII, R. 3—
36 T L R, 169
Sec. 105— 24 T L J, 698

Order IX, Rule 7.

1 The only classes of orders passed under Order IX made appealable under Order XLII of the Code are those rejecting applications for restoration of suits

already decreed *ex parte* under Order IX, Rule 13 (*vide* Sub rule 5 of Rule 1 of Order XLII) The right of appeal is one created by statute In the absence of express provision conferring a right of appeal, the same could not be validly sought to be exercised Section 82 expressly declares that appeals shall be only against orders expressly enumerated in the Code or those declared specifically appealable under any other law for the time being in force

Order IX, Rule, 7, enables a defendant against whom an order under Rule 6 to proceed *ex parte* by reason of his non-appearance on the date of the hearing has been passed to apply for being heard in answer to the suit on showing good cause for his previous non-appearance. A defendant against whom an order under Rule 6 has been passed has the right to ask for leave to file written statement and examine witnesses The stage to which the case has proceeded is a material factor to be considered in deciding the sustainability or otherwise of the prayer for restoration. It is not desirable that he should be shut out altogether on the ground that he was once declared *ex parte*. 20 T L J, *879*.

3. Under Order IX, Rule 7, a party who has been made *ex parte* and who desires to take part in the proceedings from the stage at which he appears need not have the *ex parte* order passed against him, set aside. The Order and Rule applies to a party who wishes to be relegated back to the position in which he would have been if he had appeared at a previous hearing at which he was absent and who wishes the proceedings taken in his absence to be taken over again in his presence so that he may regain the opportunities of cross-examination, &c., which he lost by his absence. Its operation cannot be extended to the subsequent hearings of the suit, so that the defendant can conduct his case from the day of his appearance.—

23 T L J, *998*.

Order IX, Rule 9

1 The provisions of Order IX are not applicable to execution proceedings. When an application under Order XXI, Rule 87, is dismissed for default, no restoration application under Order IX, Rule 9, is competent Such an order is not, therefore, appealable under Order XLII, Rule 1, Clause 13, of the C P C—

20 T L J., *285*.

2 The rejection of an application for restoring a suit dismissed for default is an order under Order IX, Rule 9, and Order XLII, Rule 1, clause 5, provides for an appeal against an order under Rule 9 of Order IX, rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit This right of appeal does not seem to be restricted to cases where the application is rejected on its merits, but it is wide enough to apply to all cases of rejection of applications under Order IX Rule 9 without reference to the grounds upon which the application is rejected —

21 T L J, *415*

3. Where a suit for recovery of money was at first dismissed owing to default of appearance of the plaintiff, but was subsequently restored on his application, and a decree passed against the defendant

The lower Court had no jurisdiction to set aside the order of dismissal of plaintiff's suit as a matter of grace in view of the finding that the plaintiff has no sufficient explanation for his absence.—

49 T L R. *301*

(=23 T L J., *704*)

4 See also Sec. 105— 20 T L J, *681*

Order IX, Rule 13.

1 The discretion given to a Court of law under Order IX, Rule 13, of the Code for putting a party on terms as a condition of setting aside the *ex parte* decree against him cannot be exercised arbitrarily It

would be inequitable to impose conditions in a case where there has been no default on the part of the party asking for a re-hearing

The practice of the Courts of passing orders imposing conditions under Order IX, Rule 13, without satisfying themselves as to whether there was due service or not has no warrant in law If, in any particular case, the party is able to prove that there was no 'due service' of summons on him he is entitled as a matter of right to get the *ex parte* decree set aside

Whether in any particular case a party has been 'duly served or not is a question of fact "*Prima facie* the service must be personal service by delivering or tendering a copy as mentiond in Rule 10 Rule 17 provides among other things that where the serving officer, after using all due and reasonable diligence, cannot find the defendant and there is no agent empowered to receive service on his behalf nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides, or carries on business, or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon, or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person, if any, by whom the house was identified and in whose presence the copy was affixed Rule 19 provides that "where the summons is returned under Rule 17, the Court shall, if the return under that Rule has not been verified by the affidavit of the serving officer and may, if it has been so verified, examine the serving officer upon oath, or cause him to be so examined by another Court, touching his proceedings and may make such further enquiry in the matter as it thinks fit and shall either declare that the summons has been duly served or order such service as it thinks fit" The order that the summons has been duly served in circumstances like the present ought to be obtained as soon as reasonably possible after the return is made by the serving officer It is obvious that it is most inconvenient to postpone making the order adjudicating on the sufficiency of the service until the day of hearing The plaintiff may have had all the expense of bringing his witnesses and paying his pleader only to find that the case cannot go on and the Court may have a case in its list for hearing which cannot be proceeded with." (43 I C 632, All) —

20 T L J, *618*

Ref —23 T L J, 580
42 T L, R., 358
(=23 T. L J, 596)

2 No doubt, there is no specific provision like Order IX, Rule 13, for restoring an application for setting aside an *ex parte* decree which was dismissed for default But the Court has the jurisdiction under its inherent powers to order a restoration if the circumstances justify it. Otherwise the result would be to deprive the party of any remedy even if he had valid and sufficient reasons for his absence at the time when his application was taken up — 20 T L. J., *725*

3. Where a party instituted a suit for cancellation of the *ex parte* decree obtained against him on the ground of fraud

Held —He can succeed only on proving "an actual fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts and obtaining a decree by that contrivance" Mere proof of non service of summons is not sufficient. There must be proof of fraudulent suppression of summons as "the result of deliberate design"

20 T. L. J., *918*.

4. The suit was first dismissed for default It was eventually restored on application of the plaintiff which was filed after time and decreed *ex parte*. The

defendant then applied for restoration of the suit and for dismissal thereof on the ground of the plaintiff's application for restoration having been out of time The suit was again restored but the defendant's prayer for dismissal of the suit was disallowed

In revision by the defendant, it was contended for the plaintiff, counter-petitioner, that once the restoration has been ordered at the instance of the defendant the whole suit should be deemed to have been re-opened and all defaults on the part of either party before such restoration should be considered to have been condoned by the Court.

Held—The whole petition should be considered to determine what the defendant wanted There could be no objection to a defendant against whom an *ex parte* decree had been passed to seek for a re-opening of the case and complain of errors of procedure which should have required the Court to non-suit the plaintiff. After restoration the parties are in *status quo* giving them such rights as they could have had if a decree had not been passed against the defendant.— 20 T L J, *1030*

5 When a defendant has entered appearance after setting aside an *ex parte* decree, it is not open to the Court to act upon the *ex parte* evidence taken before the restoration — 20 T L J, *1041*

6 Defendants 1 and 2 were minors on the date of the decree. The plaintiff applied for the appointment of their sister as their guardian for the suit. But the notice issued to her was returned with the endorsement that she refused to accept it Nevertheless the Court passed an order on 15-10-1100 appointing her guardian of the minors and eventually passed an *ex parte* decree against the defendants as she did not appear to contest the suit. This decree was subsequently set aside on the application of the minors. The plaintiff-decree-holder filed the revision petition against the order of the lower Court setting aside the *ex-parte* decree passed against defendants 1 and 2 The questions that arose for determination were—

(1) Whether the minors were properly represented in the suit,

(2) If they were not properly represented, whether the decre passed against them is a nullity or whether it is only voidable? and

(3) What is the remedy of the minors in such a case? Whether it is by way of an application to set aside the *ex parte* decree or by some other proceeding

Held—(1) The appointment of the sister who not only did not appear and consent to her appointment as guardian, but openly expressed her unwillingness to act as such by refusing to accept the notice, as guardian for the minors was clearly improper and unjustifiable, as it contravened the express provisions of Section 436 of the Civil Procedure Code of 1065 (Order XXXII, Rule 3 of the Code of 1100) which was in force at the time the appointment was made The minors were therefore not represented in the suit

(2) The proposed guardian in this case refused to accept the notice to show cause why she should not be appointed guardian and did not appear in Court to express her consent She must therefore be taken to have been unwilling to act as guardian. Her appointment as guardian, therefore, was against her consent and it was illegal The decree passed in such a case is clearly a nullity and the defendants cannot be taken to have been parties to the decree. The Court in such a case has no jurisdiction to pass a decree against the minors and a decree passed by a Court without jurisdiction does not bind the parties and is null and void.

Per Venkatarama Iyer and Joseph Thaliath, J J—3 The question whether a decree has been passed against a defendant *ex parte* as contemplated in Ordar IX, Rule 13, has to be determined irrespective

of its validity against that defendant. The defendant in the case is the minor and not his guardian. Order XXXIII, Rules 3 and 4, only lay down that where the defendant is a minor the Court has to pass an order directing his or her representation through another person. The passing of the order or the omission to do the same cannot affect the circumstance that the minor is the defendant in the suit By the defendant's non-appearance on the date fixed therefor, the Court has to proceed with the suit *ex parte* so far as that defendant is concerned as contemplated in Order IX, Rule 6 (2) From the wording of Rule 13 of Order IX it could not be said that the proper service of summons through a properly constituted guardian, is a condition precedent to proceeding *ex parte* under Rule 6 (2), for, the defendant is enabled to move the Court for restoration of the suit in cases of non-service of summons properly on him If the defendant is a minor on the date of the application, necessarily any person interested in him will have to make the application on his behalf Hence the conditions laid down in Order IX, Rule 13, *viz.*, (1) that the applicant should be a defendant and (2) that the suit must have been decreed *ex parte* against him, exist in the present case and therefore the provisions of Order IX, Rule 13, are applicable to it

Per Venkatarama Iyer, J—Even if it is held that the provisions of Order IX Rule 13 are inapplicable to a case like the present, the inherent powers of the Court under Section 115 C. P. C could be invoked in the peculiar circumstances of the case The omission on the part of the Court to strictly follow the procedure laid down in Sections 423, 424 and 436 would constitute an abuse of legal process, for, it has resulted in a decree which is virtually a nullity in the eye of the law When this fact is brought to the notice of the Court it is clearly the duty of the Court to see that this wrong is righted The wording of Section 115 C P C indicates that irrespective of the other remedies allowed under the Code, the inherent powers of the Court, will have to be invoked in appropriate cases where the ends of justice require the same

Per Joseph Thaliath, J—With respect to cases falling under the old Civil Procedure Code the ruling in 36 T L. R., 371, should be held to be good law

For the ends of justice and to prevent the abuse of the process of Court, the Court has inherent powers to go beyond Section 103 to set aside an unjust *ex parte* decree or order But such powers should be very sparingly exercised and only in cases where, in view of all the circumstances in the case, such interference is well-merited

Per Parameswaran Pillai, J—A minor defendant against whom an *ex parte* decree has been passed without his being properly represented cannot move the Court under Order IX, Rule 13 In order that this Rule might apply the applicant must be a person who was a *defendant* in the suit and he must show that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. If a minor who is not represented in the suit by a properly appointed guardian cannot be treated as a party to the suit, he cannot be a defendant who can apply under that Rule. The requisitions of that Rule, *viz*, that the summons was not duly served or that he was prevented by sufficient cause from appearing presuppose that he was a party to the suit who was bound to appear and defend the suit, if he had any defence, if these circumstances did not exist If he was therefore not a party to the suit he cannot come under Order IX, Rule 13 Where a minor who was not properly represented in a suit could not be regarded as a party to the suit, the decree could not bind him and therefore an application made by him

under Order IX, Rule 13, was incompetent

It is not necessary that the extraordinary power vested in the Courts by Section 115 should be exercised in such a case. That power is vested in the Courts to make such order as may be necessary 'for the ends of justice or to prevent the abuse of the process of the Court' If the decree in the case is a nullity and cannot bind the minors, the ends of justice cannot be defeated by not reopening the case in the exercise of the inherent power of the Court, because other remedies are open to the minors, if in execution of the decree their properties are sold and they are sought to be arrested (F—B)—

47 T L R., 155
(=21 T L J, 208)

Ref—24 T L J, 718
24 T L J., 374
Fol—23 T L J, 1009.
Not Appl—22 T L J., 598

7 The counter-petitioner, put in an application in the lower Court for setting aside the *ex parte* decree passed against him The lower Court found that the summons was not shown to be improperly served but however set aside the *ex parte* decree, imposing certain conditions

Held (In revision).—The Court has no inherent power to set aside an *ex parte* decree A defendant against whom an *ex parte* decree has been passed has the following remedies —He can bring a suit to set aside the decree if there has been any fraud in the obtaining of it. He can prefer an appeal against the decree itself He can file an application as provided by Rule 13 of Order IX to set aside the *ex parte* decree. He can also file an application for review and the grounds of such an application would be wider than those covered by Rule 13

The Munsiff went wrong in having set aside the *ex parte* decree after expressly finding "Summons not shown to be improperly served" as the Court had no jurisdiction to set aside the *ex parte*

21 T L J, 331

Fol—21 T. L J, 1011

8 Cases may be conceivable which may not come under the strict letter of Order IX, Rule 13 or Order XL, Rule 18, but which might therefore require for the ends of justice the exercise of the inherent powers of Court The view that under such circumstances the Court would be justified in falling back upon those powers cannot be said to be utterly unreasonable, but this does not justify the laying down of the law in such broad terms as in 3 T. L T, 153

Where therefore a person aggrieved by a decree might have appealed against it or have applied for review of it or applied under Order IX, Rule 13 but did not avail himself of the first two remedies and only applied, in the event, unsuccessfully under Order IX, Rule 13, it was not open to him subsequently to apply under Section 115 of the Civil Procedure Code to have the decree amended

(In the circumstances of the case, however, the High Court refused to interfere with the exercise of the inherent powers by the lower Court)

The inherent rights vested in Courts under Section 115 of the Civil Procedure Code for the purpose of preventing the miscarriage of justice or preventing the abuse of processes of Courts is not intended to be resorted to in cases, where the party has got a clear remedy specifically provided by the Code.—

47 T L. R., 331
(=21 T L J, 754)

Fol—21 T L. J, 1011

9. In appeal on an order under Order IX, Rule 13, the Judge found that there were not sufficient grounds for interference with the order passed by the Munsiff, and that he was unable to say that the Court (Munsiff's Court) had acted illegally or irregularly in passing the order,

and that the Progress Diary showed, beyond doubt, that the lower Court was fully justified in passing the order Nevertheless, he set aside the *ex parte* order on the ground that since the appellant had filed several documents which *prima facie* showed that his contentions were not unsubstantial, he might be given another opportunity to prove his case

Held (In revision).—The Judge had no jurisdiction to set aside the *ex parte* decree on the ground stated by him It was not a regular appeal that was filed before the Court, in which case, the order made by the appellate Court would not have been improper But it was an appeal against an order rejecting an application for setting aside an *ex parte* decree In that case, the Court had no power apart from the provisions of Order IX, Rule 13, to set aside an *ex parte* decree. The ground stated by him was not one of the grounds contemplated under Order IX, Rule 13 According to that Section, in order that an order setting aside the *ex parte* decree may be made, the Court must be satisfied, that the summons was not duly served or that he (the appellant) was prevented for sufficient cause from appearing when the case was called for hearing — 21 T. L. J., *1011*

10 In execution of an *ex parte* decree the properties of the judgment-debtor were sold in Court auction A creditor of the judgment-debtor, who had attached the properties, applied under Order XXI, Rule 87, of the Code for setting aside the sale. At the hearing of the application, the Execution Court came to the conclusion that the summons to the defendant had not been served at all, and that, therefore, the decree was a nullity The view was taken that the Court which passed the decree had fallen into the mistake of thinking that the summons had been duly served and that the Court had inherent jurisdiction to correct its own mistake. In this view, the *ex parte* decree was set aside, and fresh summons to the defendant was ordered

Held —The execution Court was wrong in going into the question of the validity of the decree and treating the decree as a nullity, particularly when the objection was raised not by the person primarily affected, but by a total stranger to the suit.— 22 T. L. J., *108*

11 An *ex parte* decree was set aside, and after restoration evidence was recorded and a decree was passed on the merits. Against the latter decree the *present* revision petition was filed *In revision*, objection was raised *on the ground* that application for *restoration* was barred at the time of the application

Held —The petitioner was not entitled to raise any such ground —

22 T. L. J., *559*

12. The real basis of the binding character of a decree against a minor is the fact of his having been duly represented by a proper guardian and not the *mere* existence of a formal order *appointing* a guardian for him

Where the Vakkalath was filed in advance but was subsequently ratified by the party

Held —It was irregular But it could not be said to be null and void The nonfiling of a Vakkalath in Court with the appeal was not sufficient in itself to regard the appeal as improper The question was one of authority to act on behalf of another Such authority might be made out in the course of the proceedings.

Order IX, Rule 13, says that the Court *shall set aside an ex parte* decree on being satisfied that the summons was not duly served on the defendant or that he was prevented by sufficient cause from appearing. The provision is imperative, so much so it has been held that even if the defendant has knowledge of the suit against him the decree should be set aside where no summons is served on him as required by law.— 22 T. L. J., *967*.

13. Where an *ex parte* decree is alleged to have been obtained by a plaintiff by fraud, the defendant is entitled to institute a regular suit to set aside the decree on the ground of fraud But if the very fraud that is set up in the suit was set up in the application to set aside the *ex parte* decree, and the Court after going into the question of fraud rejected the application, the suit would be barred as *res judicata*, unless the fraud was of such a nature that it could not properly come within the scope of inquiry under Order IX, Rule 13 — **23 T L J**, *182*

Ref —23 T L J, 896

14 A defendant applying under Order IX, Rule 13, is not entitled to have the *ex parte* decree set aside unconditionally on the ground that the summons was not duly served on him It is possible that the knowledge of the suit by the defendant, if proved, might be a circumstance to be taken into consideration in passing the order The imposition of terms is, however, a matter in which the Court should exercise a judicial discretion and reasons should be given why, in the opinion of the Court, the terms imposed are necessary(F B)— **23 T L J**, *580.*

15. An order for payment of costs to the opposite party *irrespective of the final result of the suit* is an order imposing a penalty on the applicant for his negligence or laches and could mean only that, whatever be the final result of the suit, whether the opposite party wins or not, he is entitled to receive the costs incurred up to date. The payment could in no sense be regarded as an advance. If the payment is to be regarded as an advance, the Court would have to say so in express terms.

Where as a condition for setting aside an *ex parte* decision the defendant was asked to deposit the costs of the plaintiff incurred up to that date irrespective of the final result of the suit:

Held —In passing a decree on the merits, after restoration of suit to file, the Court has jurisdiction to award the plaintiff his costs of the suit over and above the amount deposited in connection with the setting aside of the *ex parte* decree. The taxing of costs over again on retrial applies only to ordinary cases where no provision to pay the costs, irrespective of the final result, has been made. Rule 435 of the Civil Courts' Guide —

46 T L R, *358*
(=**23 T L J**, *596*)

16 Where a decree is passed against a minor represented by a guardian who had not consented to act as such it is open to the minor to apply to set aside the decree under Order IX, Rule 13 of the Code.

Consent of the guardian may be an implied one. "Silence may be indicative of want of consent, the attendant circumstances may, however, be looked into, and consent may be found to have been made out Under the provisions of the Code what has to be looked into is whether there has been a substantial contest on behalf of the minor as well If there was such a contest, the decision binds the minor, but not otherwise " —

24 T L J, *718*

17 See Regn IX of 1090 —

22 T L J, *490*

Order XI, Rule 14

1 Under Order XI, Rule 14, of the Civil Procedure Code, no order for production of documents can be made unless the party ordered to produce has directly or indirectly admitted the documents to be in his possession or power —

20 T L J, *882*

2 The plaintiff sued for partition and recovery of her share of the properties left by her deceased husband Defendants 1 to 4 are his children and 5th defendant is his sister The 5th defendant was impleaded as he was in management of the

properties of the deceased and was liable to account to the heirs of the deceased The plaintiff and 6th defendant filed a razi petition by which the latter was exonerated from liability and the Court passed a preliminary decree against defendants 1 to 5 who were declared *ex parte*

The 1st defendant subsequently applied to have the *ex parte* decree against him set aside After notice to the plaintiff the decree was set aside and the suit restored to file Eventually the Court passed a decree under which the plaintiff and the other defendants were allowed to recover their respective shares in the amount which was alleged to have remained in the hands of 6th defendant On appeal by the 6th defendant against this decree

Held —The retrial of the suit, however, after its restoration to the file without notice to the 6th defendant would be a material irregularity, and the 6th defendant could not be bound by the decision subsequently passed

The defendants in a partition suit, being co-sharers, are not as in other suits, merely defending themselves, but occupy a position similar to that of the plaintiff and consequently when a decree is eventually passed, they can, on payment of proper Court fee, take out execution in respect of their shares. As a corollary it has been held that in certain circumstances where the plaintiff in a suit for partition wishes to withdraw, a defendant may apply to be transposed as plaintiff and allowed to continue the suit. It is the independent and inherent right of each co-owner or member of a co-parcenery who is impleaded as a party defendant to a suit for a general partition of joint property or joint family or co-parcenery property, to avail himself, if he chooses of the opportunity afforded by such a suit filed at the instance of the other co-owner or co-parcener and seek the necessary relief of separation and partition of his own individual share from that of the plaintiff and of the rest of the co-owners or co-parceners interested in the joint or co-parcenery property sought to be partitioned

Notice of the application to set aside the *ex parte* decree need be served only on the plaintiff The expression 'opposite party' in Order IX, Rule 14, of the Code can mean only the plaintiff The first defendant was concerned with the decree only so far as it enabled plaintiff to recover properties and money from him, and in the circumstances the opposite party to his application can be only the plaintiff who had been granted relief against him The order setting aside the *ex parte* decree was not irregular merely because notice was not given to the other defendants also The present case is stronger as the 6th defendant was in no sense a necessary party to the suit and in no way interested in it except as a person who had with him certain moneys for which he was stated to be accountable to the family Though the other co-sharers who may be said to occupy a position analogous to that of plaintiff, may perhaps be regarded as being entitled to notice, the same cannot be said of the 6th defendant — 24 T L J, 610

Order XVI, Rule 10

1 Order XVI, Rule 10, clearly empowers the Court to order warrant and attachment simultaneously to witnesses, if it thinks fit to do so.

The enforcement of payment, under an agreement executed for the purpose of stifling a prosecution would be one contrary to public policy A mere threat of criminal proceedings apart from an actual agreement to stifle a prosecution does not bar an action for a debt due —

20 T L J, 487

2. Courts ought not to behave as if they are impotent in the matter of enforcing the attendance of unwilling witnesses.

Non attendance after accepting summons or evasion of service of summons amounts really to contempt of Court and if once in a way a substantial fine is imposed and realised, contempt of this sort will greatly diminish. Even if a party does not apply under Order XVI, Rule 10, and the Court believes that the witness is material, it would exercise a sound discretion by itself putting in force the provisions of the said Rule — 24 T L J *403*

Order XVII, Rule 1.

Under Rule 71 of the Civil Courts' Guide, an affidavit is an indispensable appendage to an application for adjournment, but the absence of the affidavit *per se* would not entail a dismissal of the petition. Under Rule 18 of the Guide, the party or Vakil as the case may be shall be called upon to cure the defect, and only in case of failure to cure, within the time specified, should it be dismissed

The adjournment of a case at the instance of a party is within the discretion of a Court under Order XVII, Rule 1, of the Code. It is not open to the Court to adjourn a case where no cause is shown, but where cause is shown, the sufficiency of such cause has to be considered for the exercise of the discretion of the Court In matters of this kind, the Court ought not to be too technical as if one is anxious to find excuse for cutting short the work of the Court, especially when the party applying has not been negligent and there is no room for prejudice to the opposite side.

The meaning of the expression 'any other sufficient reason' in Order XLV, Rule 1, of the Code remains to be settled authoritatively so far as Travancore is concerned

When it is said that the reason to be alleged as sufficient should be analogous to those previously occurring in Order XLV, Rule 1, it means that it should be such as did not form the subject of consideration by the Court, but if considered would materially affect the conclusion arrived at — 20 T L J, *185*

Order XVII, Rules 2 and 3

1. In the case, there were both default of appearance by the petitioner within the meaning of Order XVII, Rule 2, and also failure to perform an act necessary to the further progress of the suit, *viz*, failure to pay day-costs, within the meaning of Order XVII, Rule 3. The suit was decreed in favour of the plaintiff and the petitioner put in an application under Order IX, Rule, 13, for setting aside the decree. The question arose whether the application was competent

Held —In such a case where both the contingencies contemplated in Order XVII, Rule 2 and Rule 3, occur, the proper view to take would be to regard the disposal as being under Order XVII, Rule 2 and not under Order XVII, Rule 3 The decree passed would therefore be an *ex parte* decree and the application made under Order IX, Rule 13, would be competent — 46 T L R., *103*

2. The primary Court dismissed a suit by a judgment which described itself as one for default. But there was in fact no default of appearance so as to permit the Court to dismiss the suit under Order XVII, Rule 3 The only default was the failure to produce a judgment in the prior case which failure would not dispense with the necessity for a decision on the merits

Held —The disposal of the case was one under Order XVII, Rule 3, and therefore an appeal lay from the judgment. The Court must look at the substance and not the form — 23 T L J, *806*

Order XVII, Rule 3

1. The dismissal of the suit for default of payment of deficit Court fee, is clearly

one under Order XVII, Rule 3 The only remedy open to the party will be by way of a review before the Court which decided it, or an appeal to a competent Court. No application for restoration under Order IX could validly be made in such cases.— 46 T L R, *139*

2. The dismissal of a suit for default of payment of additional Court fees and non-production of copy of plaint comes under Order XVII, Rule 3 The remedy of a party whose suit has been dismissed under Order XVII, Rule 3, is by way of appeal or by way of review as the dismissal under that Rule amounts to a decree — 21 T L J, *190*

3. In the suit brought by certain shareholders of the Tropical Plantations Company, Ltd., for the purpose of ending the impasse created by the simultaneous functioning of two rival sets of directors, the plaintiffs prayed by interlocutory application for the transposition of the Company which was impleaded as the first defendant in the case, to the plaintiff array, and the Court ordered as a preliminary to the consideration of the said prayer, the convening of a general meeting to ascertain the will of the share-holders as regards the conduct (*Vide* 21 T L J, 1314) The plaintiffs defaulted to pay the commission batta called for by the Court for convening the general meeting and the Court in consequence dismissed the suit. The appeal was filed against the decree dismissing the suit The plaintiffs did not implead the first defendant in the appeal and their only prayer in appeal was as regards a relief in the plaint which related to a declaration as to the status of one set of directors and their competency to act on behalf of the company

Held (On preliminary objection as to the maintainability, of the appeal)—The non-joinder of the first defendant was fatal to the appeal. The declaration prayed for could not be given in the absence of the company whose interests would be affected by such declaration. Ordinarily when a defect of this nature is discovered the practice of the Court is to adjourn the case to enable the defect to be remedied, but as in the case the omission of the first defendant from the array of parties appeared to be deliberate and no substantial good could result to the plaintiffs if the first defendant was made a party to the appeal, no adjournment of the case was necessary

Held further—(1) Inasmuch as Order XVII, Rule 3, seems to contemplate only that the Court should dispose of a suit on the materials before it, the dismissal of the suit for the default in question was technically wrong of the lower Court. The Court would have been justified in dismissing the petition to make the first defendant a plaintiff, but it should then have expressed an opinion as to the effect of its decision on the merits of the suit. (As this was only a question of law, their Honors did not deem it necessary to remand the case, but decided it themselves.)

(2) The plaintiffs could not succeed in the suit in their individual right as shareholders but could only succeed if they are regarded as suing on behalf of the company, since the present suit was not in respect of acts which were *ultra vires* the company or acts which affected their individual rights only but affected the internal management of the company And the plaintiffs could not be allowed to sue on behalf of the company unless they could show that the company, *i e.*, the holders of the majority of the shares approved of the suit The suit was therefore rightly dismissed by the lower Court.— 22 T L J, *1351*

Order XX, Rule 1.

1. The question arose whether the judgment of the lower Appellate Court was a nullity, having been pronounced on a

Sunday, on which day in the week, no judicial act could have been formally done or announced, as laid down under Article 547 of the Civil Courts' Guide It was also contended that the pronouncement of the judgment in question could not be considered to have been done in open Court, within the meaning of Order XX, Rule 1, of the Civil Procedure Code

Held—A judgment pronounced on a Sunday is not a nullity The provisions of Order XX, Rule 1, are only directory in their nature and do not absolutely prohibit as illegal, the pronouncement of judgments otherwise than in accordance with them It cannot be said that if the parties have not been prejudiced by the particular rule of procedure not being complied with, a reversal of the proceeding would be proper, expedient or justifiable.

The expression "Open Court" could only connote "a Court to which all the public have access as a matter of right" In appropriate cases, the Judge has the right to exclude the public from the Court for valid grounds when judicial business is transacted A Court' would refer to the place constituted by the Government by virtue of the powers vested in them under Section 5 of the Civil Courts' Regulation for transaction of judicial work. The word 'open' therefore, would only have reference to the non-exclusion of the public when a judgment is pronounced.

Article 547 of the Civil Courts' Guide does not amount to an absolute prohibition of judicial proceedings on holidays. In the absence of an express declaration that the proceedings would be void, the Article could not be treated as justifying the invalidation of the proceedings.—

46 T L R., *865*
(=20 T L J, *584*)

Ref—32 T L J, 493.

2. Article 547 of the Civil Courts' Guide is intended only for the guidance of subordinate Courts. Any violation of the provisions of the Article cannot render a judgment invalid if the parties had been given notice of the posting as required by Order XX, Rule 1 However in view of the express provisions of the Article, a subordinate Court ought not to ordinarily post cases for pronouncement of judgment to a public holiday without obtaining sanction from the High Court—

22 T L J, *493*

Order XX, Rule 6

1 An order rejecting an application for amendment of the decree whether, under the old Section 201 or the new Civil Procedure Code, Order XX, Rule 6, is not appealable— 20 T L J, *1062*

2. It is not necessary to construe a decree by referring to the pleadings or judgment, unless the decree is ambiguous It is not competent to the executing Court to go behind the decree or read into it words which appear in the judgment, but which have not been incorporated in it Where the wording of the decree is clear, it cannot be interpreted in the light of the reasoning and phraseology found in the judgment — 21 T L J, *749*.

3. A Court cannot look at its judgment to interpret its decree where the language of the decree is plain and unambiguous, and it is only when the terms of the decree is ambiguous that it can be interpreted in the light of the judgment If the decree were not in conformity with the judgment, it was open to either party to move the Court to bring it into conformity with it. So long as no such step has been taken by the parties, it is the plain duty of the execution Court to execute it as it stands.—

22 T L J., *677*.

Order XX, Rule 11.

The plaintiff sued for future subscriptions in a lump on a chitty hypothecation bond executed by the first defendant who

prized his ticket at the second instalment and who subsequently defaulted The 3rd defendant who purchased some of the items charged, deposited in Court the amount of 3rd to 6th instalments with interest and asked that the decree for future subscriptions should order payment by instalments. The lower Court granted the equitable relief claimed by the 3rd defendant on a consideration of prevailing economic depression in the country

Held.—It is by no means clear that Order XX, Rule 11 (1), is applicable to decrees on chitty transactions. For in such cases the obligation to pay a lump sum arises for default in paying instalments and it may be doubted whether the Rule should be applied to empower the Court in effect to restore the contractual obligation to pay by instalments after it has been broken. Anyhow full effect must be given to the words "notwithstanding anything contained in the contract under which the money is payable" occurring in the Rule The provision in the contract for payment by instalments does not affect the power of the Court The Rule is applicable to decrees on chitty transactions.

The principal reason appearing in the Munsiff's judgment for granting payment by instalments is "the prevailing economic depression in the country" Even if the economic depression ought to be judicially noticed, such a reason is not a sufficient reason within the rule. It is applicable to every case which comes before every Court and in the absence of proof that a party is particularly affected by it, the fact that its effect is common to every case shows that it cannot be the basis of the exercise of a discretion in any particular case.— 25 T L J, 746

Order XX, Rule 12.

1 The suit was for recovery of mesne profits from the first defendant for the period during which he deprived the plaintiff of possession by wrongful process in execution The first defendant contended that he had sold the property to the additional second defendant who sold it to a third party and that therefore he was not liable for the mesne profits .

Held —*Prima facie*, the first defendant is the man who is liable to the plaintiff for the mesne profits. He cannot avoid his liability by the simple artifice of transferring his tortious possession to a third party It may be said that in law the third party who obtains possession from the original purchaser may also be liable to the plaintiff for damages for the wrongful detention of the property But this fact cannot exonerate the original dispossessor from his liability to the plaintiff The trespasser (the first defendant in the case) and the subsequent alienee, if any, are jointly and severally liable for the mesne profits.—

20 T L J, 665

2 Mesne profits may be awarded against a co sharer if there had been an ouster— 23 T L J, 1143

3. See also Sec 2 (12) — 23 T L J, 382

Order XX, Rule 16

The suit was for recovery of a specific sum of money due from the defendant who was carrying on business as the plaintiff's agent

It was contended for the defence that the suit was not properly framed, that it ought to have been one for accounts, and that after a preliminary decree for accounts was passed, accounts ought to have been taken and a final decree passed

Held. (Overruling the defence contention) —Merely because a suit was one brought by a principal against his agent, it did not necessarily follow that the Court should pass a preliminary decree for account Under Order XX, Rule 16,

the Court had to be satisfied before directing an inquiry into accounts, that taking of accounts was necessary —

23 T L J, *184*

Order XXI, Rule 1.

1 A compromise was filed by plaintiffs and 1st defendant whereby plaintiffs agreed to assign their rights over plaint property to 1st defendant on his paying a certain sum with interest before 30-8-1102 In case no payment was made or the sale deed was not taken within the above date, the 1st defendant was to surrender plaint property If plaintiffs failed to accept amount so tendered within the prescribed date or to execute the sale-deed, the 1st defendant was allowed to deposit the amount in Court and have a conveyance to him executed through Court A decree was passed in terms of the compromise on 21-1-1102 On 30-10-1102, first defendant deposited amount with interest in Court, on the reopening of the Court The lower Court held that, under the compromise decree, the money had to be paid to the plaintiff and that the deposit in Court was not a compliance with the requirements of the decree.

Held.—The deposit in Court on the reopening day was a compliance with the terms of the compromise decree

Order XXI, Rule 1, does not lay down that it is applicable only to cases where no particular mode of payment has been prescribed under the decree. On the other hand, an option seems to have been given under the Rule to the judgment-debtor to make the payment in one of the modes set forth in the Rule. The provisions of the Rule have to be construed, giving the language used its plain meaning without importing into them any words, so as to enlarge or restrict the scope of their application Applying this well-recognised rule of construction, these provisions allow the judgment-debtor, whatever may be the nature of the directions contained in the decree, as regards the mode of payment, the option, in cases any sum of money is declared payable by him under the decree, to pay the same either by deposit in Court or to the decree-holder direct out of Court, or in such other manner as may be prescribed by the Court which passed the decree. The option is clearly one allowed him by law, as the Rule under consideration enacts, that the payment shall be made in the above manner The use of the word "shall" would require this provision to be construed as a mandatory one, the right allowed to the judgment-debtor under this provision has consequently to be considered as claimable by him irrespective of the directions under the decree.

If the judgment-debtor is deemed to have a right to make the deposit in Court, the circumstance that the Court was closed on the day fixed for payment would make the payment if made on the next working day thereafter a valid compliance with that requirement, for, the maxim "the act of Court can hurt no body" will clearly apply to such a case

The principle underlying this maxim has been expressly provided for under Section 4 of the Limitation Regulation with respect to suits, appeals or applications. Section 10 of the General Clauses Regulation extends the application of this principle to Acts or Proceedings directed or allowed to be done or taken in a Court or any Office under any Regulation.

Section 10 has to be liberally construed -

20 T L J, *15.*

2. The suit was originally instituted in the Munsiff's Court, but the plaint was returned by that Court and the case was reinstituted in the District Court subsequently The decree of the District Court provided for interest from date of suit. In execution of this decree certain remittances were received from time to time by the Court on behalf of the judgment-debtor The questions for decision

relate to the date from which interest has to be computed and to the cessation of interest on the amounts received from time to time by the execution Court on behalf of the judgment-debtor

The expression 'date of suit' cannot mean the date of institution of the suit in the *Munsiff's* Court. When a plaint is returned by the Court in which the suit is first instituted and the suit is re-instituted in another Court, the proceedings after re-institution cannot be regarded as a continuation of the steps previously taken in the Court which returns the plaint.

Under Order XXI, Rule 1, the amounts received from time to time by the execution Court should be viewed as payments into Court on account of the decree. Interest on the decree-amount should cease to run *pro tanto* from the dates of the respective payments. Under Order XXI Rule 1 it is the duty of the Court to give notice of payment to the decree-holder The judgment-debtor can be blamed only where the Court orders notice and he neglects to comply with it by the non-payment of the process fee.

The provisions of Order XXIV in regard to payment into Court during suit when compared with Order XXI, Rule 1, in regard to payment into Court during execution mark the difference between the two kinds of payment so far as their effectiveness to stop the running of interest on them is concerned. The provisions of Order XXIV are not applicable to payments into Court in execution —

47 T L R., *144*
(=21 T L J, *111*).
Ref —48 T L, R., 405
(=22 T L J, 1252)

Order XXI, Rule 2.

1. When a judgment-debtor comes forward and says that he has entered into an agreement with the decree-holder which precludes the decree-holder from taking out execution proceedings, the agreement is in effect an adjustment of the decree for the time being and is as much within the mischief contemplated by Order XXI, Rule 2, as an out and out adjustment under which the whole obligation under the decree is wiped out

Hence such an agreement must be certified to the Court within the period of ninety days, and if not so certified cannot be taken cognizance of by the executing Court.

To hold otherwise would certainly lead to difficulties and inconvenience which it was the evident intention of the framers of the Code to obviate by the enactment of Order XXI, Rule 2 — 20 T L J, *332*

Ref —23 T L J, 140

2. The word "decree-holder" in Section 225 of the old Code must be interpreted as meaning the sole decree-holder if there is only one or all the decree-holders, if there are more than one. In this view, it cannot be said that the certificate of one of the decree-holders has the binding effect which would have been given, had it been signed by all

Under Section 224 (Order XXI, Rule 13) where a decree has been passed jointly in favour of more persons than one, any one or more of such persons or his or their representatives may apply for the execution of the whole decree for the benefit of them all, or where any of them has died, for the benefit of the survivors and the representatives in interest of the deceased But the right to execute a decree does not necessarily imply a right to surrender the decree without payment.

Per Narayana Pillai, J —The certificate under Section 255 of the Code does not preclude an enquiry into the truth of the alleged payment.— 20 T L J., *592*.

3. The adjustment referred to in Order XXI, Rule 2, is a transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of

the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree.

Where, therefore, one of several judgment-debtors pleaded an oral adjustment whereby he promised to pay a certain portion of the decree amount to the plaintiff by a certain date, and the plaintiff, in return, promised to exonerate him from further liability and the judgment-debtor sought specific performance of such contract, in execution of the decree

Held.—On a proper construction, the adjustment pleaded was a transaction to vary the terms of the decree leaving the altered terms to stand in the place of the terms of the decree so as to constitute a new-executable decree, and could by no means be called an adjustment of the decree in whole or in part to the satisfaction of the decree-holder under Order XXI, Rule 2

Held further—Section 92 of the Indian Evidence Act was also a bar to the setting up of such an oral agreement substituting a new executory contract in place of the original decree.— 20 T L J, *814.*

4. There is no doubt that a suit to enter satisfaction of a decree by virtue of uncertified payments made out of Court and for a perpetual injunction to restrain the decree-holder from executing the decree would not be maintainable, in view of the provisions of Section 255 of the old Civil Procedure Code. Though the plaintiff frames his suit as for a declaration that the decree had been satisfied and for striking it off the file and not for a perpetual injunction, still the claim is in substance the same inasmuch as the result of a decision as prayed for, would be to prevent the executing Court from executing the decree.

There is however no reason why the plaintiff's suit for recovery of damages caused by the decree-holder's conduct by applying for execution should be postponed till the recovery by him of the amount under the decree

The Law casts a duty on the decree-holder receiving payment out of Court—the duty of certifying such payment in satisfaction of the decree, and if he fails to do so there is a breach of that duty and this necessarily implies that a cause of action accrues against him And it has been held that with the presentation of every fresh application for execution there would be a recurring cause of action.

Indeed as nothing that the judgment-debtor could do would prevent the execution of the decree, it must follow that consideration failed when the decree-holder applied for execution ignoring the adjustment and a suit for the recovery of the amount paid as damages would lie.

Cause of action accrues to a judgment-debtor who has satisfied a decree by payment out of Court when the judgment-creditor commits breach of the express or implied agreement by applying for execution of the decree ignoring the alleged satisfaction or adjustment.

48 T L R., *26*
(=21 T L J, *1250*)
Ref.—22 T L J, 1404.
23 T L J, 63

5. *Per Chakko, J*—A mere allegation by a judgment debtor that he paid or adjusted the debt out of Court is not a sufficient justification for a Court of law to release a judgment-debtor brought under arrest particularly in a case of a decree passed on a compromise.

Per Narayana Pillai, J—The Execution Court can stay execution in appropriate cases only on a proper application and on safeguarding the interests of all concerned. A petition of adjustment out of Court presented by the judgment-debtor cannot oust the jurisdiction of the Court to proceed with execution—

22 T L J., *1012.*

6. Where by an agreement between the plaintiff and the defendants, the first

defendant consented to give plaintiff six months time in which to pay the decree-amount and undertook not to execute the decree before the expiry of that period and the properties were sold in execution in violation of the agreement

Held —A suit for damages by the judgment-debtor for breach of an agreement to grant time was maintainable Section 254 of the old C P C which declared every agreement to give time for satisfaction of a decree debt to be void unless made with the sanction of the Court, has been repealed by the new C P C and hence such contracts will be tested by the rules as to the validity of contracts in general— 48 T L R., 197 (=22 T L J, 856)

7 The decree-holder applied for the execution of the decree against the surety of the judgment-debtor The surety pleaded a payment to the decree-holder's Vakil by Anchal Money Order and also certain other payments into Court The decree-holder disputed the payment to his Vakil, but admitted the payments into Court which he was prepared to credit towards the decree, but without interest since no notice of the deposits was given to him as and when they were made The lower Court found as a fact that a payment was made to the decree-holder's Vakil On appeal by the decree holder

Held.—(1) Order XXI, Rule 2, speaks only of applications by judgment-debtors in order to certify payments out of Court The expression judgment-debtor as defined in the Code means a person against whom a decree is passed or an order capable of execution is made A surety in execution is not a person against whom a decree has been passed Execution against such a surety can be taken only on an order after notice to him under Section 109 C P C As the payment to the decree-holder's Vakil was before the application for execution against the surety, the surety had not become a judgment-debtor at the time of payment and therefore Order XXI, Rule 2, does not stand in his way to plead an uncertified payment

(2) The liability of the surety to pay arises only on notice to him under Section 109 The payments into Court were made before any such notice to the surety The surety-bond in the case was a part of the compromise petition between the parties providing for payment into Court as a mode of satisfying the decree. Payments into Court by the surety have been in conformity with the agreement between parties. It is only proper that interest should cease on the amounts paid into Court.— 48 T L R., 405 (=22 T L J, 1858)

8 A decree debtor paid out of Court certain amounts in partial satisfaction of the decree without being made aware by the decree-holder, who had knowledge of a subsisting attachment, and on failure to get the amount certified and before paying the amount over again the decree-debtor filed a suit *inter alia* for recovery from the decree holder of the amounts paid but not certified

Held —It is clear that a decree-debtor who had paid part of the decree debt has a cause of action when the implied contract to certify satisfaction is broken and breach of contract occurs when the time prescribed for it under the law expires. The allegation in the plaint was that the attachment itself was placed fraudulently and collusively, and the decree-holder's receipt of the amount was with the deliberate intention of defrauding the plaintiff In the circumstances, the plaintiff's right to sue arose as soon as he came to know of the fraud — 23 T L J, 63

9 A mere agreement between the parties, to the terms of which effect has not been given by the parties in any manner, could not be pleaded in bar of execution. The 'adjustment' contemplated in Order XXI, Rule 2, is one which has actually extinguished the decree in part or in its

entirety and cannot include a mere executory contract by which the terms of the decree are in effect varied or modified Such a variation is against the policy of the Civil Procedure Code

Where, therefore, the judgment debtor pleaded in bar of execution, an agreement with the decree-holder, under which its terms were virtually substituted for the provisions of the decree, but no part of the consideration for the agreement has been paid or received and the agreement itself was to take effect only after the decision of an appeal between the judgment debtor and a third party

Held—The executing Court could not recognise the plea— 23 T L J, *140*

Order XXI, Rule 13.

1 The Court has a discretionary power to allow one of the several joint decree-holders to execute the decree.

A question of conflicting title between two persons holding a joint decree is a proper subject for a fresh suit between them, and it cannot be determined as a question arising in the execution of the decree

A Karanavan of a Tarwad can sue to recover properties which had been the subject matter of a former suit brought by the members of his Tarwad in which suit the Karanavan had been a defendant and had opposed the claim, and the Karanavan's suit is not barred by *res judicata* 20 T L J, *497*

2 See also—

Or XXI, R 2— 20 T L J, *592*

Order XXI, Rule 14

1 *Benami* assignments have been frequently recognised in cases where it is not shown that the real transaction fell within the second proviso to Order XXI, Rule 14, or that any other provision of law was being infringed

Gour Sundar Lahiri V Hem Chander Chowdhuri (I L R., 16 Cal 355) and *Balkishan Das V Bedmati Koer* (I L R., 20 Cal 388) do not seem to lay down a rule that judgment debtor can object to the assignment on the mere ground that it is *benami* in favour of some person other than the nominal applicant.—

20 T L J., *1243*

2 The assignment of the decree in question is dated Makarom 13, 1102, but subsequent to it, that is, on Makarom 28, 1102, the decree was attached by a certain creditor of the decree-holder, assignor The lower Court rejected the application for recognising the assignment on the ground that the decree was attached before the transfer was recognised by the Court

Held—Order XXI, Rule 14, states that where a decree is transferred by assignment in writing, the transferee may apply for execution of the decree From the above Order, it would appear that for the completion of the transfer, the recognition by Court is not necessary For the words used are "where a decree is transferred by assignment in writing etc, the transferee may apply" It follows, therefore, that where a decree is transferred by an instrument in writing, such transfer takes effect from the date of such instrument, and not from the date of its recognition by the Court.—

21 T L J, *76*

3 The omission of the words 'if the Courts think fit' occurring in Section 225 of the C P C of 1065 leads to the conclusion that if an application is made by the assignee, the decree may be executed without any permission of the Court in the same manner and subject to the same conditions as if the application has been made by the original decree-holder

An uncertified adjustment cannot, therefore, be now raised as a ground for asking the Court not to recognise an assignment of the decree— 21 T L J., *499*.

4. *Per Venkata Rao, J.*—*Held*—The contention that application for execution was not in accordance with law inasmuch as it was not accompanied by a copy of a decree had no force, as there was good authority for the view that the *omission* to produce a copy of the decree was only a defect which might be cured later and that it did not invalidate the application itself

The application by a transferee (of a decree) for recognition of the transfer in his favour and to execute the decree was in accordance with law even though the right had been negatived in subsequent proceedings

On the contention that there was no warrant for the view that in execution proceedings started by one person another person could intervene on the strength of a hostile title and after obtaining a declaration of such title seek to continue such proceedings

Held—There appear to be no good grounds for holding that the Court has no jurisdiction to do so So long as the assignment stood the right to execute the decree was *prima facie* in the assignee but he was nevertheless a person who claimed under the decree holder and had prayed to be substituted in his place as a person entitled to carry on the execution proceedings. There is nothing opposed to principle in the view that the decree holder himself (or as in the case a person representing the Tarwad which had obtained the decree) who has successfully assailed the assignment would be entitled to take out execution in pursuance of the application filed by the assignee. Any other view would be based upon mere technicalities and would undoubtedly lead to hardship.— **21 T L J, 955**

5 It is competent to the Official Receiver, where the decree-holder has been adjudicated insolvent, to resist in execution proceedings the recognition of the assignment of the decree on the ground that it is fraudulent and collusive It cannot be said that the Official Receiver's only remedy is to apply to the Insolvency Court for annulment of the assignment

The order rejecting the assignee decree-holder's application for execution of the decree is appealable

No formal recognition by Court is necessary to validate an assignment, as under the provisions of Order XXI, Rule 14, the assignee has the right to execute the decree by virtue of the assignment itself, the only restriction placed upon it being that orders to execute the decree can be passed only after giving notice to and hearing the assignor and the judgment debtor— **21 T L J, 1076**

6 Under the Civil Procedure Code of 1065 it was held that a judgment-debtor, who had satisfied the decree in whole or in part, could raise this satisfaction as an objection to the recognition of an assignment by the Court But that was because Section 225 of that Code only enabled the decree to be executed by the assignee if the Court thought fit However, under the present Code, no order of the Court is necessary but the decree may be executed by the assignee in the same manner and subject to the same conditions as if the application had been made by the original decree-holder Therefore, an objection that the decree has been satisfied will be no more valid against the assignee than it could have been against the original decree holder— **21 T L J., 1091**

7 In execution, the decree-holder presented an application to the following effect—

"Among certain properties of mine allotted to my sons S and R and the amount recoverable under the decree in this case has been made over to them and it is therefore prayed that they may be impleaded as additional plaintiffs in this case and that the amount due under the decree herein may be allowed to be realised by them and paid to them

Held—The petition amounted to an assignment in writing— 22 T L J, *211*

8. Where the decree-holder died during the pendency of an execution application, his legal representative could be substituted in his place in the execution petition and be allowed to continue it No fresh application by the legal representative is necessary

An execution application may be dismissed for want of effective prosecution. But to make the dismissal a judicial act, it must be for the default of the decree-holder including in that term, the legal representative of the decree-holder

Where, therefore, without granting sufficient time to the legal representative of a deceased decree-holder to take steps in continuation of a pending execution application, the application had been struck off the file

Held—The order for striking off was not a judicial order 22 T L J, *464*

9 According to the amended provision in the Code, Order XXI, Rule 14, the discretion of the Court in recognising the assignment of a decree and to grant or refuse the application for execution seems to have been taken away So unless proper reasons are made out by the appellant, the transfer of the decree has to be accepted as a mater of course

The necessity for leave to sue the receiver rests upon two considerations—(1) that such a suit is incompatible with the dignity and authority of the Court and (2) that it might interfere with the duty of the Court to maintain the receiver's possession. Neither of these considerations affects the jurisdiction of the Court. It is a mere irregularity which can be effectively cured by obtaining sanction subsequently

Where the receiver was not impleaded in the suit, but the District Judge allowed the receiver to be brought in as a party in execution:

Held—The subsequent sanction cured the initial defect

The provision in Rule 451 of the Civil Courts' Guide is intended to guard against possible abuses and does not render void assignments taken by Vakils.—

23 T L. J, *642*.

Order XXI, Rule 15.

The decree was passed on 15-6-1091. After certain other applications have been filed and disposal of, the decree-holder, on 19-6-1101, applied for sale of a certain Otti right mentioned in a prior execution application. On 10-6-1103 the decree-holder purchased it in auction This sale was set aside on 4 10-1104, on the ground, *inter alia* that the property had been wrongly attached and sold as movable property On 14-10-1104, the decree-holder applied for attachment and sale of the said right as immovable property The judgment-debtor objected to the attachment and sale prayed for on the ground that this last application was a fresh application filed after twelve years from the date of the decree

Held—The relief prayed for in the last previous application was the sale of this Otti right, and the same relief is now prayed for and the objection on the ground that the subsequent application was for a different relief is unfounded. It is true that while in the former application sale alone was applied for in the latter the decree-holder prayed for attachment and sale. This makes no difference as the main relief, *viz*, the sale of the mortgage right, finds a place in both.

Viewing the latter application as one to amend the previous application which was defective for want of inventory, the Execution Court had jurisdiction under Order XXI, Rule 15, Clause 1, to allow an amendment of a defective execution application if it thinks fit, at any time before the disposal and such amendment,

if allowed, would, under Clause 2, act retrospectively

There was no reason for holding that the discretion vested in the Execution Court was wrongly exercised And, the amendment so rightly allowed dated back to the previous pending application of 1101, which being within time no question of limitation arose — 22 T L J, 87

Order XXI, Rule 16

In order that Order XXI, Rule 16, may apply two conditions must be satisfied, *viz*, first, the two decrees must have been passed in suits between the same parties and second, the decree-holder in one of the suits in which the decree has been made is the judgment-debtor in the other

Clause (2) of Rule 16 only means that if the appellant is entitled to a set off against the original decree-holder, he will be entitled to the same remedies against that decree-holder's assignee also on the equitable principle laid down in Section 42 of the C P C namely, every transferee of a decree shall hold the same subject to the equities, if any, which the judgment-debtor might have enforced against the original decree-holder

Where a decree-debtor resisted the recognition of the assignment of the decree, on the ground that he was the assignee of two other decrees against his decree-holder

Held —He had no sustainable claim of set-off under Order 21, Rule 16, Clause (2), and cannot consequently oppose the assignment of the decree against himself, being recognised — 20 T L J, 789

Order XXI, Rule 17.

Special appeal against the order allowing the plaintiff's application for delivery of the properties in execution of the decree for partition passed in the case. Under the decree the plaintiff was allowed to recover his share on payment to the first defendant Rs. 430 and odd and the first defendant was directed to pay the plaintiff's costs. The plaintiff applied for delivery and deposited the difference between the amount ordered to be paid to the first defendant and the amount of costs payable by the latter to him. The Munsiff and the intermediate Appellate Court allowed the set off

Held.—Though the case cannot be brought strictly within the provisions of Order XXI, Rule 17, the plaintiff's prayer can be granted on grounds of equity

Per Narayana Pillai, J—Improvements, if any, effected after the commencement of the suit should be viewed with disfavour in the absence of valid justification. A party who is seen to have become busy in improvements, with eyes wide open to the contingency of the property being recovered in a pending action cannot complain of any inequity if he is turned out without any remuneration for his meddlesome activities. The extreme indulgence shown by some decisions of this Court in favour of those who talk of what they call 'hard cash" as having been spent on improvements on other people's properties without a particle of *bona fides*, is a matter which merits consideration in the light of the established legal principles to the exclusion of sentimental inclinations.— 20 T. L. J, 890

Order XXI, Rule 19.

Order XXI, Rule 19, under which the Court may in its discretion refuse simultaneous execution against the person and property of the judgment-debtor should be read along with Order XXI, Rule 28, which provides for execution both against the person and property of the judgment-debtor It has therefore been held that the Court has no power to refuse execution against the person of the judgment-debtor

on the ground that the decree-holder should in the first instance proceed against the properties — 22 T L J, 468

Order XXI, Rule 20.

1 It has been held that for an order in execution to operate as a bar, it should have been passed after notice sufficient to give information of the nature of the reliefs sought in the execution application

The only important question that has to be decided in matters of this kind is that the other party should have notice of the fact that the question was fixed for decision on that date. 23 T L J, 1242

Ref.—24 T L J, 770

2 See also Regn VI of 1100 Art 166 —21 T L J, 411

Order XXI, Rule 27.

The appellant who was the judgment-debtor under a decree passed by the Quilon Munsiff's Court applied to that Court under Order XXI, Rule 27, to stay execution of the decree on the ground that he had instituted a suit against the decree-holder in the Quilon District Court The application was not allowed and the appeal was from that order

Held,—Under Order XXI, Rule 27, the presentation of the application must be to the Court where the suit was pending Also, the suit by the judgment debtor against the decree-holder must be one pending in the same Court which passed the decree against the judgment-debtor Though, no doubt, some decisions have interpreted the expression "such Court" in Order XXI Rule 27, to include not merely the original Court but also the Appellate Courts and also Courts to which the decrees are transmitted for execution, still these considerations did not apply to the case. The application of the judgment-debtor was therefore misconceived and rightly rejected. The appellant had no case even on the merits

Per Sivasankara Pillai, J—An appeal might be maintainable even from an order refusing stay of execution on an application under Order XXI, Rule 27 — 49 T L R, 473 (=23 T L J, 862)

Order XXI, Rules 30 & 31.

Under Order XXI, Rules 30 and 31, the Court has discretion when the imprisonment of a refractory party to a decree for restitution of conjugal rights is applied for In this respect the law differs from the British Indian Civil Procedure Code, which, following the provisions of the Matrimonial Causes Act of 1884 (47 and 48 Vic C 68) omitted imprisonment as a mode of enforcing decrees in such cases. A party seeking the exercise of the discretion in his favour under Order XXI, Rules 30 and 31, should however show good grounds to enable the Court to do so

Where, therefore, a wife against whom a decree for restitution of conjugal rights was passed set up in answer to the execution petition more or less the same grounds as were raised by her by way of defence to the suit and her objections were overruled by the execution Court in exercise of its discretion

Held.—It was not open to her to rely upon a fresh ground which had not been pressed by her in the earlier stages of the proceedings — 21 T L J, 1192

Order XXI, Rule 31

Order XXI, Rule 31, empowers the Court to pass an order, either at the time of passing the decree or at any time afterwards, directing that a decree for the restitution of conjugal rights shall not be executed by detention in the Civil prison. Under the old Code of Civil Procedure,

the Court had no discretion in the matter of the execution of a decree for restitution of conjugal rights. Once a decree was passed for restitution of conjugal rights and *the decree-holder applied for the* execution of the decree, the Court had to grant the application as a matter of course The Legislature thought that it was desirable to invest the Courts with a certain amount of discretion in the matter Accordingly the present Rule 33 of the British Code (corresponding to Rule 31) based on the principles of the Matrimonial Causes Act 1884 (47 and 48 Victoria C 68) was enacted although that Rule does not go to the length to which the Matrimonial Causes Act goes. Under this latter Act in England, this mode of execution by the attachment of the person or property of of a recalcitrant judgment-debtor has been done away with. The British Indian Legislature evidently thought that the time had not arrived for making such a radical chage in the law as was effected by the English Matrimonial Act of 1884 although they thought that some relaxation of the old law in India was neces sary Order 21, Rule 31 appears to be the result of the altered sentiment Under it, the Court is invested with a certain amount of discretion in the matter of the execution of a decree for restitution of conjugal rights. It may either at the time of the passing of the decree or at any time afterwards pass an order that the decree shall not be executed by the detention of the judgment debtor in the Civil prison What the circumstances are under which a Court may pass an order refusing to arrest or detain the judgment-debtor in prison would depend on the facts of each case. No hard and fast rule can be laid down in the matter for the guidance of the Courts A good deal of latitude has to be allowed to the subordinate Courts in the matter It is not the practice of the High Court to interfere with the orders passed by subordinate Courts in the exercise of their discretionary powers unless the Court is satisfied that the lower Court has exercised its discretion in a perverse, arbitrary or manifestly unjustifiable manner

In the case, the judgment-debtor was a young woman of 19. It was also in evidence that a petition for divorce filed by her was pending before the lower Court On the lower Court refusing to send her to jail, the decree-holder-husband appealed to the High Court

The tendency of modern legislation is against sending women to jail in civil matters, and except in exceptional circumstances, the Court ought to set its face against sending women to jail in civil matters. Of course there may be cases exceptional in their nature in which the interests of justice would imperatively require that a woman should be incarcerated in jail and in such cases, the Courts would not and ought not to hestitate in the exercise of their discretion to send such recalcitrant woman to jail But this should be the exception and not the rule

Held —The High Court would not interfere. In the case it could not be said that in refusing to send the judgment-debtor to jail, the lower Court exercised its discretion either arbitrarily, perversely or unjustly so as to justify interference in appeal — **49 T L R., 14**
(= 23 T L J , 101)

Order XXI, Rule 38

Order XXI, Rule 38, specifically refers to poverty or any other sufficient reason as a good ground for suspending the execution of the decree against the person of the debtor The burden of proving poverty under the Rule is on the debtor

When there is an execution application, the primary consideration is the interest of the decree-holder and where his interests are likely to be jeopardised, the Courts have no option but to execute the decree. But where without any detriment

to the decree-holder, the granting of time to the judgment debtor would not only enable the decree amount to be paid, but would also prevent serious loss or ruin, the Court would do well to stay execution against the person of the debtor for such time as it considers reasonable in the circumstances of the case.—

21 T L J, *921*

Order XXI, Rules 43 & 44

See Regn. I of 1074, Secs. 403 & 425 —
46 T L R, *846*
(=20 T L J, *1131*).

Order XXI, Rule 50.

See Sec 59 — 46 T L R, *4*
(=20 T L J, *628*)
24 T L J, *107*

Order XXI, Rule 51.

1 A decree is capable of being hypothecated and of being sold in Court auction in execution of a decree for its sale The provisions of the Civil Procedure Code for the attachment of decrees and the procedure to be followed by those who attach decrees do not preclude the possibility of a sale of a decree by a Court of Law. Decrees may be transferred by act of parties or by operation of law even according to the Civil Procedure Code. A Court sale is certainly a process of law If a decree may be sold by act of parties, it should equally be saleable by a Court of Law — 22 T L J, *568*.

2. Attachment of a decree for money has not the effect of preventing a valid transfer of the decree.— 23 T L J, *411*

3. The decree in S. C. No. 665 of 1102 of Krishnapuram Munsiff's Court was attached before judgment in O S No. 376 of 1102 of the same Court and subsequent to the passing of the decree in the latter case the decree-holder therein applied for execution of the attached decree whereupon the first defendant in the Small Cause opposed on the ground that the decree had been adjusted prior to the application for execution and that he had no knowledge about the attachment since no notice had been issued to him as required by Order XXI, R. 51 (6) The execution Court found that the prohibitory notice was not served upon the first defendant but overruled his objection on the ground that the payment pleaded was not true

Held (*in revision*) —Order XXI, R 51, read along with Order XXXVI, R. 10 shows that even for attachment before judgment, the notice contemplated by clause (6) of Order XXI, R. 51, must be issued This provision appears to be of a peremptory nature and payment or adjustment made by the judgment-debtor under the attached decree would not be liable to be recognised by the Courts, if done after the receipt of the notice referred to in Clause (6). It is significant that under this Rule notice of the order of attachment either through Court *or otherwise* would be sufficient As this is however, only a special case of the application of the well known principle of justice and equity intended for the protection of parties to a *bona fide* transaction without notice, the question of notice does not arise with regard to payments made or any adjustment not *bona fide* effected by the judgment-debtor — 24 T L J, *433*

4. Where a decree is attached before judgment the order issued by the Court attaching the decree absolutely prohibits the execution of the decree by anybody It clearly amounts to an injunction The case is stronger when the order in terms prohibits the execution.—

24 T L J, *584*

5. See also Or XXI, R. 55 —
47 T L R, *18*
(=21 T L J, *25*).

Order XXI, Rule 52

A debt secured by an usufructuary mortgage of immovable property should, for the purposes of attachment and sale in execution, be regarded as immovable property The procedure prescribed by Order XXI, Rule 52, (Section 271 of the old Code) should therefore be followed in effecting attachment of such debts —

22 T. L J, *1908*

Order XXI, Rule 53

See *Order* XXI, R. 55 —

47 T L R, *18*
(=21 T. L. J, *25*),

Order XXI, Rule 55

1 The decree in the case was passed in appeal on 23-1-1088 After several obstructions in execution, the decree-holder applied on 4-8-1099 to execute the decree by attachment and sale Attachment was ordered on 26-8-1100 and the properties came up for sale on 14-4-1102 As no one came forward to bid, the sale was adjourned to 28-4-1102 for further steps. No steps were, however, taken but the Court instead of dismissing the petition adjourned the case *sine die* On 29-6-1103, without notice to the decree-holder and without hearing him, the execution petition was rejected On a plea of limitation raised by the judgment-debtor

Held (Agreeing with the Court below).— The order "rejected" passed on 29-6-1103 was hardly judicial and the attachment already effected cannot be deemed to have been withdrawn by it, and therefore, the application dated 18-8-1103 which was one for proclamation, was but auxiliary to the pre-existing attachment and not a substantive application within the meaning of Section 41

Whether the disposal of an execution petition is judicial or merely ministerial, would depend upon the intention gatherable from the phraseology and the circumstances. The test to be applied is whether the order under consideration was passed after notice to the decree-holder and whether his default has led up to the order

Held further—Inasmuch as there had been attachment before judgment in the case, such attachment remained in force notwithstanding the dismissal of the execution application at a subsequent stage, since Order XXI, Rule 55 was applicable in terms only to attachments after judgment and re-attachment in execution did not mean an abandonment of the attachment before judgment —

20 T L J, *898*

Ref —22 T L J, 464.
24 T L J, 587
Fol —23 T L J, 753
22 T L J, 900

2 The new Civil Procedure Code has no retrospective effect on attachment existing when it came into force

An attachment operates *de die in diem* as a process in execution

Where therefore an attachment in execution was effected on 29-1-1101, but for default of the decree-holder to produce the proclamation schedule, the application for execution was rejected on 8 2-1101 and the decree-holder subsequently applied on 28-5-1104, to sell the properties originally attached

Held—The attachment survived and the sale of properties could be held on basis of such attachment Order XXI, Rule 55, is not applicable —

20 T L J, *1219*

Ref —21 T L J, 743
24 T L J, 587

3 The decree-holder attached the properties of the defendants on 14-8 1090 Various other steps were taken subsequently and the execution applications were dismissed On 14-4-1099, application was

made for the sale of the properties already attached On 30-7-1099 that application was dismissed. On 25-7-1101 intimation was received that the decree under execution was attached in execution of the decree in O S No 78 of 1092 on the file of the Parur District Court On 29 7 1101 the attaching creditors applied for proclamation and sale of the properties already attached by the original decree-holder On 31-11-1102 the proclamation for sale was duly published When the properties came up for sale on 18-7-1103, the 2nd defendant put in a petition alleging payments to the decree-holder which were not certified His objections were dismissed by the Munsiff on 19-7-1103 and on the same day items 1 to 6 in the proclamation schedule were purchased in Court auction by the attaching creditors. An appeal was preferred which was also dismissed The questions for consideration were :

(1) Whether a fresh attachment was necessary inasmuch as the attachment originally effected should be taken to have fallen to the ground with the dismissal of the subsequent execution petitions.

(2) Whether uncertified payments made to the holder of the attached decree could be set up in execution as against an attaching creditor

Held (In special appeal).—(1) There is difference between the old and the new Civil Procedure Code in regard to the provisions relating to the termination of attachments. Under Order XXI, Rule 55, the attachment would cease on the dismissal of the execution application but under Section 272 of the old Code(=Order XXI, Rule 53), the attachment would continue until it is withdrawn by the Court. In the present case the attachment was made before the new Code came into force. It would persist in spite of the dismissal of execution applications since the new Code came into operation

(2) A payment not certified within the time limited by law cannot be set up in execution as against an attaching creditor An attaching creditor is like a purchaser on the attached decree and is regarded as the representative of the holder of the attached decree by virtue of Order XXI, Rule 51 The holder of an attached decree remains in a state of suspended animation while the attachment lasts Were it not so, his rights would not revive on the cesser of the attachment His ownership is not divested and an uncertified payment being unavailable against the decree-holder is of no effect against the attaching creditor either —

47 T L R, *18*
(=21 T L J, *25*)

Ref —48 T L R, 350 (=22 T L J, 1058)
24 T L J, 69.

4 Where an execution application, presented after the new Civil Procedure Code came into operation, for sale of properties attached when the old C. P C was in force, was dismissed for default

Held —The attachment ceased under Order XXI, Rule 55, on account of the dismissal of the prior application and a fresh application for sale of the properties was not sustainable On the date the present Code came into operation, the attachment no doubt subsisted and the decree-holder had a right to bring the property to sale in pursuance of the attachment, but the effect of the dismissal of his application for sale must be governed by the C. P C that was then in force.—

48 T L R, *200*
(=22 T L J *661*)

5 Order XXI, Rule 55, has no retrospective operation. Under the old Code, the decree-holder was entitled to move for the judgment-debtor's property which had been attached before judgment without a fresh attachment even in cases where his application for execution had been dismissed Even according to the British Indian decisions, in order that attachment before judgment should come to an end under Order XXI, Rule 57, it is

necessary that the decree-holder should have applied for execution by sale of the attached property and his application been dismissed for default —

49 T L R., 404
(=23 T L J 758)

Ref —24 T L J, 587

6 In execution of the decree in O S No. 22 of 1092, an application was made on 20-11-1098 to attach the decree in O S No 56 of 1094. Attachment was accordingly ordered on 1-12-1098 but subsequently on 8-12-1098 the execution application was struck off for alleged default to produce copy of the decree in O S 56 No time had however been fixed for the production of the copy of the decree nor had notice been issued to the decree holder about the passing of such an order The question arose for decision whether after expiry of the normal period of limitation from 8-12-1098, the attachment ordered on 1-12-1098 did subsist so as to enable the decree-holder in O S No 22 to apply to draw some money that had come to the credit of the decree in O S, No. 56 of 1094

Held.—The case is not governed by Order XXI, Rule 55, of the Code of 1100, but by the corresponding provision of the repealed Code, *viz*, Section 272. Under the decisions based on the wording of the latter, attachment once issued will continue in force until it is withdrawn by the Court even in cases where the application for execution had been dismissed. It therefore follows that the attachment effected is in existence and operates *de die in diem* till date of application to draw the money in question

The execution application on which attachment was effected cannot be said to have been finally disposed of. No time limit was fixed for production of the copy of the decree and no notice about the passing of such an order had been issued to the decree-holder in O S No. 22 of 1092 He got what he then wanted by securing an attachment and it is open to him to wait until an opportunity occurred for making a move forward The execution application must be considered to be still pending and the petition for issue of the cheque must be viewed as simply a revivor of it

If and so long as the execution proceedings are pending, the decree-holder's application for their continuance is not subject to any rule of limitation and can be made at any time All the time the proceedings initiated by him are pending his right to apply for their continuance accrues from day to day The application for the money which is merely one process for reaping the benefit of the attachment of the decree cannot be ruled out as being out of time

Per Venkata Rao, J—The attachment of 29th Audi 1079 still subsists. It was never set aside The decree-holder's failure to pay the necessary process for the order of proclamation which he had obtained, only affected the order for proclamation. But an order for attachment under the old Code subsists until cancelled under Section 272 of the Code. The effect of attachment being to place the property in the custody of the Court, the Court holds the property as trustee for the judgment-creditor and until released from the custody of the Court, no question of limitation can arise — 24 T L J., 69

Dist —24 T. L J, 587

7 Where after the dismissal for default of an execution application, the decree holder remained quiescent for more than the time prescribed for a fresh execution application and the judgment-debtor thereupon moved the Court for an order declaring that the decree was barred so that she may be enabled to realise a debt due to her which had been attached before judgment, and the Courts below refused to accede to the prayer on their view that the mere dismissal of an execution application did not terminate the attachment before judgment.

Held —The opinion of the lower Courts as to the continuance of an attachment

before judgment after the dismissal of an application for execution of the decree cannot so far as the authorities of this Court go, be said to be unsound It was noticeable, however, that all the British Indian Courts did not speak with one voice on the matter It would therefore require careful consideration before disturbing the course of the authorities here and starting a new current, but the determination of the question was unnecessary since the decision could be based on another point

The attachment before judgment whether it continued or not could not avail the decree-holder in the case because its pendency could not *proprio vigore* keep alive the decree If the decree had otherwise become barred such attachment would be nugatory Order XXXVI, Rule 11, of the Code providing for the effect of attachment before judgment did not necessarily mean that attachment before judgment was for all practical purposes possessed of the same legal efficacy as an attachment in execution of the decree. In regard to attachment in execution, it had been settled that it operates *de die in diem* as process in execution of a decree, but it would be an unwarrantable stretch of language that the same could be said of attachment before judgment.

Therefore the Courts below acted wrongly in failing to pass an order at the judgment-debtor's instance that the decree was barred so that the prohibition issued by the Court may be removed and she be enabled to realise the money due to her — 26 T L J, *557*

Order XXI, Rule 56

1 Rule 56 of Order XXI does not apply to mortgage or hypothecation decrees since properties directed to be sold under a mortgage or hypothecation decree do not require to be attached The proper remedy of a person claiming rights in or title to properties directed to be sold in execution of a mortgage decree is to proceed by way of a suit — 22 T L J, *737*

2. See also Sec 40 — 21 T L J., *165.*

Order XXI, Rule 57

See Or, 21 R. 55 — 23 T L J,, *753.*

Order XXI, Rule 61

1 The plaintiff who was in possession of the plaint property under an original mortgage and a subsequent sale of the equity of redemption, mortgaged the same to the defendant In execution of a money decree obtained by one A, the property was attached The plaintiff filed a claim petition, but it was dismissed for default on 1-4-1098 and the property was sold in Court auction and purchased by the decree-holder who sold it to the defendant on 24-2-1105 The suit for redemption was instituted on 1-6-1105 It was contended that the suit was barred by limitation as it was not instituted within one year after the claim order

Held —In order that Article 9 of the Limitation Regulation of 1062 might apply the order in question must be one coming within the purview of Section 280, C P C (old) The order contemplated by this Section must be one passed under Sections 277, 278 and 279 These Sections relate to orders passed after due investigation. In the case, the order was passed not after investigation, but the claim was merely dismissed for default. To such an order Section 280 does not apply Therefore Section 278 and Article 9 of the Limitation Regulation do not apply to the case.

In order that the provisions of Order XXI, R. 61, C P C. and Section 31 of the Limitation Regulation might apply it should have been incumbent upon the plaintiff to institute the suit within 12

years. The attachment merely threw a cloud at best on the plaintiff's title, but it caused no infringements of his rights. It is merely discretionary with the party on whose title some cloud has been thrown to institute a suit for the declaration of his right and therefore the plaintiff was not bound to bring a suit to set aside the claim order In fact the plaintiff was not bound to put in any claim petition at all No question of limitation therefore arises in the case.—48 T L R., *409*
(=22 T L J, *1314*)

2. Certain movables were attached by the defendant in execution of another decree obtained by him The plaintiff put in a claim petition which was rejected He therefore instituted the suit, under Order XXI, Rule 61, for the cancellation of the above order rejecting his claim

On the question of onus of proof, it was held that the onus lies on the defeated claimant who institutes the suit, to make out his title — 48 T L R., *428*
(=22 T L J, *1860*)

3. See also Or XLV, R 1 —
20 T L J, *975*

Order XXI, Rule 62

1 The Court has a discretion in the matter of selling properties in execution of decree, either to sell them in several lots or in mass in the absence of something to indicate that, in the particular circumstances, the discretion was exercised wrongly or improperly It cannot be held that because, on a prior occasion, the Court ordered the properties to be sold in separate lots, it is bound to stick to that order whatever circumstances may arise subsequently — 23 T L J, *89*

2. See also Sec 44.— 20 T L J, *894*

Order XXI, Rule 64.

1 When a judgment-debtor agreed to pay an enhanced rate of interest under the decree in consideration of time allowed by the decree-holder for the discharge of the decree, and the Court, 'recorded' the agreement, and the properties of the judgment-debtor subsequently came on for sale in execution of the decree for the amount calculated at the enhanced rate, the judgment-debtor having raised no objections either at the time of the settlement of proclamation or on the first posting for sale which had been adjourned at his instance

Held —It was not open to the judgment-debtor to raise the plea that the agreement for additional interest had only been 'recorded' and not 'sanctioned' by the Court. If a judgment-debtor, after receipt of notice under Order XXI, Rule 64, or of the knowledge of the contents of the sale proclamation before it is issued, neglects to take any objection to the proceedings, he should not, in justice, be allowed to take such objections at the sale or afterwards.— 21 T L J *1021*

2. Where an objection is raised under Order XXI, Rule 64 (2) (c), on the ground of non-disclosure, in the proclamation, of certain encumbrances to which the property is subject, it is necessary for the Court to consider whether such encumbrances in fact exist The matter comes under Section 40 of the Code and the decision of the Court thereon is appealable.

Questions as to under valuation and as to the factum of possession of the property with particular person are on the other hand not specifically mentioned in Order XXI, Rule 64, though presumably they come under clause 2 (*e*) of the Rule. The remedy of a party sustaining damage on this score by sale in execution, lies by an application under Order XXI, Rule 87 —
22 T L J, *888*

3. The appeal is taken by the judgment-debtor against the order of the lower Court rejecting his objection to the proclamation of the property under Order XXI, Rule 64. On a preliminary objection

being taken that no appeal lies against this order it was contended that the said order is one falling under Section 40 of the Code and as such appealable

Held—Every order under Section 40 C P C relating to execution is not appealable It is only such orders as have the effect of decrees as defined in Section 2 (2) of the Code, i e, such orders as determine the rights of the parties with regard to the matters in controversy in suit that are appealable

If the judgment debtor does not object on receipt of notice under Order XXI, Rule 64, he is afterwards estopped from contending that the proclamation was defective But if the Court without considering the objections settles the proclamation there is no estoppel against him and he has a right to question the validity of the sale under Order XXI, Rule 87, on account of irregularity in conducting and publishing it. In such a case the proper thing for him to do is to allow the sale to proceed and after the sale has taken place, to apply for setting it aside under Order XXI, Rule 87, and not to appeal against the order— 43 T L R, *850*

(=22 T L J, *1058*)

4 Where an objection to the settlement of a proclamation on the ground of serious mis-statements contained in the schedule to the proposed sale proclamation was rejected by the lower Court with the summary order "that the petitioner has a right to come in even after the Court sale, and no opportunity was given to the objector to substantiate his case by evidence

Held—Though an appeal from the order was not maintainable unless it was shown to have come within the ambit of Section 40, still the High Court has power to interfere in revision if the lower Court had not considered the petition on the merits and disposed of the matter judicially In enacting Order XXI, Rule 64, with its elaborate provisions for giving notice of the proclamation to the judgment debtor and the decree holder and the several other particulars the Legislature must have had some purpose in view The view of the lower Court was obviously erroneous and if pushed to its logical conclusions would in very many cases stultify the provisions of Order XXI, Rule 64.— 22 T L J, *1317*

5 All orders passed under Order XXI, Rule 64, could not be treated as falling under Section 40 of the Code, but if however they decided some questions relating to the execution of the decree, the orders would fall within the ambit of Section 40 and be therefore appealable against decrees under Section 2 Clause (2) of the Code An order settling a proclamation after rejecting objections to it on the ground of under valuation or other defect of form is not appealable except where the said order could be regarded as final.— 49 T L R, *406*

(=23 T L J, *702*)

Order XXI, Rule 65

See Sec 44— 20 T L J, *894*

Order XXI, Rule 67

The adjournment of the Court sale under Order XXI, Rule 67, consequent upon the order staying execution, and the subsequent sale after the order of stay had been cancelled did not affect the validity of the sale In the case, when the Court proceeded to sale, the stay order had vanished and hence there was no cramp on the jurisdiction of the Court.

The removal of an order staying execution revives the rights of the decreeholder

A unilateral mistake not induced by the Court is of no moment in considering the validity of a Court sale.—

22 T L J, *838*

Order XXI, Rule 68

A purchaser in Court auction failed to deposit the 25 per cent of the purchase money under Order XXI, Rule 81 The property was consequently resold at a loss, but the re-sale was conducted only after 5 P M on that day It did not appear that the Presiding Officer or any other Officer in Court intimated to the bidders present that the properties will be re-sold that day itself in case the first purchaser failed to deposit the 25 per cent

Held—There was no proper re sale and the judgment-debtor could not therefore take advantage of the provisions of Order XXI, Rule 68, so as to recover the deficiency from the first purchaser Under Order XXI, Rule 81, the deposit of 25 per cent has to be *immediate* and in default of the deposit the property has to be sold *forthwith*. By adopting the procedure prescribed under the Rule the bidders who are present at the first auction will be aware of the re-sale and if they care they can take part in the second auction also—

22 T L J, *1161*

Order XXI, Rule 69

See Sec 55— 20 T L J *438*

Order XXI, Rule 70

Under Article 451 of the Civil Courts' Guide, paragraph 2, Vakils are declared prohibited from purchasing property at auction sales held by the Courts in which they practice, without the express sanction of the Presiding Officer who will record his reasons for granting the sanction. It could be seen from the above provision that the High Court did not consider Vakils to be Officers having any duty to perform in connection with the sales within the meaning of Section 289 (old Code), for the legalising of such purchase where the previous sanction of the Court is taken could not have been made if the Vakil had been considered to be an Officer of the Court, especially as the prohibition contained in the Section was absolute

Order XXI, Rule 70 of the Code of 1100 lays down that no Officer or other person having any duty to perform in connection with any sale shall either directly or indirectly bid for, acquire or attempt to acquire any interest in the property sold The corresponding Section 289 of the Code of 1065 laid down that no Officer having any duty to perform in connection with any sale under this Chapter (relating to the execution of decrees) should either directly or indirectly, bid for, acquire or attempt to acquire, any interest in any property sold at such sale

The fact that the Vakil has to prepare the proclamation schedule or other papers in connection with the same or to produce them in Court cannot *per se* amount to the duty to be performed in connection with the same as contemplated in Order XXI, Rule 70. The provisions embodied therein create a restriction on the rights under the general law that the persons referred to therein possess. Being restrictive in their nature, they have to be strictly construed The duty referred to therein should be construed as relating only to those expressly contained in the Code itself It could have reference only to the provisions in the Code insisting upon the timely presentation of the petitions and the like by persons interested in or aggrieved by the same Under the circumstances, the Rule contained in Article 451 of the Civil Courts' Guide cannot be deemed to have been abrogated by virtue of the passing of the *Code of* 1100

The fact that the Vakil was the purchaser could not by itself affect the validity of the sale. Whatever its effect may be as regards the rights and obligations of the Vakil to his client by allowing the benefit thereunder to enure in favour of the latter, or the liability of

the Vakil for disciplinary action by the High Court, it could not afford a basis for cancellation of the same unless the conditions laid down in Order XXI, Rule 87, have been made out to exist in the case. The sale could not be set aside for any other reasons

Quaere.—Whether the non compliance of the rules in the Code of 1100 would amount to illegalities or only to irregularities.— 20 T L J, *818*

Order XXI, Rule 75

Money reserved in a document as payable to a judgment-debtor is movable property for purposes of sale in execution and under Order XXI, Rule 75, no irregularity in publishing or conducting the sale of such property shall vitiate such sale Order XXI, Rule 75, applies to all kinds of movable property whether recoverable *in specie* or not— 49 T L R, *464* (=23 T L J *747*)

Order XXI, Rule 81

See Or XXI R. 68— 22 T L J, *1161*

Order XXI, Rule 83

1. Under Order XXI, Rule 83, a discretion is vested in the Court in the matter of cancelling the sale and ordering forfeiture of the deposit. This discretion has to be exercised judicially and on grounds that ought to appear from the order itself— 21 T L J, *956*

2. The new Civil Procedure Code has effected an important alteration in the law as regards the forfeiture of the deposit made by a defaulting auction purchaser Under the old Code, the Court had no discretion in the matter. The present Rule (Rule 83 of Order XXI) has invested the Court with a wider discretion. The change was found necessary as the Rule in its original form was found to work hardship in several cases. Under the present Code it is not obligatory on the Court to pass an order forfeiting the deposit to Government The Court can in proper cases order the refund of the amount to the auction-purchaser —

22 T L J, *1174*

Order XXI, Rule 86

1 The expression 'immovable property' in Order XXI, Rule 86, could not be construed to be restricted to all the properties comprised in the Court sale and not any individual item included therein Every item covered by the sale would be immovable property that has been sold The expression 'such property' occurring in the latter part of the Rule can have reference only to the immovable property falling under the category specified in the previous portion As such there is no reason to hold that the person who had succeeded to the title over one of the items sold should not be considered to be one who could claim the benefit of Rule 86 To construe the expression 'immovable property' occurring in this Rule as connoting all the properties sold in one lot would virtually require the importing into the Section words which do not as a matter of fact find a place therein If, however the intention of the Legislature has been to restrict this privilege to persons who acquire title over *all* the properties sold in one lot, such intention would have been made clear by the wording of the Rule. Further, the restricted construction would require a denial of this right not only to holders of title by sale from the judgment-debtor of certain items of properties covered by the sale, but also to holders of interest in specific shares in all the items covered by the Court sale besides judgment-debtors who have a title only to certain of the properties so sold, that with respect to

the others being vested in their co-defendants. A refusal of this right in such cases would be contrary to the policy of the Legislature providing for the judgment debtor an opportunity to discharge the decree-debt, of course allowing the auction-purchasers 5 per cent. of the purchase amount as a solatium for the non-confirmation of their sales.

20 T L J., 428

2 The attaching creditor under a decree obtained against a decree-holder who for purposes of execution has been impleaded as additional plaintiff can have *priority only* with *respect* to the expenses incurred by him in execution, and the balance available in the Execution Court could not be claimed by him wholly, ignoring those of the other creditors who have placed an attachment on that decree.

The amount realised by sale and deposited under Rule 86 of Order XXI should be treated as assets of the decree-holder

The expression "decree-holder" occurring in the Rule would refer only to the person in whose favour a decree is passed or his transferees whether by act of parties or operation of law and not to persons who hold an interest therein By the mere fact that as such holder of interest an attaching creditor was allowed to execute the decree, he could not be considered to have become the decree-holder in the execution proceedings, within the *meaning* of the Rule —

46 T L R, 1
(=20 T L J., 678)

3. In execution of a decree against the first defendant and others (governed by the Eazhava Regulation III of 1100), certain properties belonging to the first defendant were sold in Court auction and purchased by a stranger Subsequent to the Court sale but within thirty days thereafter, the appellant obtained a private sale from the first defendant, of the said properties, paid off the decree-holder out of Court and made application to Court under Order XXI, Rule 86 (1), for setting aside the Court sale, accompanied by a deposit of five per cent commission due to the auction-purchaser The decree-holder also certified satisfaction to Court, of the decree On the objection of the auction-purchaser and applicants for ratable distribution that the application under Order XXI, Rule 86 was incompetent,

Held —(1) Though the sale deed in favour of the appellant was not binding on the Tarwad of the first defendant because it was executed by him alone, still in the absence of any objection from the junior members of the Tarwad as to its validity, it conferred sufficient interest in the appellant to entitle him to apply under Order XXI, Rule 86

Section 21 of the Eazhava Regulation III *of 1100 does not say that a sale deed* executed by the Karanavan or other managing members without the written consent of *all the major members shall be void* in law All that the Section can possibly mean is that such sale deeds, etc, as are specified in the Section *cannot be valid or* operative as against the Tarwad if the junior members choose to question its validity

(2) It was wrong to contend that after the sale in auction and purchase by a stranger, any adjustment between the decree-holder and the judgment-debtor within the statutory period cannot affect the stranger auction-purchaser's purchase of the property sold in Court auction Order XXI, Rule 86, differs from the British Indian Code, in one respect, *viz*, that under the British Indian Code the would-be depositor must be one who had an interest by virtue of an interest acquired *before the sale* whereas under the Travancore Code the interest may be one acquired *before or after the sale* That a third party and not the decree-holder is the purchaser in Court auction does not make the slightest difference.—

21 T L J, 1001.

4. Section 307-A of Regulation II of 1065 is the provision that corresponds to Order XXI, R 86 The draft of the now Code did not contain the second proviso to Order XXI, R. 86, but the proviso was subsequently adopted on the motion of a non official member When the old Regulation was in force, it was decided that under Section 307-A it was not necessary for a person interested in setting aside the sale of one or more of several lots sold under one proclamation, to ask to have the whole sale set aside, provided that the strict terms of that Section were complied with It is obvious therefore that the proviso is only a legislative recognition of a right upheld by judiciary law It has to be seen whether under the new enactment, the obligations imposed on a person who seeks to set aside the sale of all the items, and on one who desires to cancel the sale of only some of them, under Order XXI, Rule 86, are identical or whether there is any variation Under Clause (1) (*b*) the deposit must be of "the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may since the date of such proclamation of sale, have been *received by the decree-holder*," whereas in proviso 2, the deposit is directed to be of "the balance if any, of the amount specified in the proclamation of sale, as that for the recovery of which the sale was ordered, *still remaining unrealised*" The difference in the phraseology employed in these two instances is striking, for in the former the reference is to *the amount received by the decree-holder* but in the latter it is to *the amount still remaining unrealised* There is clearly a distinction between *the amount received by the decree holder* and *the amount still remaining unrealised* If the amount specified in the sale proclamation had been realised by the auction sale and no balance remained, then it is enough for one applying for cancellation of the sale of one of the items to deposit the amount of the purchase money and 5 per cent thereof, and if that be done he acquires a statutory right to have the sale cancelled and it is immaterial that on account of claims for ratable distribution the decree-holder was able to get only a fraction of his decree amount—

24 T L J, *488*

Order XXI, Rule 87.

1 No appeal lies against an order rejecting an application for review

Under the old Civil Procedure Code an application for setting aside a sale on the ground of fraud is not an application for setting aside a sale on the ground of irregularity in conducting and publishing a sale. Under the new Code, Order XXI, Rule 87, relates to applications for setting aside a sale on the ground of irregularity and fraud in conducting and publishing it

Article 138 of the old Limitation Regulation which corresponds to Article 151 of the present Limitation Regulation relates to applications for setting aside a sale on the ground of irregularity The present Article 151 is more general in the wording as it merely says 'under the same Code to set aside a sale in execution of a decree'

An application for setting aside a sale on grounds of irregularity and fraud whether it is one under Section 40 or Order XXI, Rule 87—All applications under Order XXI Rule 87 are also applications under Section 40—comes under the purview of Article 151 of the Limitation Regulation

47 T L R, *403*
(=20 T L J., *1284*)

2. The scaring away of intending bidders by a third party even if true, cannot amount to an irregularity, which would attract the provisions of the Rule in Order XXI, Rule 87

Nor could it constitute fraud in the eye of the law so far as execution proceedings

are concerned, for it is essential in cases where any proceeding is sought to be avoided on the ground of fraud the acts and omissions relied on whether in the nature of *suppressio veri or suggestio falsi* should be those of the party who is benefited by the proceeding, as the Courts could not in such cases, allow the party who has wronged the other, to enjoy the fruits of his wrong doing It is not every irregularity that would constitute fraud A finding of fraud should be reserved for that which is dishonest and morally wrong Vague and general allegations however strong they may be would be insufficient to amount to an averment of fraud which the Courts could take notice of — **20 T L J**, *1292*

3. The value fixed in the proclamation was excessively low and it was held to constitute material irregularity following the dictum of Viraraghava Iyengar, C J, in 13 T L J, *463*

The fact that a Vakil (a party to litigation) was allowed to bid, was calculated to have, and probably did have, the effect of discouraging other bidders. This was deemed to form circumstances required by Rule 451, Civil Courts' Guide, to be shown to exist, and was held to constitute another material irregularity — **21 T L J**, *857*

4. A person attaching a property after its sale in execution is not one 'whose interests are affected by the sale' and cannot therefore apply under Order XXI, Rule 87, to set aside the sale for the simple reason he had no interest on the date of sale to be affected by it The expression means interests existing before the sale.— **22 T L J**., *69*

5. The sale of the property without attachment would be a mere irregularity. It would not even justify the setting aside of the sale in an application under Order XXI, Rule 87, unless substantial injury was caused thereby — **22 T. L. J.**, *96*.

6 No second appeal lies against an order in appeal refusing to set aside a sale in execution of a decree where the sale is attacked on the ground of material irregularity under Order XXI, Rule 89 The fact that the decree-holder is the auction-purchaser in the case does not make any difference in the applicability of the above principle — **48 T L R.**, *287* (= **22 T L J**, *632*)

7 A plaintiff who has only effected an *attachment before judgment* is not entitled to apply under Order XXI, Rule 87 of the Civil Procedure Code But an attaching creditor who attaches property in execution of the decree before the sale is one 'whose interests are affected by the sale' within the meaning of the Rule.— **22 T L J**, *714*

8 The defendant in the case filed a petition under Order XXI, Rule 87, for setting aside the sale of properties in Court auction. The petition was dismissed, and an appeal against the order of dismissal by the Court in execution was also dismissed This was on 17-12 1103 The 17th Adi 1106 was a holiday On 18-12-1106, the decree-holder applied for execution. The defendant contended that the application was barred by time This objection was overruled by the Court below

Held —The application was not barred by limitation Under the Civil Procedure Code, no Court sale is valid until it is confirmed by the Court Order XXI, Rule 89, allows a Court to confirm a sale where no application is made under Rules 86, 87 or 88 or where such applications are made and 'disallowed' The word 'disallowed' would take in the orders passed in appeal, if any, against the order of the Court executing the decree The sale, therefore, could be taken to be confirmed only after the appellate order In the case, the application for delivery having been filed within three years of the appellate order dismissing the appeal was not barred.— **23 T. L J**, *159*.

9 The property of the judgment-debtor was attached and sold in auction in execution of the decree After the attachment but in ignorance of it, the judgment-debtor sold the property by private sale undertaking to indemnify the purchaser against any possible loss by reason of any encumbrance or defect of title

Held—The judgment-debtor is one whose interests are affected by the sale, and as such he had a right to apply under Order XXI, Rule 87, to set aside the sale

The Legislature has, in the new Code, substituted the words 'whose interests are affected by the sale' for the expression 'any person whose immovable property has been sold' contained in the old Code. This alteration appears to be a deliberate one intended to set at rest whatever conflict there may have been in regard to the nature and extent of the interest necessary to entitle one to apply under the Section. The words 'whose interests are affected by the sale' are very wide and, *prima facie* cover any kind of interest affected by the sale. It need not be an interest in the property itself or in other words, the interest need not be a proprietary interest in the property The word used is 'interests' in plural and must include any kind of interest whether proprietary, pecuniary or otherwise that a person may have and if such an interest is affected by the sale, he is entitled to apply —

48 T L R., *336*
(=23 T L J, *645*)

10. The second defendant in the case obtained a decree and in execution thereof purchased the right under a hypothecation bond executed in favour of the judgment-debtor by the first defendant. The plaintiff got an assignment of the right from the second defendant and filed the suit to enforce the bond It was in evidence that subsequent to the second defendant's assignment, his decree was modified in appeal and the execution sale under which he bid the right, was also set aside by the High Court, on appeal, on the ground of material irregularity and that the second defendant had not brought the fact of assignment to the notice of the Court either when the appeal was pending or the dispute continued in execution but had himself contested the appeal and execution proceedings. The first defendant therefore resisted the suit on the ground that the auction sale having been set aside, plaintiff had no interest on which to sue The plaintiff in answer contended that the property sold in execution being only movable property, an application to set aside the sale for material irregularity would not lie and the order in execution setting aside the sale was invalid and passed without jurisdiction

Held—The plaintiff who got the right, title and interest of the second defendant was bound by all the equities which the assignor was subject to. He took a fluctuating interest the nature and extent of which was determined only by the final decision. The fact that in the case it was not the decree that was assigned but only the rights of the auction purchaser did not make any difference in principle

In view of the fact that it was the High Court, in appeal, that passed the order setting aside the sale, there was no substance in the contention as to want of jurisdiction in setting aside the sale. Even if an appeal did not lie, the High Court had unlimited powers of passing appropriate orders when unjust orders were brought to its notice—

24 T L J, *691*

11 The suit was at first decreed *ex parte* against defendant and item 1 Items 2 to 6 were attached in execution. The decree was set aside on the application of the defendant. After re-trial a decree on the same terms was passed again. The properties were proclaimed for sale and sold subsequently without fresh attachment. The defendant judgment-debtor

applied to have the sale set aside The application was dismissed

Held (in appeal)—Omission to effect attachment does not render the sale void but only voidable The executing Court ought to have ordered attachment

The absence of the attachment must be regarded only as a material irregularity in publishing the sale Before a judgment-debtor could get the sale set aside under Order XXI, Rule 87, he is bound to prove substantial injury— 24 T L J, *723*

12. See also—

Sec 40—	21 T. L J, *1048*
	46 T L R., *49*
	(=20 T L J, *153*)
Or. IX, R 9.—	20 T L J, *285*
Or XXI, R. 64—	22 T L J, *888*
	48 T L R., *350*
	(=22 T L J *1058*)
„ R 70—	20 T L J, *318*
Or XXIII, R 5 —23 T L J, *441*	

Order XXI, Rule 88

Order XXI, Rule 88, enacts that the purchaser, at any Court sale in execution of a decree, may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property The Section shows that the remedy under it is available to the auction purchasers only in cases where the judgment-debtor had no saleable interest in the property sold The expression 'no saleable interest' occurring in the Section means nothing to sell It would apply to cases where the judgment-debtor had no interest at all or the interest was not one that he could sell. The circumstance that the title of the judgment-debtor is defective would not attract the provisions of this Section in his favour If he has been induced to purchase the property for something more than its real worth by reason of a misrepresentation or concealment, his remedy is only by way of a separate suit—

20 T L J., *147*

Order XXI, Rule 89.

1 According to the Code of 1100 there is no provision for a Second Appeal from an order under Order XXI, Rule 89; A judgment-debtor not objecting to the sale of the properties mentioned in the sale proclamation cannot question it after sale— 47 T L R, *471*

2. Under Order XXI, Rule 89, of the Code the sale becomes absolute on the confirmation of the sale.

Under Article 164 of the Limitation Regulation VI of 1100, the time allowed for a purchaser of immovable property at a sale in execution of the decree, for delivery of possession is three years when the sale becomes absolute. The grant of a sale certificate is not essential for confirmation of the sale and it could not be contended that limitation for an application for delivery of possession begins to run only from the date of the grant of the sale certificate.— 24 T L J, *888*

3. See also Or XXI, R 87— 48 T. L. R., *887* (=22 T L J, *993*).

Order XXI, Rule 90

One of the grounds taken by the appellant was that the purchaser at Court auction should get the sale set aside under Order XXI, Rule 89, and move the execution Court under Order XXI, Rule 90, for the recovery of the purchase money and he had no right to institute a separate suit for recovery of the same

Under the Civil Procedure Code a purchaser in Court auction has a right to maintain a suit for recovery of the purchase money if the sale has been set aside on the ground that the judgment-debtor had no saleable interest in the property

Where the purchase in Court auction and the setting aside of the sale on the ground that the judgment-debtor had no saleable interest in the property took

place under the old Code, a right of suit for the recovery of the purchase money became vested in the auction purchaser and such vested right is not taken away by the new Code (Section 7, Clause (*d*), of Regulation II of 1072)

The Article of the Limitation Regulation which is applicable to the case is Article 109 21 T L J, *1360*

Order XXI, Rule 91

See Regn VI of 1100, Art 9—
47 T. L. R., *222*
(=21 T L J, *903*)

Order XXI, Rule 92.

See Regn. VI of 1100, Art 164,—
20 T L J, *1118*

Order XXI, Rule 94

The decree is against the defendant personally and against the Devaswom belonging to defendant's Illom The decree-holder in execution purchased the Illom properties in Court auction and applied for delivery of possession The defendant's son, who was not a party to the decree and who did not profess to represent the defendant, resisted delivery on the ground that the decree did not bind the Illom The decree-holder replied that the decree was valid and binding on the Illom The Munsiff held that the defendant's son was not entitled to maintain the petition as he was not a party to the decree and dismissed the objection without entering into its merits

Held—The petition came under Order XXI, Rule 94, and no appeal lay when one of the parties to the dispute under Order XXI, Rule 94, was not a party to the decree.

The enquiry under Order XXI, Rule 94, had to start on the complaint of the auction purchaser. There would be such a complaint when the auction-purchaser, as in the case, had put in his objection to the ante-delivery petition, and the Court delivery and the objection had to be decided on the merits, and the dismissal of the ante objection petition without any decision was unsustainable—

21 T L J, *173*,

Order XXI, Rule 96.

1 The appeal is against the order allowing the application of the auction-purchaser for removing the obstruction caused by the appellants. They were found to be in possession of the properties as tenants at-will under the first defendant They contended that such possession was on their own account within the meaning of Order XXI, Rule 96

Held—A tenant-at will is not entitled to obstruct the decree-holder as he cannot claim to be in possession on his own account under Rule 96 of Order XXI.—

46 T L R, *197*
(=20 T L J, *607*).

Ref—21 T L J, 1329

2 The application for delivery in the case was by certain puisne mortgagees who had purchased the properties in execution of their mortgage-decree in O S. No. 276 of 1101 The obstructors were the prior mortgagees who had purchased the property in execution of their decree in O S No 246 of 1102 who had obtained delivery of the same. Neither party had impleaded the other in his suit On the contention of the puisne mortgagees that the purchase of the property in the subsequent suit by the prior mortgagee was affected by *lis pendens* and that his obstruction in execution was incompetent

Held—(1) The decree in the puisne mortgagee's suit or the execution proceedings in pursuance of it, cannot be deemed to have affected the prior mortgagee's paramount rights in any manner

(2) The prior mortgagee was in possession on his own account within the

meaning of Order XXI, Rule 96, and not in possession on account of the mortgagor

(3) Order XXI, Rule 99, which refers to transferees *pendente lite* was not applicable to the case of auction purchasers of properties sold in execution of a decree, and

(4) The puisne mortgagees cannot therefore dispossess the obstructor in these execution proceedings.— **20 T L J, 802**

Dist —22 T L J., 591
21 T L J, 1329
Ref — 49 T L R., 32
(=22 T L J, 1298)

3. In cases of resistance or obstruction by persons claiming possession on their own account or on account of others besides the judgment debtors, the Court should either summarily overrule the objection and direct that delivery of possession should be made under Section 319 if it is satisfied of the fact that the obstruction or resistance is made by a third party at the instigation of the judgment-debtor Otherwise it has to proceed under Section 320 and dispose of the matter treating it as a regular suit In the suit that could be filed by him against a summary order under Section 319, *it would be open to him to question* the view taken by the Court that he was not holding the property on his own account or on account of any other person besides the judgment-debtor The proceedings under Section 320 must be taken to be virtually a similar remedy granted to the decree holder in cases where a decision adverse to him on *a priori* grounds is passed It would be unreasonable to hold that a direction (under Section 320) would conclude the decree-holder on the question whether possession of the obstructor is under the judgment-debtor or not"

The scope of the proceeding under Section 320 is primarily for the adjudication upon the nature of possession set up by the obstructor Though in the nature of the wording of Section 320, questions of title could also be dealt with, the Court has to treat it as a suit for property and determine all questions between parties relating thereto The denial of the right to have this question determined in the proceedings under Section 320 would virtually make the proceeding in question unnecessary— **21 T L J, 833**

4. The third defendant, a prior hypothecatee, in enforcement of his hypothecation right obtained decree (without impleading the plaintiff a puisne encumbrancer), and in execution of the decree himself purchased the property and got delivery The plaintiff subsequently filed suit with the prior encumbrancer also on record and after likewise purchasing the property applied for delivery in execution On resistance set up by the third defendant

Held (Ordering removal of the third defendant's obstruction) —"The puisne mortgagee was not bound by the decree and execution proceedings taken by the prior mortgagee The sale of the hypotheca had no more effect on his rights than if the mortgagor had sold it to a third party In such a case the puisne mortgagee could sue for the sale of the mortgage property subject only to the right under the prior mortgage, the whole of which would not be necessary for the suit"

On the contention of the third defendant that Order XXI, Rule 96, was applicable to the facts of the case

Held —Inasmuch as a decree has been passed against the third defendant he had to be regarded as a judgment-debtor and as such bound by the decree and execution proceedings in the case. Order XXI, Rule 96, was therefore manifestly inapplicable **22 T L J., 691.**

Order XXI, Rule 97

1. Though the dispossession contemplated in Rule 97 of Order XXI refers to

actual possession, the possession of the tenant will be possession of the landlord for the purposes of this Rule.

The principles relating to investigation of claims under Order XXI, Rule 56, of the Code will apply with equal force to disposal of applications under Rule 97 of the Order 20 T L J. 638

2. The point for determination was whether the counter-petitioner who was virtually in the position of a prior hypothecatee who had purchased the property in dispute in execution of a decree, was entitled to get delivery on removal of obstruction, as against a subsequent charge-holder who had, in execution of his own decree, purchased it and obtained possession earlier The petitioner was not represented in the counter-petitioner s suit nor was the counter-petitioner in the suit by the petitioner

Held—(1) The obstructor (petitioner) being a purchaser of the equity of redemption in a sale held in execution of a decree obtained by him against his debtor, was not holding the property on the debtor's behalf or under him in any sense, He was a person claiming to be in possession on his own account

(2) Where a dispute arises between the prior mortgagee and the subsequent mortgagee who had each purchased the property without obtaining a decree binding on the other, the title to the outstanding equity of redemption is determined by the priority not of the respective mortgages but of the respective sales.

(3) The counter-petitioner was therefore not entitled to recover possession from the petitioner (obstructor) in execution.—

42 T L. R., 864
(=23 T L J, 763)

Order XXI, Rule 99

The plaintiff mortgagee filed suit and obtained decree in O S. No. 81 of 1103 for recovery of the mortgage properties from the first defendant-mortgagor who had continued in possession as lessee under her She recovered certain items in execution, but as regards the rest, was met with obstruction at the hands of a prior hypothecatee of the first defendant, who had purchased them in execution of his hypothecation decree in O S No 35 of 1100 The hypothecation decree was passed before the institution of the suit O S No. 81 but the execution sale and delivery in O S. No. 35 took place during the pendency of the suit Plaintiff was not impleaded in O S No. 35 nor was the hypothecatee a party in O S No. 81 The lower Court dismissed the plaintiff's application to remove the obstruction. On appeal by the plaintiff, a preliminary objection was raised by the respondent in regard to the maintainability of the appeal

Held.—The rulings on the matter favoured the view that an auction-purchaser of the judgment-debtor's rights is his representative and questions between such purchaser and decree-holder purchaser, would fall under Section 40 C P C, in addition to the Order and Rules relating to obstruction to delivery in execution. (Order XXI, Rule 99). The point need not however be definitely settled as the appeal may be dealt with as a revision petition also

The contention of the obstructor that the rule of *lis pendens* had no application to involuntary sales was not acceptable In this view the transfer obtained by the obstructor when the plaintiff's suit was pending could not be recognised in execution of the plaintiff's decree.—

21 T L J, 1329

Order XXI, Rule 100

Plaintiff sued to recover property on the allegation that he purchased the same in Court auction and obtained delivery in due course. Defendant objected to the delivery in the former suit and his prayer

was granted by the Executing Court In appeal it is contended that the order passed by the Executing Court should be deemed to be conclusive only so far as the execution Court is concerned and that in the suit instituted to contest the validity of that order the burden would again shift to the claimant in spite of the order in the latter's favour

Held.—In a suit filed under Order XXI, Rule 100, to set aside an order passed by the Executing Court directing restoration of possession to a *bona fide* claimant, the burden of proof lies on the plaintiff in the first instance. The order passed by the Executing Court should be regarded as valid and conclusive until the plaintiff succeeds in satisfying the Court which tries the subsequent suit filed by him that that order is wrong Hence the burden of proof lay on the plaintiff in the first instance —

46 T L R, *402*
(=22 T L J, *1285*)

Order XXII, Rule 2

The fact that the defendant is also one of the legal representatives of a deceased plaintiff is no bar to the impleading of the others in place of the deceased —

20 T L J, *745*

Order XXII, Rule 3

Both the special appeal and the revision petition, in the case, were by two of the sons of the first defendant who died during the pendency of the appeal in the District Court Their applications to be brought in as legal representatives was rejected, and the Court holding that the appeal had abated dismissed it, The special appeal in addition to the revision petition was resorted to as a matter of caution since it was a controversial question whether an appeal from a decision of this kind was competent.

Held —The words 'Legal representative' cannot be construed to mean all legal representatives They must include any legal representative to whom the right to sue survives. The Court has some discretion in the matter of allowing applications made by some of the legal representatives of a deceased plaintiff or appellant and is not bound to reject such applications merely on the ground that all the representatives had not associated themselves therein. It is open to the Court to bring in the other representatives as respondents on application duly made or to proceed under Order XL, Rule 4, of the Code Each case must be decided in the light of its peculiar circumstances

Per Raman Tampi, J —There is no warrant for the proposition that unless all the legal heirs came in, the suit should abate The action is to be continued after the death of the plaintiff, representing the estate of the deceased plaintiff and if some of the heirs do come in they are legal representatives. For the purposes of the Rule, it has only to be considered whether they are heirs and the fact that there are some others also of the same category cannot make them the less legal representatives. If it is brought to the notice of the Court that there are other persons also claiming under the original plaintiff, it is open to the Court *suo moto* to direct their impleading Matters regarding the impleading of legal heirs of deceased parties without allowing the suit to abate should receive a liberal interpretation.—

30 T L R, *133*

Order XXII, Rule 4

See Order I, R 10,—20 T L J, *1242*

Order XXII, Rule 5

Held, inter alia.—The enquiry, after all, relates to the question as to who got the *prima facie* title to be impleaded. If the revision petitioner was dissatisfied

with the summary order of the Judge, nothing precluded him from instituting a regular suit claiming appropriate reliefs in regard to the property in question —

20 T L J, *662*

2. *Per Venkata Rao, J* — The duty cast upon the Court of deciding who among rival claimants is the proper person to be impleaded as legal representative of a deceased party to the suit is confined to cases of persons claiming to have succeeded to the estate of the deceased as heirs, or perhaps also as executors, and does not arise in the case of persons claiming merely as beneficiaries under a will.

Per Joseph Thaliath, J — The language of Section 351 (corresponding to Order XXII, Rule 5, of the present Code) does not mean that the Court is bound to select one set only of the rival claimants as the person or persons who shall be admitted to be such legal representatives for the purpose of prosecuting the suit and that in order to prevent objection being raised that the true representative has not been brought in, both the claimants can be made legal representatives for the purpose only of continuing the suit, if that course is not inconvenient

In many of the Marumakkathayam suits the question of the legal representative will depend upon the nature of the acquisition of the property in dispute. In such suits (the present one is of that kind) the proper procedure to be adopted will be to go on with the suit with the rival claimants on record, unless, of course, such a course is inconvenient or embarrassing —

21 T L J., *566*

3. The duty cast upon the Court of deciding who among rival claimants is the proper person to be impleaded as legal representatives of a deceased party in a suit is confined to cases of persons claiming to have succeeded to the estate of the deceased as heirs or perhaps also as executants and does not arise in the case of persons claiming merely as beneficiaries under a will

Even in cases where in ignorance of the will left by a deceased person certain persons are sued as the legal representatives by the creditor and a decree is obtained, the decree would be binding on the estate or on the person who turns out to be heir ultimately

In the case of a gift by a Marumakkathayee the presumption should be that he intended that the donees should take his properties under the gift as properties acquired by their branch with the usual incidents of Tarwad property in accordance with Marumakkathayam usage which governed the donees.—

24 T L J, *303*.

Order XXII, Rule

1. The Civil Procedure Code does not contemplate the passing of an order of abatement and when the period prescribed under Article 162 of the Limitation Regulation expires, the suit or appeal automatically abates Thereafter the only application provided for under the Code is an application presented within 60 days from the date of such abatement under Order XXII, Rule 9 (2), for setting it aside and such application can be granted only if the petitioner succeeds in proving to the satisfaction of the Court that he was prevented by sufficient cause from continuing the suit

In an application to 'review' a prior order of abatement, the Court should see that the provisions of the Code are not lightly disregarded especially when there is evidence to show that the party had not acted *bona fide* and had supported his claim by false evidence "When suit has abated, the setting aside of the abatement deprives the party, in whose favour the abatement operates, of a valuable right."—

46 T L R., *373*

(=21 T L J., *903*)

2. The plaintiffs and defendants 1 to 3 were members of an undivided Nayar Tarwad to which the suit property belonged The property was mortgaged to the 1st defendant in the year 1045, by the then Karanavan To redeem that mortgage the next Karanavan (who was also Karanavan of the 1st defendant) instituted a suit in 1076 against the 1st defendant and others. As the latter Karanavan died during the pendency of the suit and as none came forward to be impleaded an order of abatement was passed by the Court. The 1st defendant who was the mortgagee in possession of the property then became the Karanavan. The 1st plaintiff, the next senior Anandaravan became the manager of the Tarwad on the removal of the 1st defendant from Karanavasthanam on 6-3-1086 The present suit was filed on 25-6-1088 for redemption of the above mortgage. The plaintiffs also prayed that the suit might be regarded as an application to set aside the order of abatement in the prior suit.

It was contended that the present suit was barred under Section 355 C P C (old) on the ground that when once a suit had abated no fresh suit could be brought on the same cause of action and that even if the present suit be regarded as an application to set aside the order of abatement in the previous suit, it was barred under Article 148 of the Limitation Regulation (old) Both the lower Courts upheld these contentions and dismissed the suit

Held—Merger extinguishes the right which is merged and it cannot be contended that the mortgage right was extinguished. There could at best have been only a suspension of rights. If there was a devolution of interest at all at the death of the plaintiff it could not be on the junior member but could only be on the succeeding Karanavan, who in law became entitled to take possession of the properties of the Tarwad and in that capacity could alone sue or be sued as the law stood and even if a junior member could bring an action on behalf of the Tarwad, the then Karanavan had also to be impleaded in the suit. The right to represent the Tarwad passed on the death of the plaintiff to his successor in the Karnavanship, *viz*, the defendant. No junior member could claim to be the legal representative within the meaning of the expression in the C P C. and in the case as the 1st defendant was the legal representative in whom the right to represent the Tarwad had vested at the death of the plaintiff, there was none of whom it might be said that he ought to have applied to be impleaded in the suit There was no abatement within the meaning of Section 355

The term "legal representative" means something more than persons who may apply to be impleaded and it means one who under the law is bound in the discharge of his duties to take steps to get himself impleaded in the interests of the Tarwad and without whose presence in the suit no other person could claim to continue it as of right. The principle that there may be suspension of rights of action in such cases has been recognised in several cases.

It is clear from the above rulings that when there is no person competent to sue or where the right to sue and be sued vest and unite in one and the same person such rights may be suspended

The order of abatement is no bar to the plaintiffs continuing the suit inasmuch as the right of action was suspended in the case. When a cause of action has once arisen and a suit has been instituted on the basis of such cause of action, it is against established principles to hold that the suit should be deemed to have terminated though without prejudice to the aggrieved party's right to sue again on the same cause of action. As there has been a suspension of rights and when the intervening cause has been removed, the person

in whom the right of action has vested should move the Court to set aside the order of abatement and permit him to continue the suit

The suit viewed as an application to set aside the order of abatement should be regarded as one virtually for permission to continue the suit when the right of suit which had been temporarily suspended but had revived by removal of the first defendant from Karnavasthanam and as there is no specific provision in the Limitation Regulation applicable to such an application it must fall under Article 152 of the Limitation Regulation (old).

As the suit was filed within 3 years of the accrual of right which was on the date on which the first defendant ceased to be Karanavan (6-3-1086), the suit is not time-barred.— 48 T L R, 441 (=23 T L J, 1)

Order XXII, Rule 10.

While under Order XXII, Rule 5, the Court has to determine whether the person seeking to be impleaded has the right to be brought on record, no such duty is expressly cast upon the Court under Order XXII, Rule 10, and the matter is left to its discretion to be decided with due regard to the circumstances of each case.— 22 T L J, 659

Order XXIII, Rule 1.

An application was made by the plaintiff for permission to withdraw a suit with liberty to bring a fresh suit It was granted by the lower Court on the only ground that 'if the plaintiff files a fresh suit, the defendant will have his remedy'

Held (in revision).—The order of the Court below was not sustainable. Permission to withdraw a suit with liberty to bring a fresh suit is not in the free gift of a Court. The Court's jurisdiction in that respect is limited by the provisions of Order XXIII, Rule 1 Some formal defect or some other sufficient cause should be made out before such permission is granted "Sufficient ground" mentioned in the Rule need not be analogous to formal defect The power given by the Code is governed by certain considerations and if it appears that these considerations were not present in any given case, it must be held that the order was passed without jurisdiction, or by a wrong exercise of jurisdiction or at any rate with material irregularity The order should state grounds for permitting withdrawal with leave to sue afresh. The ground stated by the lower Court is not sufficient for passing the order.—

23 T L J, 17

Order XXIII, Rule 3.

1. Under Order XXIII, Rule 3, or Section 359 of the old Code (of which the present Rule is a substantial reproduction), the Court has to record the compromise and shall pass a decree in terms of the compromise. Of course, the Court has a responsibility to enquire into certain facts before recording a compromise. It should satisfy itself that the parties who proposed to compromise did really sign in the compromise and that the compromise is *prima facie* legal The enquiry about the legality of the compromise does not mean an exhaustive trial regarding the merits of the terms of the compromise. If the fact of the compromise is disputed by a party whose name appears on record, that fact may be enquired into. But if a penalty clause, which on proper occasions the Court may relieve against, is entered in a compromise, the Court shall not say 'nay' to the compromise. Within certain limits, the Court to which a compromise is submitted may scrutinise the terms. If there is nothing illegal, the Court is bound to pass a decree on the compromise.

Where, therefore, in a prior suit in which the first defendant was the plaintiff

and the 1st plaintiff and 2nd defendant were co-defendants respectively, the first entered into a *compromise* with the second defendant ignoring the 1st plaintiff and negativing her contentions in the suit, and the Court passed a decree accordingly, and the first plaintiff did not seek to set aside the decree either by an application under Order IX, Rule 13, or by means of an appeal

Held—The plaintiffs' suit based on her former contentions was not barred by *res judicata* by virtue of the prior compromise decree *For there* was nothing apparently illegal in the terms of the compromise and in all probability the first plaintiff's objections to recording the compromise in the prior suit would not have been countenanced The decree based on a compromise has the effect of *res judicata* only against suits brought by parties to the *compromise or those* claiming under them To hold otherwise, would result in mischievous consequences - **42 T L R.,** *113* **(=23 T L J,** *187*)

2 Order XXIII, Rule 3, is peremptory The obligation is upon the Court to consider the lawfulness of the agreement or compromise, and if found lawful, to record the same and pass a decree thereon so far as it relates to the suit. Where this has not been done, the dereliction of jurisdiction constitutes a serious error of law that vitiates the decision altogether — **23 T L J,** *1248*

3. *See also* Or XXXIX — **46 T L R.,** *36* **(=20 T L J,** *667*) Or XLII, R 1 — **46 T L R,** *190* **(=22 T L J,** *606*)

Order XXIII, Rule 4.

Under Order XXIII, Rule 4, the Court has discretion to allow a party for proper reasons to withdraw from the oath agreement. But the discretion is a judicial discretion and has to be exercised with care and caution.

In the case the reason given by the lower Court for granting permission to the plaintiff to withdraw from the oath agreement is as follows.—"The main ground urged by plaintiff's Vakil is that plaintiff's brother and other relations do not want plaintiff to take oath Plaintiff is admittedly one in easy circumstances in life. Taking oath, *according* to notions prevailing in their country does not only affect prejudicially the status of the person taking oath but also that of those connected with him I am of opinion that the said ground is a lawful excuse entitling plaintiff to withdraw from the oath agreement I, therefore, allow this application.

Held.—The discretion was not properly exercised '— **23 T L J.,** *449*

Order XXIII, Rule 5

The provisions of Order XXIII, Rule 5, do not apply to proceedings in execution. If a decree is adjusted by an agreement which provides for conditions different from those in the decree, this may provide a fresh cause of action. But the altered terms cannot be executed as a decree.

An execution Court has no power to vary or alter a decree under execution and to substitute a new decree for it. A mere consent of parties cannot confer such jurisdiction.

It has been frequently held that where a party being aware of the defects in the proclamation offers to waive those defects on condition that time *should* be given to him to pay off the decree amount and the time asked for is given, the judgment-debtor *is then* estopped. Most of the cases are cases where the undertaking is made before the sale has taken place and provides that if the money is not paid as agreed, the sale may take place without fresh proclamation The same reasoning

however, would apply where the undertaking to accept the proclamation is made after the sale and during the pendency of an application under Order XXI, Rule 87 There was no legal impediment in the Court accepting the arrangement under which the defendants agreed to pay the decree amount within a certain time conditionally on the sale being set aside and with a further condition that in case of default, the sale would be confirmed —

23 T L J, *441*

Order XXV

1 When a period is fixed for furnishing security, it is not intended that the final order accepting it should be passed within the period, as such acceptance depends on the result of an enquiry into the validity of the objections which may be filed by the opposite side and such enquiries may take more time and that was expected or foreseen by the person moving the Court If the security is offered within the time fixed, the order must be deemed to have been obeyed.— 20 T L J *1031*

2 There is nothing in law to prevent a party from offering as security any property as long as it is situated in Travancore. To insist on the party offering as security only property situated within the jurisdiction of a particular Munsiff's Court may in some instances conduce to a failure of justice because a party may not have property within a particular jurisdiction but may have valuable property situate elsewhere in Travancore. All that the Court is concerned with is to see whether the property was sufficient security, and, if found sufficient, to accept it as security — 49 T L R., *44*
(=23 T L J., *149*)

Order XXVI, Rule 9.

See Regn II of 1100, Other cases.—
47 T L R., *117*
(=20 T L J, *1200*).

Order XXVI, Rule 10

1. Unless it appears from the records that the Court has enquired into objection filed by the parties with regard to the findings of the first commissioner, it would be improper, if not illegal, to issue a second commission or to act on the report of the second commissioner

Where it was found that, though an express order setting aside the first report was not passed, as ought to have been done, there was an enquiry into the objections to the findings of the commissioner, and that there was no data on which he based his conclusions

Held—It was not possible to hold that there has not been substantial compliance of the requirements of Rule 10 (3) of Order XXVI of the Code.—
21 T L J, *975*

2. Order XXVI, Rule 10 (2), simply means that if any formal evidence is taken by the commissioner it must be sent along with the report and not that the commissioner is bound to take evidence in all cases. The rule further says that 'the evidence without the report' shall not be admitted in evidence. It does not however say that the report without the evidence shall be inadmissible. The evidence contemplated in the Rule is the statement of witnesses examined by the commissioner and other evidence in cases where he thinks it necessary to take formal evidence. It does not mean that in every case where a commissioner is sent out for any of the purposes mentioned in Order XXVI, Rule 9, the commissioner is bound to examine witnesses or take evidence.

Although the Court is not bound as a matter of course to accept a commissioner's report in its entirety on the mere ground of absence of objection to the report, the Court is bound to consider the report and if there is nothing in the report to justify its rejection the Court may act upon it (F B.).— 48 T L R., *170*
(=22 T. L. J., *406*).

Order XXVII, Rule 3

See Sec 19 — 46 T L R, *178* (=20 T L J, *1084*).

Order XXIX, Rule 17

An application under Section 502 of the Code of 1065 corresponding to Order XXIX, Rule 17, for filing an agreement between the parties to refer certain disputes to arbitration and for other consequential reliefs, does not cease to be maintainable on the ground that the arbitrators are persons resident beyond the limits of the State and there might be a remote possibility that they might decline to function. A Court having jurisdiction in other respects to admit the application would not be ousted of that jurisdiction merely on account of this circumstance.—
24 T L J, *617*.

Order XXX, Rule 4.

In enforcement of a partnership liability, the suit against the partners was filed only against the defendants personally and not against the firm as such, and on death of some of the defendants, the suit was continued without bringing the legal representatives of the deceased defendants on record

Held—The suit did not abate as against the surviving defendants. By virtue of Section 43 of the Contract Act, the joint contract of the defendants created a joint and several liability, in the absence of an agreement to the contrary, and where the defendants are jointly and severally liable, the death of one or more of them could not effect an abatement of the suit as against the surviving defendants, even though the legal representatives of the deceased defendant or defendants are not brought on record

Also, the principle of Order XXX, Rule 4, with reference to all its clauses is to permit a partnership to sue in the firm's name and to provide that if a partner dies pending the suit, the surviving partner or partners may continue the suit which would not abate. This principle equally applies to suits where the partners are defendants.—
23 T L J, *886*.

Order XXXII, Rules 3 and 4.

1 A minor defendant sought to reopen a case tried when the old Civil Procedure Code was in force on the grounds that a proper guardian was not appointed for him in the suit, that no defence on his behalf was put forward by his mother who was described to be his guardian, and that the mother's interests were adverse to his. But it was found that the mother had accepted summons and notice of proposal to appoint her as guardian, and appeared and contested the suit actively both in the trial and appellate Courts though not expressly describing her defence as on behalf of her minor son also, and there was really no contention set up by her involving any rivalry or adverseness to the interests of the minor

Held—The circumstances indicated were sufficient to conclude that there was a substantial defence of the suit on behalf of the minor as well and that it was unfair, if not unjust, to reopen the decree at the instance of the minor and that long after the decree was passed.

The consent to act as guardian *ad litem* may be either express or implied 'Silence may be indicative of want of consent' the attendant circumstances may, however, be looked into, and consent may be found to have been made out' Under the provisions of the Civil Procedure Code (old and new), what has to be looked into is whether there has been a substantial consent on behalf of the minor as well. If there was such a consent, the decision binds the minor, but not otherwise.—
23 T. L. J., *1002*.

Ref—24 T L J., 718.

2. In O. S. No. 118 of 1098, the plaintiff obtained a decree on a hypothecation bond executed by defendants 1 to 5 in his favour In execution some properties belonging to the Tarwad of the defendants were proclaimed for sale. The 8th and 9th defendants, who were minors at the time of the suit, objected to the sale on the ground that the 3rd defendant who represented them in the suit was not a proper person to represent them as his interests were adverse to their interests inasmuch as he was one of the executants of the hypothecation bond

Held,—Merely because the 3rd defendant who acted as guardian *ad litem* was one of the parties who executed the document on which the suit was based, his interests could not be held to be so adverse within the meaning of Order XXXII, Rule 4, as to make the decree a nullity Probably the fact that the third defendant was one of the executants of the document may be a circumstance which would give the 8th and 9th defendants a right to set aside the decree in a properly framed suit brought for the purpose The decree at worst is not void but only voidable —

21 T L J, 671

Ref —24 T L J, 374.

3. When a decree is passed in a suit in which a minor was not properly represented it is a nullity There is however a distinction between a decree where the minor was wholly unrepresented and where he was represented on the record by a guardian not disqualified from acting. There may be cases where there was irregularity in the appointment of the guardian, such as that his willingness to act was not ascertained before his appointment to that office. This will constitute a serious irregularity but it will not be such an irregularity as would by itself go to vitiate the decree passed in the suit. Even taking a case where there was a possibility of the interest of the guardian being adverse to that of the minor, that circumstance by itself is insufficient to make the decree a nullity. The decree at worst is not void but only voidable. The case will be different where the appointment of the guardian was made in spite of his expression of unwillingness for that would be a contravention of the express provisions of Order 32, Rule 4, of the Code. It is advisable to emphasise the distinction between a case where the decree obtained against a minor is a nullity and where on account of irregularity in the order of appointment of a guardian the decree is only voidable

"A clear distinction exists between a judgment which is void and a judgment which is voidable An erroneous judgment is a voidable judgment, for the argument that a judgment is erroneous assumes both the regularity of the procedure and the jurisdiction of the Court to render it An erroneous judgment is one which, though regularly rendered, is contrary to law or facts, and is, therefore, liable to be reversed by an appellate tribunal An irregular judgment is also voidable judgment, but the distinction between an erroneous judgment and an irregular judgment is this, that whereas an erroneous judgment will always be reversed by an appellate Court, an irregular judgment will be reversed in appeal or ignored in a collateral proceeding only when it is shown that the irregularity in the proceeding has affected the merits of the case between the parties. A void judgment on the other hand, is a judgment where there was a total lack of jurisdiction in the Court to render it. Such a judgment is a mere nullity. It is not necessary to set it aside. It can be completely disregarded whenever it is pleaded either in support of a claim or in answer to a claim

The Court has no jurisdiction to render judgment against one who is not a party to the suit, though it has jurisdiction to render judgment against one who is a party to the suit but who has not been brought

before it by reason of the failure on the part of the Court to follow the particular procedure laid down in the Code. The one affects the existence of the jurisdiction of the Court, the other affects the exercise of it To take a simple case, a minor is not a party to the suit, unless he is represented in the record of the suit by a guardian competent to act as such. Where the record of the suit itself shows that the minor is wholly unrepresented, or that he is represented by a guardian disqualified from acting as such a guardian under the express provision of the statute, the result is that the minor is not properly a party to the suit and a judgment rendered against the minor is without jurisdiction and null and void But where he is properly a party to the suit—and as he is properly a party if he is represented in the record by a guardian not disqualified from acting—the jurisdiction of the Court to try and determine the cause as against the minor is complete and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian. It is the record of the suit that must decide the question of jurisdiction, and where the record, on the face of it, shows that the minor was properly a party to the suit the judgment rendered in such a suit will not be declared a nullity in a collateral proceeding brought to impeach its validity though it may be set aside if it is shown that the defect or the irregularity in the proceedings affected the merits of the case between the parties.

The authorities have laid down the modes by which a decree that is voidable may be vacated by the minor It may be by appealing against the decree, or by applying for a rehearing under Order IX, Rule 13, or by applying for a review or by instituting a separate suit for setting aside the decree. But it is not open to the minor to impeach the validity of a voidable decree in execution.—

24 T L J, 874.

Order XXXII, Rule 15

Section 443 of the old Code of 1065 laid down that the provisions of Sections 420 to 442 (relating to next friends and guardians *ad litem* of minor plaintiffs and defendants) would apply in the case of persons of unsound mind The Code of 1100 substantially embodied the above provision in an amplified form adapting the amendment in the British Indian Code of 1908 in this behalf It extended the provisions to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on enquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting their interests when suing or being sued. In some of the British Indian High Courts, it was once considered that an adjudication as a lunatic was essential for the above provisions to apply But this view has been dissented from in later cases.

By the expression 'unsoundness of mind', in Order XXXII, Rule 15, what the law contemplates is that the person should be either suffering from *dementia*, *i e*, where the mind which once was normal has subsequently become deranged, or where he is subject to *amentia*, *i e*, suffering from weakness of mind which would constitute him either an idiot or a person so deeply defective in mind from birth or from any early age as to be unable to guard himself against common physical dangers, or an imbecile or a person in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, and yet so pronounced that he is incapable of managing his affairs or a feeble minded person or one in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that he requires care, supervision or control for

this own protection. The weakness of intellect by itself is insufficient to constitute 'unsoundness of mind' within the meaning of the above provisions.

The amendment in the Code of 1100 has not effected any change in the law It has only amplified the provisions in this behalf in the older Code and made the same clearer It is essential that both under the old and the new Codes, a specific statement should be made that the person on whose behalf a suit is proposed to be filed by another or for whom a guardian *ad litem* is sought to be appointed is incapable of managing his affairs or protecting his own interests This allegation has to be substantiated by cogent and reliable evidence, so that the Court may record a finding in this behalf before the suit or proceeding is so allowed to be conducted by the next friend or a guardian *ad litem* appointed for a person of unsound mind — 20 T L J, *54*

Order XXXIII, Rule 1

1 There is a difference in the wording of this Rule (Order XXXIII, Rule 1 of the Civil Procedure Code) and that in the British Indian Act. While in the latter, there has been an express exclusion in the case of the subject matter of suit, no such reservation has been allowed by our Legislature. So far as our Court is concerned the question of the propriety of the inclusion of properties admittedly in the possession of the plaintiff in determining the means of the plaintiff for purposes of enquiries in respect of applications under Order XXXIII, Rule 1, does not seem to be doubted —

46 T L R., *307*
(=20 T L J., *1232*).

2 After the institution of the suit, some of the defendants objected to the plaintiff's valuation of the suit alleging that the plaint schedule properties were under-valued. On the report of the commissioner the Court ordered payment of additional Court fee. The plaintiff did not pay the additional Court-fee but prayed for continuation of the suit in *forma pauperis* The lower Court rejected this prayer

Held—Under Order XXXIII, a plaintiff is entitled not merely to institute a suit in *forma pauperis*, but also continue it in *forma pauperis*, if at any stage of the suit, the plaintiff finds himself unable to make any further payment which he may be ordered to make The fact that the plaintiffs applied for and obtained time to make the further payment cannot stand in their way, if as a matter of fact, they are found to be paupers within the meaning of Order XXXIII, Rule 1 —

47 T L R., *65*
(=21 T L J, *118*)

Ref —48 T L R, 117
(= 22 T L J, 390)

3. While in the case of suits and appeals provision has been made in the Code for filing them in *forma pauperis* no such provision is made for a review petition. If the Legislature intended that review petitions also should be admitted in *forma pauperis* provision would have been made for it in the Code itself, that not having been done, the Court has no power to admit a review petition in *forma pauperis*.

No Court has the inherent jurisdiction to permit the doing of anything in violation of an express imperative provision of law

A case is only an authority for what it actually decides and not what may logically follow, from that decision.—

48 T L R., *117*
(=22 T L J, *390*).

4 The words 'is not possessed of sufficient means' in the Explanation to Order XXXIII, Rule 1, must mean that the applicant 'has no actual control over it' A debt which is due to the applicant

from a third party cannot therefore be said to be means of which the applicant is possessed — 22 T. L. J., 428.

Order XXXIII, Rule 3

The petitioner was present in Court but did not go near the Head Clerk to hand over the petition to him. The petition was put into Court by the Vakil. The endorsement on the petition by the Head Clerk of the Court is clear that it was presented by the applicant in person. If the petitioner asked another to hand over the petition to the Head Clerk, it was proper presentation.— 21 T. L. J., 78.

Order XXXIII, Rule 5

1 Rule 5 of Order XXXIII is imperative. Clause (a) of the Rule makes the presentation of a schedule of any movable or immovable property belonging to the applicant, duly signed and verified along with the application as a condition precedent to the grant of leave to sue as a pauper. The schedules of movables and immovables required to be produced could not by any stretch of argument be considered to be a paper with the columns prescribed in which the necessary entries contemplated in the Section have either not been made or where such entries are incomplete. [illegible] of the word "shall" in Rule [illegible] that, where the requirements of the Section have not been satisfied, the Court has no other alternative than to dismiss the application.

20 T. L. J., 140.

2 Although the provisions of Order XXXIII, Rule 2, have to be strictly construed, if the necessary averments are contained in the papers produced before the Court though not in the application for leave itself, these provisions should be considered to have been substantially complied with.

The expression "cause of action" occurring in Rule 5 of this Order has to be taken to mean a good subsisting cause of action capable of enforcement in Court and calling for an answer, and not barred by the Law of Limitation or any other law

"Interest" in the subject-matter of the suit contemplated in Clause (c) of Rule 5 is one *in presenti* and not one contingent on the death of the petitioner —

20 T. L. J., 636.

3. When the Court examined the plaint and plaintiff not with a view to decide the merits of the alleged cause of action, but only to decide whether the suit was *prima facie* barred by limitation, it could not be contended that the Court had no authority to consider and decide this question for the purpose of such enquiry Order XXXIII, Rule 5, enjoins that the Court shall reject such an application where no subsisting valid cause of action is disclosed Possibly no hard and fast rule could be laid down with regard to the extent to which investigation should proceed at the preliminary stage, but before an application for leave to sue *in forma pauperis* is granted it is the duty of the Court to satisfy itself that the allegations of the petitioner do show a cause of action, and the allegations are not only those made in the plaint but also include those made in the examination of the applicant before the Court.— 21 T. L. J., 417.

4. The lower Court dismissed an application to sue *in forma pauperis* on the ground that the plaint claim was barred by limitation. But the question of limitation was one which could not be decided off hand

Held —The lower Court was wrong in dismissing the application on the ground of limitation. There are certainly cases in which remedy is so obviously barred by limitation and the ground of limitation is clear on the face of the plaint that the matter comes clearly under Clause (d), *viz.*,

where the plaintiff's allegations do not show a (subsisting) cause of action In such cases, Order XXXIII, Rule 5 (*d*), imperatively requires that the permission to sue *in forma pauperis* should be refused But the Section cannot apply to a case where the ground of limitation is not clear and in which it is necessary to investigate the facts in detail before the Court can come to a definite conclusion whether the suit is barred. The jurisdiction of the Court to dismiss the suit at the preliminary stage is strictly circumscribed by Order XXXIII, and that Order has to be strictly enforced —

23 T L J, *811*

5 See also Or VII R. 11 —

21 T L J, *850*

Order XXXIII, Rule 7.

The provisions of Order XXXIII, Rule 7, Clause (3), clearly empower the Court to give a direction for payment of Court fees. There is nothing in the Section to restrict the discretion of the Court. The corresponding provision in the British Indian Code does not expressly contemplate the passing of such an order —

20 T L J, *864*

Order XXXVI, Rule 5

1 An attachment before judgment under Order XXXVI, Rule 5, Clause 3, if not withdrawn, remains in force after the decree is passed so as to make a re-attachment of the property unnecessary upon an application for execution of the decree Order XXXVI, Rule 11, is wide enough to include also a conditional attachment under Rule 5, Clause 3, if it is not withdrawn before the decree is passed under Rule 6 or 9 of the same Order —

21 T L J, *1089*

2. On the plaintiffs' prayer for attachment before judgment of crops standing on some paddy fields of the defendant, the Court ordered notice under Section 463 C P C (old) and conditional attachment of the crops and also directed that the attachment would be released if security be given for 1300 and odd fanams, the value of the crops. The respondent thereupon executed a surety bond which, while referring in the preamble to the plaint amount ended with an undertaking 'to pay the amount due under the decree that may be passed in accordance with the plaint' In enforcement of the surety bond, the plaintiff contended that the respondent was liable under the decree for the amount which had reached a total of 16,000 odd fanams, but the surety replied that his liability was limited to the plaint amount

Held (accepting the surety's contention) —The event in which under the bond the security was to become enforceable was the failure of the defendant to produce the property sought to be attached and in no event can the surety become liable for the satisfaction of the decree itself and his liability would certainly be limited to the value of the property attached It is not unreasonable to hold that the later expression in the bond, *viz.*, the amount of the decree that may be passed in accordance with the plaint was intended only to mean a decree for the plaint amount for which alone the plaintiff could at date of suit have been given a decree The rule as regards interpretation of surety bonds of this nature seems to be that the terms of the bond should be construed in the light of the order calling for security —

23 T L J., *39*

Order XXXVI, Rule 9.

Where an attachment before judgment (under Section 467 of the Civil Procedure Code of 1065) had been granted in favour of the plaintiff and the suit was dismissed for default but subsequently restored on the application of the plaintiff and there

was no special order of Court withdrawing the attachment at the time of dismissal of the suit.

Held—The attachment subsisted and could be availed of by the plaintiff in execution.

Per Thaiath, J—There is no reason why there should be any difference in the effect of attachment when a claim petition is allowed but reversed in a suit and when a suit is dismissed but restored to the file and decreed — 21 T L J, *941*

Order XXXVI, Rule 10

See Order XXI, Rule 51 —
24 T L J, *433*

Order XXXVI, Rule 11.

See Order XXI, R. 55,— 24 T L J, *537*

Order XXXVII

1 The act restrained under Order XXXVII must be specific The direction made by the lower Court prohibiting generally acts which would amount to mischief without expressly specifying them was clearly unsupportable.—
20 T L J, *361.*

2. A suit was brought *in forma pauperis* for recovery of a sum of money Even before the question of pauperism had been decided, the Court, on the motion of the plaintiff, granted a temporary injunction under Order XXXVII, Rule 1, restraining defendant from disposing of certain properties. The order was passed without hearing the opposite side or even issuing notice to the other side

Held.—The order could not be sustained. It could not be said that in no case like the present the Court could pass an order of temporary injunction or the like, unless the question of pauperism has been decided in favour of the applicant and the suit is registered and numbered In appropriate cases, the Courts may have to pass prohibitory orders even though technically a suit may not be pending —
20 T L J, *865*

Fol —24 T L J., 730.

3. When a lessor alleges that the lessee has incurred a forfeiture by violating the covenants in the lease, the lessee's continuance in possession has to be viewed as a trespass. In such cases ejectment is the appropriate remedy and not an injunction. This does not mean that an injunction cannot be granted against a lessee in possession in any case. But before it can be granted the plaintiffs must show that the act complained of, is in fact a violation of his right or is at least an act which if carried out will necessarily result in violation of his right — 21 T L J, *876*

4. In the first place the Judge in granting or refusing a prayer for an injunction has to see whether the plaintiff has made out a *prima facie* case in support of the title asserted by him, and secondly, whether the injury threatened is irreparable The question of balance of convenience will arise only if these two questions are found in favour of the plaintiff —
22 T L J, *631*

5. The *prima facie* strength of the applicant's case is generally speaking the pre-requisite of the grant of a temporary injunction. It is necessary that the Court should be satisfied that there is a serious question to be tried at the hearing and on the facts before it that there is a probability that the plaintiff is entitled to relief

Where a foreigner not owning any properties in Travancore, applies to have moneys realised in execution of a decree to be held in deposit by order of injunction

Held—He might be called upon to secure against any possible loss of interest on the decree amount while kept in deposit, if and when realised in execution.—
23 T. L. J., *452.*

6 The Civil Procedure Code contemplates no *interim* injunction after the opposite party has received notice of the application and filed his objection. The order granting the injunction at such a stage, in whatever form or words, it might be stated, has to be regarded as falling under Rule 1 or Rule 2 of Order XXXVII, as the case may be and has consequently to be held as appealable under Order XLII, Rule 1, Clause (21).

An order for temporary injunction could not be granted under Rule 2 of Order XXXVII, except in aid of the prospective order for permanent injunction prayed for in the plaint —

20 T L J, *867*

7 Ordinarily, a co-owner suing for partition is not entitled to an injunction restraining another co-owner from erecting a building on the common property pending the suit There are however cases in which on the eve of or after the institution of suit for partition a costly building is about to put up by a co sharer with the evident object of forcing the hands of the Court to allot as his share the land of its site and in such cases injunction may be given — 46 T L R, *251*

(=20 T L J, *596*)

8 The plaintiff alleging herself to be a minor, sued in *forma pauperis* for a declaration that certain decrees obtained against the Tarwad were not binding and for a permanent injunction restraining the execution of the decrees. It was contended that as the application to sue in *forma pauperis* was still pending, no temporary injunction can be granted

Held.—The provisional remedies allowed under Order XXXVII and allied provisions of law are intended for the benefit of all suitors and there is no reason to rule out suitors whose applications for determination of pauperism for purposes of payment of Court fee are pending To do so would have the effect of denying to such suitors adequate reliefs interim and substantially frustrating their suits altogether

The provisions of Order XXXVII can be invoked also in cases where the execution sale has taken place as execution proceedings can be taken to terminate only when the properties are delivered over in execution and till then execution proceedings should be taken to be pending The literal meaning of the expression "is in danger of being wrongfully sold in execution" ought not to be accepted and the expression may reasonably be taken to include also the actual transfer of possession of the properties sold —

24 T L J, *730*

Order XXXVIII, Rule 1.

1 The selection of a receiver is a matter in the discretion of the lower Court and its decision would be interfered with only if some overwhelming objection in point of propriety of choice or some objection fatal in principle to the person selected is made out

It has been further ruled in C M A No 3 of 1104 that, though as a general rule one of the parties to a suit ought not to be appointed as receiver, such an appointment would not be improper in cases where 'the Court finds for some special reasons that, in spite of the opposition of the other parties such an appointment has to be made as it is impossible to make any other appointment'— 20 T L J, *704*

2 Where a simple creditor, in a suit against the legal representatives of his deceased debtor, attached before judgment certain properties as belonging to the deceased and subsequently applied for the appointment of a receiver of the attached properties

Held —An application by a simple creditor for the appointment of a receiver would not ordinarily be competent and it was opposed to principle to hold that the

defendants could be dispossessed at the instance of a simple creditor who complained that unless the profits were accumulated and conserved it would be impossible to obtain satisfaction of his claim. The plaintiff had no right of any kind over the property except such as might arise from the attachment before judgment, which by itself created no interest whatever in his favour much less a right to dispossess those who were in possession and enjoyment as heirs of the deceased

It would not follow that in a proper case the remedy by way of appointment of receiver could not be granted by Court. Where, for instance, the deceased debtor has left numerous debts which cannot possibly be realised out of the assets left by him the law empowers the Court to take action for conserving these assets for the whole body of creditors. In such cases the creditor may file an administration suit and it would then be competent for the Court to appoint a receiver with a view to facilitate the satisfaction of all the debts of the deceased and in order to prevent a scramble among his creditors —
21 T L J, 924

8. The confirmation of sale and delivery of possession in execution were held up on account of an application to set aside the sale under Order XXI, Rule 87, preferred by a junior member of the judgment-debtor's Tarwad The auction-purchaser applied for security being taken for the mesne profits or for the appointment of a receiver to take the yield of the property purchased The junior member objected

Held —Though there might be difficulty in appointing a receiver where the dispute about title is fairly well-balanced and there is the additional advantage of possession in favour of the party sought to be ousted, the case in question was quite different By the Court auction the title had passed to the purchaser and there was only an off-chance of the title being defeated in view of the presumption in favour of the legality and regularity of Court sales. Further, the party opposing the Court sale was not the Karanavan in possession, but a junior member and the Karanavan may disclaim liability for mesne profits since he had not opposed. The purchaser is thus left without any interest on the money for which he purchased the property or any clear recourse for mesne profits. In such circumstances it was just and convenient that his interests should be safeguarded. The circumstances as a whole should be considered in granting or refusing a receiver

(The Court, however, ordered the junior member to furnish security for mesne profits for two years and in default, the appointment of a receiver) —
22 T. L. J, 760.

4. There is nothing in Order XXXVIII, Rule 1, restricting the powers of the Court with reference to the particular party making the motion, whether he was arrayed as a plaintiff or defendant According to the English practice, a defendant in an action may, before judgment, apply for a receiver The law here appears to be in conformity with it

Where the lower Court, on being satisfied that the appointment of a receiver was expedient, called for the suggestion of a nominee for the receivership, and the order was appealed against

Held (on preliminary objection being raised that the order being of an interlocutory character, the appeal was incompetent) —The appeal was valid The matter is, however, only of an academic interest for it is open to the High Court to treat the appeal as a revision petition. —
23 T L J., 457

5. Where a receiver, in his capacity as receiver, objected to the proclamation for sale on the ground that the leave of the appointing Court was not obtained, but

he had, on an earlier occasion, in his individual capacity as hypothecatee, raised certain contentions including the want of sanction, and such contentions had been rejected

Held—The receiver could not be heard on his objections. The receiver could not get round the prior order by putting in a fresh petition to the same Court If the receiver was aggrieved, he should have vacated that order by taking appropriate proceedings (F B)— 23 T L J, 711

Order XXXIX.

1 Where the award of an arbitration was completed and filed in Court after the time allowed by the Court for the purpose, the award is invalid even though the delay amounted only to a day and was due to a *bona fide* mistake on the part of the arbitrator

Semble—Under Order XXXIX, Rules 3, 6 and 15, the validity of an award made under the Court's order depends on the making of it within the period allowed and it is immaterial on what date it is filed in Court— 22 T L J, 1164

2. It is the Court that has to determine whether a particular reference has been properly made and whether the matters in dispute between the parties have been properly placed before the arbitrators. As the arbitrators get their powers to give an award only by the agreement of the parties to submit to their arbitration, the extent of the powers will have to be specified clearly in such agreements. The ordinary rules of the law of contract will be applicable for determining the validity of the references. If the powers conferred on the arbitrators are not definite, the terms being vague and indefinite, the award could not be allowed to be enforced But the question whether the terms are clear and definite has to be decided with reference to the facts of each case. If from the attendant circumstances, the import of the terms is definitely gatherable, there is no reason why the award should be allowed to be avoided, especially as the parties are estopped from backing out of a reference after an award has been made unless one of the grounds set forth in Order XXXIX, Rules 14 and 15, is shown to exist

It is a well-recognised principle that, in construing an award, the Court has to make every reasonable intendment and presumption in favour of the award being a final, certain and sufficient termination of the matter in dispute The statement of the arbitrators should be taken as *prima facie* representing the true state of affairs as to what took place at the time of enquiry unless there is very strong reason for doubting the accuracy of the same.

Failure to give an opportunity, to parties to lead evidence would be a misconduct which would vitiate the award In cases where the party does not appear and adduce evidence, the arbitrator may proceed *ex parte*, and the award passed thereon could be validly avoided only when such *ex parte* proceedings had been conducted without any justifiable cause or without giving the party absenting himself notice of the same. The ordinary rules relating to procedural law are not applicable to arbitration proceedings, for an arbitrator is free from the fetters of adjectival law, but the fundamental principles of justice have to be looked into by him The recording of the evidence behind the back of a party without justifiable grounds would be a valid ground for avoiding it. If no evidence is adduced, the award would be final. If the parties were not heard before giving the award, it would amount to misconduct.

By reference to arbitration, the parties should be taken to have agreed to adjust their differences by the decision of a third party who is declared by the reference to

be acceptable to them for the purpose. Reference to arbitrators in pending suit without sanction of Court cannot be treated as not being lawful agreements contemplated in Order XXIII, Rule 3 The rights of parties to adjust their differences even when they are covered by pending suits should be left unrestrained, the Court having the right to interfere and veto the same only when the act is expressly forbidden by law or is opposed to well recognised rules of public policy Section 82, clause (c), provides for appeal in cases of *orders filing* or refusing to file an award in an arbitration without the intervention of the Court This right conferred under the Statute cannot be defeated by the order relating to the filing of the award being embodied in the judgment itself and by the drawing up of the decree, the order for filing the award, which is the foundation therefor, cannot be said to have become merged in it and thereby liable to be deemed to have lost its appealable character —

46 T L R , *30*
(=20 T L J , *667*)

Order XL

1 To enable an *effective* interference with a joint decree in favour of three plaintiffs in appeal all those plaintiffs must be on the record If only one of them is on the record the appeal is imperfectly constituted and must fail —

47 T L R , *475*
(=20 T L J , *1233*)

2. A party can recover only in his action according to his claim as stated and proved The plaintiff cannot be permitted to take advantage of the defendant's plea and claim relief on that basis on the evidence on record as that would be springing a surprise on the defendant and would seriously prejudice him as the question of his liability on that basis has not been properly fought out in the Court below —

49 T L R., *68*
(=22 T L J., *1816*)

3 See also Sec 10 — 20 T L J , *743*
" 2 (2) — 21 T L J , *998*

Order XL, Rule 4

1. The suit was for arrears of chitty subscription based on a chitty security bond executed by E, the deceased Karanavan of defendants 1 to 14, charging on three sets of properties described in A, B, C, schedules attached to the plaint Schedule C had been purchased in Court auction by defendants 15 and 16 Defendants 1 to 14 remained *ex parte*. Defendants 15 and 16 contested the suit on the ground that E, the subscriber, was not a defaulter On evidence it was found that he was not a defaulter and therefore plaintiff had no cause of action. *On the question arising* whether the plea of no default raised by defendants 15 and 16 would be a common ground so that a reversal of the decree could be made in appeal even in favour of all the defendants

Held —It would be a common ground as contemplated in Order XL, Rule 4, and would benefit all the defendants although *ex parte*

When a suit is brought on an instalment bond claiming the whole amount on the ground that there was a default, the plaintiff should lead evidence as to the default For only when there is default, the right accrues to the plaintiff to claim the whole amount The *slightest evidence on the part* of the plaintiff might shift the burden on to the defendant to prove that there was no default.

It has however to be remembered that on whomsoever the burden of proof may rest, the Court will expect that party who *has materials in his possession for arriving* at a correct conclusion on a question in issue, to place those materials before the Court.— 22 T. L. J , *988*

Upheld —23 T. L J., 1040
50 T L. R., 126

2. The Court has some discretion in the matter of allowing applications made by

some of the legal representatives of a deceased plaintiff or appellant and it is not bound to reject such applications merely on the ground that all the representatives had not associated themselves therein It is open to the Court to bring in the other representatives as respondents on application duly made or proceed under Order XL, Rule 4, of the Code. Each case must be decided in the light of its peculiar circumstances— 23 T L J, *1097*

Order XL, Rule 18

See Or IX, R 13,—

47 T L R, *981*
(=21 T L J, *754*)

Order XL, Rule 19

Order XL, Rule 19, which enables the Court in its discretion to add a party interested in the appeal can be invoked only where there is a proper appeal and does not empower the Court to animate a dead appeal A plaintiff in whose favour a decree has been passed if omitted in appeal cannot be added under Order XL, Rule 19

A suit against a dead man cannot be amended by impleading his legal representative. 22 T L J, *1189*

Order XL, Rule 21

1. The plaintiff under Exhibit C Udampady deposited 26 064 fanams in Court and saved plaint properties from sale. He subsequently sued the defendants who had executed the said Udampady for a declaration that the plaintiff had a first charge on the plaint properties, to the extent of the full consideration of 30,100 fanams under Exhibit C

Held—The utmost that the plaintiffs could claim would be for subrogating them to the position of the first mortgagee by reason of the deposit made by them in Court, The extent to which such subrogation could be allowed would depend only upon the amount actually deposited Anything in excess of this amount could amount if at all, to a claim based on the contract between the mortgagors on the one hand and the plaintiffs on the other The mortgagor cannot, by any act of his, restrict the rights of the prior encumbrancers behind their back No question of the applicability of any rule of salvage lien arises in the case

Under the present Code of 1100 the award of compensation under Section 75 of the Code should no longer form part of the decree, but should be embodied in a separate order Such orders could not be treated as decrees.

Both under the old and new Code the circumstances under which the award of compensation is made permissible are identical, and the change introduced in the new Code relates only to procedure.

From the wording of Rule 21 of Order XL of the Code of 1100 it is clear that it has to relate to reliefs disallowed or granted against the respondent. It may also set forth the objections to the findings recorded by the Court which decided the cause, which the respondent proposes to attack in supporting the decree If however any relief is proposed to be claimed, it could only be with respect to that which could have been prayed for by means of a cross appeal, for, an objection memorandum contemplated in this Rule virtually takes the place of a memorandum in a cross-appeal

It is clear law that the rule that Statutes are *prima facie* prospective and not retrospective, unless a clear intention is expressed to that effect by the Legislature, is not applicable to those relating to procedural law. Of course, if under the earlier Statute, rights had become vested in a party such rights could not be divested by virtue of the provisions of a later Statute repealing the same. No party will have a vested right to insist upon a particular form of procedure prescribed by a repealed Statute to be adopted

by reason of the fact that the same was in force at the time when the proceedings were initiated by him The provisions requiring the *incorporation of* the award of *compensation* is only one of procedure.

Inasmuch as the claim for *compensation has not* been adjudicated upon in the suit, the decision in the case will not operate as a bar to its being sought for by a regular suit — 21 T L J, *91*

2. Under the law in this State the vendee cannot seek relief on the basis of any implied covenant for title and in the absence of express covenants he must be presumed to have intended to take what title the vendor had and nothing more Section 55, Clause 2, of the Transfer of Property Act contemplates an implied covenant against encumbrances in the case of every sale By analogy it might *follow* that under the law here there can be no such implied covenant against encumbrances in this State In any event it seems to be clear that no such covenant can be implied in a sale in which it is found that the covenant (provided for under *its* terms) if at all, was only in respect of the acts of the vendor and the parties knew or believed that there was no encumbrance which would in fact have to be borne by the property

A vendee cannot resist a suit for balance of sale consideration or require indemnity from the plaintiff, on the *basis of* a covenant against *encumbrances*, when he has not sustained any loss at the date of suit and there is only a risk of loss accruing to him in future.

Under the new Civil Procedure Code, the provisions of Order XL, Rule 21 (3), are slightly different and they give wider powers of interference to the Appellate Court. Instead of the words 'the appellant' which occurred in Section 592 of the old Code are found the words "the party who may be affected by such objection" in Order XL, Rule 21 (3) The result probably is that under Order XL, Rule 21, a respondent may urge cross-objections against other *respondents* also (*conflict of opinion in* British Indian High Courts, pointed out) But it should be noted that the rule requires that notice of this claim should be served on the parties to be affected by such objection —

32 T L J., *998*

3. Where the plaintiff's application for temporary injunction was *dismissed* by the *lower Court* but still defendant filed appeal from the order of dismissal on the ground that the reasons stated by the lower Court were unjustifiable and therefore required to be expunged, and the plaintiff filed a memorandum *of objections*.

Held—As the plaintiff's application had been dismissed, an appeal by the defendant *cannot* be entertained merely on the ground that the reasons stated by the lower Court are unjustifiable.

Objections may be filed in C M Appeals under Order XL, Rule 21 Where on hearing the appeal the Court decides that the appeal is not competent, the respondent may be heard on his *memorandum* of objections. — 24 T L J, *458*

4. *See also* Sec. 10 — 24 T L J *288*

Order XL, Rule 22

1. It is only in cases where the disposal by the trial Court has been *upon* a preliminary ground or where there has *been* a gross miscarriage of justice and abuse of legal process which justifies the exercise of the extraordinary powers by way of inherent jurisdiction vested in the Court that the decree of *the primary* Court could with *propriety* be reversed and a re-trial ordered If the judgment of the primary Court is unsatisfactory, what the Appellate Court ought to do is to point out the fact in the judgment and not to vacate the decree of the trial Court and *thereby indirectly* postpone the final disposal of the suit Nor could such a course be proper or justifiable in cases

where certain witnesses of the appellant had not been examined or findings on material issues had not been recorded. In such cases, the proper course would be for the Appellate Court to retain the appeal on its file and send back the case under the appropriate provisions of the Code in this behalf. There seems to be a tendency on the part of the subordinate Appellate Courts to indulge in the unwholesome practice of remanding suits after reversal of the decrees of the primary Court on flimsy grounds. This practice cannot but be attributed to an over-anxiety to show large disposal.—

28 T. L. J., 824.

2. In a suit in regard to a partnership concern the plaintiff sued for an account and recovery of the money due on his shares and what would be due from defendants 1, 2, 4 and 5 with damages on account of his exclusion from the profits of the concern. The contentions of the 3rd defendant, the chief contesting defendant, did not prevail. The Munsiff gave a decree for the plaintiff and on that decree the 3rd defendant appealed to the District Court. In appeal, the plaint was amended on the application of the plaintiff and the suit remanded under Order XL, Rule 22, setting aside the decree passed against the 3rd defendant. The remand order did not leave the Munsiff free to deal with the whole case, but restricted it to the "reliefs claimed against the 3rd defendant and the partnership assets". After remand, although the 3rd defendant contended that the whole case was reopened after the remand, the Munsiff confining himself within the narrow limits set by the remand order, dissolved the partnership as from the date of the decree and decreed the recovery of Rs. 1260 as profits from the 3rd defendant and the assets of the partnership. On second appeal by the 3rd defendant:

Held.—The amendment of the plaint by the respondent was a strange step since it was allowed behind the back of the other defendants who are admittedly partners.

When the case was not disposed of on a preliminary point by the trial Court and when the Judge did not decide anything in ordering the remand, Order XL, Rule 22, was inapplicable. The remand should be viewed as made for the ends of justice under the inherent powers of the Court.

By such remand the whole case might be reopened even if the appeal is not by all the defendants.

It is an elementary proposition of law that no partnership can be dissolved except in the presence of all the partners. In an action to dissolve and wind up a partnership, it is impossible to say what, if anything, is due to one partner from his copartners until the accounts are taken and no interest should be allowed only from the date of the final decree on sums, if any, decreed in favour of the plaintiff.—

47 T. L. R., 72
(=20 T. L. J. 1226).

3. The question was whether the findings recorded in the order of remand are binding on the successor who hears the appeal from the final decree passed after remand.

Held.—The findings recorded in the order of remand are conclusive and could not be re-opened in such cases.—

23 T. L. J., 915.

Order XLI, Rule 24.

1. An order of remand calling for findings upon the additional issues raised made by the Judge under Order XLI, Rule 24, of the Code is clearly not appealable as the only orders with respect to which appeals are provided for in matters falling within the purview of Order XLI are those passed under Rules 16, 18 and 23 of that Order. Section 89, Sub-section (1), of the Code expressly declares that no appeal would lie against orders other than those

specifically enumerated in that Section and those provided for under the other provisions of the Code There is no provision in the Code making orders under Order XL, Rule 24, like the one in appeal, appealable.— 20 T L J, 605

2. A Court of appeal should exercise the power of remand only very sparingly, and should order a retrial only in cases where the Appellate Court is clearly satisfied that the ends of justice require the same. In cases where the trial Court has omitted to frame an issue or record definite findings upon issues already framed or where such findings have to be recorded after taking additional evidence the remand should be under Order XL, Rule 24 Reversals and remands by subordinate Courts invested with appellate jurisdiction have to be viewed with very great disfavour and the necessity of avoidance of such remands impressed strongly upon them.

The impropriety of the findings and that of the decree are matters which ought to be rectified by the Appellate Court itself for, it is not open to the latter Court to require the primary Court, without exercising its own judicial discretion to record a particular finding upon an issue or pass a decree in the case in a manner indicated by the Appellate Court. If the findings on a particular issue not recorded by the primary Court are considered necessary the Court has to act under Order XL, Rule 24 or Rule 27 No question of the exercise of inherent jurisdiction in such matters would arise.— 20 T L J, 979

3. *Per Chakko, J. (Narayana Pillai, J reluctantly concurring).*—The question whether in the absence of a specific direction by the appellate Court to admit evidence, a Court of first instance has power or discretion to reject the evidence tendered by parties is not free from difficulty. In the absence of a specific direction by the appellate Court directing the lower Court to allow parties to let in further evidence the lower Court has a discretion to assume that the order of remand did not contemplate taking additional evidence. And where the materials on record appear to have been sufficient for coming to a determination on the issue remitted it cannot be said that the lower Court erred in refusing the prayer of a party for adducing further evidence.—

46 T L R., 165
(=22 T L J., 168).

Order XL, Rule 26.

1 Though it is open to a Court of Appeal to admit additional evidence, such power should be exercised with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised — 20 T L J., 816

2. Under Order XL, Rule 26, the admissibility of additional evidence is made to depend not upon the relevancy or materiality to the issue before the Court of the evidence sought to be admitted or upon the fact whether or not the applicant had an opportunity of adducing evidence at some earlier stage but upon whether or not the Appellate Court requires the evidence to enable it to pronounce judgment or for any other substantial cause. Under the Rule the legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence but "when on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent" It will be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands.—

24 T L. J., 804.

Order XL, Rule 32

1. The primary Court's decree in the case allowed the recovery of a portion of

the plaint amount from the fourth defendant and the balance from defendants 1 to 3. In appeal before the District Court, by the fourth defendant alone, the decree against him was set aside, but the District Court omitted to grant equitable relief, as it should have done under Order XL, Rule 32, so as to entitle the plaintiff-respondent before it, to recover the whole plaint amount from defendants 1 to 3 Defendants 1 to 3 alone specially appealed The plaintiff special respondent claimed before the High Court that the omission of the lower Court should be rectified and contended that the discretion under Order XL, Rule 32, may be exercised even though the special appeal should be dismissed.

Held—The plaintiff having failed to appeal against either the first or second Court's decision, was responsible for the consequences and no relief could be granted to him as prayed

The discretion under Order XL, Rule 32, cannot be exercised in favour of a respondent so as to give him a relief which he is equitably entitled to, unless it is found to be necessary as a result of the Appellate Court s interference with the decision of the Court below at the instance of and in favour of the appellant before it, in whole or in part Much less can such a relief be granted against the special appellant himself while rejecting the special appeal— 22 T L J., 636

Appl—23 T L J, 1176

2. In a suit for contribution by the plaintiff against his joint judgment-debtors, the Court first passed an *ex parte* decree apportioning the plaintiff's claim against the several defendants jointly liable. The *ex parte* decree was however set aside as against some defendants only who were the appellants herein. They pleaded that they had discharged more than their share of the joint debt even before the suit and were, therefore, entitled to be absolved. The lower Court directed the appellants to a separate suit for contribution against the plaintiff and other defendants as, in its view, the acceptance of their plea would involve the enhancement of the liability of the other defendants as declared by the *ex parte* decree against them in force

Held—The view that the defendants should seek their remedies against plaintiff and other defendants in another suit appeared clearly unsustainable as it did not stand to reason that after the joint debt had been discharged there should be more than one suit for contribution among the latter In any event there seemed to be nothing opposed to principles in holding that in a suit for contribution to which all the joint debtors are parties, all rights and liabilities *inter se* should be settled once for all The right to contribution has its foundation in and is controlled by the principles of equity, good conscience and justice In a suit for contribution the respective liabilities of the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit In a suit of this nature, it was therefore open to the Court to recognise and give effect to all equities arising between the parties *inter se* and it might for that purpose even go outside the matter in issue in the case There was nothing to prevent the Court from adjusting all mutual liabilities among these persons in the suit itself To hold otherwise would result in the multiplication of suits regarding the same transaction

(2) The lower Court was not, in the circumstances, incompetent to alter or modify the *ex parte* decree against the other defendants. The granting of any relief to which these defendants were entitled could not be made to depend on a decree passed against the other defendants. The reasonable course would have been to

re-open the decree if it was necessary to give adequate relief to these defendants

(3) In view of the fact that all the parties were before the High Court, the High Court would itself have the power under Order XL, Rule 32, to pass such decree as the ends of justice might require, but as Order XL, Rule 32, apparently refers to cases of claims which come before the Appellate Court after there has been an enquiry after due notice, the proper course was to send back the case for re-trial The case was remanded —

23 T L J., 776

3. In a suit on a promissory note alleged to have been executed by the first defendant in favour of the second defendant and endorsed over for consideration to the plaintiff, the first defendant denied execution while the second defendant admitted the genuineness and endorsement, but only disclaimed personal liability The trial Court dismissed the suit as against the first defendant and decreed the suit against the second defendant The second defendant appealed to the District Court from the decree as against him, but the plaintiff did not appeal against the dismissal of the suit as against the first defendant, but preferred a cross appeal in respect of the direction of the trial Court making him liable for the costs of the first defendant. The District Court dismissed the second defendant's appeal, but gave the plaintiff a decree on the promissory note against the first defendant as well:

Held, (In second appeal by the first defendant) —The first Appellate Court went beyond its jurisdiction in allowing the suit against the first defendant By the dismissal of the appeal of the second defendant, the plaintiff stood where he was when the trial Court disposed of the suit and there was no call for any interference on equitable grounds.

'The discretion under Order XL, Rule 32, cannot be exercised in favour of a respondent unless it is found necessary as a result of the Appellate Court's interference with the decision of the Court below at the instance of and in favour of the appellant before it So far as the authorities go, it would appear that, unless this condition is fulfilled and unless the Court decides the appeal in favour of the appellant in whole or in part, it would have no jurisdiction to modify the decree of the Court below in order to give the respondent a relief which he is equitably entitled to —

22 T L J, 1176.

Order XLII, Rule 1.

1 All orders by which the Court seeks to control or direct the actions of the Receivers are not appealable under Order XLII, Rule 1 (23) — 47 T L R., 334 (=21 T L J, 531)

2. Neither Section 62 nor Order XLII, Rule 1, made orders granting leave to sue *in forma pauperis* under Order XXXIV, Rule 7, Sub-rule 3, appealable.

On the contention that under Section 22, Sub-section (1) of the Nayar Regulation of 1100 properties acquired under gift or bequest by the wife or widow, child or children from the husband or father as the case may be, have been declared to belong to the donees or legatees in equal shares and as such the plaintiff (a donee) should be deemed to have acquired a definite share in the property gifted and that such share must be held alienable.

Held.—Until the right of individual partition has been actually enforced or at least, sought to be enforced the persons entitled to such properties (properties gifted or bequeathed) constituted a Tarwad by themselves.

Section 22, Sub-section (3), provided that the rules of devolution and distribution of the property of an intestate would apply to property mentioned in Sub-section (1) of Section 22. On the face of

that express provision, Sub-section (1) of Section 22 must be held to be controlled by the provisions of the Regulation relating to partition of Tarwad property —
21 T L J, *668*

6 The District Judge allowed a petition to record a compromise and by the same order finally disposed of the suit A decree in terms of the compromise was passed On Civil Miscellaneous Appeal against such order of recording (and not on the decree), the respondent raised a preliminary objection that the appeal was not maintainable

Held —A Civil Miscellaneous appeal will lie from an order *allowing a compromise petition under* Order XXIII, Rule 3.

A Judge who succeeds another should try a case in conformity with the findings recorded therein by his predecessor and not go back on those findings and come to quite opposite conclusions —
46 T L R, *130*
(=22 T L J, *608*)

4. Order XLII, Rule 1, Clause (27), which allows an appeal against an order granting a review must be read as controlled by Rule 7 of Order XLV In this view, before an appeal is admitted the appellant will have to show that it comes within the purview of Order XLV, Rule 7 — 22 T L J, *994*

5. The Code does not confer a right of appeal against orders granting reviews except in the three cases specified by Rule 7 of Order XLV The right of appeal given under Clause 27 of Order XLII of the Code, is restricted by the provisions of Rule 7 of Order XLV, and was not intended to confer an unrestricted right by appeal Otherwise the provisions of Order XLV, Rule 7, would be superfluous and meaningless.

No second appeal lies from an order which is passed in appeal from an order granting an application for review, whether the appellate Court confirms or sets aside the order of the lower Court granting the review — 24 T L J, *701*.

6 See also Or I, R. 10 —
22 T L J, *905*

Order XLV, Rule 1.

1 The High Court cannot be invited to call upon the Chief Revenue Authority (under the Income-Tax-Regulation) to state a case for the decision of questions not specifically urged before that Authority The jurisdiction vested in the High Court could be invoked only with respect to matters expressly urged before the Chief Revenue Authority, but wrongly decided or refused to be dealt with by that authority If the question had never been raised before that authority, the High Court could not legitimately require that Authority to state a case upon matters not urged before it. The fact that certain points not originally urged were required to be considered by a review application presented before the Authority could not justify the High Court to call for a statement of the case inviting that Court to express an opinion upon the points so raised afresh. The ordinary rules relating to the entertainment of a review in civil cases are to be applied to the applications for the purpose made before the Chief Revenue Authority in matters relating to income-tax. Such applications should be confined to matters specifically urged at the earlier proceeding. The provisions of Order XLV, Rule 1, of the Code may also be applied to such applications by way of analogy In this view, the raising of new grounds in a review application not urged at the earlier stage could not be deemed to be competent, and the petitioner in the case would not be justified in falling back on the contents of an application for review in support of his prayer for the exercise of the extraordinary powers by the High Court.—
20 T L J, *514*

2. Where a Court granted a review of a former order allowing a claim petition, the question whether the new important matter or evidence relied on, is one coming within the category of cases contemplated in Rule 1 of Order XLV, is one that will have to be determined in appeal.

The word "conclusive" occurring in Order XXI, Rule 61, could not be construed as depriving the Court which passes the order or a superior Court of competent jurisdiction to cancel or modify the same in appropriate cases. In spite of the use of the word "conclusively" in the above definition, the right of the party aggrieved to move that Court itself for review of its original decision is undisputed Such a right could not be denied in cases of the orders referred to in Order XXI, Rule 61— 20 T L J, 975.

3. In a suit by a junior member of a Marumakkathayam Nayar Tarwad to set aside a sale deed executed by the Karanavan—1st defendant—the plaintiff withdrew the suit admitting the plaint properties to be the self-acquisitions of the 1st defendant The suit was thereupon dismissed Another junior member of the Tarwad who was not a party to the suit applied for restoration of the suit and for permission to continue the same. From the court fee paid on the application, it was intended to be treated as one for review. The lower Court dismissed the application on the ground of the petitioner not having a *locus standi* to present the same. In revision:

Held—The plea based on the representative nature of the suit and the petitioner being a constructive party thereto cannot avail as the suit was not then pending

In cases where suits have been finally disposed of, applications for reopening the same could be allowed to be made only by persons actually on record, those claiming to be constructive parties thereto being left to seek their remedies, if any, on the ground of fraud or collusion by a separate suit

The expression "any person aggrieved by the decree" occurring in the Rule only restricts the right to such of those who are on record, and who are actually affected by the decree, for the right of review cannot with propriety be held to be available for *pro forma* parties who are not really affected by the decree— 46 T L R, 205 (=20 T L J, 1027)

4. The expression 'or for any other sufficient reason' occurring in Order XLV Rule (1) has reference to a reason of the same kind or at least analogous to those specifically enumerated in the previous portion of the Rule The Court has the power in cases where an error has been committed by its previous decision, and its rectification is essential in the ends of justice or to avoid an abuse of its legal process. Its inherent powers would be invoked and the mistake duly corrected (F B)— 46 T L R, 7 (=21 T. L J 180)

Ref—22 T L J, 642

5 The right of review is a creature of the Statute and has, therefore, to be confined to the express provisions of the Civil Procedure Code in Order XLV, Rule 1

It is only when new material is overlooked by excusable misfortune, mistake or error apparent on the face of the record that review can be generally granted

The discovery of an authoritative precedent on the question involved will not justify an interference in review

The error or mistake contemplated under the Rule may be one of fact or of law

A wrong exposition of law cannot *per se* amount to an error as contemplated in the above Rules. The fact that a different conclusion of law could have been arrived at, is not a justifiable ground for

review Even the omission by a Judge to consider a decision, however regrettable and however wrong, could not warrant an interference in review

The expression "sufficient cause" has to be construed as being *ejusdem generis* or analogous with the classes of cases dealt with in the preceding portion of the Rule

The Legislature cannot have contemplated to bring under the above expression reasons entirely different in character from those specifically enumerated in the above Rule The use of expression '*other*' in the Rule would militate against such construction.— **21 T L J, *951***

6 Ignorance of Vakil of the date of posting and his consequent absence at the hearing, leading to the dismissal of the case by Court, does not constitute a ground for review within the meaning of 'or for any other sufficient reason' in Order XLV, Rule 1.

Where a judgment-debtor resists an attempted sale in execution on the ground that the decree is satisfied by a prior sale in execution of the same decree, it is the duty of the Court, before ordering fresh sale, to determine for itself by reference to the papers connected with the prior sale how far the allegation is justified The fact that the defendant's objection petition was rejected for default does not preclude the Execution Court from doing its duty — **22 T L J., *649***

7 See also—

Sec. 115 —	**20 T L J, *59***
Or XVII, R. 1 —	**20 T L J., *185***

Order XLV, Rule 2

An application for review was made to a Judge other than the Judge who passed the decree, to bring it into conformity with the real intention of the Judge who delivered the judgment. The application to amend the decree was allowed

Held —The lower Court was not competent to review the order Order XLV, Rule 2, requires that in order that an application for a review may be made to a Judge other than the Judge who passed the decree, one of two conditions must be satisfied, *viz.*, (1) that the application must be made on the ground of the discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or (2) on the ground of the existence of an arithmetical or clerical error or mistake apparent on the face of the decree. Neither of these grounds existed in the case. The application was not based on the discovery of any new and important matter or evidence. There was also no clerical or arithmetical error or mistake apparent on the face of the decree. The mistake referred to was not in the decree but in the reasoning of the Judge in his judgment That was not mistake or error contemplated by Order XLV, Rule 2

The test whether a Court can make an amendment of a decree is whether the order as it stands represents the intention of the Judge at the time he made it In the case, there was no doubt that the Judge intended to pass the decree which he passed Where a decree is on the face of it in conformity with the judgment upon which it is based, a successor of the Judge who delivered the judgment has no power to amend the decree, in order to bring it into conformity with what he conceives to have been the real intention of the Judge who delivered the judgment That the intention of the Judge was based on a wrong view of the evidence would not entitle his successor to amend the decree under Section 116 C P C— **23 T L J, *96***

Order XLV, Rule 4

Where the Munsiff originally decreed a Small Cause Suit, but subsequently

reviewed his decision on the application of the defendant and on the rehearing dismissed the suit, and in revision against the final decree the plaintiff challenged the Munsif's decision to review the case, but it was contended by the defendant that the plaintiff was precluded from doing so by his omission to get the review order immediately revised.

Held—On a construction of the last part of Order XLV Rule 7 (1) and the last line of Order XLVII, that the question of the validity of the order granting the review may properly be considered in this revision irrespective of any jurisdiction in this Court under Section 39 of the Code.

There is an obvious inconsistency between the two Orders. It is doubtful whether it is proper in construing statutory rules to refer to the debate which preceded the legislation and to do so in this case provides little assistance. There is no clearly applicable rule of construction in such a case as this, but it seems to be reasonable to treat Order XLV as though it were a Section of an Act, and Order XLVII, as a schedule, it being principally a list of Rules and Orders, and to follow the English rule that, where a passage in the schedule to a Statute repugnant to one in the body of the Statute, the latter prevails.

Held further—Though under Order XLV, Rule 4 (2) (*b*), no application for review on the ground of new evidence shall be granted without strict proof of previous inability to adduce it, the High Court in revision is not normally prepared to embark on an appreciation of evidence particularly to decide whether it amounts to "strict" as opposed to any other kind of proof and is less inclined to do so in a Small Cause Suit than in some other cases.— 24 T. L. J., *606*.

Order XLV, Rule 7.

See Or. XLII, R. 1.— 22 T. L. J., *264*, 24 T. L. J., *701*.

„ Or XLV, R. 4— 24 T. L. J., *606*.

Order XLVII.

See Or XLV, R. 4.— 24 T. L. J., *606*.

Other Cases.

1. In a suit on a debt-bond, it was found that the date fixed for payment in the bond was fraudulently altered to escape limitation bar:

Held—The suit was incompetent. No suit could be brought on a document materially altered, and tampering with the time for payment constituted material alteration.— 20 T. L. J., *110*.

2. A suit was instituted on a bond. The first defendant pleaded that he had not executed the bond, and this plea was upheld by the Courts below. The 2nd defendant admitted the genuineness of the bond and the suit against him was dismissed by the Munsif. But on appeal, the Judge held that the second defendant was liable on his own admission and decreed the amount as against him. On appeal filed by the second defendant:

Held—The decision of the Judge was correct. It is only where it has been established that the first defendant's signature to the bond was a forgery brought about by the plaintiff and second defendant acting together, the plaintiff's suit is liable to be dismissed on that ground.

It is only where an instrument intended to be executed by two persons is executed only by one that it cannot be enforced even against the person who has executed it. When the latter, however, admits that the other person has also executed the instrument, the finding that it has not been executed by such other cannot avail him, as a suit could have been filed against

him alone to enforce the joint and several liability arising from its provisions —
20 T L J, 444

3. The suit was to recover property leased

The defendant set up an agreement arrived at after the expiry of the term fixed in the lease deed whereby he was allowed to continue as lessee on payment of Rs 500 as premium, and alleged that Rs 200 had already been advanced towards the amount He contended that the property could not be recovered till the amount of Rs 200 was returned to him

The Court of first instance found against the defence and decreed the recovery of the property

On appeal by the defendant, the lower appellate Court held that there was an executory contract between the parties for the continuance of the lease with a premium of Rs. 500 But since the defendant did not complete the contract by paying up the balance of the premium, he was liable to surrender the property and was entitled to get back Rs. 200 paid towards premium on payment of court fees on that amount

It was contended in special appeal on behalf of the plaintiff that as the defendant did not pay court fees in the Court of first instance on the amount counterclaimed, the lower appellate Court could not have decreed any sum in his favour

Held (Overruling the contention) —There was no need to levy any court fees from the defendant His case was that the suit should be dismissed, as it was premature in view of the executory contract of which there was part performance. He did not claim anything — 20 T L J, 658

4. A transferee, *pendente lite*, is entitled to come on record and to conduct all proceedings from the date he is added as a party though he would be bound by all orders passed up to that date and could not raise a defence not open to his transferor. When an alienee has been so added, he gets all the rights of a party to the suit He cannot be confined to the evidence already adduced by his transferor, and should be permitted to adduce further evidence in the case.— 21 T L J, 989.

5 The principle that in the case of a decree for possession the value of improvements effected after the date of the decree up to the date of the recovery of the property may be awarded, is applicable also to the present case where the plaintiff seeks to recover the mortgage amount and value of improvements by the sale of the mortgaged properties

There are no valid grounds for holding that the mortgagee who seeks to recover compensation for improvements effected by him, cannot in execution proceedings be made liable for waste committed after the date of the decree On principle, it seems, such reliefs may be granted in execution proceedings without directing the mortgagor to recover damages by a separate suit — 21 T L J, 989

6 Where two decrees are in conflict, the rights under the later should prevail In cases of judgments *inter parties* the later adjudication should be taken as superseding the earlier whether or not the earlier adjudication was pleaded as a bar to the trial of the suit in which the later adjudication was made.—
21 T. L J, 1106

7 Improvements of which the value had been once assessed and ordered to be paid under the decree cannot be revalued, because the decree has finally settled the matter

There are, however, no valid grounds for holding that the value of improvements made after the date of the decree should not be given to the person in possession. On the question of good faith it may be pointed out that so far as the Courts in Travancore are concerned it is not the

possible risk to his (i. e, the person in possession) title that is considered, but the question whether the permanent value of the property has been enhanced The equitable claim for compensation for improvements effected has, therefore, always to be recognised even in the case of trespassers and can be rejected only in very exceptional cases as for instance, where the attempt of the mortgagee is virtually to improve the mortgagor out of his property or where the improvements are inconsistent with the use to which the property would be ordinarily put by the owner — 21 T. L J, *1886*.

8 Exhibit A (sale deed) stood in the name of four persons *Prima facie* all the four were entitled to the property. The plaintiff's case being that he alone was entitled, the co-existence of the names of others as co-vendees in the deed was considered to be a cloud on the plaintiff's right to the property.

The Munsiff dismissed the suit saying— 'It is not even so much as suggested, much less averred in the plaint that the other vendees under Exhibit A have asserted a hostile title or possession or even intend to do so and disturb the plaintiff's possession.' The Judge concurred in the finding of the Munsiff saying— 'The plaint does not refer to any act or omission on the part of the defendants which necessitated the institution of a suit asking for the declaration contained in the plaint.'

Held —It is enough that the defendants are interested in denying the rights of the plaintiff They need not actually deny them or resort to hostile demonstrations. Section 42 of the Specific Relief Act gives remedy to a person against all persons who not only claim an adverse interest to his own, but against all those who may do so. The existence of a cloud on title furnishes the cause of action.—
22 T L. J *57*.

9 Where the plaintiff claimed a hereditary right to sing serpent songs and *perform* allied ceremonies in the sacred groves within certain specified area and sought by a prayer for declaration and injunction to restrain the defendant from following such occupation inside the area but the plaintiff did not say whether the right he claimed arose under Royal Grant or by custom or by any other lawful means

Held (Non-suiting the plaintiff) —In matters religious as the singing of serpent songs in question, the citizen had an utmost freedom of choice, and any attempt by the Courts to control the convictions of the individual on such points would be to set up the worst kind of tyranny The plaintiff had not also set out the exact basis of his claim His claim therefore, was not sustainable in law — 22 T L. J, *386*

10 Two items of property of the indemnifier were outstanding in Panayam in favour of fifth defendant One item was sold to the fourth defendant who undertook to discharge the Panayam The other item was sold to the plaintiff with a stipulation to indemnify the plaintiff for whatever damages that would accrue to plaintiff in case the fourth defendant failed to discharge the Panayam, and the property sold to plaintiff was proceeded against. The fourth defendant failed to discharge the Panayam and fifth defendant obtained a decree against the property sold to plaintiff and brought it to Court auction. Hence the suit against the indemnifier for damages. The suit was resisted on the ground that the plaintiff had not sustained any damages and that till the property was actually sold he had no cause of action.

Held.—It was not necessary that the plaintiff should have discharged the decree before he could maintain a suit against the indemnifier The passing of a decree against the plaintiff was sufficient to sustain his cause of action.—
22 T L. J, *517*.

Ref.—23 T L. J., 383.

11 The plaintiff rested his cause of action on the following facts—In execution of a decree for redemption, the plaintiff deposited the mortgage money in Court The defendant appealed and obtained a stay of the execution. The appeal by defendant was ultimately dismissed The mortgage money deposited in Court remained there all along till the disposal of the appeal Loss of interest on the money deposited having arisen from the stay order obtained by the defendant, the plaintiff sued to recover damages

Held—The plaintiff had no cause of action An action is not maintainable for damages occasioned by a Civil action even though brought maliciously.—

22 T L J, *558*

12. A party can recover only in his action according to his claim as stated and proved The plaintiff cannot be permitted to take advantage of the defendant's plea and claim relief on that basis on the evidence on record, as that would be springing a surprise on the defendant and would seriously prejudice him, as the question of his liability on that basis has not been properly fought out in the Court below.— 49 T L R, *68*

(=22 T L J, *1316*)

13 The decree in the case was passed, following an error in the plaint against the 1st defendant instead of against the real hypothecator Defendants 3 to 5 were impleaded in execution as the legal representatives of the first defendant On execution taken against the hypotheca, the additional defendants raised objections as regards the executability of the decree obtained against the wrong person, but the lower Court overruled their objection on the ground (1) that they did not object to their addition in execution, and (2) that they had executed a sale of the hypotheca in favour of a stranger directing the discharge of the disputed decree.

Held (admitting the appeal by the 5th defendant)—(1) The omission to sue the real hypothecator could not be cured by an amendment of the decree, inasmuch as that could be done only by correcting the plaint But the plaint could not be amended after the decree has become final

(2) The impleading of the additional defendants as heirs of an imaginary person was merely innocuous.

(3) The execution of the sale deed by the additional defendants was at best an admission of liability under the decree, but that was not the same thing as the existence of the decree itself—

47 T L R, *171*

(=23 T L J, *868*)

14. Where on the failure of the mortgagee to pay off a debt of the mortgagor recited as part of the mortgage consideration, the creditor of the mortgagor filed a suit and obtained a decree against the mortgagor and mortgagee alike

Held—The mortgagor had a cause of action for recovery from the mortgagee of the amount withheld It was not necessary that the decree obtained by the creditor should have been executed and the mortgagor compelled to pay the money The passing of the decree against the plaintiff was sufficient in law to give him a cause of action. But inasmuch as the mortgagee also had been liable under the decree obtained by the creditor, provision should be made in the decree to protect against the chance of the mortgagee being compelled to pay the amount twice over— 23 T L J., *383*

15 At the present day, it is almost a truism to say that in all cases in which the evidence is conflicting, it is the duty of the Court of Appeal to have great regard to the opinion formed by the Judge in whose presence the witnesses gave their evidence as to the degree of credit to be given to it.

If all that an appellant can show is a nicely balanced calculation which leads to the equal possibility of the judgment

on either the one side or the other being right, the Appellate Court should not interfere with the verdict of the trial Court— 50 T L R, 94

16 The period of six years provided by Article 166 of the Limitation Regulation could not apply to a decree or order which is not actually registered To apply the Article to a decree or order not in fact registered but which in the opinion of the Court ought to have been registered but was not actually registered owing to the fault or neglect of the Court or any one else is in effect not to interpret the law but to legislate It is the function of the Court to interpret and not to legislate— 50 T L R, 96

17 The High Court directed that the decree holder should get mesne profits from the plaint property from the date of suit to the date of delivery and that the mesne profits should be ascertained in execution The decree-holder put in an execution petition in the Munsiff's Court on 5-3 1091 The commutation rate given in the petition was 6 fanams per standard parah. The judgment-debtor paid amounts to the decree-holder on 4-4-1091, 18 8-1095, Karkadagom 1096 and Edavom 1097 The Munsiff calculated at the rate of 6 fanams per standard parah for the first payment, and for the subsequent payments Nirak rates prevailing on those dates. The District Judge held in appeal that the whole paddy should be calculated at the Nirak rate that existed at the date of the first execution application

Held (In special appeal) —When payments have to be made in paddy and on default a suit is brought for their recovery, there are rulings of this Court which lay down that the paddy should ordinarily be valued at the Nirak rate on the date of the suit and not on the dates when they became due.

By analogy it may be held that the paddy due as mesne profits for the past eight years could be valued at the rate prevailing on the date of the first execution application — 24 T L J, 292

18 The suit was for recovery of land trespassed upon by the defendant It was contended for the defendant that inasmuch as the plaintiff had stood by and allowed the defendant to spend large sums of money in the construction of a building on the land in question, the plaintiff should be deemed to have acquiesced in the defendant's act and was therefore estopped from claiming recovery of the land

Held (Overruling the defence contention) —A plea of acquiescence in cases of the kind under consideration could be supported only by proof of good faith on the part of the person whose act is in question and conduct akin to fraud on the part of the other party The following facts should be established to sustain a plea of acquiescence "In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff If he does not know of it, he is in the same position as the plaintiff and the doctrine of acquiescence is founded upon conduct with knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the

Court to restrain the possessor of the legal right from exercising it but nothing short of this will do"— 24 T L J, 783

REGULATION V OF 1101

(*Travancore News Papers*)

The 'Prabodhakan', a Malayalam Weekly Newspaper, printed and published in Travancore under a license issued by Government in accordance with Section 3 of the Newspapers Regulation, V of 1101, had its license cancelled by Government for publication of certain passages some of which, in the opinion of Government, offended the provisions of Section 5 (1) (*a*) (exciting hatred, contempt and disaffection against Government) and the others, the provisions of Section 5 (iii)—habitually disseminating false information. The Editor then petitioned Government under Section 9 for reconsideration and prayed either for revocation of the order of cancellation or for the referring of the matter to a Full Bench of the High Court The Government refused to revoke their order, but made the reference It was argued in the High Court on behalf of the Editor that the passages complained against did not come within the mischief contemplated by Section 5 of the Regulation and that for this purpose the Regulation should be strictly construed and in favour of the alleged offender

Held (*By Chatfield, C J and Chakko, J*)— It is obvious that Section 5 of the Newspaper Regulation on the face of it is penal in its nature It is now recognised that the paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully its plain and rational meaning and to promote its object. The tendency of modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction All Statutes are now construed with a more attentive regard to the language and Criminal Statutes with a more rational regard to the aim and intention of the Legislature than formerly The effect of the rule of strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself But it yields to the paramount rule that every Statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence

The provision in Section 5 of the Newspaper Regulation is quite impersonal whereas Section 117 of the T P C makes motive and intention essential When the Legislature in one Act makes motive and intention essential and in another Act in *pari materia* deliberately leaves out the *question of motive and intention it may* fairly be presumed that the object of the Legislature in enacting the later Statute was to do away with the question of intention

Section 5 of the Travancore Newspaper Regulation does not contain any words importing any intention or motive on the part of the offender

Intention or guilty knowledge on the part of the offender is absolutely unnecessary under Section 5 clause i (*a*) if the words are likely or have a tendency to create the mischiefs specified in the Section

The Travancore News Paper Regulation is a Regulation passed with a specific purpose, *viz.*, for the purpose of bringing under better control the Newspapers in Travancore. It is essential therefore that in extreme cases the Government should have prompt and effective means of suppressing the evils which irresponsible

journals and journalists may seek to foster or promote

The intention of the writer has generally to be gathered from the articles themselves, *viz*, from the words used This intention which is a state of mind may be gathered from the surrounding circumstances and from the language and conduct of the accused

It is a question of fact in each case whether an attack on a certain class of Officers or a certain Department of the Government whether the attack is directed against those officers merely or is intended as a mere cloak for vituperation of the Government *It is quite obvious that* in the guise of attacking an Officer or Officers generally the writer may well intend to bring into hatred contempt or disaffection the Government constituted by lawful authority

Per Joseph Thaliath, J—For construing the provisions of Section 5, Sub Section (1), Clause (*a*) of the Regulation, writings are to be divided into two classes, one, those that will excite its readers and the other, those that disclose only attempts to excite. In the first class of writings intention of the publisher need not be looked into In the second class, intention is material, but the publisher will be deemed to intend that which is the natural result of the words he used The line that can be drawn between writings that excite its readers and those that disclose attempts to excite is indeed thin, but the distinction is not unintelligible One class of writings, however, may often overlap the other

By reason of the expression habitually' used in the Section it should be shown that the publisher was repeatedly or persistently disseminating false information The word 'Habit' means persistency in doing an act. It is difficult to say how many items of false news published in a Newspaper will make its publisher a habitual disseminator of false information No hard and fast rules can be laid down in this respect Each case will have to be decided on its own merits

Knowledge on the publisher's part of the falsity of the news need not be proved *for bringing home the offence of false dissemination of news*

Held (*per curiam*)—(1) The extracts complained of against as coming within the mischief of Section 5 (1) (*a*) had a distinct tendency to bring the Sovereign and the *Government into hatred, contempt* and disaffection within the meaning of the Section It was also clear from the language of the articles that the intention of the writer was to create such feelings of hatred and contempt

(2) The articles in question read fairly and as a whole cannot come within the Explanation of Section 117 of the Penal Code. It cannot be said that the object of the writer was honestly to call the attention of Government to existing evils with a view to their removal and redress.

(3) The charge under Section 5 (iii) can not however be said to have been made out as only two statements of a false nature have been proved (F B)—

47 T. L. R, 336
(=21 T L J, 901)

REGULATION VI OF 1101
(*Nanjanad Vellala*).

1 Though Section 3 of the Nanjanad Vellala Regulation invests with legal validity only those marriages between a Nanjanad Vellala female and a Nanjanad Vellala male, still law and custom recognise the validity of the marriage of a Nanjanad Vellala woman following Marumakkathayam Law with a Makkathayee Vellala hailing from British India. The fact that the parties do not belong to a homogeneous class is by itself no ground to regard the marriage as invalid. The

trend of modern decisions is to uphold the validity of mixed marriages. The existence of such marriages does not turn on the facility of divorce either

Quare —Whether such marriage is terminable at the will of the wife, whose personal law is to prevail whether that of the wife or husband — 22 T. L. J., *701*

2. The filing of a suit for partition by a member of a Nanjanad Vellala Tarwad effects a status of division among the members of the Tarwad (Spl. B) —

48 T L R *105*
(=22 T L J, *274*)

3 The plaintiffs in the case (Nanjanad Vellalas) had obtained a decree for maintenance charged on the Tarwad properties. On their applying to execute the decree against the Tarwad properties, the third defendant, a member of the Tarwad, resisted the application on the ground that, in a suit for partition filed by him, a preliminary decree had been passed declaring and determining his share in some of the properties, though the suit was proceeding as regards other items regarding their divisibility or otherwise. He claimed that the items in respect of which the preliminary decree was passed had been actually divided and delivered over to him and that such properties delivered over were, in any event, not liable

Held —The maintenance decree being against the Tarwad as a whole, all the properties of the Tarwad were liable under it, until actual division by metes and bounds in pursuance of the decree in the partition suit. When once the shares of one or more members were determined and delivered over to them, from that moment their shares ceased to be Tarwad properties and the maintenance decree ceased to be executable as against them. For the amount of the plaintiffs' maintenance that fell due up to the date of delivery to the third defendant of his share of the properties even those properties were liable, but for the claim beyond that period the properties would be exempted — 23 T L J, *1105*

REGULATION II OF 1105

(*Probate and Administration*)

It is well-established that an Administration Court has no jurisdiction to enquire into questions of title "The only question in controversy in a proceeding in the Probate or Administration Court is that of representation of the estate of the deceased and no question of title thereto, i e the title of the deceased or of the conflicting titles alleged by the parties to the proceeding can be investigated by the Court. A Hindu widow governed by the Mitakshara Law is entitled to get letters of administration of her husband's estate on the mere allegation that he left separate property, the Court cannot go into the question whether the property left was joint or separate"

In the above view regarding jurisdiction it is also held that the lower Court had no power to appoint interim Administrators to take and hold charge of the estate till the final decision of the case This conclusion however does not imply that the prior order appointing interim Administrators passed *ex parte* was *ipso facto* irregular Such orders could undoubtedly be passed for the preservation of the estate and until objections have been put forward which raise questions of title The preparation of an inventory and the ascertainment of assets which were carried out by the interim administrators must therefore be regarded as acts done under an order which the lower Court had jurisdiction to pass at that stage and must accordingly be declared to be perfectly justified.

The interest of the heir of a deceased partner is a limited interest and does not carry with it a right to interfere in the further conduct of the business. "The representatives of a deceased partner have

a general lien upon the surplus assets of the partnership in respect of their deceased partner's interest in the partnership, but they have no lien on any specific asset, whether personalty or realty, such as would fetter the realisation or conversion into money by the surviving partner '

Where there is no one who is legally entitled to represent or take possession of the deceased's property and it is requisite to bring actions or to make demands for the payment of money due to his estate it is often necessary that an administrator *pendente lite* should be appointed, but where the deceased at the time of his death was in partnership with another person, the case is very different. They were joint tenants of this property and it belonged to them in partnership The only result of a grant of administration *pendente lite* would be the appointment of some person to wrangle with the surviving partner as to the management of the firm The Court does not thrust a stranger to the business into the partnership to represent the interests of the deceased partner —

46 T L R., *341*
(=22 T L J, *1047*)

REGULATION VIII OF 1108
(Insolvency.)

Section 23.

The petitioner when arrested in execution of a decree, applied for adjudication as an insolvent. He further applied to be released from arrest The Court ordered him to furnish sureties. He produced sureties, but on objection by the counter-petitioner-decree-holder, the Court rejected the sureties and ordered security of immovable property

Held (on appeal) —The order was bad and had to be set aside. The security contemplated by Section 23 of the amended Insolvency Regulation (VIII of 1108) was for the production of the petitioner when called for by the Court. For that purpose solvent sureties were sufficient. If the sureties produced were not proper, the petitioner should be allowed to produce other sureties.— 24 T L J, *649*

Section 84

Insolvency proceedings were instituted under the Regulation of 1090 and application for the appointment of an interim receiver was made after the repealing Regulation of 1108 was passed The question was raised that the Court had no jurisdiction to appoint an interim receiver excepting by virtue of Section 13 (2) of the Regulation of 1090, and that the provisions of the Regulation of 1108 should not be applied

Held —Section 84 of the new Regulation provides that "the provisions of this Regulation shall, as far may be, apply also in all cases of insolvency pending in the Courts on the date of the commencement of this Regulation" This appears to be a contrary intention within Section 3 of the General Clauses Regulation, Section 7 (*c*) and (*f*) of which therefore do not apply If the petition for the appointment of a receiver was not a step in a case of insolvency pending on 1 7-1108 it must be regarded as proceeding distinct from the proceedings instituted on 14-1-1108 In that case, as it was instituted on 29-7-1108, *i e* after the new Regulation came into force, no question of the retrospective operation of the Regulation can arise But if the petition for the appointment of a receiver was merely a step in the main insolvency proceedings instituted before the Regulation came into force, those proceedings are a case of insolvency pending on the date of the commencement of the Regulation and therefore are clearly within the provision of Section 84. If that be so, the Regulation of 1108 applies to every step in these proceedings and in particular to the petition for the appointment of a receiver (The question whether a Regulation which enlarges the jurisdiction of the Court is retrospectively operative was left open) —

24 T. L J, *785.*

LAW
Re
MALABAR BRAHMINS

CONTENTS.

I	ADOPTION.	...	9 T L. R., 160. 10 T. L R., 151.
II.	ALIENATION.	..	6 T. L. R., 143. 11 T L R., 1. 12 T. L. R, 46 27 T. L R, 29 (=2 T. L J, 131). 13 T L J, 266. 40 T L R, 294 (=13 T. L. J, 343).
III.	GIFT		9 T. L. R, 148 12 T L R., 157 16 T L. R, 68.
IV.	GUARDIANSHIP	...	10 T. L R, 151.
V	JUNIOR MEMBERS.	.	10 T L. J, 387 18 T. L. J, 774.
VI.	LAW APPLICABLE.	. .	25 T. L R, 196.
		..	19 T. L J, 441.
VII.	MANAGING MEMBER.	.	7 T. L. R, 33 14 T. L. J, 68 18 T L. J., 241.
VIII.	MARRIAGE.	.	20 T L R, 65 26 T. L. R., 212 (=2 T. L J, 23).
IX.	MAINTENANCE.	...	4 T L. J, 257.
X.	STREEDHANOM.	..	25 T L. R, 196.
XI.	SUCCESSION.	...	19 T L. R, 241 34 T L. R., 262.

I Adoption

1 B, a Malabar Brahmin (Potti) adopted his sister's son A, with the consent of the members of his family After B's death, his paternal uncle, C, adopted D's son and executed an agreement to him confirming that adoption A brought an action against C and D to have the said agreement cancelled The Zillah Judge decreed in A's favour An appeal was preferred against that decree urging (i) that the suit being for a mere declaration is not maintainable, (ii) that the plaintiff having been a minor on the date of suit, the lower Court ought to have dismissed it on that ground, and (iii) that the adoption of sister's son was invalid under Hindu Law

Held.—The plaintiff's action was maintainable, since limitation would operate, if, within the time prescribed by that Regulation, he did not obtain a decree rescinding the agreement which affected his status in the adoptive family

Where a suit is instituted by a minor without the intervention of a next friend, and the defendant, without question, allows the case to proceed to decree, he (defendant) cannot be permitted in appeal to question the validity of that decree on the ground of plaintiff's minority

The ordinary Hindu Law has no application to adoptions made by Malabar Brahmins, and the customary law obtaining in that community, sanctions the adoption of sister's son (F B) —

9 T L R., *169.*

2. The mother of a minor in a Malabar Brahmin family may sue on his behalf, provided the responsible manager, *i e*, the senior male member, is made a party to the suit The legal guardian of a minor in a Malabar Brahmin family is the senior male member of that family

There are three kinds of adoption prevalent among Malabar Brahmins, *viz.*, (i) *Patthukayyal Dattu*—adoption with ten hands (the most approved form), (ii) *Chanchamatha Dattu*—adoption in which the essential ceremony, besides the gift and acceptance of the adoptee, consists in putting into the fire or sacrificing a span of sacred grass, and (iii) *Ayatha Vidhi Dattu*—adoption by merely taking into the family and constituting the appointee as heir to the adopter, without any religious ceremony.

The *Chanchamatha* adoption confers the right of sonship on the adoptee, though not as efficacious, from a religious point of view as the *Patthukayyal Dattu*. Such adoptee loses all right in his natural family except to offer *Pindams* to ancestors and to succeed to the property of that family in default of other members therein, and becomes a member of the joint family to which he is adopted The joint family property in which he may obtain an interest by the adoption would not vest in him as gift, and cannot, on his death issueless, be inherited by members of his natural family. His death without issue would leave the adoptive family in the position it occupied before the adoption

Under the general principles of Hindu Law which govern the right of adoptees in Malabar Brahmin families, the heirs of an adoptee dying without issue are members of the adoptive family

The Smritis, (Manu, Parasara, Baudhayana, Jaimini, Harita, Kowshithaka, Ashwalayana and others) are followed by the Malabar Brahmins as the fountain heads of Modern Hindu Law and unless the Malayala Brahmins can be shown to have deviated in any respect from the interpretation put upon old texts by modern Hindu sages and adopted different practices, they must be held bound by the Hindu Law as now understood and acted upon elsewhere.— 10 T L R, *151.*

Ref—20 T L R., 65
25 T L R., 196.
34 T L. R., 262.

II. Alienation.

1 A, a Malabar Brahmin, makes a sale of ancestral property to B C and D who are son and wife, respectively, of A, seek to set aside such sale on the ground that it is void for want of their written assent and for want of adequate family necessity C was, moreover, a minor at the date of the sale

Held —Under the Hindu Law, D (the wife) is not strictly a co-parcener of A (the husband) and it has been ruled that a wife is not at liberty to impeach an alienation made by her husband of ancestral property, for proper family purpose, the wife's right extending only to maintenance, but she may be entitled in equity to seek to set aside alienations made in fraud of her claim for such maintenance

As to the right of C (the son) who was a minor at the date of sale, the presumption in cases of alienation by a Hindu father, is that it was made for the benefit of the whole family, and a sale in such cases cannot be set aside unless family necessity is disproved 6 T L R., *145*

Ref —12 T L R., 46

Dist —27 T L R, 143

2. A junior member of a Namboodiri Illom sought to set aside a mortgage executed by his Karanavan, on the grounds that it was prejudicial to the interests of the family, and that it was not assented to by the plaintiff and other members of the Illom

Held (on reference to a Full Bench) — The manager of an Illom has no power to alienate permanently, by sale, gift or otherwise, any portion of the common property, without the consent, express or implied, of the other members of his family Temporary alienations made by him in the shape of leases, mortgages, etc., for short and customary periods, must stand, subject, however, to the right of the junior members to impeach them on the grounds of want of consideration and family necessity

A mortgage-deed executed by a Jenmi, providing for renewal at the expiration of 12 years, creates a perpetual right, and, as such, requires the assent, express or implied, of all the members of the Illom

Held (By a Division Bench)—The deed being a registered one and plaintiff having admittedly received the Michavarom due thereunder for 10 years, his assent to the deed should be inferred.— 11 T L R, 1.

3. In the management and enjoyment of property, the customs of Namboodiris do not differ from the customs of the Malayali Sudras, the only difference between the two classes in the matter being that the Namboodiris follow the law of descent through sons. The female members of an Illom have the right to take steps to conserve Illom property and therefore, the widows of the deceased male members of a Namboodiri Illom are competent to sue to set aside alienations of Illom property by the Karanavan. Impartibility of family property is the rule prescribed, and community of interests cannot be severed by partition without the consent of all the members of the Illom. As in a Marumakkathayam Tarwad, the right of the junior members, both male and female, is the right to be supported in the family house out of the income of the property of the family, and the absolute control of the family affairs is vested in the senior male member who represents the family In a Marumakkathayam Tarwad, the male members possess the right to succeed to the Karanavanship by seniority, and the female members have likewise the right to act as manager or *de facto* Karanavan in the absence of males. In a Namboodiri Illom too, the same rule prevails, and the senior female becomes entitled, as a matter of right, to management in preference to the junior females. (F. B.)— 12 T L R., *46*

Ref—20 T L. R, 65
25 T L. R., 196
26 T. L R., 212
34 T L, R, 262

4. The plaintiff, a Namboodiri wife, sued to set aside certain alienations of Illom property made by her husband, the manager of the Illom, and to remove him from management On behalf of the defence it was contended, *inter alia*, that the wife was not competent to maintain a suit questioning the alienations of her husband

Held (Over-ruling the contention)—The position of a Namboodiri woman in her Illom was not that of a Hindu female under the Mithakshara law, but resembled that of the female member of a Marumakkathayam Tarwad, and as all members of a Marumakkathayam Tarwad, both male and female, were entitled to impeach improper alienations of Tarwad property, the plaintiff, as a member of her Illom, was competent to impugn the alienation in question, even though made by her husband

Quaere.—Whether Namboodiri women are entitled to be consulted in respect of all permanent alienations of Illom properties, even when all the male members have assented thereto (F B)—

27 T L R, 99
(=2 T L J, 181)

Ref—34 T L R., 262

5. Where the effect of a *vempattom* deed was to create a perpetual lease not resumable at the option of the lessor but determinable according to the pleasure of the lessee, and where it is not made out that the annual rent and the periodical Adukkuvathu secure any distinct advantage to the Illom

Held,—Even a *de jure* and *de facto* Karanavan is incompetent to make such an alienation, and *a fortiori* a junior member in management under the orders of the *de jure* Karanavan— 13 T L. J., 266

6. If it be held that the female members of an Illom have no right to be consulted before Illom property is permanently alienated and that such permanent alienations are valid without their assent thereto, the consequence would be too tragic to contemplate The female members of an Illom, who are either widows or wives, are co-owners of the Illom property along with the male members. It is admitted that improper alienations of property are liable to be set aside at the instance of female members. "Improper alienations" must be deemed to include not only dispositions of property made without consideration and family necessity, but such permanent alienations of property as are made without the consent of the junior members of the Illom, male and female. To restrict the expression to alienations of the former class would be anomalous and unreasonable.

No permanent alienation of a Namboodiri Illom property can be valid unless it has been assented to by the female members. Of course, where all the male members of where the Karanavan and the next senior male member take part in such alienation and it is found that such alienation is supported by consideration and family necessity, the Court may justifiably presume that the female members have assented thereto and the burden of proof may be laid on the party who alleges absence of such consent. This however is a matter of procedure and does not affect the principle formulated above.— 40 T L R, 294
(=15 T L J, 343).

7 See also—
"Marriage"—26 T L. R., 212
(=2 T L. J, 25)
"Junior members."—18 T L. J, 774.

III Gift

A *Sarvaswadanom* donee acquires, under such gift, a life-estate in the subject thereof, and management of the property

till his death, though as trustee for his children His right thereunder will not be affected by the birth of an issue to him by his *Sarvaswadanam* wife.—

9 T L R, *148.*

2. The leading principle of succession among Malabar Brahmins is that the successor must be a member of the Illom, that as a woman of the class takes her Gotram on marriage, unless the marriage is in the *Sarvaswadanam* form, a daughter married otherwise than in the form aforesaid, will not be entitled to succeed her father as his heir, and that a Sapinda with 10 days' pollution—a *Desarathri Gnathi*—succeeds to the exclusion of a daughter so married

A gift of immovable property made by the father to his daughter accompanied with possession, is valid, natural affection being a good and sufficient consideration for the disposition.— 12 T L R *157*

3. X, a Malayala Brahmin, and two females executed a deed of gift in the name of Y, the son of X's sister, Z Z's *name is expressly mentioned in the second* part of the deed as one of the parties for whose benefit the gift was made. T, the husband of Z, and B, who is the son of T by his first wife, Z being his second wife and Y his son by that wife, sued for the cancellation of a mortgage of the gift property executed by Z, the mother of Y It was contended on behalf of T and B, the plaintiffs, that by the language of the opening clause of the deed of gift, Y was the sole donee of the property

Held—Courts of Equity are bound to grant relief on the ground of defective execution of the intent of the parties from ignorance of law as to the proper mode of framing instruments and to give effect to the real intentions of the parties as gathered from the objects of the instrument and the circumstances of the case, although the instrument has been drawn up in a very inartificial and untechnical manner,

Though Z did not appear as a party to the instrument in its opening part, yet as it was clear from the latter part of the deed that she was manifestly intended to participate in the benefit of the gift, her rights over the properties could not be questioned and, therefore, the mortgage executed by herself is valid

As in a gift of this character, the donees take the properties as tenants in common, Z has an absolute interest in a moiety of the property and a life interest in her son's share and T and B, the plaintiffs, are only reversionary heirs.—

16 T L R, *68*

IV. Guardianship.

See "Adoption"— 10 T L R, *151*

V. Junior Members

1 A junior member of an Illom can resist the enforcement of a decree obtained against the manager and affecting the Illom properties on the ground that it was obtained fraudulently or that the debt which formed the basis of the decree was not supported by consideration or family necessity (F B)—

10 T L J, *387*

2. In cases where the interests of the Illom require it, the junior members can create valid alienations of its properties. This power should be allowed to be exercised only when 'the Karanavan is absent and the matter is emergent' or when 'the Karanavan is grossly negligent or acts fraudulently and the preservation of the Tarwad property from forfeiture, destruction or sale requires the junior member to take up the duties of management for that temporary purpose and particular occasion. A distinction has to be kept in view between an undoubted emergency and a case of advancement of the Illom interests. It is only when the necessity in the particular case is imminent that the exercise of powers of

alienation by junior members could be allowed, for, it would otherwise be sapping the foundation of the Marumakkathayam system and destroying the powers of Karanavan to a considerable extent

Though under normal circumstances the right of redemption of Illom properties could be exercised by the Karanavan alone, a junior member could be allowed to exercise this right when the interests of the Illom as a whole require such redemption — 18 T L J, 774

3 See also —

"Alienation" — 13 T. L J, 266

"Manager" — 18 T L J, 241

VI Law applicable

1. *Per Sankara Menon and Muthunayagom Pillai, J J Sadasiva Iyer, C J*, dissenting.—Among the Namboodiri Brahmins money advanced or promised at the time of marriage and called 'Stridhanam' becomes the property of the husband and not of the wife. It is not 'Stridhanam' as defined by Hindu lawyers

Per Sankara Menon, J—At the time when the Namboodiris left for Malabar, the personal law that they carried with them was not the Hindu law as expounded by the authors of the Mithakshara, Smrithi Chandrika and Madhavya, but the ancient Hindu law as it was probably understood and followed about the commencement of the Christian era. Under that law, the head of the family was the absolute master of all the family properties whether movable or immovable. The other members of the family were not entitled to own or acquire properties for themselves. This being the law which governs the parties, the woman is not entitled to any property howsoever acquired by her The money given at the time of the marriage, therefore, belongs to the husband and is not Stridhanam in the modern acceptation of the word.

Per Sadasiva Iyer, C J—Stridhanam is property or money belonging to a woman and can never mean money belonging to a man When a document is executed to the bridegroom for Stridhanam promised at the marriage of his wife, the money should be held to belong to his wife and to be given to him for his wife who is usually a minor and comes under his guardianship If Stridhanam could be interpreted to mean "*Vara Sulka*", this extortion of breeding-bull price from the bride's family by a bridegroom is not less immoral than the bride-price "*Kanya Sulka*" promised to the father of the girl If the document is for "*Vara Sulka*", it is void as based on a consideration opposed to morality and public policy.

Per Muthunayagam Pillai, J.—In the matter of Stridhanam gifts, the Namboodiris follow a customary law which dates back to a time when women's independent rights of property were hardly recognised by Hindu law-givers. The law of Stridhanam as developed by the Rishis in consequence of the prevalance of partition among Non-Namboodiris outside Malabar, has no application to Namboodiris who, from time immemorial, have followed the system of impartibility

There is nothing immoral or contrary to public policy in the custom prevailing among Namboodiris, of stipulating for the payment of "Stridhanam" to a bridegroom as a condition precedent to matrimonial alliance (F B.) —

25 T L. R., 196

Ref —34 T L. R., 262,

2. The Namboodiris are, in the first instance, or *prima facie*, governed by the Hindu Law

They are bound *prima facie* by the interpretation and exposition of the Hindu Law as given in the authoritative commentaries and as now understood and acted upon elsewhere.

They are allowed to show that they have, in practice, deviated from such

interpretation in any particular instance or respect and their usage has, therefore, modified the ordinary Hindu Law in that instance or respect

Such usage or custom modifying the ordinary Hindu Law should be specifically pleaded and proved to have acquired the force of law.— 19 T L J., *441*

2. See also —
"Adoption"— 9 T L R *180*
10 T L R, *151*
"Alienation"— 6 T. L R, *148*
12 T L. R, *46*
"Marriage"— 20 T L. R. *65*
"Succession"— 19 T L R, *241*,
34 T L. R, *282*

VII. Managing Member

1 A, a Namboodiri lady, sues B, on behalf of her minor son C, for recovery of land and rent. Her husband (D) is alive, but is alleged to be of unsound mind. B objects to the right of A to carry on the suit during the life of D (C's father) in C's name

Held —D, the father of C (the minor) is, according to the law by which the Namboodiris are governed, the present head of the Tarwad Suits relating to Tarwad property must, therefore, be instituted in his name by his next friend or guardian, and there is no objection to A (D's wife and C's mother) acting as D's next friend and guardian — 7 T L R. *78*

2. The question whether a creditor should be taken to have had implied notice of an *Udampadi* entered into by the members of a Tarwad curtailing the powers of the Karanavan depends on the circumstances of each case.

There was an Udampadi in an Illom by which for debts over a certain amount all the adult members should join. The creditor was acquainted with the Illom for over 5 years, had dealings with the Karanavan even before the debt in question and made no enquiries whether any money lent to him would bind the Illom:

Held —Under the circumstances the creditor had implied notice of the *Udampadi*.— 14 T. L. J, *68*,

3. A suit by the senior male member of a Namboodiri Illom against a junior member who is the *de facto* Karanavan for recovery of the Illom properties without seeking to remove the defendant from his *de facto* Karanavasthanam is competent

The senior male member of a Tarwad or Namboodiri Illom is by right of birth the Karanavan Seniority of birth alone is the test to be applied in this matter Even if junior members are in management, such management should be presumed to be so by the sufferance of the Karanavan *de facto*, and the management is terminable at will by him The Karanavan has a right to be in possession of all and every item of Tarwad property No junior member can hold any property as against the Karanavan —
18 T L J, *241*.

4. See also —
"Alienation"— 11 T L. R., *1*,
12 T. L. R., *46*.
40 T L. R., *218*
(=14 T. L. J., *241*).
(See Vol III, P. 934)

VIII. Marriage.

1 A junior member of a Malabar Brahmin Illom contracted an alliance known as Sambandham with a Nayar lady and had children by her. In the suit by the lady and the children for maintenance, defendant (the husband) admitted the alliance and the fact that the children were born to him but denied the status of lawful marriage and his liability for maintenance

Held —(Per Govinda Pillai, J, and Hunt, J, Padmanabha Iyer, J., dissenting).— The Sambandham in the Podamuri form is a valid union according to custom and usage obtaining amongst the Malabar

Brahmins and Nayars. The children are during minority entitled to maintenance from their father and his self-acquisitions

Per Padmanabha Iyer, J—As under the Hindu Law to which the Namboodiri, if not the Sudra also, is subject in regard to marriage, a Brahmin cannot contract a valid marriage with a Sudra woman especially with one who was not a virgin, and Podamuri is not a valid marriage, and as no usage or custom having the force of law has been made out to show that a Sambandham between a Namboodiri and Sudra woman is a legal marriage (there being no evidence in the case on the point), the alliance in question in which it was not even clear that all the Podamuri-ceremonies were gone through, is not a valid and legal marriage, and under the peculiar customary law and usage which governs the parties in the matter of inheritance and maintenance, the woman and children are not entitled to maintenance.— 20 T L R., 65

2 The first defendant was given in Sarvaswadanam marriage to V N, the brother of first plaintiff V N died in 1053 without issue, and first defendant became, after her mother's death in 1069, the last member of her Illom After 1069, she made various alienations of the family properties in favour of the contesting defendants. First plaintiff and his son, the second plaintiff, sued to set aside the alienations on the grounds, *inter alia*, that they were reversionary heirs of V N., the last male member of the first defendant's Illom, and that first defendant's position in respect of her powers of alienation was that of an ordinary Hindu widow.

Held—(1) The effect of the Sarvaswadanam marriage was that the first defendant continued to remain a member of her Illom and that V. N was not thereby constituted a member of first defendant's Illom

(2) The first defendant's powers of alienation were not those of an ordinary Hindu widow, but were more akin to the powers of a senior female of a Nayar Tarwad

(3) The first defendant as the sole surviving member of her Illom had unrestricted and unlimited powers of alienation in respect of her Illom properties — 26 T L R, 218 (=2 T L J, 23)

Fol —27 T L R, 29

3 See also "Gift'— 9 T. L R, 148

IX Maintenance.

1 A Namboodiri widow was, on the husband's death, permitted to live in her father s house She sued her husband's relations for future maintenance, and the suit was resisted by the latter on the ground that they were willing to maintain the plaintiff if she would take up her residence in their Illom, but that she was unwilling to do so. It was found that the circumstances which necessitated her residence with her father had not changed so as to justify any interference with that arrangement

Held—On the application of the principles of the Marumakkathayam law to the case, the plaintiff could not be compelled to take up her residence in her husband's Illom, in the absence of material change in the circumstances that had necessitated her residence with her father.

Quaere.—Whether in the matter of rights to separate maintenance the case of a Namboodiri widow differs from that of an ordinary Hindu Widow.— 4 T L J, 257.

2. See also —

"Succession"— 19 T. L. R., 841,

X Streedhanam.

See "Law Applicable".— 28 T. L. R., 196

XI. Succession

1 A Potti (Malabar Brahmin) woman was declared an out-caste in a Smartha enquiry for adultery with plaintiff—a junior member of another Illom—who too was expelled from caste without his being heard in defence The plaintiff sued for maintenance for himself, his wife and son. The defence was that as plaintiff lost his caste and as his father performed his Jiva or Ghata Sradha and Sudha Bhojanam, he was not entitled to maintenance

Held—The mere performance of Jiva or Ghata Sradha and Sudha Bhojanam *per se* would not constitute deprivation of caste

As the plaintiff was condemned unheard he was not bound to take notice of such enquiry or anything said to be done in consequence thereof and that as he did not lose his civil rights, he was entitled to maintenance

The Namboodiri Brahmins are, according to the law laid down by decided cases, governed by Hindu Law modified by certain special customs, one of them being that the family property is impartible and no member has a right to enforce division. Succession is traced among the Namboodiris through males and property passes from father to son, while among Nayars some of whose customs the Namboodiris seem to have adopted, succession is traced to females and so property passes from mother to daughter In both cases the senior male member manages the family and the junior members are as a rule entitled to be supported at the family expense unless they become disentitled owing to special causes.—

19 T L R., *241.*

2. The self-acquisitions of a Namboodiri Brahmin go, on his death, to his sons and not to his Illom.

Per Sesha Iyer, J—1 The Namboodiris are, in the first instance, or *prima facie*, governed by the Hindu law

2 They are bound *prima facie* by the interpretation and exposition of the Hindu law as given in the authoritative commentaries and as now understood and acted upon elsewhere

3 They are allowed to show that they have, in practice deviated from such interpretation in any particular instance or respect and that their usage has, therefore, modified the ordinary Hindu law in that instance or respect

4. Such usage or custom modifying the ordinary Hindu law should be specifically pleaded and proved to have acquired the force of law

Per Raman Thampi, J—In respect of intestate succession, as in several other respects, the Namboodiris are governed, not by the Dharma Sastras, but by local usage obtaining among followers of the Marumakkathayam law —

34 T L R., *862*

Ref.—40 T L R., 294

3 See also —

"Gift' — **12 T L R, *157***

APPENDIX C.

THE REGULATIONS AND PROCLAMATIONS TO WHICH THE CASE LAW REFERS

			PAGE
1	Regulation	I of 1010—Powers and Jurisdiction of Munsifs	741
2	„	IV of 1010—Zillah Jurisdiction	„
3.	Revenue Settlement Proclamation, 1061		„
4	Viruthi Proclamation, 1061		742
5.	Regulation	V of 1067—The Criminal Procedure Code	743
6	„	I of 1068.—Revenue Recovery	790
7	„	II of 1068—Forest	792
8	Service Inams Proclamation, 1068		793
9	Regulation	V of 1071—Jehmi and Kudiyan	794
10	„	II of 1072—General Clauses	799
11	„	IV of 1073—Abkari	„
12	„	I of 1074—The Penal Code	„
13	„	VI of 1074—Wills	818
14	„	II of 1075—Negotiable Instruments	„
15	„	III of 1075—Vakils ...	822
16	„	II of 1077—Guardian and Wards	„
17	„	III of 1075—Hindu Religious Endowments	824
18.	„	IV of 1080—Stamp	825
19	„	II of 1084—Civil Courts	„
20	„	I of 1087.—Tobacco	827
21	„	II of 1087—Registration	829
22	„	VI of 1087.—Court Fees	830
23	„	III of 1088—Salt	833
24	„	X of 1089—Co operative Societies	„
25	„	XI of 1089—Land Acquisition	834
26	„	I of 1090—Village Panchayat Courts	838
27	„	VIII of 1090.—Insolvency	839

28	Regulation	IX of 1090—Succession Certificate	845
29.	,,	IV of 1091—Land Conservancy	846
30	,,	I of 1092—Companies	847
31	,,	II of 1092—Christian Succession	848
32	,,	III of 1094.—Chitties	849
33	,,	VI of 1094—Motor Vehicles	857
34	,,	IV of 1095—Police	858
35.	,,	V of 1095—Municipal	,,
36	,,	VI of 1096—Public Canals and Public Ferries	863
37.	,,	VII of 1096.—Registration of Births and Deaths	864
38.	,,	VIII of 1096—Income-Tax	,,
39	,,	III of 1097.—Government Land Assignment	872
40	,,	IV of 1099—High Court	875
41.	,,	VI of 1099.—Reformatory Schools	876
42.	,,	II of 1100—The Nayar	,,
43.	,,	III of 1100—The Eazhava	894
44.	,,	VI of 1100—Limitation	896
45.	,,	VIII of 1100.—The Civil Procedure Code	929
46	,,	V of 1101—Travancore Newspapers	1069
47	,,	VI of 1101—Nanjanad Vellala	1070
48	,,	II of 1105—Probate and Administration	1071
49	,,	VIII of 1108—Insolvency	1072
50	The Law *re* Malayala Brahmins		1073

APPENDIX D.

INDEX OF CASES.

I. THE TRAVANCORE LAW REPORTS

Vol XLVI		Vol XLVI—*contd*		Vol XLVI—*contd*		Vol XLVI—*concld.*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
1	1030	119	907	223	911	360	949
4	966	122	923	238	756	364	860
7	1062	127	766	239	996	366	765
26	827	137	1035	251	1051	368	792
30	1054	139	1008	256	971	370	780
41	820	140	895	260	834	373	1039
45	851	151	830	265	1009	385	873
49	949	154	847	276	742	396	862
53	947	160	871	280	836	404	968
59	963	164	849	285	803	415	965
70	864	168	780	298	807	451	936
75	783	171	812	307	1047	454	745
94	761	176	944	310	902	460†	780
99	843	183	934	334	846	473	951
103	1007	203	776	345	813	Vol. XLVII.	
105	743	205	1062	351	838	Page	PAGE
110	817	208	839			1	836
117	896	212	830	358*	1005	18	1023

* Read 49 R. 358, for 46 R., 358.

† Read 47 R. 460 for 46 R. 460.

The Travancore Law Reports —(*contd*)

Vol XLVII— *contd*		Vol XLVII— *concld.*		Vol XLVIII—		Vol XLVIII— *contd*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
40	931	233	871	1	854	207	754
51	826	248	997	10	870	211	751
60	907	253	869	26	1013	219	865
65	1047	268	848	30	832	223	874
69	930	282	935	34	987	230	917
72	1057	288	994	37	859	236	1033
77	950	294	868	46	864	240	811
81	815	301	742	49	866	248	801
88	746	310	897	67	925	262	932
94	820	321	1003	71	898	272	938
97	820	326	775	73	881	287	1032
100	818	330	811	117	1047	309	965
115	839	334	1060	120	979	327	771
117	883	336	1070	126	982	331	945
132	781	370	899	130	1061	338	876
136	895	373	805	137	954	341	1072
138	883	403	1031	154	954	350	1027
144	1012	407	900	168	1058	354	919
148	749	409	876	170	1049	359	795, 928
155	1003	412	838	183	824	365	821
171†	1067	437	884	185	953	383	932
176	876	555	745	195	1071	392	819
217	861	460*	780	197	1014	402	1038
		462	788				
222	909	471	1034	200	1023	405	1014
231	839	475	1054	202	834	409	1026

† Read 49 R. 171. for 47 R. 171.

* Read 47 R. 460. for 46 R. 460.

I. The Travancore Law Reports.—(*concld*)

Vol XLVIII—*concld*		Vol XLIX—*contd*		Vol XLIX. *contd*		Vol XLIX—*concld.*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
513	867	142	769	334	833	472	1019
525	943	146	759	337	789	478	983
528	1026	150	847	340	775		
531	757	154	858	349	878	Vol L	
541	1041	158	945	354	755	Page	PAGE
552	881	171†	1067	358*	1005	1	779
Vol XLIX.		176	889	364	1037	88	802
Page	PAGE	180	919	376	998	90	825
11	822	198	807	380	956	94†	1068
14	1020	207	888	399	702	96	1068
18	845	220	788	404	1024	100	822
27	800	223	831	406	1027	113	867
43	948	229	869	409	890	117	868
44	1043	237	753	428	770	126	850
46	943	242	836	430	775	130	863
52	855	249	778	436	929	133	1038
57	814	256	992	438	962	149	755
68	1054	258	793	442	824		
74	914	280	849	445	803		
87	784	295	861	451	946		
93	752	301	999	461	790		
109	796	303	967	464	1029		
113	1042	307	789	468	764		
121	848	318	889				
130	741	329	939				

† Read 49 R. 171 for 47 R. 171.

* Read 49 R. 358. for 46 R. 358.

† 50 R., 94. =23 J., 799 for which see page 973.

II. The Travancore Law Journal

Vol XX.		Vol XX—*contd*		Vol XX—*contd*		Vol XX—*contd*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
1	925	137	993	293	832	419	981
15	1011	140	1048	295	756	423	974
26	767	143	827	298	990	428	1030
38	831	147	1034	300	991	435	972
40	832	150	907	302	787	438	964
48	844	153	949	304	753	445	1065
47	829	157	947	310	612	446	994
50	821	163	976	316	1056	461	882
54	1047	165	1007	318	1029	481	852
59	961	171	976	325	849	487	1006
68	Vol VI, 1459 (45 R. 459)	173	895	329	1057	491	776
		177	774	332	1012	497	1015
73	771	196	806	337	756	502	929
75	786	197	758	353	764	505	Vol VI, 1522 (45 R. 477)
82	747	201	811	355	922		
85	744	204	827	361	1050	509	991
89	896	218	840	363	1050	511	1061
91	992	227	979	367	1051	514	814
103	826	230	923	370	999	520	985
105	834	235	847	373	852	524	974
110	1064	247	766	378*	787	544	830
118	985	258	817	381	815	551	895
124	857	266	895	384	757	555	Vol VI, 1506 (45 R. 408)
127	786	277	767	388	743		
129	898	282	1005	391	761	572	742
133	974	286	999	397	834	575	853

* For 22 J, 378
read 20 J, 378.

II. The Travancore Law Journal.—(*contd*)

Vol. XX—*contd*		Vol XX—*contd*		Vol XX—*contd*		Vol XX—*contd*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
581	995	682	1065	827	772	953	770
584	1009	686	901	831	827	959	862
589	822	688	781	833	754	965	853
592	1012	690	781	842	871	970	820
596	1051	704	1051	844	873	975	1062
601	985	706	757	855	924	979	1058
605	1058	709	852	858	844	1021	1043
607	1035	713	949	873	796	1022	839
609	986	722	969	875	842	1027	1062
612	986	725	1000	883	796	1030	1001
618	1000	727	998	886	996	1034	944
621	977	729	1018	890	1018	1041	1001
623	836	731	912	895	961	1042	769
628	966	736	880	898	1022	1050	818
632	1030	743	950	904	963	1053	965
636	1048	746	1038	907	908	1062	1009
638	1037	748	770	918	1000	1064	766
641	843	754	817	921	984	1069	863
645	815	758	747	923	920	1076	925
647	864	764	745	927	976	1083	836
652	758	768	759	933	783	1101	961
656	813	772	846	936	780	1104	968
662	1039	797	934	940	776	1116	923
664	1049	802	1036	942	790	1125	784
665	1010	806	871	945	756	1131	813
667	1054	814	1013	947	747	1138	860
680	932	819	742	949	803	1146	792

II. The Travancore Law Journal —(*contd*)

Vol XX — *concld*		Vol XXI		Vol XXI — *contd*		Vol XXI — *contd*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
1158	950	20	920	187	774	340	803
1158	935	25	1023	193	982	355	745
1180	793	29	963	198	861	371	871
1186	970	31	765	203	1039	376	1050
1170	826	35	951	208	1003	388	872
1190	996	48	994	228	820	401	936
1196	950	55	927	235	784	409	1015
1200	883	65	907	239	766	411	924
1219	1022	76	1015	243	857	415	999
1221	834	78	1048	250	995	417	1048
1226	1057	85	970	255	974	420	1008
1232	1047	91	1056	257	1032	422	982
1238	996	103	763	261	983	424	876
1242	987	106	748	269	972	474	883
1248	1015	111	1012	271	935	485	869
1250	853	115	818	278	935	505	897
1255	931	118	1047	285	830	517	795
1262	804	122	862	288	807	526	883
1268	812	130	1062	293	803	528	796
1277	783	149	836	308	909	531	1060
1282	1054	159	982	317	839	533	746
1284	1031	162	823	321	958	539	781
1288	908	165	951	325	795	544	895
1292	1032	168	792	330	845	546	951
		172	1035	331	1003	557	853
1295	883	176	783	334	763	559	829
1302	801	182	858	337	748	562	1061

II. The Travancore Law Journal —(*contd*)

Vol XXI—*contd.*		Vol XXI—*contd*		Vol XXI—*contd*		Vol XXI—*contd.*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
566	1039	788	832	948	841	1094	987
571	1045	791	762	951	1063	1102	815
574	796	794	745	956	1029	1106	1065
576	974	800	754	958	896	1109	885
584	944	803	837	968	931	1116	914
592	997	809	744	972	922	1122	885
598	796	817	807	975	1043	1128	984
600	976	820	768	985	1016	1134	975
601	1070	825	814	989	1065	1156	865
633	899	829	815	994	994	1173	975
639	997	833	1036	996	933	1175	953
644	780	841	1050	998	929	1177	885
648	822	848	780	1001	1030	1183	761
652	884	851	876	1011	1004	1189	854
669	742	854	817	1014	784	1192	1019
687	933	859	854	1024	979	1195	854
689	1065	876	763	1031	1026	1200	936
691	805	877	776	1033	944	1218	781
722	900	880	795	1038	907	1219	839
724	914	889	870	1048	952	1223	762
736	749	894	879	1063	927	1228	749
743	901	899	815	1070	880	1237	811
749	1009	907	805	1076	1016	1240	844
754	1003	910	838	1082	973	1244	776
758	959	913	917	1087	777	1245	806
768	799	921	1021	1089	1049	1247	821
780	775	924	1052	1091	1016	1250	1013
785	811						

Vol XXI— *concld.*		Vol XXII— *contd*		Vol XXII— *contd*		Vol XXII— *contd*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
1255	844	23	777	316	925	453	886
1289	964	26	864	320	902	464	1017
1292	750	29	885	323	954	466	1019
1297	868	40	886	331	979	468	969
1305	823	57	1066	335	1066	475	750
1308	937	66	937	342	944	490	845
1314	843	69	1032	347	788	493	1009
1329	1037	87	1018	356	967	504	973
1333	843	94	824	361	886	508	791
1335	832	96	1032	373	902	513	854
1340	818	102	1004	378*	787	517	1066
1356	898	109	762	376	994	537	974
1360	1035	122	859	383	961	556	1067
1366	1066	152	807	387	832	559	1004
1368	925	168	1058	390	1047	568	1021
1384	602	189	808	393	903	571	984
1388	821	208	920	397	829	577	925
1390	840	211	1017	402	838	581	754
1398	787	215	954	406	1043	585	818
1403	870	227	881	419	954	591	1036
Vol XXII		274	1071	425	955	595	818
Page	PAGE	276	857	428	1048	598	824
1	953	297	902	431	912	603	814
13	966	299	1056	435	906	606	1061
19	806	311	947	438	770	614	980
22	750	313	954	449	1042	619	830

* For 22 J. 378 read 20 J. 378.

II The Travancore Law Journal.—(*contd*)

Vol XXII—*contd*		Vol XXII—*contd*		Vol XXII—*contd*		Vol XXII—*contd*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
621	1050	727	970	868	965	1093	903
624	887	730	788	883	797	1120	928
630	756	734	759	888	1026	1127	919
632	1032	737	1025	890	754	1133	838
636	1059	739	832	898	975	1145	769
640	991	742	746	900	924	1151	752
642	1063	745	948	905	988	1154	919
645	771	750	1052	907	821	1161	1028
649	987	755	782	909	937	1164	1053
653	915	759	750	917	801	1166	741
659	1041	767	759	958	1004	1174	1029
661	788	770	980	964	1061	1177	881
666	899	772	845	968	932	1181	914
669	834	776	989	981	945	1189	1055
674	997	781	998	988	1054	1193	795, 928
677	1009	788	967	995	752	1200	876
681	1033	791	988	1001	876	1203	754
683	840	793	785	1005	955	1208	1022
686	1014	796	808	1008	823	1216	1054
689	917	802	790	1012	1013	1222	811
695	976	804	751	1014	955	1227	821
699	756	813	932	1027	938	1252	1014
701	1071	824	797	1047	1072	1256	841
706	874	828	1027	1056	830	1260	1026
715	1032	841	955	1058	1027	1264	955
721	848	858	927	1077	968	1266	746
724	977	861	865	1081	982	1270	776

II. The Travancore Law Journal —(*Contd*)

Vol XXII—*concld*		Vol. XXIII—*contd*		Vol XXIII—*contd*		Vol XXIII—*contd*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
1272	887	24	742	150	1032	335	807
1275	1854	27	943	156	772	344	888
1277	854	32	1026	167	928	355	932
1285	1038	36	939	171	814	362	930
1289	784	38	1049	178	831	366	897
1295	760	43	757	184	1011	376	928
1310	850	54	843	187	1042	380	948
1314	1026	59	967	196	847	383	1067
1317	1027	63	1014	200	943	386	1044
1331	1008	67	850	206	776	391	980
1341	830	72	867	208	752	395	776
1343	909	83	788	211	848	410	988
1357	887	86	822	220	971	411	1021
1360	914	89	813	223	887	412	921
1371	788	92	811	227	769	426	977
1376	938	96	1063	231	858	429	797
1381	945	101	1020	253	778	441	1043
1398	988	103	855	260	833	446	904
1400	825	111	803	264	752	452	1050
1404	911	117	809	268	1067	457	1052
Vol. XXIII.		126	825	274	940	460	971
Page	PAGE	128	796	279	885	462	759
1	1041	132	1005	290	903	478	855
13	800	135	939	298	999	487	929
17	1041	140	1015	301	960	490	946
20	855	145	741	306	919	501	826
		149	1043	322	948	504	889

II The Travancore Law Journal.—(*contd*)

Vol XXIII—*contd*		Vol XXIII—*contd*		Vol XXIII—*contd.*		Vol XXIII—*contd*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
308	956	711	1053	851	831	1009	1044
312	878	714	922	854	890	1015	891
318	961	719	797	862	1019	1031	891
321	869	734	702	868	792	1040	856
326	793	739	983	872	904	1045	929
350	849	741	957	875	976	1048	833
366	777	747	1029	877	991	1051	791
377	870	750	842	879	842	1056	946
380	1005	753	1024	886	998	1065	765
385	956	756	743	889	825	1067	755
396	1005	759	824	893	815	1082	803
603	789	763	1037	896	941	1092	941
615	948	767	890	902	743	1097	1055
620	845	773	962	915	1057	1103	1071
629	861	778	1060	919	998	1108	860
642	1017	784	904	923	981	1127	913
645	1033	788	929	940	798	1131	838
649	819	790	973	947	905	1138	867
669	877	793	874	956	944	1151	916
670	759	803	1007	957	789	1161	809
676	755	807	833	960	759	1176	1060
680	866	811	1049	964	856	1184	949
700	929	815	983	966	856	1193	994
702	1027	823	925	969	976	1207	755
704	999	828	940	973	983	1225	753
706	948	841	803	977 ...	890	1231	851
709	963	848	978	995	916	1242	1019

II The Travancore Law Journal.—(*contd.*)

Vol XXIII—*concld*		Vol XXIV—*contd*		Vol XXIV—*contd*		Vol XXIV—*contd*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
1248	1042	166	971	362	894	555	957
1250	992	177	764	370	927	561	896
1253	836	183	790	374	1046	564	977
1260	809	188	910	388	1034	568	794
Vol XXIV		194	775	390	898	575	978
Page	PAGE	197	790	395	930	578	790
1	911	201	770	403	1007	581	785
17	990	206	892	405	816	584	1021
23	769	218	946	411	799	587	1025
26	863	221	804	428	1031	606	1064
30	763	228	810	433	1021	610	1006
33	789	262	785	436	998	617	1044
43	760	273	981	442	741	621	906
66	959	277	843	451	879	629	868
69	1024	281	918	458	1056	639	802
74	892	288	942	469	791	646	817
80	892	292	1068	475	957	654	972
86	810	295	893	480	874	656	960
97	806	305	765	486	775	658	768
100	874	308	1039	493	801	691	1033
107	968	313	927	499	983	696	973
111	962	320	703	509	992	698	976
114	957	333	849	518	973	701	1061
140	790	338	947	521	877	705	972
147	931	341	942	527	972	708	916
158	856	357	979	545	879	711	762
161	771	359	936	549	1072	718	1005

II. The Travancore Law Journal —(*concld*)

Vol XXIV—*contd*		Vol XXIV—*contd.*		Vol. XXIV—*contd.*		Vol XXIV—*concld.*	
Page	PAGE	Page	PAGE	Page	PAGE	Page	PAGE
723	1034	750	898	777	958	818	900
725	1072	754	918	783	1069	823	900
730	1051	759	906	787	969	825	894
734	910	764	960	792	963	851	930
746	1010	770	943	804	1058		

APPENDIX E.

I

RULES UNDER THE CODE OF CIVIL PROCEDURE

CONTENTS

CHAPTER I

Preliminary

Rules

1 Commencement
2. Forms.
3. Repeal.
4 Definitions.
5 Reckoning of prescribed day
6 Service of notice

CHAPTER II

Transfer of suits, appeals, &c.

7 (1) Application for transfer
(2) Affidavit in support
(3) Separate application

CHAPTER III

General

Form of Proceedings

8 Form of plaints, &c
9 (1) Cause title of plaint, &c
(2) Cause-title of memo of appeal
(3) Cause-title of subsequent proceedings.
(4) Description of contents.
(5) Names, &c., of parties
10 (1) Address for service.
(2) Penalty for default.

Rules

11 Statement of Regulation or other authority
12. List of documents
13. Proceedings in respect of immovable property
14 (1) Section of Court Fees Regulation to be stated in plaint, &c.
(2) Valuation of each subject-matter to be shown separately
(3) Fixed fees

Presentation of Proceedings to the Court

15 Presentation of proceedings and documents.
16 Papers filed in Court to be properly signed
17 Document or proceeding not to be sent by Anchal, Post or Telegraph
18 Curing of defects.

Posting

19. Posting of suits, etc ,
20. Posting of ready cases.

Leave to sue

21 Leave to sue

Suits by or against numerous parties

22. Suits by or against numerous parties.
23. When application is made by defendant.

* The Rules of the Civil Courts' Guide relating to matters dealt with in certain Regulations were incorporated in the previous Volumes, II, III and IV The omission to include the Rules under Regulation VIII of 1100 is now made good The amendments made in the original Rules are shown in italics. Occasion is taken to give also the changes, if any, made in the Rules published in the previous Volumes so as to make them up-to-date.

Rules

Adding Plaintiff

24 Adding any person as plaintiff or as next friend

25 Name of additional parties, how entered

Recognised agents

26 Party appearing by agent

27 Signing or verification by agent

Issue of summons

28 Issue of summons

Return of service of process

29 Return of service

30 Verification of return

31 Service by affixing to outer door

32. Endorsement where summons affixed to outer door

Address for service

33 (1) Defendant to file his address for service before date fixed for hearing

(2) Address for service to be within local limits.

(3) Service by affixing to outer door

(4) Service on pleader

(5) Change of address for service, how effected

(6) Service in other manner

(7) Saving of Section 244 C. P C. [Or XXI, R. 21 (1)]

34. Heading of written statements.

Interrogatories

35 (1) Interrogatories.

(2) Grounds of objection to be stated

Inspection of documents

36 Inspection of documents

Inspection of proceedings by a party

37 Inspection of proceedings by party

Inspection of documents by a stranger

38 Inspection of documents by strangers.

39 Notice of application for inspection.

40 Consent to inspect or obtain copy

41 Fee.

Search of Records

42. Search of records.

Rules

Copies of Proceedings

43. Copies

44 Name and address for service to be endorsed on copy.

45 Refusal or neglect to furnish copy

Certified copies

46. Certified copies.

Production of Records

47 (1) Production of records in the custody of a Court

(2) Grant of certificate.

(3) Letter of request

48 (1) Records from Palace

(2) Records in the custody of a Public Officer other than a Court.

49 Receipt to be given when document retained

50 Instructions to be observed by Courts receiving or transmitting originals.

51 (1) Mode of keeping originals received

(2) Return of originals

52 Deposit for postage costs.

Exhibits

53. Marking Exhibits.

54 Marking series

55 Consecutive marking and numbering

56 Marking in subsequent proceeding

57 Inspection of Exhibits

58. Admission and proof of documents to be noted

59. Return of documents.

60. Return of original documents.

61. Register for return of documents.

62 Dismissal of application for return.

The first hearing of suits

63. Examination of defendant when no written statement filed

64. Issue paper

65 Framing of issues.

66 Application for directions.

67 Adjournment in consequence of application for commission, &.

68 Defendant's list of documents.

Rules

69 Form of list
70 Order sheet

Interlocutory proceedings

71 Form
72 To state only order prayed for
73 Notice
74 Evidence

Adjournments

75 Adjournments to be to a day certain.
76 Proceeding not to be adjourned *sine die*
77 Costs of adjournment
78 (1) Advancement of hearing.
(2) Notice of consent
79 Service of processes on witnesses present
80 List of witnesses

Summonses to witnesses

81 Application for summonses to witnesses.
81 A. Mahomedans not to be required to attend on Fridays
82 Time for filing list or application
83 Deposit of subsistence money and milege
84 Forms of summonses to witnesses.
85 Form of proclamation
86 Service of processes on public servants.
87 Certificate of attendance

Affidavits

88 Before whom may be sworn
89. Identification of declarant
90. Filing.
91 Notice of filing
92. Form
93. Name, age, etc., of deponent.
94. Alterations and interlineations.
95 Statement of officer before whom affidavit sworn
96. Blind or illiterate deponent.
97 Endorsement.
98. Matter of opinion.
99. Information and belief
100 Documents referred to.
101 Cross examination.

Rules

Oath and affirmation

102 (1) Swearing to be on religious books
(2) Form of oath to be administered.
(3) Form of oath to be taken.
(4) Solemn affirmation.
(5) Form of solemn affirmation
(6) Form of affirmation
(7) Form of oath in special cases
103 Mahomedan witnesses
104. Forms.
105 Heading of depositions
106 Signing of depositions

Original Petitions

107 Original petitions.

Judgments, decrees and orders

108 Form of judgment
109 Decree
110 Decree left unsigned by Judge
111 Original decrees
112 Proportionate Costs
113 Specification of periodical payments
114. Statement of particulars as to immovable property
115. Interest on costs.
116 Decrees for sale of hypotheca
117 Judgments and orders in matters other than suits.
118 Setting aside *ex parte* decree where money or property recovered
119 Appellate decrees to state amount of costs in original Court.
120 Several appeals against same decree.
121 What items of costs to be excluded in preparing decrees
122. Expenses for copies to be included
123. Statement of costs and expenses to be filed
Consequence of default.

Withdrawal of suit or appeal

124. Notice of application for leave to withdraw
125. Withdrawal conditional on payment of costs.
126. Production of special vakalat.

Rules

Commissions

127 Application for commission
128 Commissioner s fees to be paid into Court.
129 Return of commission
130 Local inspection by Judge
131 Commission orders
132. Amount of commissioner s fees and milege
133 Objections to commissioner s report
134 Delegation in commissions for examination of witnesses.
135 Form of commission
136 Commission for ascertaing improvements and market value.
137 Commission to translate accounts and other documents.
138. Selection of commissioner

Minors and persons under disability

139 Plaint or original petition on behalf of minor
140 Appointment of guardian *ad litem*
141 Placing guardian in funds.
142. Court officer as guardian *ad litem*
143 Decree for compromise
144 Order appointing guardian necessary
145. Description of parties in suits by or against persons under disability
146 Application not to be combined with petition to implead legal representative
147. Legal guardian to be guardian for suit.

CHAPTER IV

Taking Accounts.

148 Directions as to taking accounts.
149. Form
150 Inspection
151. Determination by Court.
152. Extension of time to file statement of account.
153. Periodical filing.

Rules.

Reference to a commissioner to vouch or take accounts

154. Appointment of commissioner
155 Appointment to audit
156 Declaration by Court.
157 Report of commissioner
158 Consideration by Court.

CHAPTER V

Payment into and out of Court

Payment into Court

159 Lodgment schedule to be brought in
160 Delivery to treasury officer
161 When treasury is closed.
162. Receipt
163. Transmission of money payable in satisfaction of decree
164 Payment out

Payment out of Court

165 Payment to be made on order of Judge.
166. Order for payment.
167 Payment schedule to be brought in.
168 Presentation of order
169 Receipt by payee
170 Delivery of securities, etc, into and out of Court

Cash deposits

171 Cases where payment may be made in cash to Court.
172. Presentation of receipt
173. Repayment.

CHAPTER VI.

Sale of property under order of Court

174 Conduct of sale under order of Court.
175 Affidavits.
176 Matters to be determined by Court
177. Appointment of person to sell
178 Proclamation of sale.
179. Production of title deeds by encumbrancer
180 Costs of proceedings.
181 Combination and sub-division of lots.

Rules

182 Publication of proclamation of sale in news-papers.
183 Auction
184 Commencement and closing of auction
185 Leave to bid
186 Conduct of sale.
187 Application to set aside sale
188 Costs of sale
189 Payment of costs, etc., when sale set aside.
190. Certificate of sale.
191 Default by applicant

CHAPTER VII

Proceedings in execution.

192 Rules applicable.

Application for transmission

193 Application for transmission of decree for execution.
194 Return of decree by Court
195 Transmission of papers by District Court
196 Execution of foreign decree
197 When Courts in Travancore may execute decrees of Civil Courts in British India and in Cochin State.
198. Execution of Travancore decrees by British Indian Courts.
199. Transmission of decrees to British Indian Courts.
200 Execution of Travancore decrees by Cochin Courts.
201 Transmission of decrees to Cochin Courts.
202. British Indian and Cochin Small Cause decrees.

Application for execution

203. Application for execution.
204. Certified copy of decrees to be filed.
205. Execution petition to set out in full steps prayed for
206. Non-compliance with Rules.

Rules.

207 Procedure on and after hearing of petition
208 Notice of date of delivery
209 Deposit of cost of seed and labour
210 Delivery of possession of house or other building locked up
211 Amin to report to Court when resistance offered
212. (1) (2) Costs of removal of attached movables and maintenance of life-stock
(3) Delivery of attached movables other than cash, etc., to Nazir for safe custody
(4) Rates of maintenance for life-stock
(5) Custody of attached cash, jewels, etc
213 (1) & (2) Procedure when removal of attached property to the Court-house inconvenient.
(3) Custody of attached life stock
214 Withdrawal of attachment
215 Recovery of expenses of maintenance
216 Breaking open door of room where property to be attached is believed to be concealed
Inventory
217 Order to appoint day for sale
218 Determination of questions arising in execution of decree

Joint decree-holders

219 Joint decree-holders.

Payment and satisfaction

220 Payment into Court.
221 Payment into Court in satisfaction.
222. Application for sanction to give time to judgment-debtor or certify payment or adjustment.

Execution of documents by the Judge

223. Procedure in case of execution of documents by Court.
224. Procedure in case of execution of documents by Courts.

Rules

225. Form of deed and of endorsement of negotiable instrument

Execution applications

226. Oral application for relief
227 Application in pending petition
228 Application of Rules.

Attachment of property in Court or in the custody of a public officer

229 Attachment of property in Court
230. Attachment of property in Court other than the Court executing decree
231 Attachment of property in custody of public officer

Attachment of decrees

232. Attachment of decrees
233 Decree not to be sold
234 Attachment of decree by several decree-holders.

Claims to attached property

235. Claims to attached property
236 Procedure when application presented
237 Hearing of application

Realisation of attached debts

238 Realisation of attached debts.
239. Receiver's powers.

Sale of attached property

240 Applicant to file affidavit
241 Order for sale
242. Sale of guns or other arms in Court auction
243 Execution of decrees altering survey boundary lines.
244. Application of Chapter VI

Arrest and imprisonment

245. Palace servants.
246. Other public servants.
247 Subsistence money
248 Tender of subsistence money

Rules

249 Endorsements on warrants returned unexecuted
250. Issue of fresh warrant of arrest
251 Sick judgment-debtor
252. Warrants of commitment to whom to be addressed
253. Fees for medical examination.
254. Moneys to be deposited before commitment.
255 Subsistence allowance, etc, to be forwarded
256 Payments of subsistence money into jail, when to be made.
257. Release of judgment-debtor on payment of decree-debt
258 Return of unexpended subsistence money
259 Intimation of arrest, etc, to official superior
260. Release of sick judgment debtors.
261 Subsistence money when arrest is made in execution of several decrees
262 Subsistence money disbursed not to be shown in warrant of commitment
263 Exemption from arrest of persons serving in the British army
264 Exemption from arrest of persons belonging to the Nayar Brigade

CHAPTER VIII.

Partnership Suits

265. Parties.
266. Inspection.
267 Impeachment of settled account.
268 Interim decree where partnership and books admitted
269 Matters to be determined at hearing
270. Accounts.
271. Errors in settled accounts.
272. Commissioner to take account
273. Order for discharge of debt and liabilities.
274. Order for payment of balance Order for distribution of assets.

Rules
275. Order for payment of balance into Court and realisation of assets
276 Appointment of receiver on default of party
277 Forms.

CHAPTER IX
Partition Suits

278. Parties.
279 Plaint
280 Order for accounts.
281 Matters to be determined at hearing
282. Account of outstanding liabilities.
283. Interim decree
284 *Discharge of outstanding liabilities.*
285 Outstandings due
286 Order for sale
287 Taking account by commissioner
288. Final hearing.
289 Final decree
290. Forms

CHAPTER X.
Additional Rules relating to appeals from decrees and orders and to civil revision petitions and reviews

291 Notice fees, etc, to accompany appeal memo.
292 Appeal by representative
293. Court fee valuation of appeal
294. Affidavit explaining delay
Endorsement returning papers.
295. Appeal or petition to be posted before Court.
296 Special notice to be given as regards offer for oath.
297 Opposite party to file memorandum of appearance
Penalty for omission. Proviso.
298. Address for service.
299. Service of notice

Rules
300 Fees for service of notice
301 Objection to findings.
302 Application to postpone or advance hearing on notice
303. Notice of hearing of cases remanded
Interlocutory applications and matters.
304 Application for amendment of appeal, objection or revision petition
305 Cases remanded for findings
306 Time for filing objections Copy to be served
307 Power of Appellate Court to deal with findings
308 Appellate judgments.
309 *Appellate decrees to be self-explanatory*
310 Table of costs to be appended to orders under Section 533
311 Judgments and decrees to be produced with special appeal memorandum.
312. Statement of case.
313. Table of costs.
314. Copies of map, plan, etc, in appeals before High Court
315 Civil revision petition to be accompanied by particulars for notice
316 References to High Court.
317 Application for review
Service of Notice
318 Procedure when notice returned unserved.
319 Fees to be paid in Court fee labels.
320. Application to Court to be by petition.
321. Rules for the reciprocal service for processes between British India and Travancore.
322. Rules for reciprocal service between Cochin and Travancore.
323. Suit by or against H. H The Maharaja of Cochin.

CHAPTER I.
Preliminary

Commencement

1 The Rules in this Part and in Part II shall apply, as far as may be, to all proceedings pending on the first day of Vrichikom 1099 and to all proceedings thereafter to be instituted

Forms.

2 The Forms in Appendices II and III hereto shall be used with such variations as circumstances may require

Repeal

3 All previous Rules, Orders, Circulars and Forms, so far as they are inconsistent with these Rules, Orders, Circulars and Forms, are hereby repealed

Definitions.

4 In these Rules, unless there is something repugnant in the subject or context —

Address for service

(1) "Address for service" means the place appointed by a party, or his pleader, at which service of summons, notice, or other process may be made on such party,

Application.

(2) "Application" includes execution application, execution petition, and interlocutory application,

Code.

(3) "Code" means the Code of Civil Procedure as amended from time to time,

Execution petition

(4) "Execution petition" means a petition to the Court for the execution of any decree or order,

Execution application

(5) "Execution application" means an application to the Court made in a pending execution petition,

First hearing

(6) "First hearing" includes the hearing of a suit for settlement of issues, and any adjournment of such hearing,

Interim decree

(7) "Interim decree" means a decree declaring the rights and liabilities of the several parties, and providing for the determination of the particular property or sum of money to be apportioned or paid to any party, or for otherwise giving effect to such declaration,

Interlocutory application.

(8) "Interlocutory application" means an application to the Court in any suit, appeal or proceeding, already instituted in such Court, other than a proceeding for execution of a decree or order,

Original petition.

(9) "Original petition" means a petition whereby any proceeding other than a suit, or appeal or a proceeding in execution of a decree or order, is instituted in a Court,

(10) "Proceeding" includes all documents presented to or filed in Court by any party, or commissioner or other officer of Court, other than documents produced as evidence,

Proceeding

(11) "Verified" means verified in manner provided by Section 48 of the Code, and

Verified

(12) All other expressions used herein shall have the respective meanings prescribed by the Code or the General Clauses Regulation, 1072

Other expressions.

5 In all cases in which any particular number of days, not expressed to be clear days, is prescribed by these Rules, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day falls on a Sunday, or other day on which the office of the Court is closed, in which case the time shall be reckoned exclusively of that day also, and of any other following day or days during which the office may continue closed

Reckoning of prescribed day

6 Except where otherwise provided by the Code, or these Rules, or any law for the time being in force, any notice directed to be given to any party shall be in writing, and may be served by the party, or his pleader, on the other party, or his pleader, personally, or by sending the same by Anchal or Post, in a registered cover, prepaid for acknowledgment, to the address for service of the party or his pleader

Service of notice.

CHAPTER II

Transfer of Suits, Appeals, etc.

7. (1) An application for the transfer of a suit, appeal, etc, from one Court or Bench to another shall be made by original petition entitled in the matter of the pending suit, appeal, etc, as in Appendix III, Form No 1. Notice of the application, as in Appendix II, Form No 1, shall be issued and served on the other parties to the suit, appeal, etc

Application for transfer

(2) The application shall be supported by affidavit stating the respective residences of the several parties to the suit, appeal, etc, the places in which the several portions of the subject-matter of the suit, appeal, etc, are respectively situate, and the several jurisdictions within which the said residences and places are respectively situate, and any other facts on which the application is based.

Affidavit in support.

(3) A separate application shall be presented in respect of each suit, appeal, etc., of which a transfer is sought, and the Court shall, in each case, record in writing its reasons for its order

Separate application

CHAPTER III
General

Form of Proceedings

8 All plaints, written statements, applications, affidavits, memoranda of appeal, and other proceedings presented to the Court, shall be written, typewritten, or printed, fairly and legibly, on stamped paper or on substantial white foolscap folio paper, with an outer margin about one and half inches wide and an inner margin about half an inch wide, and separate sheets shall be attached together bookwise The printing may be on both sides of the paper, but not the writing or type writing

Form of plaints, etc

9 (1) A plaint, or original petition, shall be headed with a cause title, as in Appendix III, Form No 2 The cause title shall set out the name of the Court, and the names of the parties, separately numbered, and described as plaintiffs and defendants or petitioners and counter petitioners, as the case may be

Cause-title of plaint, etc

(2) A memorandum of appeal shall be headed with a cause title setting out the names of the Courts to and from which the appeal is brought, the names of the parties, separately numbered, and described as appellants and respondents, and also the full cause title of the suit or matter in the lower Court, as in Appendix III, Form No 3

Cause-title of memo of appeal.

(3) All proceedings, subsequent to a plaint, original petition, or memorandum of appeal, may be headed with a short cause-title, as in Appendix III, Forms Nos 4 and 5

Cause-title of subsequent proceedings.

(4) Every proceeding shall also contain, immediately after the cause-title, a short description of its contents, as in Appendix III, Forms Nos 6 and 7

Description of contents.

(5) The full name, residence, and description of each party, and if such is the case, the fact that any party sues or is sued in a representative character, shall be set out at the beginning of the plaint, original petition, or memorandum of appeal, as in Appendix III, Form No 6, and need not be repeated in the subsequent proceedings in the same suit, appeal or matter.

Names etc , of parties.

10 (1) The first proceeding filed by any party shall also state an address for service, which shall be within the local limits of the jurisdiction of the Court in which the same is filed, or of the Munsiff's Court in which the party ordinarily resides

Address for service.

(2) Where any party fails to file an address for service, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, be liable to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, or the Court may, in its discretion, make such other order as it thinks fit

Penalty for default

11 An original petition shall also state the Section of the Regulation, or other authority, under which it is presented, as in Appendix III, Forms Nos 6 and 7 If it is not intended to serve any person with notice of the petition, it shall be so stated, and the petition shall be headed as in Appendix III, Form No 7, but if the Court directs any person to be made a party, the cause title shall be amended, and shall be in Appendix III, Form No 2

Statement of Regulation or other authority

12 Every plaint shall, at the foot thereof, contain a list, to be signed by the plaintiff or his pleader, of the documents, filed therewith, in Appendix III, Form No 8, or a statement, signed as aforesaid, that no document is filed therewith

List of documents

13 Every plaint and original petition in which relief is sought with respect to immovable property, shall give in a tabular form, as part of the description thereof, the registration district or sub district as well as the Taluk and the Pakuthy in which the property is situate, its survey number and extent and its name, if any, as also its boundaries In the case of paddy land, the tract, or '*ela*' or '*padom*,' in which the property lies shall also be added. In cases where the value of the property is required to be estimated for the purposes of the Court Fees Regulation, 1087, the market value of each item or its annual gross profits, less the assessment, if any, due thereon to the Sirkar, shall also be stated Where mesne profits are claimed, the amount claimed in respect of each item shall also be stated. In case of default, the proceeding may be received, but shall not be admitted or filed until the provisions of this Rule have been complied with.

Proceedings in respect of immovable property

14 (1) The plaint (or memorandum of appeal) shall state under what Section of the Court Fees Regulation it falls for the purpose of taxation

Section of Court Fees Regulation to be stated in plaint, etc.

(2) When a suit (or appeal) embraces two or more distinct subjects, the value of each subject for the purpose of taxation shall be separately shown in the plaint (or memorandum of appeal).

Valuation of each subject matter to be shown separately

(3) When a suit (or appeal) has to be charged with fixed fees under the Court Fees Regulation, the fact should be distinctly specified in the plaint (or memorandum of appeal).

Fixed fees

Presentation of Proceedings to the Court

15 All plaints, written statements, appeals, applications and other proceedings and documents, may be presented to or filed in Court by the party or his pleader or the pleader's registered Gumastah delivering the same personally to the head ministerial officer of the Court, at any time *between the hours of 11 A M and 4 P M, and emergent papers till 5 P M, on working days.* The said officer shall at once endorse on the document the date of presentation

Presentation of proceedings and documents.

16 All papers filed in Court by parties to suits or proceedings, and their Vakils—whether they be plaints or statements, petitions or applications, interrogatories or answers to interrogatories, memoranda or copies of exhibits, etc, —shall be signed by the signatories with their full names, e g, A B plaintiff or C B plaintiff's Vakil It is not enough if the mark "oppu" or initials alone of the signatory, without his full name, be affixed, e g, "oppu" of defendant, or "oppu" of defendant's Vakil When the signature consists of the name of the signatory, it is not necessary that the name should be repeated, but if the name be not easily decipherable from the signature, the full name should be legibly written before the signature, in the language in which the document is drawn up Similarly parties and Vakils signing statements, oath agreements or compromises, etc, taken down in Court, should sign with their full names

Papers filed in Court to be properly signed

17 No document or proceeding required to be presented to, or filed in Court which is sent by Anchal, Post or Telegraph, shall be admitted or filed in Court

Document or proceedings not to be sent by Anchal, Post or Telegraph

18 In the following cases, *viz*,

(*a*) where any plaint, memorandum of appeal, objection petition or other document, is not accompanied by such papers as are required by the law or the rules in force to be produced therewith,

Curing of defects.

(*b*) where such document is not drawn up in proper form or requires to be amended with reference to any law or order in force or on other grounds,

(*c*) where the relief sought in a document is undervalued or where the note of fees, etc, made by the parties or Vakils is incorrect,

(*d*) where the relief sought is properly valued but the whole of the institution fee prescribed by law is not paid,

(*e*) where the petition, process, registration or other fee or subsistence money, etc, required to be paid in respect of any document is not paid in part or whole,

the party or Vakil who presented the document shall be required to cure the defect within a time to be fixed by the Court and notified to the person concerned by a notice affixed on the notice-board which shall be placed in a conspicuous part of the Court house If the defect be not cured within the time fixed or within such further time as may be granted by the Court on special application, the Court shall reject the document

Posting

19 (1) On the last working day in every week a list of the suits, petitions, applications, appeals, and other cases, appointed to be heard on each day of the next week but one, shall be posted on a notice board of the Court The list shall set out the serial number and short cause title of each case, and the names of the pleaders appearing therein

Posting of suits, etc.

(2) Unless the Judge otherwise orders, the cases shall be called on, on the day and in the order in which they stand in the list.

N B—This rule does not apply to miscellaneous petitions, or applications of an urgent nature, which should be ordinarily disposed of then and there or on the following day

20 *Subject to Rule 81 A*, unless the Judge otherwise orders, every case ready for disposal shall be posted according to its order on the file of the Court

Posting of ready cases.

Leave to sue.

21 (1) If, under Section 14 of the Code, leave to institute a suit is required, the plaint shall be accompanied by a petition containing a prayer that leave may be granted, and also by an affidavit stating the residences and occupations of the several defendants, and the reasons for instituting the suit in the Court.

Leave to sue.

(2) If leave to sue is granted, the summons to the defendant shall contain the notice set out in Appendix III, Form No 9

(3) The Court may, in its discretion, issue notice of the application to the defendants, before passing an order thereon

Suits by or against numerous parties

22. (1) An application under Section 26 of the Code shall be supported by an affidavit stating the number or approximate number of the parties, and the places where they respectively reside; that they have all the same interest in the subject matter of the suit, and the nature of the said interest, and the best means of giving notice of the institution of the suit to the said parties, and the probable cost thereof If the application is made by the plaintiff, it may be made in Appendix III, Form No 10, and the estimated costs of giving notice of the institution of the suit shall at the same time be deposited in Court.

Suits by or against numerous parties

(2) The plaint shall state that the plaintiff sues on behalf of himself and all other persons interested in the subject-matter of the suit, or sues the defendant as representing all persons so interested, and the summons to the defendant shall contain the notice set forth in Appendix III, Form No 11

23 If the application is made by a defendant, notice thereof shall be given to all parties to the suit, and, if permission is granted, the plaint shall be amended by inserting a statement that the defendant is, with the leave of the Court, sued as the representative of all persons interested in the subject-matter of the suit

When application is made by defendant

Adding Plaintiff

24 If an application is made to add any person as plaintiff, or as the next friend of a plaintiff, he shall either appear in person, in which case his consent to be so added shall be recorded by the Judge in writing, or a written consent thereto, signed by him and authenticated by a person authorised to take affidavits, shall be filed in Court

Adding any person as plaintiff or as next friend

25. When any person is made a party to a suit or proceeding, either on his own application or otherwise, the name of such person and his position in the suit or proceeding must be entered in the plaint or the principal application, as the case may be, in red ink, also in the decree or final order and in the register of suits When fresh parties are brought in, they shall be numbered consecutively after the plaintiffs or defendants, as the case may be, already in the suit or proceeding

Name of additional parties, how entered

Recognised agents.

Party appearing by agent

26 (1) When a party appears by an agent, other than a pleader, the agent shall, before making or doing any appearance, application, or act, in or to the Court, file in Court the power of attorney or written authority, thereunto authorising him, or a properly authenticated copy thereof, or, in the case of an agent carrying on a trade or business on behalf of a party, without a written authority, an affidavit stating the residence of his principal, the trade or business carried on by the agent on his behalf, and the connection of the same with the subject matter of the suit, and that no other agent is expressly authorised to make or do such appearance, application or act

(2) The Judge may thereupon record in writing that the agent is permitted to appear and act on behalf of the party, and, unless and until the said permission is granted, no appearance, application, or act, of the agent shall be recognised by the Court

Signing or verification by agent

27 If any proceeding, which under any provision of law or these Rules is required to be signed or verified by a party, is signed or verified by any person on his behalf, a written authority in this behalf signed by the party shall be filed in Court, together with an affidavit verifying the signature of the party, and stating the reason of his inability to sign or verify the proceeding, and proving the means of knowledge of the facts set out in the proceeding of the person signing or verifying the same

Issue of summons

Issue of summons.

28 A plaint shall be accompanied by a sufficient number of copies or concise statements for service on the person concerned along with the summons to be issued to him These copies or concise statements shall also mention (1) the name of the party and his pleader, if any, producing the original and (2) the date of presentation of the original.

Return of service of process

Return of service.

29. (1) The return of the serving officer shall state the manner in which the process was served and the place, and day, and month of service, and also whether he is personally acquainted with the person served, and if not, by whom such person was identified

(2) If the person to be served refuses to sign the acknowledgement of service, the return shall state that he was informed of the nature and contents of the process, and, in the case of a plaint, that, upon applying to

the Court, he could obtain a copy or concise statement of the contents of the plaint

Verification of return

30 (1) The return of service shall be verified by the affidavit of the serving officer or by a sworn statement made by him

(2) If the process server is not personally acquainted with the person to be served, the return shall be supported by the attestation of the person identifying him or of a village officer

Service by affixing to outer door

31 In every case where a process is affixed to the outer door of a house, in the absence of the person to be served, the serving officer shall make an affidavit as to the following matters —

(1) The number of times and the dates and hours at which he went to the house,

(2) the attempts made by him to find the person to be served;

(3) whether he had any, and what, reason to suppose that such person was within the house or its neighbourhood, or endeavouring to evade service,

(4) whether any adult male member of the family of the person to be served was residing with him,

(5) the municipal number or the census number, if any, of the house in question.

Endorsement where summons affixed to outer door

32 If a summons to a plaint is affixed to the outer door of the house, the serving officer shall endorse on it that the defendant can, upon application to the Court, obtain a copy or a concise statement of the contents of the plaint, and shall in his return state that he has done so and shall return the copy of the plaint or concise statement to the Court. If the summons has been sent by another Court for service and the defendant does not, within fourteen days from the affixing of the summons, apply for the said copy, it shall be returned to the said Court

Address for service

Defendant to file his address for service before date fixed for hearing.

33. (1) Every party who intends to appear and defend any suit, appeal or original petition shall, *not later than* the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service

Address for service to be within local limits.

(2) Such address for service shall be within the local limits of the Court in which the suit, appeal or petition is filed, or of the Munsif's Court in which the party ordinarily resides

(3) Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house, and such service shall be deemed to be as effectual as if the notice or process had been personally served

Service by affixing to outer door

(4) Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by Section 36 of the Code, unless the Court directs service at the address for service given by the party

Service on pleader

(5) A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly Notice of every such petition shall be given to all the other parties to the suit, appeal or original petition

Change of address for service, how effected

(6) Nothing in this Rule shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

Service in other manner

(7) Nothing contained in this Rule shall apply to the notice prescribed by Section 244 of the Code

Saving of Section 244 C P C [=Or XXI, R 20 (1)]

34 The heading of all written statements shall contain the full name of the party, his or her family name or Tarwad name, his or her father's or mother's or uncle's name or her husband's name (if the party be a married woman governed by the Makkathayam Law), the religion, caste, profession, age, and the Pakuthy and the name, if any, of the house in which the party resides Written statements not containing these particulars may be returned for amendment

Heading of written statements.

Interrogatories

35 (1) A party who desires to administer interrogatories to any other party, shall, on presenting or making his application for leave to deliver the same, bring into Court two copies of the proposed interrogatories, and the fees prescribed for service of process If leave is granted, one of the said copies shall be filed on record, and the other copy shall be served by the Court on the other party

Interrogatories.

(2) If a party objects to answer any interrogatory he shall state shortly the grounds of his objection in his affidavit in answer to the interrogatories

Grounds of objection to be stated

Inspection of documents

Inspection of documents.

36 A party shall be at liberty to inspect and obtain a copy of any document recited or referred to in a plaint or written statement, and filed in Court therewith.

Inspection of proceedings by a party

Inspection of proceedings by party

37. Every party and his pleader desiring to inspect any proceeding filed in Court by him or any other party, or a commissioner or officer of Court, in the suit, appeal or matter, to which he, or his client, is a party, shall present a memorandum specifying the proceeding of which inspection is required

Inspection of documents by a stranger

Inspection of documents by strangers.

38. An application for inspection or copies of records or documents of, or in the custody of, a Court, other than records or documents filed in a suit, appeal or matter, to which the applicant is a party, shall be made to the said Court by an application, entitled in the suit, appeal, or matter in which the records or documents are filed, and specifying the particular records or documents, of which inspection is, or copies are, required, by reference as far as possible to the nature, date, and date of filing of, and the parties to, each record or document. The application shall be supported by affidavit stating whether the applicant has any, and what, interest in the subject-matter of the document or of the proceeding in which the record or document is filed, the purpose for which inspection or a copy is required, and, if the same is required for the purpose of an intended or pending proceeding, the nature of the said proceeding and the relevancy of the record or document to the case of the applicant.

Notice of application for inspection

39. The Court may, in its discretion, cause notice of the application to be given to the parties to the said proceedings, and where such notice is given, the provisions of the Code and of these Rules, with respect to a summons to a defendant, shall apply to the said notice

Consent to inspect or obtain copy

40 The Court shall not grant leave to inspect, or to obtain a copy of, any record or document produced by a person not a party to the proceedings in which the same is filed, or to the discovery of which any person is entitled to object, except in either case with the written consent of such person

Fee.

41. If leave is granted, the following fee shall be deposited in cash —

Fee for searching the records of any one year, for a single document, or entry, or for all papers forming a single record Fs 3½
And for every additional year ,, 1¾

Enclosures or annexures to a proceeding or document and the vouchers appertaining to an account shall be reckoned as part of the proceeding or document to which they relate

If the proceeding or document is not found on the record, the applicant shall be entitled to a certificate to that effect, free of cost

The search-fee deposited under this Rule will be paid to the record-keeper or other officer of the Court who conducts the search

The maximum fee collected under this Rule on any one application shall not exceed Rs 5

Search of Records

Search of records

42 When a person is entitled to inspect a proceeding or document the search therefor shall be made by the officer of the Court, and such person shall be allowed to read the proceeding or document which he is entitled to inspect, or to have it read to him, and to make a short memorandum of the date and nature thereof so as to enable him to describe it sufficiently, in case a copy is required, but, except where otherwise expressly provided by these Rules, he shall not be entitled to take a copy of the proceeding or document, or any part thereof or to make extracts therefrom

Copies of Proceedings

Copies.

43 A party or pleader, filing any proceeding, shall, on demand in writing, furnish to any other party a copy of the proceeding, upon payment therefor at the rate of 2½ chuckrams for every one hundred and seventy five words, four figures being calculated as one word Provided that one copy of a written statement, and a memorandum of appeal or of objections, and, when a concise statement of a claim has been presented for service with a summons, one copy of the plaint, shall, on the like demand, be furnished free of charge to each party appearing by a separate pleader.

Name and address for service to be endorsed on copy

44. The name and address for service of the party or pleader by whom any copy is furnished shall be endorsed thereon, and the party or pleader shall be answerable for the same being a true copy of the original or of a certified copy of the original, of which it purports to be a copy, as the case may be.

Refusal or neglect to furnish copy.

45 In case any party or pleader, who has been required to furnish any such copy as aforesaid, either refuses, or, for four days from the time when the application for the copy was made, neglects to furnish the same, the person by

whom the application has been made shall be at liberty to procure a certified copy from the Court, and in such case the party in default shall, unless the Judge otherwise orders, be liable for the costs of procuring the same, provided that in the application to the Court for the grant of such certified copy, the applicant makes a verified statement that the copy applied for by him under Rule 43 has not been supplied to him by the party or pleader concerned, as required by that Rule

Certified copies

Certified copies

46 Rules relating to certified copies are contained in Part III, Chapter III

Production of Records.

Production of records in the custody of a Court

47 (1) An application for the production of records in the custody of a Court shall specify the particular documents required to be produced Unless it is made to appear to the Court that the production of the original documents is necessary, the party shall be required to obtain and file copies thereof and the original shall not be sent for

Grant of Certificate.

(2) Whenever it is found that copies of records from other Courts or offices are required for purposes of evidence, the fact should be recorded and a certificate furnished to the parties to enable them to apply for the copies to the proper Court or office

Letter of request

(3) When a Court finds it necessary to require the production of the records of another Court, it shall address a letter of request as in Appendix III, Form No. 12, to the presiding Judge of that Court

Records from Palace.

48 (1) Courts shall not call for records from the Palace, except through the Dewan

Records in the custody of a public officer other than a Court

(2) A summons for the production of records in the custody of a Public officer other than a Court shall be in Appendix III, Form No 13, and shall be addressed to the Head of the department concerned or to the head of the office if he is a Gazetted Officer, and in the case of a summons to a District Registrar or a Sub-Registrar of Assurances, it shall be addressed to the Registrar or Sub Registrar in whose office or sub office, as the case may be, the required records are kept A summons for the production of revenue papers kept in any office in a District shall in all cases be directed to the Division Peishkar of the District

Provided that, where the summons is for the production of village accounts, including field measurement books, such summons shall be addressed to the Tahsildar

(3) Every application for such summons shall be made by a verified petition setting out (i) the document or documents the production of which is required, (ii) the relevancy of the document or documents, and (iii) in cases where the production of a certified copy would answer the purpose, whether application was made to the proper officer for a certified copy or copies and the result of such application

(4) No Court shall issue such a summons unless it considers the production of the original necessary or is satisfied that the application for a certified copy has been duly made and has not been granted The Court shall, in every case, record its reason in writing and shall require the applicant to deposit in Court, before the summons is issued, to abide the order of the Court, such sum as it may consider necessary to meet the estimated cost of making a copy of the document when produced

(5) On production of the document in obedience to the summons, the Court shall direct a copy of it to be made at the expense of the applicant and, unless it thinks it necessary to retain the original, shall with all convenient speed return the original retaining the copy

(6) Unless the Court requires the production of the original, every such summons to a Public officer shall state that he is at liberty to produce, instead of the original, a certified copy thereof

(7) Nothing in the above Rules shall prevent a Court of its own motion from issuing a summons for the production of public records or other documents in the custody of a Public officer, if it thinks it necessary for the ends of justice to do so. The Court shall, in every such case, record its reasons in writing.

Receipt to be given when document retained

49 If any such document is retained, a receipt containing a descriptive list of the document shall be given to the officer producing it and a duplicate of the receipt placed with the record or document Any apparent erasure or alteration in any document shall be noted in the said list which shall be countersigned both by the officer of the Court taking charge of the document and the officer producing the document.

Instructions to be observed by Courts receiving or transmitting originals

50 When an original document is received from or transmitted to other Courts or public offices, the following instructions shall be observed by the Courts receiving or transmitting the same —

(*a*) As soon as any original document is received, the officer receiving it shall carefully inspect it, and if he finds any apparent erasure, overwriting or other alteration in it, he shall

make a memorandum thereof over his signature and get it at tested by the presiding officer

(*b*) Transmission of an original document to other Courts or public offices shall be in a sealed packet with a descriptive list of the same and shall be made by Anchal or Post registered or by special messenger as the case may be

Mode of keeping originals received

51 (1) Original documents produced by Public officers or received from other Courts or public offices shall, as long as they remain in the custody of the Court which required their production, be kept in a sealed packet properly labelled and the packet shall not be opened except in the presence of the presiding Judge

Return of originals

(2) Such documents shall be returned together with a descriptive list as soon as the suit, appeal or matter is disposed of, if the case is not appealable, and in other cases after the expiration of the period limited by law for appeal (due regard being had to the time taken for giving copies), unless in the meantime notice of appeal has been received, in which case the document will be sent up to the appellate Court along with the other records of the case and shall be returned as soon as the records are received back from the Court of appeal or special appeal The provisions of Regulation III of 1057 and the Rules framed thereunder shall not apply to such a document until it has been returned to the Court or the Public officer by whom it was produced

Deposit for postage costs.

52 If a record or document is required to be sent by Anchal or Post, the Court may direct the applicant to deposit in Court a sum sufficient to defray the postage of the same to and from the Court *The amount deposited by the applicant shall directly be credited in the cash book and remitted to the Treasury as judicial revenue and the records transmitted with a note that the necessary Anchal charges have been levied The Service Anchal Stamps shall be utilised by the Court for transmission and by the other Court for re transmission In case, the records have to be re-transmitted to a Court in British India, the necessary postage stamps for transmission and return, and to a Court in Cochin, the postage stamps for re-transmission, shall be purchased from the contingency allotted to the Court.* Unless the Court otherwise orders, the costs of and incidental to an application for production of records, which are material and relevant to the case, or which are sent for by the Court of its own accord, shall be costs in the case.

Exhibits

Marking exhibits

53 Exhibits admitted in evidence shall be marked, if put in by the plaintiff or one of several plaintiffs, with capital letters of the alphabet, and if put in by the defendant or one of several defendants, with numerals. If the capital letters of the alphabet are exhausted, double capitals shall be used, such as AA to AZ, BA to BZ and so on

Note—In marking the exhibits for plaintiff, the letters 'I,' 'V,' and 'X' shall be avoided

Marking series.

54. A series of similar exhibits may be marked with the same capital letter and numerals in brackets, when put in by the plaintiff, or with the same numeral and small letters of the alphabet in brackets, when put in by the defendant.

Consecutive marking and numbering.

55 The exhibits put in by one of several plaintiffs or defendants shall be marked consecutively with those put in by the other plaintiffs or defendants (The same procedure shall be followed also in numbering the witnesses examined)

Marking in subsequent proceeding.

56 If, in a proceeding subsequent to the trial of the suit or matter, further exhibits are admitted in evidence, they shall be marked with letters or numbers consecutive to the letter or number on the last exhibit previously filed

Inspection of exhibits.

57 If any party or his pleader desires to inspect any exhibit, he shall do so in open Court, at the hearing of the suit or matter, provided that, with the leave of the Judge, such inspection may be had in the presence of an officer of the Court, to be named by the Judge.

Admission and proof of documents to be noted.

58 When the genuineness of documents tendered by one party in evidence is admitted by the other, the latter or his Vakil shall be required to note on such documents the fact of the admission At the final hearing the Judge should reject all documents neither admitted nor proved and make an endorsement on them to that effect Documents, to prove which evidence is produced, shall be treated, for the purpose of marking, as proved. The marking of exhibits being a judicial act, parties and their Vakils should not be allowed in the list of documents to assign marks to the documents produced by them. The list should only describe the documents.

Return of documents.

59 Applications for the return of documents filed in Court shall be made to the Court in which they were originally filed. If any document has been transmitted to any other

Court, the former Court shall itself apply to such Court for the re-transmission of the document and shall return it to the applicant

Return of original documents

60 *Taxed applications for return of documents are necessary only in the case of documents of which the return is demanded before disposal of suit After disposal of the suit the parties are entitled to get back without a taxed application, such of the documents as can be returned*

The following are the exceptions to the rule that all applications for return of documents before disposal of suit should be taxed —

1 Shop books or other books of account in current use filed along with the plaint and accompanied by a copy of the entry on which the plaintiff relies. The Court or any Officer as it appoints in this behalf shall forthwith mark the document for the purpose of identification and after examining and verifying the copy with the original shall if it is found correct certify it to be so and return the book to the plaintiff and cause the copy to be filed The point of time to which this applies is the filing of the suit If an account book is filed for being exhibited during the trial of the case and if a party requires its return after it is exhibited and before the disposal of the suit, the general rule of a taxed application should be insisted on

2 Any of the following group of documents admitted in evidence may be returned without a taxed application on the filing of copies of necessary entries or passages prepared at the instance of the party on whose behalf it is produced

(a) Letter books or books of account belonging to a party or a third person

(b) Documents produced by a Public Officer

(c) Documents sent for from other Courts or Public Offices

(d) Documents produced by witnesses

3 Documents rejected and documents produced but not tendered in evidence may be returned before disposal of suit without a taxed application

The following are exceptions to the rule that after disposal of suit documents should be returned without a taxed application

(1) Documents furnishing more causes of action than one

(2) Documents which though the bases of the suit have to be retained by the party as for example when a suit is brought by the mortgagee on a usufructuary mortgage on the ground that possession is withheld and a decree is given to the plaintiff and he has to retain the document as a title deed during the continuance of the mortgage

Register for return of documents.

61. Every Court shall keep a register of applications for the return of documents (Appendix III, Form No 14)

Dismissal of application for return

62. If the applicant does not appear and take back the documents within a week of the order granting his application, the application may be dismissed after putting up a notice in the Court's notice board calling upon the applicant to take back the document within a month of such notice and after the expiry of the date fixed in such notice

The first hearing of suits

Examination of defendant when no written statement filed

63 If a defendant, who has given his address for service, fails to present a written statement, he shall not on that ground alone be declared *ex parte*, so long as he puts in appearance either in person or by Vakil The Courts shall, in such cases, ascertain by oral examination, the nature of the defence, if any, and frame issues after reducing such examination to writing.

Issue paper

64. The following procedure shall ordinarily be followed by the Courts in settling issues in original suits and other proceedings of a similar nature under special enactments —The several averments of the plaintiff as disclosed by the plaint, the plaintiff's written statement, if any, and other statements, if any, made by him at the time shall be arranged and numbered by the Court on the left hand side of a paper to be headed "the issue paper " The Court shall then note on the right hand side opposite to each such averment whether the same is admitted or denied by the defendant Where the written statement of the defendant, besides admitting or denying the plaintiff's allegations, contains fresh averments material to the decision of the suit, such averments should be entered on the right hand side below the defendant's averments and the fact of the plaintiff's admission or denial noted on the left hand side These statements shall be signed by the respective parties or Vakils in token of their correctness The points upon which the parties are at issue being thus ascertained, the Court shall settle the issues in the case and enter them in continuation of the allegations recorded

Framing of issues.

65 In framing issues, the Court shall proceed as follows :—

(1) Every material proposition of fact and every proposition of law, which is affirmed by the one side and denied by the other, shall be made the subject of a separate issue

(2) Every issue of fact shall be so framed as to indicate on whom the burden of proof lies

(3) Every issue of law shall be so framed as to indicate, either by a statement of admitted or alleged facts, or by reference to the pleadings or some document mentioned therein, the precise question of law to be decided

(4) No proposition of fact which is not itself a material proposition, but is relevant only as tending to prove a material proposition, shall be made the subject of an issue

Application for directions.

66 Any party may, at the first hearing, apply to the Court for directions as to any of the following matters —

(1) The filing of a written statement by any party, stating the pleas raised by him or further and better particulars thereof,

(2) Adding or striking out parties,

(3) Discovery of documents and interrogatories,

(4) Inspection or production of any document or public record;

(5) Issue of a commission to examine witnesses, or for any other purpose,

(6) Reference to an arbitrator,

(7) Settlement by oath,

(8) Any other matter or proceeding necessary to be considered or taken previously to the trial of the suit

Unless the Court otherwise orders, not less than three days notice of such application, and of any affidavit filed in support thereof, shall be given by the applicant to the other parties to the suit

Adjournment in consequence of application for commission, etc

67 If an application for the issue of a commission to examine a witness, or with respect to any other matter mentioned in Rule 66, is made subsequently to the first hearing, and an adjournment of the further hearing is prayed, the adjournment shall not be allowed unless it is made to appear to the Court that the application could not, or ought not to, have been made at the first hearing

Nothing in this Section shall prevent the Court from granting an adjournment for reasons to be recorded by it and on such terms as to costs or otherwise, if it thinks it necessary to do so

Defendant's list of documents

68. If the Court does not call for the production of the documentary evidence of the parties, under Section 133 of the Code,* it shall direct the defendant to file in Court a list of the documents on which he intends to rely and shall fix a time for the production thereof The said list shall be in Appendix III,

* Section 133=Or. XIII, R. I (1).

Form No 8, and shall be signed and verified by the party filing the same or by his pleader

69 The list of documents produced by the parties or, at their instance, by witnesses or otherwise, shall be filed by the party concerned and shall be in Appendix III, Form No 8

Form of list

70 In every contested original suit or proceeding, the presiding officer shall maintain a record called "order-sheet," wherein he shall in chronological order make a note in his own hand of all material incidents in the course of the trial of the suit or proceeding, such as the reasons for permitting a party to begin against the provisions of Section 174 of the Code, decisions as to questions of the admissibility of evidence, all other questions incidentally raised and decided, any special directions to or undertakings by parties or Vakils regarding the further progress of the suit or proceeding, and also dates to which the suit or proceeding is adjourned from time to time

Order-sheet

Notes of argument taken at the final hearing by the presiding officer will be appended to the 'order sheet'

Interlocutory proceedings

71. (*a*) *Interlocutory applications shall be headed with the cause title of the plaint, original petition or appeal as in Appendix III, Form No 15*

Forms

(*b*) *The following interlocutory applications shall be supported by affidavits —*

(*1*) *Application for adjournment*

(*2*) *Application to implead additional parties or legal representatives of deceased parties*

(*3*) *Application to set aside a decree or order passed against a party for default or ex parte*

(*4*) *Application by a claimant or objector under Sections 275, 320, 321 or 324 of the Civil Procedure Code*

(*5*) *Application for admitting an appeal, review, revision petition or objection memorandum presented out of time*

(*6*) *Application to stay execution*

(*7*) *Application to admit fresh document or other evidence in appeal or revision:*

(*8*) *Application to the High Court for transfer of a case from one Bench to another or from one Court to another.*

(9) All applications which according to the provisions of the Civil Procedure Code have to be supported by affidavits and

(10) Generally all applications containing prayers which a Court cannot grant without certain facts being proved.

72 Except where otherwise provided by these Rules, or by any law for the time being in force, an interlocutory application shall state only the order prayed for, and shall not contain any statement of facts or argumentative matter Every application in contravention of this Rule shall be returned for amendment or rejected

To state only order prayed for

73. Unless the Court otherwise orders, notice of an interlocutory application shall be given to the other parties to the suit or matter or their pleader not less than three days before the day appointed for the hearing of the application

Notice

74. Any facts required to be proved upon an interlocutory proceeding shall, unless otherwise provided by these Rules or ordered by the Court, be proved by affidavit, but the Judge may, in any case, direct evidence to be given orally, and thereupon the evidence shall be recorded, and exhibits marked, in the same manner as in a suit, and lists of the witnesses and exhibits shall be prepared and annexed to the judgment

Evidence

Adjournments

75 All adjournments shall be to a day certain, if possible, and the day shall be fixed with regard to the convenience of the parties and the business of the Court. Upon an application for an adjournment, the Court shall consider the interest of all parties and the particular circumstances of the case. The absence of the pleader of a party, or want of preparation on his part, whether arising from insufficient instructions, or otherwise, shall not of itself be a sufficient ground for an adjournment Adjournment of cases, being a judicial act, should be made by the presiding officers themselves and not delegated to clerks

Adjournment to be to a day certain

76 No suit, appeal, matter or proceeding shall, under any circumstances whatever, be adjourned *sine die*. If by inadvertance or owing to the non sitting of the Court for a number of days, cases are left unadjourned to a day certain, notice, allowing sufficient time for the information of the parties, should be put up fixing the trial thereof to days certain.

Proceeding not to be adjourned *sine die*

77. Except where an adjournment is granted with the consent of all parties, or is necessitated by the business of the Court, or by the act or default of any other party, the party desiring an adjournment shall be ordered to pay the costs thereof, including the expenses of re-summoning the witnesses, if any, and the fee of the pleader of the other party

Costs of adjournment

78 (1) Any party, who desires that the hearing may be advanced, may apply therefor by interlocutory application, of which notice shall be given to the other party

Advancement of hearing

(2) The party served with notice may give to the other party or his pleader notice in writing that he consents to, or will oppose, such advancement

Notice of consent

79 When a case is adjourned by a Court otherwise than on the application of any party, the Court, on its own motion, must issue processes to the witnesses present in Court and serve them free of cost if the party concerned deposits the necessary mileage and subsistence money In such cases no fresh application for issue of second summonses to the witnesses present in Court is necessary

Service of processes on witnesses present

80 A party wishing to examine witnesses shall file a list of such witnesses stating the full name, residence and description of each witness and whether he is to give evidence as an expert or otherwise or to produce any document and, in the latter case, specifying the date, if any, and description of the document so as to identify it (Appendix III, Form No. 16)

List of witnesses.

Summonses to witnesses

81. Parties wishing to secure the attendance of witnesses through Court shall apply for the issue of processes to them and shall, along with such application, deposit in Court the prescribed fees for service of the processes and the total amount of the allowances to which the said witnesses are entitled as mileage and subsistence money and, in the case of an expert or scientific witness, for qualifying to give evidence If the Court grants the application, the processes shall issue, provided that, in respect of first applications for summonses, the head ministerial officer may ordinarily direct their issue without obtaining orders from Court

Application for summonses to witnesses.

81-A. *Mahomedan parties and witnesses shall as far as possible not be required to attend Court on Fridays.*

82 If the list is not filed or the application made, not less than 10 days before the date fixed for trial, processes shall not issue, unless the Court otherwise orders

Time for filing list or application

Deposit of subsistence money and mileage

83 (1) Parties applying for summonses to witnesses shall deposit in Court the sums required for their travelling and other expenses according to the following scale —

Class	Subsistence money per diem	Mileage by road or canal	Railway fare.
First Class	10½ Fanams	8. Chs per mile	First Class
Second Class.	5¼ „	4 Chs „	Second Class
Third Class	3½ „	2 Chs „	Third Class

(2) When the whole or part of the journey could be made by railway, only railway fares will ordinarily be allowed for such distance

(3) When a witness resides within a radius of one mile from the Court house, he shall be entitled only to subsistence money and not to mileage When he resides outside this radius, he shall be given mileage for the distance travelled to and from the Court house and also subsistence money for every day of his attendance in Court

(4) In the case of expert or scientific witnesses the fees shall be not less than Rs 5 or not more than Rs 25 as the Court may fix for qualifying to give evidence and not less than Rs 2 or not more than Rs 7 *per diem* as the Court may fix as subsistence money, in addition to the mileage prescribed for ordinary witnesses of his class

Fees for expert witnesses.

(5) The Judge before whom the witness is required to appear will, in cases of dispute, fix the class, with due regard to the witness's station in life

Forms of summonses to witnesses.

84. Appendix II, Forms Nos 9, 10, and 11 will be used for summoning witnesses

Form of proclamation.

85. Appendix II, Form No 12 will be used for issuing proclamation for the attendance of witnesses.

Service of processes on public servants.

86. All processes to public servants as witnesses shall be served either through their official superiors or after obtaining their counter-signature to the processes The same procedure may be followed in issuing processes to them otherwise than as witnesses.

Note—Processes are, as a general rule, to be served by the Court process-servers Process-servers entrusted with the service of processes on Government servants shall take them to the official superior of the addressees or, during his absence from his head quarters, to his deputy, if any, and after obtaining the counter signature of such officer or his deputy, in token of permission to the addressees to absent themselves from duty for the purpose of complying with the requisition of the Court, serve the processes themselves on the addressees and return them to the Court, unless the officer, to whom the processes are taken for counter signature, thinks fit to serve them himself In the latter case, the process servers may leave the processes with him for service and obtain from the officer concerned an acknowledgment in writing of the delivery of the processes to him The officer concerned will, after serving the processes, return the originals to the Court to which the process server is attached The counter-signature above referred to shall be sufficient authority for the addressees to accept service of the processes and absent themselves from duty to comply with the requisition made by the Courts, without formal orders from their superiors

Certificate of attendance

87 Whenever public servants appear before a Court in obedience to processes issued, they shall be furnished with a certificate under the hand of the presiding officer of the Court specifying the dates of their attendance and relief and, in the case of those attached to the military service, also with the hours thereof

Affidavits.

Before whom may be sworn.

88 *Affidavits intended for use in judicial proceedings may be sworn before any Court or Magistrate or a Judge of a Village Panchayat Court or any of the following Officers — The Registrar, the Deputy Registrar and the Manager of the High Court, Sheristadars of the District Courts, Head Clerks of the District and Munsiffs' Courts, District Registrars, Sub-Registrars, Tahsildars, and Proverthicars, or Members of the Travancore Legislative Council, or Members of the Sri Mulam Popular Assembly or Presidents and Members of Municipal Councils or persons residing in Travancore upon whom a title has been conferred by the British Government or retired Officers of Government drawing a pension of not less than Rs 50 per mensem*

Identification of declarant.

89 Every person making an affidavit, if not personally known to the officer or person before whom the affidavit is taken, shall be identified by some person known to the officer or person, and the officer or person shall specify

at the foot of the affidavit the name and description of him by whom the identification was made

Filing.

90. Before any affidavit is used it shall be filed in Court, but the Judge may, with the consent of both parties, or in case of urgency, allow any affidavit to be presented to the Court and read on the hearing of an application

Notice of filing.

91 The party filing an affidavit intended to be read in support of an application shall give not less than two days' notice thereof to the other parties, who shall be entitled to inspect and obtain copies of the same, and to file counter affidavits, and shall give notice thereof to the applicant, who may inspect and obtain copies of the same, and file affidavits in reply, but, except with the leave of the Court, no further affidavit shall be filed or read If any party fails to give notice of filing an affidavit, the Court may grant an adjournment of the hearing, and order the party in default to pay the costs thereof

Form

92. Every affidavit shall be drawn up in the first person and divided into paragraphs numbered consecutively, and each paragraph, as nearly as may be, shall be confined to a distinct portion of the subject

Name, age, &c., of deponent

93. Every affidavit shall state the full name, age, description and place of abode of the deponent and shall be signed or marked by him. Except in the case of a European or Eurasian, the description shall include the father's or Karanavan's (husband's or mother's) name as the case may be, and the religion or caste of the deponent.

Alterations and interlineations.

94. Alterations and interlineations shall, before an affidavit is sworn or affirmed, be authenticated by the initials of the officer before whom the affidavit is taken, and no affidavit having therein any alteration or interlineation not so authenticated, or any erasure, shall, except with the leave of the Court, be filed or made use of in any matter

Statement of officer before whom affidavit sworn.

95 The officer, before whom an affidavit is taken, shall state the date on which, and the place where, the same is taken and sign his name and description at the end, as in Appendix II, Form No 13, otherwise the same shall not be filed or read in any matter without the leave of the Court

Blind or illiterate deponent

96. When an affidavit is sworn or affirmed by any person who appears to the officer taking the affidavit to be illiterate, blind, or unacquainted with the language in which the affidavit is written, the officer shall certify that the

affidavit was read, translated or explained in his presence to the deponent, that the deponent seemed to understand it and made his signature or mark in the presence of the officer as noted in the form, otherwise the affidavit shall not be used in evidence

97 Every affidavit shall bear an endorsement stating on whose behalf it is filed

Endorsement

98. Every affidavit stating any matter of opinion shall show the qualification of the deponent to express such opinion, by reference to the length of experience, acquaintance with the person or matter as to which the opinion is expressed, or other means of knowledge of the deponent.

Matter of opinion

99 Every affidavit containing statements made on the information or belief of the deponent shall state the source or ground of the information or belief

Information and belief

100 Documents referred to by affidavit shall be referred to as exhibits and shall be marked in the same manner as exhibits admitted by the Court, and shall bear the certificate noted in the form aforesaid, which shall be signed by the officer before whom the affidavit is taken

Documents referred to

101 The Court may at any time direct that any person shall attend to be cross-examined on his affidavit

Cross-examination

Oath and affirmation

102 (1) Witnesses shall, as a rule, be sworn on religious books preliminary to giving evidence Christian witnesses should swear on the Bible, Hindus on the Ramayana or any other religious book which people of the witnesses' class and persuasion hold sacred, Mahomedans on the Koran, and witnesses of other creed or persuasion on their sacred books

Swearing to be on religious books.

(2) The following shall be the form of oath to be administered to witnesses of all creeds —

Form of oath to be administered

"The evidence which you shall give touching the matter now before the Court shall be the truth, the whole truth and nothing but the truth So help you God"

(3) When oath is administered to a witness, he shall be required to take his religious book in his hand and to repeat the words "I swear upon the I hold in my hand that the evidence which I shall give touching the matter now before the Court shall be the truth, the whole truth and nothing but the truth So help me God"

Form of oath to be taken.

(4) Witnesses, who have religious scruples to making an oath, may be solemnly affirmed

Solemn affirmation

(5) The following shall be the form of solemn affirmation —

Form of solemn affirmation

"I solemnly affirm in the presence of Almighty God that what I shall state shall be the truth, the whole truth and nothing but the truth"

(6) If a witness objects to making a solemn affirmation or is a child, the following affirmation shall be made by him —

Form of affirmation

"I affirm that what I shall state shall be the truth, the whole truth and nothing but the truth"

(7) If any party to, or witnesses in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency and not purporting to affect any third person, the Court may, if it thinks fit, tender such oath or affirmation to him

Form of oath in special cases.

103 If a witness professing the Mahomedan religion, who is to be sworn on the Koran previous to giving his evidence, desires to be sworn after performing the usual ablutions, he may be allowed to do so, whenever practicable Where there is a Mahomedan employee attached to the Court in whatsoever capacity, the Koran shall be handed over, and the oath administered, by that employee to the Mahomedan witness In the absence of such an employee, the Koran which should be kept on the Bench-clerk's table may be taken and opened by the Mahomedan witness himself If there is no other Mahomedan present in Court who can read the form of oath prescribed and administer the same to the witness, the Bench-clerk may read the form, a sheet containing the form in Malayalam and Tamil being always left on the Bench clerk's table The copy of the Koran supplied to the Courts for swearing Mahomedan witnesses on shall be kept covered in a clean cloth case specially made for the purpose

Mahomedan witnesses.

104. Forms Nos 1, 2 and 3 of Appendix III, Form No 17, shall be used in cases where an interpreter, other than an official interpreter of the Courts, is employed.

Forms.

105. In the heading of all depositions of witnesses and statements, should be given the full name of the deponent, his or her family name or Tarwad name, his or her father's or mother's or uncle's name or her husband's name (if the party be a married Makkathayee woman), the religion, caste, if any,

Heading of depositions.

profession, age and the village or Proverthy in which the deponent resides The heading shall also state the name and the occupation of the person by whom the witness was sworn

Signing of depositions

106 All witnesses who are able to write their names should be required to add, in their own hand, their names to the "Oppu" (mark or signature) if any which they affix to their depositions When the witness is unable to write his name, the Bench clerk or other officer obtaining his signature shall himself enter the full name of the witness.

Original Petitions

Original petitions

107 Original petitions shall be heard and determined in the same manner as original suits

Judgments, decrees and orders.

Form of judgment

108. Every judgment shall be headed with the full cause title of the suit, appeal or matter, the name of the Judge, the day of the week and the date on which it was passed (the Malabar date, month and year and the corresponding English date, month and year being shown), and shall give the names of the parties, or their pleaders, who appeared at the hearing It shall be drawn up in consecutively numbered paragraphs and shall further state the date or dates on which the case was heard (Appendix II, Forms Nos 14 and 59) A list of the exhibits filed and witnesses examined shall also be annexed thereto, the nature of the exhibits, the parties thereto, and the dates thereof, being specified in each instance with brevity

Explanation.—In the case of original suits, original petitions, contested interlocutory applications, execution petitions and execution applications, the expression "the date or dates on which the case was heard" means the date or dates on which evidence was recorded and the date or dates on which final arguments were heard in respect of them

Decree

109 Every decree shall be headed with the full cause title of the suit, appeal or matter, the name of the Judge, the day of the week, and the date on which the suit, appeal or matter was filed and the date on which the decree was passed (the Malabar date, month and year and the corresponding English date, month and year being shown), and shall state the names of the parties, or their pleaders, who appeared at the hearing It shall be drawn up in consecutively numbered paragraphs (Appendix III, Forms Nos. 18 and 19) and shall bear the seal of the Court.

Decree left unsigned by Judge

110 If decrees are left unsigned by a Judge who has died, vacated the office or quitted the station after delivering judgments in open Court, such decrees may be signed for him by his successor

Original decrees

111 Original decrees should be explicit and not call for reference to any other documents

Note.—Decrees in suits for ejectment brought by Jenmis under Section 10 of the Jenmi and Kudiyan Regulation shall set out fully the several particulars enumerated in that Section and shall not be defective in any particular

Decrees in suits under the Jenmi and Kudiyan Regulation

Proportionate costs.

112 (1) When partial or proportionate costs are awarded by the decree, the total costs so awarded and the amount on which the same are calculated shall be specified in the decree

(2) Whenever proportionate costs are decreed, it is only the Court-fees paid on the plaint or appeal memorandum and the Vakil's fee that shall be apportioned The other costs shall be borne by the parties who have incurred them, unless the judgment gives distinct instructions as to the apportionment of all or any of them

Specification of periodical payments

113 Where periodical payments are directed, the decree or order shall specify the date of the first payment, and the day of each month or year on which the subsequent payments are to be made

Statement of particulars as to immovable property

114 Every decree with respect to immovable property shall give in a tabular form a description stating the particulars specified in Rule 13 with such modifications in the description, as may be brought out in the course of the trial

Interest on costs

115. In cases in which the judgment provides for the payment of costs of the litigation, the decree shall, in the absence of a provision in the judgment itself as to the rate of interest on such costs, specify that interest at the rate of six per cent per annum will be allowed thereon from the date of the decree up to the date of realization, but the total amount of such interest shall not exceed one-half of the amount of costs allowed by the decree.

Decrees for sale of hypotheca.

116. Decrees for sale of hypothecated property in default of payment shall be in Appendix III, Form No. 20.

Judgments and orders in matters other than suits.

117. The judgment and final order in matters other than suits or appeals, including contested interlocutory applications, execution petitions, and execution applications, shall be drawn up in the same manner as the judgment in a suit, and a table of costs shall be appended thereto

Setting aside *ex parte* decree where money or property recovered

118. An order, setting aside an *ex parte* decree or order, under which a party has recovered any money or property, shall ordinarily contain a direction that the same be brought into Court or possession thereof be restored to the party from whom it was recovered or be delivered to a receiver, pending the final disposal of the suit or matter

If a decree is then passed dismissing the suit or matter, it shall be drawn up in Appendix III, Form No 21

Appellate decrees to state amount of costs in original Court

119 Decrees passed by the District Courts in appeals decided by them shall also state the amount of the costs incurred by the parties thereto in the Court of first instance

Several appeals against same decree

120. If more than one appeal is made against the same decree, the appeals shall, if possible, be heard together and one decree only shall be drawn up which shall be headed with the cause titles of the several appeals

What items of costs to be excluded in preparing decrees.

121. In preparing the table of costs appended to decrees, institution fees for the refund of which provision is made in the judgment, excess fees paid by mistake, unexpended process fees and subsistence money, day's costs imposed for laches and costs of adjournment, etc, incurred for the convenience of either party and not attributable to the fault of the opposite side, should be excluded.

Expenses for copies to be included.

122. Expenses incurred by the parties in preparing copies of documents produced in Court and in procuring authenticated copies of material records connected with the case, whether from the Court itself or from any other public office, shall be included in the table of costs appended to decrees and dealt with as other costs

Statement of costs and expenses to be filed.

123. Every party shall, within a week from the date of judgment or order or such further period as may be allowed by the Court, bring into Court a statement signed by him and his pleader, if any, of the costs and expenses incurred by him and may include therein the cost of production of any public record

or copy thereof and of any adjournment or interlocutory application allowed to him The said statement shall be checked by the decree-writer of the Court, who shall note thereon the sums, if any, disallowed and the total amount allowed by him and shall sign and enter the same in the table of costs appended to the decree If any party makes default in filing the said statement, the decree-writer shall prepare the table from the records, and the parties shall be bound by the same

Consequence of default.

Withdrawal of suit or appeal

124 Notice of an application for leave to withdraw from a suit, matter, or appeal, shall be given to all parties who have appeared at the first hearing, or, if the application is made before the first hearing, then, to all parties who have filed an appointment of a pleader

Notice of application for leave to withdraw

125 Unless the Court otherwise orders, an order under Section 357 of the Code permitting a party to withdraw from a suit, matter, or appeal, shall be made conditional upon payment of the costs of the defendant or respondent (Appendix II, Form No 44)

Withdrawal conditional on payment of costs.

126. To consent to a compromise or settlement by oath, a Vakil should, in the absence of a specific authority to that effect in his original vakalat, produce a special vakalat from his client

Production of special vakalat

Commissions

127. Every application for the issue of a commission shall be supported by an affidavit setting forth the grounds upon which such application is made, and shall, when necessary, also state the particulars to be ascertained by the commissioner The opposite party may also, when he considers necessary, state in writing the facts which he requires the commissioner to ascertain

Application for commission

128 The Court shall thereupon fix the amount of the commissioner's fees, and the estimated other incidental expenses, if any, and subject to the provisions of Rule 171, direct payment thereof into Court, on a day to be fixed by the Court, and the commission shall not be issued unless the sum fixed by the Court for the purposes aforesaid is paid into Court within the period limited therefor Provided that the Court may, from time to time, on the application of any party, direct that any further sum be brought into Court by any party

Commissioner's fees to be paid into Court

129 Every order for the issue of a commission shall appoint a period within which the return of the commissioner is to be filed in Court An application by any party for the extension of the said period may be made by inter locutory application, upon notice to the other parties to the suit or matter, and shall be supported by affidavit setting forth the grounds on which the extension is prayed If the commissioner wants additional time, he should apply to the Court stating the reasons for the same and obtain an extension

Return of commission

130 When a Judge bases his decision of any fact on the results of local inspection made by him, he should place on record a note or memorandum of the facts observed by him at such inspection with a view to enable the Court of Appeal or Revision to form an opinion on the same

Local inspection by Judge

131 The processes that are to be treated as commission orders and entrusted to commissioners for execution will usually be the following —

Commission orders

(*a*) For local investigation, such as (1) measurement of area of lands and reporting on the condition, etc, of properties of all kinds, (2) taking plans, (3) valuing properties, improvements or wastages, (4) estimating pattom or mesne profits,

(*b*) For examination of witnesses out of Court,

(*c*) For taking accounts and

(*d*) For seeing oath agreements of parties carried out

132 (1) In respect of orders for oath, the fee to be levied from the parties and paid to the commissioner shall not exceed Rs 2 in a Munsifl's Court and Rs 4 in a District Court Where, however, the distance to be travelled each way exceeds two miles from the Court-house, a mileage at the rate of two annas per mile may also be levied from the parties and paid to the commissioner

Amount of commissioner s fees and mileage.

(2) In the case of orders coming under heads (*a*) to (*c*) of Rule 131, a fee not exceeding Rs. 25 in a Munsiff's Court and Rs. 50 in a District Court, with a mileage as fixed in the preceding paragraph, may be levied from the parties and paid to the commissioner If the nature of the work to be done is such that a higher remuneration is considered necessary, the special sanction of the High Court for its levy and payment shall be previously obtained

132 The payment of commission fees shall be deferred until the report is accepted by the Court which issued it. Objections to the commissioners report may be filed within a week after the receipt of the report is notified on the notice board of the Court or within such further time as the Court may grant on an interlocutory application by the party desirous of filing objections. Such objections shall be disposed of as early as practicable after hearing the parties

Objections to commissioner's report

134. When under the provisions of Chapter XXV of the Code for the examination of witnesses, who could not be compelled to appear and give evidence before a Civil Court, a commission is issued to a Judge or Munsiff presiding over another Court, a specific clause, authorizing the delegation of the execution of the commission to any of his subordinates or to any other person whom he considers competent to execute the same, should be added (Appendix II, Form 46)

Delegation in commission for examination of witnesses.

135 Commission for local investigation and to examine accounts shall be issued in Appendix II, Form No 47.

Form of commission

136 Commissioners deputed for assessing improvements and ascertaining the market value of garden lands should show in their reports the following particulars —

Commission for ascertaining improvements and market value

1 The area of the property,

2. The lie of the property, *i e.*, whether it is of uniform level or whether it slopes in any direction, whether it is terraced, etc,

3 The nature of the soil, *i e.*, whether lateritic, gravelly, sandy, or clayey, etc

4 The distance of the property from the nearest cartable road or navigable stream and the means of access from the same to the property,

5 Average distance between the different trees, the commissioner should state also whether the garden is too shady or not,

6. In the case of cocoanut trees, the height and girth, the age of the tree, and the number of *madals* or fronds of each tree, and if the tree is bearing, the number of bunches, number of nuts in each bunch, the annual yield, its value, the capitalised value of the tree, and the time when it began to bear, and the number of years for which a tree of that sort will be bearing in the locality,

7. In the case of arecanut trees, the height, girth and the number of bunches with the nuts, if any, and also the age as mentioned in paragraph 6, and the capitalised value of the tree, and

8 In the case of other trees, the height, girth and age and, if possible, the annual yield as also the cubic contents of any timber that may be had from the tree.

Wherever possible the particulars referred to in paragraphs 6, 7 and 8 above may be put in a tabular form

137. The Court may, in any suit, issue a commission to such persons as it thinks fit to translate or transliterate accounts and other documents which are not in English or in the language of the Court The report of the commissioner shall be evidence in the suit and shall form part of the record

Commission to translate accounts and other documents.

138. When commission orders have to be issued, the parties or Vakils on both sides should be requested to make their suggestion as to the person or persons whom they would like to be deputed for the work In case they do not name any individual, a statement to that effect should be taken from them. When the parties do not agree as to the persons to be deputed or when they fail to suggest any names, the Courts should exercise their discretion in selecting a suitable person or persons from among those whose names are borne on the list of commissioners

Selection of commissioner.

Minors and persons under disability

139. When a plaint or original petition is presented by a person as the next friend of a plaintiff, who is a minor or under disability, he shall at the same time file an affidavit by some disinterested person that he has no interest, direct or indirect, in the subject matter of the suit or matter, adverse to that of the plaintiff, that he is not a defendant or respondent in the suit or matter, and that he is a fit and proper person to act as next friend

Plaint or original petition on behalf of minor

140. If the plaintiff applies for the appointment of a guardian *ad litem* of a minor defendant, notice of the application shall be given to the proposed guardian, (Appendix III, Form No. 22)

Appointment of guardian *ad litem*.

141. When a guardian *ad litem* of a defendant, who is a minor or a person under disability, is appointed, and it is made to appear to the Court that the guardian is not in possession of any, or sufficient funds for the conduct of the suit on behalf of the said defendant, and that the defendant will be

Placing guardian in funds.

prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to pay, through the Court, moneys to the guardian for the purpose of his defence, and all moneys so paid shall form part of the costs of the plaintiff in the suit The order may be made conditional upon the guardian filing in Court his account of the money so received by him

Court officer as guardian *ad litem*

142 Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be the guardian, and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require

Decree for compromise.

143 (1) Where an application is made to the Court for leave to enter into an agreement or compromise on behalf of a minor or other person under disability and such minor or other person under disability is represented by pleader, the pleader shall file in Court with the application a certificate to the effect that the agreement or compromise proposed is, in his opinion, for the benefit of such minor or other person under disability

(2) A decree or order for the compromise of a suit, appeal or matter, to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto, and shall set out the terms of the compromise

Order appointing guardian necessary

144. No person shall be allowed to act as the next friend or guardian *ad litem* of a minor or other person under disability who is a party to a suit unless the Court has made an order recognizing or appointing him as such

Description of parties in suits by or against persons under disability

145. (1) In all suits brought on behalf of, or against, a minor, or other person under disability, his or her name (with full description) should appear in the pleadings and decree, as plaintiff or defendant, as the case may be. The name of the next friend or guardian should not appear as plaintiff or defendant, but an entry may be made to the following effect —

A. B. (minor), plaintiff, by his next friend C D or

E F (lunatic), defendant, by his guardian G H

(2) If the next friend or guardian happens to have some interest in the litigation *in his own right* (but not otherwise) his name and description should appear *as additional plaintiff or defendant* In such cases, the entry many be as follows —

1 A B (minor), 1st plaintiff, by his next friend C. D.

2 C D, 2nd plaintiff,

or

1 E F (lunatic), 1st defendant, by his guardian G H

2 G H, 2nd defendant

Application not to be combined with petition to implead legal representative

146 An application for the appointment of a guardian for the suit, of a minor or other person under disability, shall not be combined with an application for the bringing on record the legal representatives of a deceased plaintiff or defendant (appellant or respondent) The applications shall be by separate petitions

Legal guardian to be guardian for suit

147 Where a minor or other person under disability has a guardian appointed or declared by competent authority, no person other than the guardian so appointed or declared shall act as the next friend of such ward or be appointed his guardian for the suit, unless the Court considers, for reasons to be recorded, that it is for the ward's welfare that another person be permitted to act or be appointed, as the case may be.

CHAPTER IV

Taking accounts

Directions as to taking accounts.

148 If, in any suit or matter, it is necessary to take an account, the interim decree shall specify the nature of the account, and the date from which it is to be taken, and, if the account is to be taken by the Court, shall direct by whom a statement of account is to be filed, and limit the periods within which statements of account, objection, and surcharge, shall respectively be filed in Court, as in Appendix III, Form No 23 The suit or matter shall then be adjourned to a fixed day

Form

149 (1) A statement of account shall be in the form of a debtor and creditor account and shall be verified by the affidavit of the accounting party or his agent The items on each side of the account shall be numbered consecutively, and the balance shall be shown

(2) A statement of objection to an account, or to the report of the commissioner, shall specify the items to which objection is taken, by reference to their number in the account or report, or the date of the item and page of a particular book of account or otherwise, as in Appendix III, Form No 24.

(3) A statement of surcharge shall specify the amount with receipt of which it is sought to charge the accounting party, the date when, the person from whom, and the particular account on which, the same was received by him, as in Appendix III, Form No 24

(4) A statement of objection or surcharge shall also state shortly and concisely the grounds of the objection or surcharge, and shall also state the balance, if any, admitted or claimed to be due, as in Appendix III, Form No 24

Inspection

150 Every party to the suit or matter shall be at liberty to inspect and take notes of a statement of account, balance sheet, statement of objection and surcharge, or report or proceedings of a commissioner, when filed in Court

Determination by Court

151 On the adjourned hearing the Court shall consider the objections and surcharges made, and determine the amount due

Extension of time to file statement of account

152 If any party has not filed his statement of account or of objection and surcharge, within the period limited, the Court may from time to time extend such period or direct any other party to file a statement of account, or proceed to decide the suit forthwith on the evidence before it. Evidence shall not be admitted with respect to an objection or surcharge not included in a statement of objection or surcharge

Periodical filing

153 When a person is directed to file his accounts periodically, the Court shall fix the dates in each year before which his statement of account and balance sheet are to be filed and on which the same will be considered by the Court.

Reference to a commissioner to vouch or take accounts.

Appointment of commissioner.

154 If a commissioner is appointed, the order appointing him shall specify the several dates before which his report, and the objections of the several parties thereto, shall respectively be filed in Court, and the suit or matter shall be adjourned to a fixed day

Appointment to audit.

155. If the Court finds that the books of account have been regularly and properly kept, and correctly represent all the dealings and transactions in question, the Court may appoint a commissioner to audit the accounts and vouch the items thereof, and to prepare a statement of account and balance sheet, as in Appendix III, Form No. 25.

156 If the Court finds that any items have been included in the books of account which do not form part of the transactions in question, or are not properly chargeable to any party or that any transactions have not been included in the said books, it shall declare generally the nature of the transactions or items, to be excluded or included in taking the accounts, as in Appendix III, Form No 26, and the commissioner shall be empowered to state what, in his opinion, should be allowed or disallowed in these respects, as in Appendix III, Form No 27

Declaration by Court

157 The commissioner shall make his report in manner prescribed by Appendix III, Form No. 28, and shall annex thereto a statement of the proceedings had before him, together with lists of the witnesses examined and exhibits marked by him If he is empowered to state his opinion on the matter referred to him, he shall append to his report schedules setting out the several contested items allowed or disallowed by him, and stating shortly his reasons for so doing, as in the said form

Report of commissioner

158 At the adjourned hearing of the suit, the Court shall consider the objections, if any, of the several parties, to the statement of account and balance sheet or to the report of the commissioner, and may, if necessary, direct any party to bring in a fresh account and balance sheet, or refer the report to the commissioner, with fresh directions as to the manner of vouching or taking the accounts.

Consideration by Court

CHAPTER V

Payment into and out of Court.

Payment into Court

159 A person desirous of paying money into Court, hereinafter called the payer, shall bring into Court a lodgment schedule in Appendix III, Form No 29, headed with the cause-title of the suit, appeal or matter, and the particular account therein, if any, to which the money is to be credited, and stating the decree or order, if any, in pursuance of which the payment is made, or the reason for the payment, and the several sums and the total amount to be paid into Court. A chalan (order for lodgment and counterfoil receipt) stating the date of issue, and bearing a serial number, shall then be filled in, except as to the date of payment and the signature of the receiving officer, by the clerk concerned and issued to the payer

Lodgment schedule to be brought in.

160 The payer shall deliver the money and the order and counterfoil receipt to the treasury officer mentioned therein, who will retain the order and return the receipt, duly signed and dated, to the payer, who shall return the said receipt to the Court

Delivery to treasury officer

161 If the treasury is closed, the money may, with the leave of the Judge, be paid to the head ministerial officer of the Court and the payment shall forthwith be entered in the cash-book In such case the lodgment schedule shall be endorsed with a receipt to be signed by the Judge, and the amount shall, on the next day on which the treasury is open, be sent, together with an order and counterfoil receipt, by the head ministerial officer of the Court, to the treasury officer, who will return the said receipt to the Court

When treasury is closed

In the case of deposits by purchasers in Court auctions when the deposit is made when the treasury is closed, the payment should be made to the officer conducting the sale The payment shall be entered forthwith in the cash book and the money left for safe custody with the head ministerial officer until the next day on which the treasury is open The lodgment schedule shall be endorsed with a receipt to be signed by the Judge, and shall also be signed by the head ministerial officer in token of his having received the money A chalan (lodgment order and counterfoil receipt) shall also be issued on the same day On the next day on which the treasury is open, the officer of the Court to whom the money was originally paid shall receive it back from the head ministerial officer, and shall, in token of having done so, sign the lodgment schedule, and he shall with all convenient speed produce the money together with the order and counterfoil receipt before the treasury officer, who will return the said receipt duly signed and dated to the said officer, who shall return the said receipt to the Court. The number of the treasury receipt shall then be forthwith entered in the register of chalans (Appendix III, Form No 30) The same procedure shall apply, as far as may be, to amounts collected by amins and peons on warrants of attachment or warrants of arrest when the money is brought into Court when the treasury is closed

162 Upon the return of the said receipt to the Court under the preceding Rules a receipt signed by the Judge shall be issued to the payer

Receipt

163 Unless it appears to the Court that the personal attendance of the party is necessary, money payable in satisfaction of a decree or order may be transmitted to the Court by Anchal hundi, Postal money order, or in Government of India currency notes. In such case, the payer shall, before transmitting

Transmission of money payable in satisfaction of decree.

the money, send to the Court in a prepaid registered cover, a lodgment schedule in the Form prescribed by Rule 159, and stating the manner in which the money is to be sent

Payment out

164 If the person entitled to immediate receipt of the amount, or his duly authorised agent, is present at the Court with the payer, the money may, with the leave of the Judge, be paid at once to the person so entitled or the said agent In such case, an order for payment of the money to the person so entitled shall be passed by the Judge on the lodgment schedule and the said amount shall be disbursed to him on his executing a receipt therefor, and satisfaction *pro tanto* of the decree or order, if any, in pursuance of which the money is paid, shall be entered up A receipt signed by the Judge shall also be issued to the payer and the transaction entered in the cash-book

Payment out of Court

Payment to be made on order of Judge.

165. Except as provided by Rules 164 and 173, payment of money out of Court shall be made only upon the order of the Judge, made at the hearing of a suit, appeal, or matter, or upon an interlocutory or execution application, supported by affidavit showing how the applicant is entitled to receive payment

Order for payment

166 The order may be for payment to the applicant or his duly authorised agent, provided that payment shall not be directed to be made to the pleader of the applicant, unless his vakalat contains an express authority for this purpose, and if such payment is directed, the full name of the pleader shall be inserted in the order of the Judge

Payment schedule to be brought in.

167 A person desirous of obtaining payment of money out of Court, hereinafter called the payee, shall bring into Court a payment schedule, in Appendix III, Form No 31, headed with the cause title of the suit, appeal or matter, and the particular account, if any, to which the payment is to be debited, and stating the decree or order authorising the payment, and the several sums, and the total amount, to be paid out of Court and also a receipt for the said amount, signed by the payee If the payee is the agent of the person entitled to receive the money, he shall also file a power-of-attorney, duly stamped, authorising him to receive payment. A cheque (order for payment and counterfoil receipt) stating the date of issue, the amount to be paid, and the account to which the payment is to be debited, shall then be issued to the payee.

168 The order shall be presented for payment within the account month in which it is issued, and, if not presented within the period, shall be returned to the Court, and may then, after being re dated and initialled by the Judge, be re issued to the payee.

Presentation of order

169. On payment of the amount of the order, the payee shall sign a receipt therefor endorsed on the order

Receipt by payee.

Delivery of securities and other valuables into and out of Court.

170. The foregoing Rules shall apply to the delivery of securities, jewellery or other valuables, into and out of Court, with the following modifications —

Delivery of securities, etc, into and out of Court.

(i) Debenture bonds issued by the Government of Travancore shall be endorsed to " the Judge of the Court of " according to the instructions laid down therefor

(ii) Government of India Promissory Notes and other negotiable securities shall be endorsed to " the Judge of the Court of

(iii) When jewellery or other valuables are to be brought into Court, two copies of a descriptive list thereof shall be presented with the lodgment schedule, and shall be checked and signed by the officer of the Court in the presence of the depositor The jewellery or other valuables shall be placed in a box furnished with a lock and key, to be provided by the depositor. The box shall then be locked and sealed with the seal of the Court, and forwarded by the Court to the treasury officer together with one of the copies of the said list, and the key shall be retained by the officer of the Court The remaining copy of the said list shall be returned to the depositor, and on the return of the counterfoil receipt by the treasury officer, a receipt signed by the Judge shall be given to the depositor, in exchange for the said descriptive list

Cash deposits

171 Notwithstanding anything contained in this Chapter, moneys for any of the purposes hereunder mentioned may be paid in cash to the head ministerial or other officer of the Court authorised by the Judge —

Cases where payment may be made in cash to Court

(1) Services of summons in respect of which the fees cannot be paid in stamps,

(2) Allowances to witnesses,

(3) Commission fees,

(4) Money order commission for transmission of commissioners' fees;

(5) Judgment debtors' subsistence moneys,

(6) Tom tom charges,

(7) Charges for the conveyance of attached property and for feeding attached cattle,

(8) Postage and other charges for calling for records for reference, etc.

(9) Search fees, *and*

(10) *Printing charges*

Provided that as regards commission fees in excess of *Rs 15 in the case of the Kanjirapally Munsiff's Court and of Rs 7 in the case of the other Courts*, the procedure prescribed by Rules 159 to 169 inclusive, shall be followed

172. The person making any such deposit as aforesaid, shall present therewith a receipt, in Appendix III, Form No 32, headed with the cause title of the suit, appeal or matter, and specifying the purpose for which the deposit is made, the receipt shall be signed by the said officer and returned forthwith to the depositor

Presentation of receipt.

173. (1) The repayment of any cash, which, has not been expended for the purpose for which the same was deposited, shall be made upon the production of the said receipt, and under the immediate superintendence of the Judge who shall satisfy himself as to the identity of the person to whom such repayment is made, and of his authority to receive it

Repayment.

(2) If the applicant is unable to produce the said receipt, he shall file an affidavit accounting for its non-production

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CHAPTER VI

Sale of Property Under Order of Court

174 Subject to the provisions of Rules 240 to 242 with respect to the sale of attached property, a sale by public auction of any property, when directed in any suit or matter, shall be conducted in manner prescribed by this Chapter.

Conduct of sale under order of Court.

175 Before an order for the issue of proclamation is passed, the Court shall direct the party applying for the sale, hereinafter called "the applicant", to bring into Court an affidavit or affidavits by himself or some other person acquainted with the property, giving the particulars prescribed by Section 284 of the Code, and

Affidavits.

also stating what, in his opinion, is the best time and place of sale and method of advertising the same, the lots, if any, into which the property should be divided, and the approximate value of the property or the several lots, as the case may be

176 The Court shall determine the lots, if any, in which the property shall be sold, the manner of advertising the sale, and the probable expenses thereof, and shall fix the date and place of sale, and, after giving notice to the judgment-debtor or other party to the suit or matter whose property is to be sold and hearing his objections, if any, settle the proclamation of sale (Appendix II, Forms Nos. 30 and 31)

Matters to be determined by Court

177 The Court may, if it is made to appear by affidavit or otherwise that a more advantageous sale can be had thereby or for other sufficient reason, appoint a fit person, other than an officer of the Court or a pleader, to sell the property, and may fix as his remuneration a sum certain, or a percentage on the net sale proceeds. Such remuneration shall include all personal and travelling expenses but not the expenses of the sale

Appointment of person to sell

178. The proclamation of sale, when settled by the Judge, shall be signed by him, and an order for sale shall then be made, and the further hearing of the suit or matter shall be adjourned to a day which shall be ordinarily not more than thirty one days from the day fixed by the Court for the sale

Proclamation of sale.

179 Where any encumbrance existing on the property shall be discharged from the sale proceeds, the Court shall have power to direct the encumbrancer to produce the title deeds or duly attested copies thereof and to deliver the same to the purchaser

Production of title deeds by encumbrancer

180 The costs of the proceedings upon the settlement of the proclamation shall be paid in the first instance by the decree-holder but they shall be allowed as part of costs of execution unless the Court shall otherwise direct.

Costs of proceedings.

181. With the consent of the judgment-debtor or for sufficient reason, the Court may combine or sub-divide lots The order in which the lots shall be sold shall be determined by the Court

Combination and sub-division of lots.

182. The Court may, of its own motion, or on the application of a party to the suit or proceeding, order the publication, at the cost of the applicant, of the proclamation of sale of immovable property or an abstract thereof

Publication of proclamation of sale in newspapers

in local newspapers in cases where the value of the property to be sold exceeds Rs 1000

Auction

183 Immovable properties advertised for sale shall ordinarily be auctioned at the spot only on one day and at the Court-house for three days

Commencement and closing of auction

184 All auction sales held in the District and Munsifs' Courts shall commence at 12 45 P. M, and the sale of any lots not put up before 2 15 P M, shall be adjourned to 12 45 P M, on the next Court day

Leave to bid

185 (1) An application for leave to bid at the sale shall be supported by an affidavit setting forth any facts showing that an advantageous sale cannot otherwise be had, and an undertaking shall be given by or on behalf of the applicant that, in the event of his being declared the purchaser of the property, or of any lot or lots, he will give credit or will enter up satisfaction of the decree or order under which the sale is made, for the purchase money Provided that if there are several decree holders entitled to rateable distribution the purchase money shall be paid into Court.

(2) Notice of the application shall be given to the other parties to the suit or matter

(3) In cases in which the Court may consider that the applicant should not be allowed to bid for less than a sum to be fixed, it shall be competent to the Court to give leave to bid at the sale, only on condition that the applicant's bid shall not be less than the amount so fixed by the Court, which amount shall, as far as practicable, be determined with reference to the probable market value of the property, or of the lot or lots into which the property is divided for sale

(4) In the event of any dispute arising as to the amount bid or as to the bidder, the lot shall, at once, be again put up to auction

Conduct of sale

186 (1) The person appointed to sell the property shall conduct the sale in the manner prescribed by the Code for the sale of attached property

(2) Upon the completion of the sale, the person appointed to sell the property shall file in Court his report of the sale

Application to set aside sale.

187 In the case of any application under Section 307 A, Section 308 or Section 310 of the Code to set aside a sale, the applicant shall, if the application is under Section 307-A, or Section 308, give to the purchaser and the parties to the suit or matter, or, if the application is under Section 310, give to the

parties to the suit or matter, not less than five days' notice in writing of the application setting forth his objections to the sale or the confirmation thereof If no such notice or insufficient notice is given, the Court may adjourn the hearing, and order the person in default to pay to the other parties their costs of the adjournment or may dispose of the application forthwith If no application to set aside the sale is made, or if such application is made and disallowed, the Court shall make an order confirming the sale An application under Section 307 A of the Code may be as in Appendix III, Form No 33

Costs of sale

188 At the adjourned hearing, the Court may make an order directing the payment to the applicant of the costs and expenses of the sale, and to the person appointed to sell the property of his commission, if any, and providing for the application of the balance of the sale proceeds If, under Section 300 of the Code, a vesting order is required, the order shall also direct that the property sold shall vest in the purchaser

Payment of costs, etc, when sale set aside.

189 (1) If the sale is set aside under Section 307 A of the Code, the Court may make an order for payment by the judgment-debtor of costs and interest, if any, not covered by the proclamation of sale

(2) If the sale is set aside under Section 308 of the Code, the Court shall determine whether any and what party is responsible therefor, and may order such party to pay the costs and expenses of the sale, and may make an order that any other party entitled to have the property sold may have the conduct of the sale, and may make an order for the re-sale of the property

(3) If the sale is set aside under Section 310 of the Code, the Court may make an order for payment by the execution creditor of the costs of the sale

Certificate of sale.

190 A certificate of sale of immovable property shall specify, as part of the description of the property, the survey number, if any, and the registration district or sub district, in which the same is situate (Appendix II, Form No 37)

Default by applicant

191. If at any time it is made to appear to the Court that the applicant has failed to comply with any order of the Court, or any of the provisions of the Code or these Rules, or is not proceeding with due diligence, the Court may make such order as to the application for sale, or matter, and the costs thereof, as it thinks fit.

CHAPTER VII
Proceedings in Execution

192. The following Rules shall apply to all proceedings in execution, as well of decrees as of orders, and in this Chapter the word "decree" includes order

Rules applicable.

Application for transmission

193 (1) An application for the transmission of a decree to another Court, whether local or foreign, for execution shall be by a verified petition, headed with the cause title of the suit and the serial number of the petition for execution (execution form), if any, in the suit, and shall state, in addition to the particulars set out in clauses (*a*) to (*j*) of Section 228 of the Code, any facts relied upon by the applicant to bring the case within the terms of Section 218 of the Code It shall also specify the Court to which transmission of the decree is sought

Application for transmission of decree for execution

(2) Notice of the application shall be given to the judgment debtor in all cases in which, under Section 244 of the Code, notice of a petition for execution is required

(3) If the application is admitted the applicant shall, within seven days thereafter, produce court fee stamps to the value of seven chuckrams to cover the expenses of transmitting the same to the Court specified If the latter Court is situate in Travancore or Cochin, the said decrees may be sent by Anchal 'on Sirkar service' and in other cases by post In the latter case the charges for such transmission shall be met from office expenses under contingencies allowed to Courts The costs of returning decrees received from foreign Courts for execution in Travancore shall also be met from "office expenses" as above mentioned, no separate charges for such purpose being levied from the foreign Courts concerned

194. If, after a decree has been sent to another Court for execution, the decree holder does not, within six months from the date of the receipt of the necessary papers in that Court, apply for the execution thereof, the Court to which the decree has been sent shall certify to the Court which passed the decree the fact that no petition for execution has been filed and shall return the decree to that Court

Return of decree by Court

195 If the decree is sent to the District Court of another District in Travancore for execution by a Court subordinate thereto, such District Court shall at once transmit the papers to the subordinate Court specified and no application shall be made by the party to the said District Court. No

Transmission of papers by District Court.

charges for transmitting the decree to such subordinate Court shall be levied by the said District Court.

Execution of foreign decrees

196 Decrees passed by the Civil Courts, *including Village Panchayat Courts*, in British India and in the Native State of Cochin may be executed in Travancore as if they had been made by the Courts in Travancore *

When Courts in Travancore may execute decrees of Civil Courts in British India and in Cochin State.

197. (1) The decrees passed by the Civil Courts, *including Village Panchayat Courts*, in British India and in the Native State of Cochin may be executed in Travancore on receipt of the following papers —

(*a*) A copy of the decree,

(*b*) Certificate, as in Appendix II, Form No 15, setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtainted and what part of the decree remains unexecuted,

(*c*) A copy of any order for the execution of the decree and, if no such order has been made, a certificate to that effect

(2) If the papers received under paragraph 1 are in a language not understood in Travancore, the Court which receives such papers, may ask the Court from which they were received, to supply it with a true and correct translation of the necessary papers, either in Malayalam or English

(3) The District Judge is competent to transfer the decree, received from Cochin or British Indian Courts, to the Courts of the Munsiffs within his District, when the value of the suit as stated in the decree, does not exceed Rs 2,000 and the decree is passed by a Court inferior to that of the District Court

(4) The Courts of Travancore are required to give full effect to the terms of the decrees received from British India and Cochin, in respect of interest and mesne profits

(5) In executing decrees received from British India or the Cochin, State, the Courts will be guided by the provisions contained in the Code of Civil Procedure, (*Regulation VIII of 1100*)

Execution of Travancore decrees by British Indian Courts.

198. The Governor General in Council has been pleased to declare that the decrees of the High Court of the State of Travancore, and of the *District* Courts, the Courts of the Munsiffs, *and Village Panchayat Courts* established in

* Government Notification under Section 1 of Regulation IV of 1061 issued under sanction of His Highness the Maharaja dated 1st July 1886.

Travancore may be executed in British India as if they had been made by the Courts of British India, provided, that, when the decree sent to a Court in British India for execution is a decree of the Court of a Munsiff, *or a Village Panchayat Court*, the documents mentioned in *Order XXI Rule 5 of the* (*Order XXI Rule 6, British Indian*), Code of Civil Procedure, bear the counter-signature of the Judge of the *District* Court to which the Court of the Munsiff *or Village Panchayat Court* is subordinate. †

Transmission of decrees to British Indian Courts.

199. The following Rules shall be observed by the Civil Courts *including Village Panchayat Courts* of Travancore in sending to Courts in British India their decrees for execution —

(i) Decrees intended for execution in British India must be sent to the District Courts in British India within whose jurisdiction the judgment debtor resides or holds property, but not to the Courts of Subordinate Judges or Munsiffs although the debtor may reside or hold property within the local jurisdiction of such Subordinate Judge or Munsiff

(ii) The following papers must be sent to British Courts when decrees are transferred to them for execution .—

(*a*) A copy of the decree,

(*b*) An English translation of the decree, if in Malayalam, certified as "true translation" under the signature and the seal of the Judge of the *District* Court or through whom such decree is sent to British Courts,

(*c*) A certificate, with an English translation, duly certified as aforesaid setting forth that satisfaction of the decree has not been obtained by execution within Travancore, or where the decree has been executed in part, the extent to which satisfaction has been obtained, and what part of the decree remains unexecuted,

(*d*) A copy of any order, with an English translation, for the execution of the decree, and, if no such order has been passed, a certificate to that effect, with an English translation thereof

(iii) *District* Judges are alone competent to send decrees to District Courts for execution, whether passed by themselves, or by any other Court, either co-ordinate with or subordinate to them

(iv) Whenever *the President of a Village Panchayat Court*, a Munsiff or Second or Additional Judge of a *District* has to send a

† Notification by His Excellency the Governor-General in Council, No. 4035 dated 10th December 1885 issued under Section 434, Code of Civil Procedure, Act XIV of 1882, and Notification No. 91-1 dated the 29th January 1930

decree for execution in *British India*, he shall send the papers mentioned in paragraph (ii) to the *District* Judge who shall, subject to the provisions of paragraph (v), forward them to the *District* Court in British India in whose jurisdiction the judgment-debtor resides or holds property

(v) In the case of decrees passed by Munsiffs *or Village Panchayat Courts* and proposed to be sent to British India for execution, it shall be the duty of the *District* Judge to countersign such decrees after satisfying himself that they have been properly drawn up Should the Judge have any reason for suspecting that the decree has been obtained by any fraud or undue influence, he will, at once, report the matter for the orders of the High Court No decree of a Munsiff's Court *or Village Panchayat Court* shall be sent to British India for execution without being counter-signed by the Judge of the *District* to whom the Munsiff, *or Village Panchayat Court* who passed the decree, is subordinate.

(vi) In the certificate sent to British Courts under clause (c) of paragraph (ii), a full statement of the judgment-debt due, inclusive of interest, according to the law in force in Travancore, shall be stated so that the British Courts may have nothing to do but issue execution for the amount stated in the certificate

(vii) When a decree sent for execution in British India is silent as to the rate and maximum amount of further interest recoverable under it, the *District* Judge shall append to it, under his signature, the following note in English —

"According to the Laws of Travancore (*a*) when a decree awards future interest but does not specify the rate of interest such interest shall be calculated at 6 per cent per annum and (*b*) the maximum amount of further interest awardable on the judgment-debt should not exceed the judgment debt."

(viii) If the amount of the decree is expressed in Travancore currency its equivalent in British currency should be stated in a footnote authenticated by the *District* Judge.

(ix) In these Rules the words "*District* Judge" mean First Judge of a District where there are more than one Judge in a *District* Court; and "*District* Court" include the High Courts *in British India* in respect of decrees to be executed within the ordinary original jurisdiction of those High Courts.

200 (1) The Courts of Cochin shall execute the decrees of the Travancore Courts on receipt of the following papers :—

Execution of Travancore decrees by Cochin Courts.

"(a) A copy of the decree

"(b) A certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted

"(c) A copy of any order for the execution of the decree, and, if no such order has been made, a certificate to that effect

"(2) If the papers received under Rule (paragraph) (1) are in a language not understood in Cochin, the Court which receives such papers may ask the Court from which they were received to supply it with a true and correct translation of the necessary papers either in Malayalam or English.

"(3) The Zillah Court is competent to transfer the decrees received from Travancore Courts to the Courts of Munsiffs subordinate to it when the value of the suit as stated in the decree does not exceed Rs 1000 *The decree of a Village Panchayat Court may be executed by a Village Panchayat Court situated within the jurisdiction of the Court which directs its execution.*

"(4) In executing decrees received from Travancore the Courts will be guided by the provisions contained in the Cochin Civil Procedure Code with respect to execution of decrees

"(5) On the application of a party holding a decree a Zillah Court in this State whose duty it is to execute the same may send it for execution to a Civil Court in Travancore *Note.—In this clause the words "Civil Courts" include a Village Panchayat Court*

"(6) A Zillah Court sending a decree for execution under Rule (paragraph) (5) shall send therewith the papers mentioned in Rule (paragraph) (1)

"(7) On the application of a party holding a decree, a District Munsiff's Court *or a Village Panchayat Court* in this State, whose duty it is to execute the same, shall cause such copies and certificate as are specified in Rule (paragraph) (1) to be prepared and send them to the Zillah Court *within whose jurisdiction it is*, for transmission to the District Court in Travancore, within the limits of whose jurisdiction the decree-holder desires to have the decree executed "

201. The following Rules shall be observed by the Civil Courts *including Village Panchayat Court* in sending to the Cochin Courts their decrees for execution.

Transmission of Decrees to Cochin Courts.

"(1) On the application of a party holding a decree, the *District* Court in Travancore whose duty it is to execute the same may send it for execution to the Zillah Court in Cochin within whose jurisdiction the decree is to be executed

(2) A *District* Court sending a decree for execution under paragraph 1 shall send therewith the papers mentioned below :—

(*a*) A copy of the decree in English or Malayalam

(*b*) A certificate in English or Malayalam setting forth that satisfaction of the decree has not been obtained by execution within Travancore or, where the decree has been executed in part the extent to which satisfaction has been obtained and what part of the decree remains unexecuted.

(*c*) A copy of any order in English or Malayalam for the execution of the decree and if no such order has been passed a certificate to that effect

(3) On the application of the party holding a decree in a Munsiff's Court *or Village Panchayat Court* in Travancore, the Court, whose duty it is to execute the same shall cause such copies and certificates as are specified in paragraph (2) to be prepared and send them to the *District* Court to which it is subordinate for transmission to the Zillah Court in Cochin within the limits of whose jurisdiction the judgment debtor resides or holds property

(*4*) *When a decree sent for execution to Cochin is silent as to the rate and maximum amount of further interest recoverable under it, the District Judge shall append to it under his signature the following note in English* —

"*According to the Laws in Travancore—(a) When a decree awards future interest but does not specify the rate of interest, such interest shall be calculated at six percent per annum and (b) the maximum amount of further interest awardable on the judgment-debt should not exceed the judgment debt*"

(*5*) "*If the amount is expressed in Travancore currency, its equivalent in British currency should be stated in a foot note authenticated by the District Judge.*"

British Indian and Cochin Small Cause decrees.

202 Small Cause decrees received from the British Indian or Cochin Courts for execution should be treated as decrees in ordinary suits, the object of the transfer being not simply to obtain execution by attachment of moveable property, but also to proceed, if necessary on immovable property

Application for execution

203. (1) An application for execution of a decree shall be by petition, and, in addition to the particulars set forth in Section 228 of the Code, shall be headed with the cause title of the suit and separately numbered in each suit

Application for execution

(2) The petition shall, if it relates to any property of the judgment debtor, pray for the realisation thereof, in the manner appropriate to the nature of the property, as in Appendix III, Form No. 34, and shall also set out the whole of the relief which the applicant requires at the time of presenting the same The Court shall not grant any relief not claimed by the execution petition

204 The judgment creditor shall, together with the first petition for execution or transmission of a decree, file in Court a certified copy of the decree sought to be executed, and shall not be required, upon any subsequent application, to file a further copy of the same decree unless the copy already filed has been sent to another Court under Section 219 of the Code and has not been returned and application is made to the Court which passed the decree for concurrent execution The production of a certified copy of the decree may not, however, in the discretion of the execution Court, be insisted on in cases of applications for immediate execution under Section 252 of the Code

Certified copy of decree to be filed

205. Applications for execution of decrees presented to the Courts shall set out fully the nature of the several steps which the decree-holder desires to be taken against the person of the judgment debtor or his representative and their property, for obtaining the relief or reliefs which the decree has granted him The Court shall, on receipt of a proper petition, issue one after another or simultaneously as the circumstances of the case demand, all such processes, as the nature of the assistance sought for requires, without waiting for or demanding a fresh application, and no petition presented under Section 228 of the Code shall be treated as disposed of until and unless all the steps, which the nature of the assistance sought for in the last column requires, are exhausted, or the petition is dismissed for default or otherwise The Court shall, when disposing of the petition, pass such order as to costs as it thinks fit

Execution petition to set out in full steps prayed for

206. A petition not complying with the provisions of the Code or these Rules or not claiming any substantial relief shall be returned for amendment or rejected.

Non-compliance with Rules.

207. Upon the hearing of the petition, the Court shall ascertain whether the provisions of the Code and these Rules have been complied with, and shall determine whether notice thereof is to be served on any person If the petition is admitted, the Court shall pass the appropriate order and the applicant shall, within three days or such other period as may be fixed by the Judge, bring into Court the fees prescribed for issue of process, and, if the application is for arrest of the debtor, the subsistence moneys fixed by the Judge under Section 329 of the Code In cases of default, the Court may dismiss the petition and shall pass such order as to costs as it thinks fit.

Procedure on and after hearing of petition

Note—Where there is an application for execution of a decree against the Sirkar, the Court to which such application is made shall ordinarily issue a notice to Government through the Sirkar Vakil demanding payment of the money or other satisfaction of the decree within a reasonable time, such time being fixed with due regard to the circumstances of each particular case and so as to allow sufficient time for the necessary communication with and for the issue of instructions by Government If, after the time fixed in the notice, the decree remains unsatisfied, the Court shall report the matter to the High Court.

208 When a warrant for the delivery of possession of immovable property under Sections 260, 261, 313 or 316 of the Code is entrusted to an amin on the application of the decree-holder or auction-purchaser, a notice specifying the date on which the delivery will be made by the amin at the locality shall be given by the Court, at the expense of the applicant, to the judgment debtor or other person in possession of the property and served as far as practicable upon him in person or on any adult male member of his family residing with him The expense of the service of such notice shall be included in the costs of execution

Notice of date of delivery

209. Parties, when applying for delivery of possession of paddy lands which happen to be at the time under cultivation, shall deposit in Court the cost of seed and labour Such cost of seed and labour shall ordinarily be taken to be two parahs of paddy per one parah of land As regards the cost of ploughing alone, each Court may fix its own scale Notice of such deposit should be given to the opposite party and all objections regarding the same shall be fully considered and settled by the Court, before the issue of warrants for delivery of possession

Deposit of cost of seed and labour

210. When an amin, to whom a warrant is entrusted for delivery of possession of a house or other building, finds that the occupants have left the building locked up, he shall at once report the matter to the Court that issued the warrant. The Court will then issue a notice calling upon the person who has locked up the building to open it and remove his property therefrom, if any, within a time to be fixed in the notice The notice shall be served on such person personally or, if personal service is not possible, by affixing a copy of the notice in some conspicuous part of the building If such person does not comply with the requisition in the notice within the time fixed and the person to be put in possession of the building offers to deposit the expenses of removing and taking care of the moveable property and live stock that may be found in the building, the Court may direct the amin to remove the lock, enter the building, prepare an inventory of the things and live stock, if any, found in the building, in the presence of two respectable *thadasters*, and take possession of and hold them subject to the further orders of the Court The Rules relating to live stock and perishable articles attached in execution of decrees, shall apply to property of similar nature taken possession of under this Rule If the owner of the property does not claim it within three months and pay into Court all the expenses incurred in its carriage, storage and maintenance, etc, it shall be sold in public auction, and the sale proceeds *minus* the expenses incurred as above, held in deposit for the benefit of the owner The expenses, when recovered, shall be paid to the person who deposited the costs

Delivery of possession of house or other building locked up

211. Where resistance is offered by parties claiming a title to possession of the property, the amin should not deliver possession but should report the matter to the Court for orders.

Amin to report to Court when resistance offered

212 (1) Every person applying to the Court to attach moveable property (other than cash, Government or other securities, jewels or other valuable articles of small bulk, which may conveniently be taken manual possession of by the amins) shall, in addition to the process fee fixed by the Rules, deposit such reasonable sum as the head ministerial officer of each Court may, subject to the control of the presiding Judge, fix for the costs of its removal to the Court-house and of its custody, and if such property is live-stock, for its maintenance for not less than fifteen days, calculated with reference to the rates fixed under paragraph (4). If such deposit, when ordered, be not made within a reasonable time not exceeding five days, to be fixed by the Court, the attchment shall not issue. Provided that, it shall be competent for the Court to order the execution

Cost of removal of attached moveables and maintenance of live-stock

of any warrant of attachment, without the previous deposit of the expenses mentioned in this Rule, on the judgment-creditor or his Vakil undertaking to pay the necessary expenses to the attaching officer, on the attachment of the property, and also to authorise the attaching officer in such cases to release the property attached if the expenses be not paid when required Whenever the attaching officer, under the authority specially conferred upon him under this proviso, releases the property on default of payment of the expenses, he shall produce a statement signed either (*a*) by the judgment-creditor, (*b*) in his absence, by his authorised agent, or (*c*) in cases where the creditor and his agent are either absent, or being present, refuse to sign the statement, by two respectable neighbours and, if possible, by the Proverthicaren or some other Government servant who may be found on the spot, setting forth the circumstances that led to the release of the property

Note.—'Costs of custody' includes, in the case of machinery, costs necessary for its preservation in good condition.

(2) The Court may, at any time during the pendency of an attachment, direct the decree-holder to pay into Court, within a time to be prescribed, such additional sum as may be necessary to provide for the cost of the removal of the property from one place to another for safe custody and of the maintenance of live-stock.

Delivery of attached moveables other than cash, &c., to Nazir for safe custody.

(3) All attached property except cash, jewellery, Government securities, currency notes, etc, falling within paragraph (5) brought to the Court-house, shall be delivered to the Nazir of the Court, who shall as far as practicable secure them in the property room and shall be responsible for such property, until the same is disposed of by order of Court No attached moveable shall be kept by the attaching amin or, except as provided for in Rule 213 (1), be entrusted by him to third parties without the express premission of the Court, and such permission shall be given only in exceptional cases where the attached moveables happen to be articles which cannot be easily removed to the Court house

Rates of maintenance for live-stock

(4) A table of rates of maintenance to be charged in the several seasons of the year for every description of live-stock shall be prepared by each Court at the beginning of the year and posted on the notice board of the Court, In the case of Munsifs, such rates shall be subject to the confirmation of the presiding Judge of the District Court to whom a copy of such table is to be submitted and who may, from time to time, alter the rates on sufficient cause being shown.

(5) If the property attached consists of cash, jewels, Government or other securities, or other valuable articles of small bulk which may conveniently be kept in Court, the amin shall, without unnecessary delay, bring the same into Court, deliver the same to the head ministerial officer and obtain a receipt from the latter in acknowledgment of such delivery

Custody of attached cash, jewels, &c

213. (1) Whenever it appears that the removal of the attached moveable property into the Court-house would be attended with risk and expense out of all proportion to its estimated value or is otherwise inconvenient, the amin may leave it in the village or place where it has been attached, in the charge of any respectable inhabitant, who enters into a bond, with one or more sufficient sureties, for its production when called for, or in the charge of a peon, if a suitable place for its safe custody be found, and proper arrangements for its up keep and maintenance (if it consists of live-stock) be made by the parties and if the decree holder pays in advance the peon's batta at the rate of seven chuckrams per diem Whenever attached property is kept in the village or place where it is attached, or whenever it is not taken to the Court but left in the charge of third parties, the attaching officer shall forthwith report with full particulars the fact to the Court and forward an accurate list of the property seized and the security bond, if any, and the Court shall pass such order thereon as it thinks fit.

Procedure when removal of attached property to the Court-house inconvenient.

(2) The Court may also direct that any property attached, which cannot conveniently be stored or kept in the Court house, be left in the charge of a suitable person able and willing to furnish sufficient security for its production when called for

(3) If the property attached consists of live stock, the amin may leave them, while under attachment, in the custody of the judgment debtor, or of any person claiming to be interested therein, provided such debtor or person undertakes to feed and maintain them properly without any extra expense and enters into a bond with two or more sureties for their production when called for and for their safe custody and maintenance If the judgment-debtor or other person fails to act up to his engagement, the Court shall order the Nazir or other officer of Court to take possession of and manage such live stock in the same manner as if it had been entrusted to his care on its attachment In the case of milch-cows, they may be entrusted to the care of a receiver who will duly account for the profits derivable by the sale of the milk and furnish proper security therefor.

Custody of attached live-stock

214. If owing to any default of the decree holder or other person at whose instance moveable property is attached, it is not found possible to bring it to sale within such time as the Court considers reasonable, the Court may at once withdraw the attachment and direct the return of the property to the party from whom it was originally seized and charge the defaulting decree-holder with the cost of attachment, etc, including the fee leviable on the process for releasing the property from attachment and on the notice hereinafter mentioned. The Court shall give notice to the party from whom the property was taken in attachment, calling upon him, within the time fixed, to pay any amount that may be due to the Court in respect of the custody and up keep and release of such property and on account of the notice, and receive possession of the property On his default to appear and pay the expenses, fees, etc, and receive the property, it shall be lawful for the Court to sell the property, deduct out of the sale proceeds the amount due to the Court for fees, etc., and hold the balance in deposit for the benefit of the judgment-debtor The judgment-debtor shall be entitled to set off the amount paid to, or collected by, the Court under this Rule against any amount that may be due to the judgment-creditor under the decree, or recover such balance of the amount paid by him, or collected by the sale of the property, as may be in excess of the judgment-debt in the manner provided by law.

Withdrawal of attachment

215. (1) The Court may direct that any sums, properly expended by the attaching amin with the sanction of the Court for the up keep and maintenance of attached moveables and which have not been duly deposited, be recovered from the proceeds of the property, if sold, or be paid by the persons, declared entitled to delivery, before receiving the same.

Recovery of expenses of maintenance.

(2) The Court may further order that any sums deposited, paid or collected under these Rules be recovered as costs of execution from any party to the proceedings

216 The warrant of attachment is a sufficient authority to the amin to break open the door of any room in which he believes the property to be attached is concealed or secured. But he should never break open the room except in the presence of respectable *thadasters*

Breaking open door of room where property to be attached is believed to be concealed

He must also prepare an accurate inventory of all articles found in the room and obtain the attestation of *thadasters* thereto.

Inventory.

217. In the case of an application for the attachment, proclamation and sale of any property, the order for proclamation shall appoint a day for the sale of the attached property, which shall be ordinarily not more than six weeks from the date of the order and shall adjourn the hearing of the petition accordingly

Order to appoint day for sale

218 If any question arises for the determination of the Court executing a decree, the same shall be heard and determined upon the hearing of the petition, or an application made therein, and, if evidence is taken orally, the Court shall record the evidence of the witnesses, and mark all exhibits admitted in evidence, in accordance with Sections 176 and 180 of the Code The Court shall, in any case, record its judgment and draw up its order, in the same manner as upon the hearing of a suit

Determination of questions arising in execution of decree

Joint decree holders.

219 When an application is made by one or more of several joint decree holders, unless a written authority, signed by the other decree-holders, for the applicant to execute the decree and to receive the money or property recovered, is filed in Court, the Court shall give notice of the order, if any, passed for the execution of the decree, to all the decree holders who have not joined in the application, and may also in its discretion give notice of any application for payment out of Court or delivery to the applicant, of any money or property recovered in execution

Joint decree-holders.

Payment and satisfaction

220. Except when payment is made to the decree holder under Rule 164 all moneys recovered by an officer of the Court, or received by an auctioneer, shall be paid into Court in manner prescribed by Chapter V, and notice of the payment shall be posted on a notice-board of the Court and a certificate thereof shall be endorsed on the lodgment schedule

Payment into Court

221. Except when payment is made to the decree holder under Rule 164 a person paying money or bringing property into Court in satisfaction of a decree shall, when doing so, deposit in Court the process fees necessary for giving notice of such payment or deposit to the judgment-creditor

Payment into Court in satisfaction

222. An application under Section 254 or Section 255 of the Code shall be by petition, or if an execution petition is then pending, by an application at the hearing thereof or an execution application made in the said petition. If all parties are present in Court at the hearing of the petition or application, the Court may examine them

Application for sanction to give time to judgment-debtor or certify payment or adjustment.

as to the terms of the agreement and the consideration therefor, and in such cases shall record their evidence in writing, if any of the parties do not appear and the case falls within Section 254 of the Code, the applicant shall file in Court a written agreement signed by the parties, and the execution thereof shall be proved orally, or by affidavit If the agreement is sanctioned by the Court, an order shall be drawn up stating the terms thereof in Appendix III, Form No. 35.

Execution of documents by the Judge.

223. The procedure prescribed by Section 258 of the Code shall apply to all documents whereof the execution by any party has been directed by the Court

Procedure in case of execution of documents by Court.

224 The decree-holder shall, together with the draft mentioned in Section 258 of the Code, bring into Court a duplicate thereof and two copies of a notice, in Appendix II, Form No 18, and the prescribed Court-fee stamps for service thereof One of the said copies shall be annexed to the draft, and shall be served on the person directed to execute the document in manner prescribed for service of summons on a defendant to a suit.

Procedure in case of execution of documents by Courts

225. In the case of a deed, the concluding portion shall be in Appendix III, Form No 36 and in the case of a negotiable instrument, the endorsement shall be in Appendix III, Form No 37, and the Judge shall sign the name of the party directed to execute the document, and his own name, as in the said forms, and shall affix the seal of his Court thereto

Form of deed and of endorsement of negotiable instrument

Execution applications

226. At the hearing or any adjourned hearing of an execution petition the judgment creditor may apply orally for any relief prayed for by the petition, and any other party may, upon giving three days' notice in writing to the opposite party, make any application with respect thereto

Oral application for relief.

227. If it is necessary to make an application in connection with a pending execution petition otherwise than at the hearing or any adjourned hearing thereof the application shall be headed with the cause-title of the suit, and the serial number of the execution petition

Application in pending petition.

228. Rules 71, 72, 73 and 218 shall apply to all applications by a party to the suit or matter made in or with respect to a pending execution petition.

Application of Rules.

Attachment of property in Court or in the custody of a public officer.

229 If the property sought to be attached is deposited in, or is in the custody of, the Court to which the execution petition is presented, and stands to the credit of a suit or matter other than the suit or matter in which the petition is presented, and an order for attachment is made, the decree holder shall, during the continuance of the attachment, present to the Court an application entitled in the suit or matter to the credit of which the property stands, and praying, if the property is money, that a sufficient part of the amount due to the judgment-debtor may be paid to the credit of the suit in which the order of attachment was made, or in the case of property other than money, that a sufficient part thereof may be realized, and the amount due to the judgment-debtor may be paid as aforesaid The Court shall then proceed as if the decree-holder was an assignee of the judgment-debtor to the extent of the amount due to the former, provided that notice under Section 225 of the Code shall not be issued to any party, unless the Court thinks fit

Attachment of property in Court

230 Where the property sought to be attached is deposited in, or is in the custody of, a Court other than the Court executing the decree, the execution petition shall ask that, after attachment, the decree may be transmitted to the former Court for execution, and if an order for attachment is made the decree shall be transmitted accordingly The decree-holder shall then apply to the former Court as in Rule 229 mentioned, if such application is not made during the continuance of the attachment, or if the same is refused, the Court shall retransmit the decree to the Court which passed it, with a certificate stating whether any and what proceedings have been taken in the former Court

Attachment of property in Court other than the Court executing decree

231 If the property sought to be attached is in the custody of a public officer, the execution petition shall ask that the property may be brought into Court and realized, and the notice of attachment shall request that the money or property may be brought into Court, or that such officer will state whether he has any and what objection to so doing If any objection is raised by such officer, notice may be issued, in manner provided by Chapter XXVII of the Code for issue of summons, for the determination of such objection

Attachment of property in custody of public officer

Attachment of decrees

232 An application for the attachment of a decree shall also pray that the applicant may be at liberty to apply for execution thereof. If an order of attachment is made, it may be as in Appendix II, Form No. 25 or 26 and the application

Attachment of decree

shall be adjourned to a fixed day for the applicant to apply to the Court, or if the decree of another Court is attached, to that Court, for execution of the attached decree; and notice may, if the Court thinks fit, be given to the holder of the decree The application shall be made by execution petition entitled in the suit or matter in which the attached decree was made, and shall be accompanied by certified copies of the order of attachment, and of the decree sought to be executed Provided that, if the attached decree is the decree of another Court other than a decree for money, the applicant shall also pray for the transmission of the decree sought to be executed to that Court, and the Court may transmit the same accordingly, together with a notice, in Appendix III, Form No. 38. The applicant may then apply to the former Court by execution petition entitled in the suit or matter in which the attached decree was made, for execution of its decree

Decree not to be sold.

233 No decree shall be ordered to be sold in execution of another decree.

Attachment of decree by several decree-holders.

234. If a decree is attached by more than one decree holder, liberty to execute the same shall be given to the decree-holder whose attachment is first in date, and the Court shall direct any money or property recovered by the said decree-holder to be brought into Court for rateable distribution. Provided that, if the decree holder, to whom liberty is given as aforesaid, does not show due diligence in executing the attached decree, or for any other sufficient reason, the Court may give to any other decree holder liberty to execute the attached decree in place of the former decree holder

Claims to attached property

Claim to attached property

235. An application by a claimant or objector, under Sections 275, 320, 321 or 324 of the Code shall be made by a verified petition entitled in the execution petition under which the property in question has been attached and shall set forth the particulars of the claim in the manner prescribed for the plaint in a suit as in Appendix III, Form No 39

Procedure when application presented

236. The claimant or objector shall along with the petition bring into Court the prescribed fee for service of notice on the attaching creditor and the judgment-debtor and the same shall be served in manner prescribed for service of summons on a defendant to a suit, and if the claim or objection relates to immovable property, he shall also bring into Court the necessary registration fees.

Hearing of application.

237. At the hearing of the application, the Court shall record the evidence and mark all exhibits admitted in evidence, and shall draw up its order thereon

Realization of attached debts

238 Unless it is made to appear to the Court that, from the smallness of the amount of the debt attached, or otherwise, the appointment of a receiver to collect, the same would be worthless or vexatious, no debt or right to any periodical payment shall be realised by sale

Realization of attached debts

239. If a receiver is appointed, he shall be empowered to sue in the name of the judgment debtor, and to grant receipts for any moneys or property recovered by him

Receiver's powers

Sale of attached property.

240. (1) The applicant for sale shall, within seven days after the receipt of the report of attachment or along with his application for issue of proclamation, file in Court an affidavit or affidavits as prescribed by Rule 175 which shall also state the interest of the judgment debtor in the attached property, and whether any person other than the judgment-debtor has any, and what, interest therein.

Applicant to file affidavit

(2) The applicant for sale shall, with the said affidavit, also bring into Court the estimated expenses of the sale and the prescribed fees for the proclamation and warrant of sale

(3) Notice of an application by the judgment-creditor for leave to bid shall be given to the judgment-debtor

241. If the provisions of the Code and these Rules have been complied with, and the proclamation of sale is approved by the Judge, an order for sale shall be made and a warrant of sale shall issue. In case of default, the Court may adjourn the application to a fixed day or may dismiss the execution petition

Order for sale

242 Whenever guns or other arms, in respect of which licenses have to be taken by purchasers under the Travancore Arms Regulation (V of 1084), are sold by public auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the District of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers, of such arms so that proper steps may be taken by the Police to enforce the requirements of the said Regulation.

Sale of guns or other arms in Court auction.

243. (1) When decrees have been passed by Civil Courts affecting boundaries demarcated by the Survey Department, the Courts shall themselves execute their decrees, and when the decree alters a survey boundary line, the

Execution of decrees altering survey boundary lines

amin of the Court entrusted with the execution, shall place the new boundary marks where necessary

(2) The amin will at once prepare a tracing from the survey village map and mark upon it the alteration made by him in execution The tracing or sketch will then be submitted to the Court along with the warrant of execution by the amin, and it will be attached to the copy of the decree

(3) Whenever a Civil Court alters a survey boundary, a copy of the decree together with the amin's tracing or sketch of the alteration should be sent immediately after execution to the Superintendent of Survey to enable the Department to make the alteration at once in their maps

(4) In cases where the demarcation by a skilled surveyor is necessary, the Civil Court executing the decree may have the demarcation made by the Survey Department with the consent of that Department

Application of Chapter VI

244 Subject to the foregoing Rules, the provisions of Chapter VI shall apply to all cases in execution of a decree

Arrest and imprisonment

Palace servants.

245. Parties applying for warrants of arrest in civil cases shall state in their applications whether the persons whose arrest they apply for are or are not attached to the Palace of His Highness the Maha Rajah or to the Pagoda of Sri Padmanabhaswami at Trivandrum, such persons being governed by the provisions of Section 590 of the Code

Note—Communications from the Civil Courts under Section 590 of the Code for sanction to arrest, in execution of civil processes, officers and servants attached to His Higness the Maha Rajah's Palace or to the Pagoda of Sri Padmanabhaswami at Trivandrum, must invariably specify the amounts to be recovered from such officers or servants

Other public servants.

246 (1) When an application is for the execution of a decree for money by the arrest and imprisonment of a judgment-debtor who is liable to be arrested in pursuance of the application, the decree holder shall state in his application whether the judgment-debtor to be arrested is a public servant or not, and if a public servant, the office wherein he is employed, his official designation, and the designation of his official superior

(2) The Court shall, where the judgment-debtor is a public servant, instead of issuing a warrant for his arrest issue a notice under Section 241, clause 1, of the Code calling upon him to appear before the Court, on a day to be specified in the notice, and show cause why he should not be committed

to jail in execution of the decree But such notice need not be issued whenever the Court considers it unnecessary to do so

(3) Such notice shall be served upon the judgment-debtor through his official superior either (1) by transmission by Anchal to the said official superior for service and return to the Court by the latter, or (2) by the Court process-server after obtaining the counter-signature of the official superior

(4) Whenever a Court orders the issue of a warrant for the arrest of the judgment-debtor who is a public servant, a letter regarding the intended arrest shall be sent by the Court issuing the warrant to the official superior of the person to be arrested The letter shall be delivered to the official superior before the warrant is executed by the process-server to whom the warrant is entrusted for execution, unless it appears to the Court issuing the warrant that the delivery of the letter in this way is likely to delay the execution of the warrant unduly, in which case the letter shall be despatched to the official superior by Anchal or such other means as appear proper to the Court issuing the warrant and sufficient time allowed for the letter reaching its destination before the warrant is handed over to the process-server.

Note—The Rules regarding the service of processes (including warrants of arrest) on public servants as witnesses are not affected by this Rule

Subsistence money

247 Subsistence money to civil debtors shall be calculated at ten chuckrams per diem provided that the Court may, for reasons to be recorded in writing, order a higher rate in particular cases

Tender of subsistence money

248 Every application for arrest should be accompanied by the tender of subsistence money for the period provided for in paragraph 1 of Section 329 of the Code The money shall be received in Court and entrusted to the process-server when the wrrant of arrest is issued The process-server shall take the money with the warrant and tender the same to the debtor as soon as the arrest is made If he accepts the money an acknowledgment shall be obtained from him on the back of the warrant and produced in Court If the arrest is not made or the judgment debtor declines to receive the sum, the process-server shall, *subject to the directions contained in Rule 862 as regards payment to the party or his Vakil*, refund the same to the Court with an endorsement to that effect on the back of the warrant.

Endorsements on warrants returned unexecuted.

249 Endorsements on all warrants of arrest returned unexecuted shall, as a rule, be counter-signed by the party at whose instance the warrant was issued or by his agent or Vakil

Issue of fresh warrant of arrest.

250. When a warrant issued for the arrest of a judgment debtor is returned unexecuted on the ground that he could not be found, the fact must forthwith be notified in the notice-board of the Court and a fresh warrant may issue in the event of the decree holder or his Vakil filing a memorandum (no Court fee need be levied) within five days from the date of such notice and on his paying the necessary process fee

Sick judgment-debtor

251. Whenever a person against whom a civil warrant of arrest has been issued appears too ill to be removed from his residence, the process server shall report the matter to the Court for its orders

Warrants of commitment to whom to be addressed

252 (1) The District Court of Trivandrum and the several Munsiffs' Courts subordinate thereto shall direct their warrants of commitment to the officer in charge of the Central Prison at Trivandrum and forward the civil prisoners direct to that officer,

(2) All other Courts shall direct their warrants of commitment to the jailor attached to the civil jail at the headquarters of their respective districts

(3) The presiding Judges of such of the District Courts as have separate civil jails attached thereto shall be deemed to be the officers in charge of such jails, and shall exercise, so far as may be, the functions of the Superintendent as defined in the Prisons Regulation (I of 1071) and the Rules issued thereunder

Fees for medical examination.

253. If the Court thinks it necessary that the judgment debtor should be medically examined for the purpose of testing his fitness to undergo incarceration, it shall decide in each case whether the necessary medical fees should be deposited by the judgment-debtor or by the decree-holder and then arrange for deposit of such fees beforehand and for payment of the same to the medical officer

The fee to be levied shall not exceed the amount of Rs 3 as fixed by Government in their letter No 1523/G, 634, dated 6th March 1897

Moneys to be deposited before commitment

254. Before committing a judgment debtor to jail in execution of any decree, whether ordinary or small cause, the Court shall cause the decree holder *or decree-holders when there are more than one* to make the following payments :—

(1) For escorting the judgment-debtor, process fee at the rate of seven chuckrams when the distance between the Court and

the jail is five miles or less and an additional fee of seven chuckrams for every additional five miles or fraction thereof when the distance is more than five miles

Note—If the Court considers it necessary to employ more than one process-server to escort the judgment-debtor, process fee at the above rate shall be levied for each process-server so employed

(2) Subsistence money for such portion of the current month as remains unexpired after the date of commitment

(3) Four rupees on account of bedding charges when the judgment-debtor is to undergo incarceration in any of the civil jails in the mofussil and at the rate fixed by the Superintendent when the incarceration is to be in the Central Prison

(4) Any conveyance or ferry charges which the Court may consider necessary

Provided that when the same judgment debtor is being committed to jail in execution of more decrees than one, the Courts, shall cause only one set of the charges provided in this Rule to be paid into Court, the amount being contributed equally by the several decree-holders

255 The subsistence allowance for the unexpired portion of the month in which the commitment is made as well as the bedding charges paid into Court shall be forwarded to the officer in charge of the jail along with the warrant

Subsistence allowance, etc, to be forwarded

Provided that if more than one decree-holder deposit the said charges, the Court shall forward only one set of such charges to the officer in charge of the jail and rateably distribute the balance to the decree holders

256. All payments of subsistence money into jail under the third paragraph of Section 329 of the Code shall be made to the officer in charge of the jail as provided in that paragraph between the hours of 11 A M, and 5 P M

Payments of subsistence money into jail, when to be made.

Note—The officer in charge of the civil jail may receive subsistence money remitted by Anchal or Post by the judgment creditor

257 A civil debtor committed to jail is entitled to immediate release on payment of the amount of the decree in execution of which the commitment was made The officer in charge of the jail is competent to receive payment of the judgment-debt and set the debtor free. He need not wait for the special orders of the Court under whose warrant the debtor was committed to

Release of judgment-debtor on payment of decree-debt.

custody The amount received must be remitted to the Court as early as practicable The warrant of commitment shall also be returned to the Court with the fact of payment endorsed thereon

Return of unexpended subsistence money.

258 Whenever any unexpended portion of the money deposited for subsistence remains in the hands of the officer in charge of a civil jail, he shall, when returning the warrant of commitment, remit the same to the Court, under whose warrant the deposit was made, for eventual repayment to the party entitled

Intimation of arrest, &c, to official superior

259 When a public servant is arrested and imprisoned in execution of a decree or order, the dates of arrest and discharge should be intimated to his official superior

Release of sick judgment-debtor

260 (1) If on the report of a medical officer or otherwise the officer in charge of a civil jail is satisfied that any civil debtor is in such a bad state of health that he cannot undergo further incarceration without endangering his life or without detriment to the health of the other inmates and that it is necessary to take action before an order under Section 331 (*g*) of the Code can be obtained, he may forthwith order the release of the judgment-debtor.

(2) Such release shall not, however, discharge the judgment debtor from liability to rearrest in execution of the same decree, but the period of his detention shall not in the aggregate exceed that prescribed by Section 332 or Section 460 of the Code as the case may be

(3) To enable prompt action being taken in the matter, all medical officers who may have occasion to notice such cases of dangerous illness are requested to give information thereof in writing to the jailor who will at once report the matter to the officer in charge of the jail and to the Court under whose warrant such sick persons are confined

Subsistence money when arrest is made in execution of several decrees.

261. If a debtor be imprisoned on account of several decrees obtained against him by the same creditor, subsistence money need not be deposited in each case Where several decree-holders apply for the imprisonment of a judgment debtor, *all the decree-holders must* provide the monthly allowance for the debtor's subsistence as directed by the Court.

Subsistence money disbursed not to be shown in warrant of commitment.

262 Sums disbursed by the decree holder for the subsistence of the judgment-debtor in jail shall not be shown in the warrant of commitment to jail

263 Under Section 334 of the Civil Procedure Code (Regulation II of 1065) the following persons serving in or with the army of His Majesty the King Emperor of India will not be liable to be arrested for the purposes mentioned in that section —

Exemption from arrest of persons serving in the British army

(1) All Commissioned Officers whether European or Native, Sub Assistant Surgeons, Native Doctors, Warrant Officers, Non commissioned Officers, Hospital attendants of any class, Trumpeters, Buglers, Drummers, Musicians, Soldiers, Un-attested recruits, Lascars, Mahoots, Drivers, Farriers, Syces, Grass cutters, Artificers, Labourers, Sutlers, Camp followers and all other persons attached to or serving in any portion of the said army

(2) Every person attested under Act V of 1869 of the Government of India according to the Regulations of the Government to which they are respectively attached or under any previous articles of war passed for the government of the army of His Majesty the King Emperor of India, or any articles of war in force for the time being or any statutory modifications or amendments thereof which may be made hereafter

264. No person shall, so long as he belongs to the Nayar Brigade, be liable to be arrested for debt under any process issued by or by the authority of any Civil or Revenue Court or revenue officer

Exemption from arrest of persons belonging to the Nayar Brigade.

Neither shall the arms, clothes, equipment, accoutrements, regimental accessaries of any such person be seized nor shall the pay and allowances of any such person or any part thereof be attached by direction of any Civil or Revenue Court or revenue officer in satisfaction of any decree or order enforceable against him †

CHAPTER VIII

Partnership Suits

265 In a suit for dissolution of partnership, or for an account of partnership dealings, all the partners and all persons entitled to share in the profits of the partnership business shall be made parties The plaint may be as in Appendix III, Form No. 40

Parties.

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* Government Notification dated 2nd January 1891.

† Rules dated 29th October 1904 passed under sanction of His Highness the Maha Raja under Section 2 of Regulation VI of 1079.

266. If, at any time, it appears to the Court that any party has not had inspection of the books of account or papers of the partnership, either through his own neglect or the default of any other party, the Court may order the same to be produced for his inspection at the Court-house, or other convenient place, and if any party alleges that the books of the partnership do not correctly set forth all the dealings and transactions of the firm, or contain items or transactions not proper to be included therein, the Court shall direct such party to file a written statement giving particulars of the errors or irregularities complained of, as in Appendix III, Form No. 41 The hearing of the suit shall then be adjourned, and the party in default may be ordered to pay the costs of the adjournment

Inspection

267 If any party desires to impeach a settled account on the ground of error, he shall in his plaint or written statement set out the specific errors or irregularities alleged by him, if on the ground of fraud, or of a mistake affecting the whole account, he shall in his plaint or written statement set out full particulars of the fraud or mistake alleged by him

Impeachment of settled account

268. If, at the first hearing of the suit, the partnership and the terms thereof and the correctness of the books of account are admitted, and it is only necessary to take an account, the Court may at once pass an interim decree specifying the account to be taken and the manner of taking the same

Interim decree where partnership and books admitted

269. At the hearing of the suit, the Court shall determine the persons who are partners of the firm and who are entitled to share the profits thereof, and the proportions in which they are entitled to share profits and are liable for losses, and also whether the books of the partnership have been regularly and properly kept and correctly represent the transactions and dealings of the partnership, or, if any allegations have been made in this behalf by any party, whether there are any errors or irregularities therein, or any party has been guilty of fraud in respect thereof If the Court finds that there are errors or irregularities in the accounts, or that fraud has been committed, it shall declare generally the nature of the said errors, or irregularities, or fraud, or the particular transaction in respect of which the same has been committed as in Appendix III, Form No. 26.

Matters to be determined at hearing

270 At the hearing of the suit, the Court shall also determine what accounts are to be taken, and from what dates, and give such directions as may be necessary for taking the same, in manner prescribed by Chapter IV, and shall direct what notice,

Accounts.

if any, is to be given, by advertisements in the local newspapers or otherwise, of the dissolution of the partnership The Court may, if a receiver has not been previously appointed, appoint a receiver of the assets of the partnership The Court shall then pass an interim decree in Appendix III, Form No 23 or in Appendix III, Form No. 42 and shall adjourn the further hearing of the suit to a fixed day.

Errors in settled accounts

271. In the case of a settled account, if errors or irregularities are proved, the Court may either rectify particular items, or give liberty to any party to file a statement of objection or surcharge, if fraud or a mistake affecting the whole account is proved, the Court may direct an account to be taken from the date of the settlement of account, if any, preceding the fraud or mistake

Commissioner to take account

272 If a commissioner is appointed to take an account he shall take the same in accordance with the directions and finding of the Court, as contained in the interim decree, and except as aforesaid, none of the matters in Rules 269 and 270 mentioned shall be referred to or dealt with by a commissioner

Order for discharge of debts and liabilities.

273 When the accounts of the firm have been duly taken, and approved by the Court, it shall pass an order providing for the discharge of the debts and liabilities of the firm, and for the retention in Court of a sum sufficient for payment of any costs, charges and expenses of the suit, properly payable out of assets, and adjourn the suit to a fixed day

Order for payment of balance. Order for distribution of assets.

274 If the assets exceed the debts and liabilities of the firm, and if the parties agree to retain the assets in their hands respectively on account of their respective shares in the firm, the order in Rule 273 mentioned may also provide for the payment of any balances which may be due by the firm to any of the parties, after debiting them with the estimated value of the assets in their hands The order may be in Appendix III, Form No 43 or if a commissioner has been appointed to take the accounts or a receiver has been appointed, in Appendix III, Form No 44 If the parties apply for the distribution of the assets in any other manner the order may direct the realization of sufficient assets to discharge the debts and liabilities of the firm, and to provide for equality of partition, as in Appendix III, Form No. 45 At the adjourned hearing, the Court may, if the terms of the said order have been complied with, pass a final decree in Appendix III, Form No 46, 47 or 48 according to the circumstances of the case.

275. If the debts and liabilities exceed the assets of the partnership, or the parties do not consent to a distribution of the assets, the Court shall direct the balances due from the several partners to be paid into Court, and the assets to be realized, as in Appendix III, Form No 45 and if, at the adjourned hearing, it appears that the debts and liabilities have been fully discharged, the Court may pass a final decree in Appendix III, Form No 47 omitting paragraph 4 thereof

Order for payment of balance into Court and realization of assets.

276 If any party, ordered to make any payment or to do any other act, fails to comply with the order of the Court, another party may apply that a receiver may be appointed to collect and realize the assets of the firm, and for an injunction to restrain the party in default from retaining or parting or dealing in any manner with the said assets

Appointment of receiver on default of party

277. An order for an injunction in a partnership suit, an order on appeal varying the interim decree, and an order on appeal from a final decree reversing the same and appointing a receiver, may be as in Appendix III, Forms Nos 49, 50 and 51 respectively

Forms

CHAPTER IX

Partition Suits

278. In every suit for partition of property all persons entitled to share therein, or to maintenance, shall be joined as parties, and if it is alleged that any co-owner has alienated any portion of the joint property or his interest therein, in circumstances rendering the alienation not binding on the co-owners, the alienee shall be made a party to the suit and the plaint shall set out the particulars of the alleged alienation

Parties.

279 The plaint shall state the relationship, if any, of the parties and the shares to which they are respectively entitled, and the allowances or residences, if any, which it is proposed to allot to them respectively, and unless a general account is prayed for, the particular items of joint property of which division is sought, the incumbrances, charges, and outgoings if any, to which the same are subject, and the net value of each item, and shall also state whether any debts or liabilities of the co-owners, payable out of the joint property, are outstanding or unsatisfied.

Plaint.

280. If, at the first hearing, it appears to the Court that only the amount of the property to be divided, or of the debts or liabilities of the parties, is in dispute, it may at once pass an order directing the taking of the necessary accounts

Order for accounts.

281 At the hearing of the suit, the Court shall determine who are the persons interested in the joint property and their respective shares and interests therein, whether there are any outstanding debts and liabilities, which should be satisfied out of the joint property, and, if any allegation has been made in this behalf, whether any person has alienated any portion of the property in circumstances rendering the alienation not binding on the co owners, or is liable to account for any particular property in his possession, or in any other manner No such question as aforesaid shall be referred to or dealt with by a commissioner appointed to take an account or divide any property, and if any such question arises before him, he shall reserve the same for the determination of the Court

Matters to be determined at hearing.

282 If it appears to the Court that there are outstanding debts or liabilities which ought to be satisfied out of the joint property, and that the same cannot then be ascertained, the Court shall direct an account to be taken thereof, and may, in its discretion, direct notice to be given to all persons having claims against the property, or the co-owners, by advertisement in the newspapers or otherwise, to bring their claims into Court before a fixed day

Account of outstanding liabilities.

283 If it is necessary to take an account, the Court shall pass an interim decree specifying the several accounts, which shall be taken in manner prescribed by Chapter IV, and the further hearing of the suit shall be adjourned

Interim decree

284 If any debts or liabilities, other than incumbrances, charges or outgoings, on or out of immovable property, are out standing, the same shall, unless the Court otherwise directs be ascertained and as far as practicable discharged or provided for before any order or decree is made for the division or distribution of the joint property

Discharge of outstanding liabilities.

285 If there are any outstandings due to the co-owners, unless the same are accepted by any party in satisfaction or part satisfaction of his share, they shall, unless the Court otherwise directs, be collected and brought into Court, by means of the appointment of a receiver, or otherwise before any order or decree is made for the division or distribution of the joint property

Outstandings due.

286 If, in a partition suit, the sale of any property is ordered, an order, for sale shall be made, and the subsequent proceedings shall be coducted in manner prescribed by Chapter VI of these Rules as far as the same are applicable Provided that Rule 185 shall not apply to the said sale, and the Court may grant leave to any party to bid for and purchase the property, or any part thereof, on such terms as the Court thinks fit

Order for sale.

287 If a commissioner is appointed to take an account, or to divide any property, the Court shall determine the amounts to be deposited in Court on account of his remuneration, and the expenses of the commission, and shall fix a date for the return of the commission, and adjourn the further hearing of the suit to a fixed day, and the commission shall not be issued until the said sums are deposited accordingly.

Taking account by commissioner

288. At the final hearing of the suit, the Court shall determine of what the joint property consists, and the manner in which the same is to be divided, and the amount of the allowance, and the residences, to be allotted to any person entitled to maintenance, marriage or residence, and the manner in which the same are to be paid and secured

Final hearing

289. The final decree shall in all cases specify the several portions of the joint property assigned to the several parties as their respective shares

Final decree.

290 The plaint and the decree in a partition suit may be as in Appendix III, Form No 52 and as in Appendix III, Forms Nos 53 to 58 respectively so far as the same are applicable A deed of indemnity may be as in Appendix III, Form No. 59

Forms

CHAPTER X

Additional Rules relating to appeals from decrees and orders and to civil revision petitions and reviews

291. The memorandum of appeal shall be accompanied by the fees prescribed for service of notice on the respondent and by the particulars for service of the same set out as in Appendix III, Form No 60

Notice fees, etc, to accompany appeal memo.

292. The representative of a party dying after decree may present an appeal without previously obtaining permission therefor, and such appeal, when presented before the expiry of the period allowed for appeal, shall be registered and proceeded with, the appellant's competency to represent the

Appeal by representative.

deceased party being open to be objected to by the respondents and to be disposed of by the Court at the hearing of the appeal

293 Every memorandum of appeal and of objection shall contain a statement of the value of the appeal or objection for the purposes of the Court Fees Regulation

Court fee valuation of appeal

294 Every memorandum of appeal or petition which is presented after the expiration of the time limited by law shall be accompanied by an affidavit explaining the delay If any such memorandum of appeal or petition is presented without such affidavit, it shall, together with all papers presented therewith, be returned to the pleader or party presenting them with an endorsement as follows —

Affidavit explaining delay

"This memorandum of appeal (or petition) has been presented days out of time The pleader (or party) is requested to explain the cause of the delay, in order that the case may be posted before the Court for the consideration of such explanation, and for orders thereon"

Endorsement returning papers.

295 Every memorandum of appeal or petition presented with an affidavit explaining delay shall be posted for orders before the Court

Appeal or petition to be posted before Court

296 When an appellant makes an offer in the memorandum of appeal for the settlement of the case by oath, special notice of such offer shall be given to the respondent in addition to the notice of appeal, and served upon him or his Vakil at least a week before the case comes on for hearing before the Court. Separate process fees must be levied from the appellant for the issue and service of such notice

Special notice to be given as regards offer for oath.

297 If the respondent, counter petitioner, etc, intends to appear and defend the appeal, petition, etc, he shall, not later than the date fixed for hearing in the notice of appeal, petition, etc., enter an appearance by filing in Court a memorandum of appearance.

Opposite party to file memorandum of appearance.

If a respondent, etc, fails to enter an appearance within the time and in the manner provided above, he shall not be heard in the appeal or matter

Penalty for omission

Provided that a respondent, etc, may apply by petition for further time, and the Court may thereupon make such order as it thinks fit

Proviso.

298. The memorandum of appeal (or petition) and the memorandum of appearance shall state an address for service, at which service of any notice, order or process may be made on the party filing such memorandum

Address for service.

If a party appears by a pleader his address for service shall be that of his pleader, and such address shall be within the municipal limits of the town where the appellate Court is situate All notices to the party shall be served on his pleader at that address.

If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred or of the Munsiff's Court in which the party ordinarily resides

Provided that, if such party subsequently appears by a pleader, he shall state in the vakalat an address for service within the municipal limits of the town where the appellate Court is situate and shall give notice thereof to each party who has appeared

299 (1) All notices and processes, other than a notice of appeal, shall be sufficiently served if delivered by a party or his pleader, or by a person employed by a pleader, or by an officer of the Court, between the hours of 11 A M and 5 P M, at the address for service of the party to be served

Service of notice

(2) Notices which may be served by a party or his pleader under this Rule or which are sent from the office of the Registrar may, unless the Court otherwise directs, be sent by registered Anchal or Post, and the time at which the notice, so posted, would be delivered in the ordinary course shall be considered as the time of service thereof, and the posting thereof shall be a sufficient service

300 The memorandum of objections shall be accompanied by the fees prescribed for service of notice on the parties affected thereby and by the particulars for service of the same, set out as in Appendix III, Form No 60

Fees for service of notice

301 Whenever a respondent proposes to support the decree appealed against, by taking objection to the findings of the lower Court against him, he shall give notice of his intention to do so, not later than fifteen clear days after the service of notice of hearing of the appeal, by filing in Court a memorandum of the grounds on which the decree is sought to be supported. The appellate Court may, in its discretion, excuse delays in the filing of such memorandum of grounds, if proper reasons are shown

Objection to findings.

302 An application to postpone or advance the hearing of, or otherwise with respect to, a case shall be made by petition endorsed with the consent of, or on notice to, all parties who have entered an appearance and shall be supported by evidence to be given on affidavit

Application to postpone or advance hearing on notice

303. When cases are remanded by appellate Courts, the Court receiving the order of remand shall affix a notice in the Court's notice board specifying the date fixed for the hearing

Notice of hearing of cases remanded

Interlocutory applications and matters

304 An application for leave to amend a memorandum of appeal or of objection or a petition of revision shall be made by petition upon notice to any party who has entered an appearance, and shall set out the amendment prayed

Application for amendment of appeal, objection or revision petition

305. (1) Cases remanded under Section 537 of the Code for submission of findings should be given precedence over all civil work other than that of a specially urgent nature

Cases remanded for findings.

(2) In no case should an adjournment of the hearing be granted beyond the day fixed by the appellate Court for the submission of the finding without the previous sanction of such Court If, owing to the neglect of parties, a finding cannot be submitted within the time fixed, extension of time shall not, as a rule, be applied for but an answer shall be returned intimating the fact of such neglect

(3) The Court to which a remand is made under Section 537 shall, in submitting its finding, certify at the foot thereof the amount of costs (showing the items in detail) incurred by each of the parties to the case at the retrial before that Court, in view to such costs being provided for in the decree that may finally be passed by the appellate Court

306 When an issue is referred for trial and the finding of the lower Court is returned, notice shall be given on the notice-board of the Court, and any party desirous of objecting to the finding shall, within ten days after such notice, or within such other period as may be allowed by the order of remand, file in Court a memorandum of his objections and serve a copy thereof on the other party

Time for filing objections. Copy to be served

307 The Rule that requires parties to file objections to findings within a prescribed time before the date of hearing of an appeal is one of procedure and does not affect the power of the appellate Court to deal with the findings as it deems proper in the interests of justice

Power of appellate Court to deal with findings.

308. (1) Appellate Judges are bound to record proper judgments even in cases they concur in the conclusions arrived at by the Courts of first instance The judgment of the appellate Court must on its face show that material points did not escape its attention and that it considered the grounds alleged against the decision of the lower Court, examined the evidence and framed its own independent judgment The mere endorsement of the opinion of the lower Court is not a judgment within the meaning of Section 545 of the Code A judgment which does not satisfy the requirements of this Section is legally no judgment.

Appellate judgments

(2) If more than one appeal is made against the same decree, the appeals shall, as far as possible, be heard together and disposed of by one judgment which shall embrace the several matters put in issue in each of the appeals and one decree only shall be drawn up which shall be headed with the cause-titles of the several appeals

309. The decrees of the appellate Courts in all cases where the decrees of the lower Courts are modified or reversed must be self-explanatory, *i e*, the portion of the decree of the lower Court confirmed must be re-produced in the decree of the appellate Court and the amendments duly entered.

Appellate decrees to be self-explanatory

310 In appeals remanded for retrial and decision *de novo* under Section 533 of the Code no decrees need be prepared when there is nothing to be executed and the costs are to abide by the fresh decision to be passed in the case It will be enough if a table of costs is added to the judgments in such cases

Table of costs to be appended to orders under Section 533

311. With all special (second) appeal memoranda to the High Court, copies of both the lower Courts' judgments and decrees should be produced.

Judgments and decrees to be produced with special appeal memorandum.

312. In all appeals from orders the appellants are required to file a short statement of the case

Statement of case.

313. In all civil miscellaneous appeals a table of costs shall be prepared and appended to the judgment.

Table of costs.

314. Where a party or Vakil desires to refer, at the hearing of any appeal before the High Court, to any map, plan or other record, for preparing copies of which skilled labour is required, he shall, if an appellant, along with the appeal memorandum, and if a respondent, within twenty days of the service of the notice of appeal or along with his memorandum of objections, if any, file a list containing the description of all

Copies of map, plan, etc., in appeals before High Court.

kinds of papers referred to above On receipt of such list and of the records, the Registrar shall fix a fee proportionate to the skill, labour and time required for preparing the copy, and the party or Vakil concerned shall deposit the same in cash in Court within ten days of the service of notice upon the Vakil or the posting thereof in the Court's notice-board if the party has no Vakil The whole of such fee shall be paid to the person employed in preparing the copy, he supplying his own materials He shall prepare three copies of the papers in Full Bench cases and two in other appeals When a copyist or other employee of the Court is appointed to prepare the copy, he shall do the work without prejudice to his legitimate duties.

Civil revision petitions to be accompanied by particulars for notice.

315 Civil revision petitions shall be accompanied by the particulars for service of notice of the same set out as in Appendix III, Form No 60

References to High Court

316. Whenever references are made to the High Court under Section 563 of the Code, the lower Courts shall direct the parties or their pleaders to put in their appearance before the High Court, if they choose to do so, on a specified date and note the fact in the letter of reference

Application for review.

317. With all applications for review, copy of the judgment, of which the review is applied for, shall be produced

Service of Notice

Procedure when notice returned unserved

318. If any notice is returned unserved an intimation of that fact and of the reason why the notice has not been served shall be given on the notice board, and within thirty days from the date on which the intimation is so given the appellant or his pleader shall, except when the notice has not been served because the respondent concerned is dead, deposit further fee for the service of a fresh notice and shall give the particulars necessary for serving it, and if the fresh notice or any subsequent notice is returned unserved, the same procedure shall be repeated

Fees to be paid in Court-fee labels.

319. The fees for the service of notice on respondents, counter petitioners, etc., shall be paid in the form of Court-fee labels or stamps as the case may be, such Court fee labels or stamps being attached to a memorandum, as in Appendix III, Form No. 60.

Application to Court to be by petition.

320 When any act has not been done within the time lawfully appointed for that purpose by the Registrar, and an application to the Court therefore becomes necessary, such application shall be made by petition.

321 (1) All processes received from the Civil Courts in British India for service in Travancore shall be served by the Courts in this State free of charge

Rules for the reciprocal service of processes between British India and Travancore

(2) All processes received from the Civil Courts aforesaid shall be served in Travancore by the District Courts or Munsiffs' Courts within whose jurisdiction the person to whom they are addressed resides, as if such processes had been originally issued by those Courts Such processes shall be returned by the Courts that served them direct to the British Indian Courts from which they were received and the fact of such return shall be intimated to the District Court in cases where processes have been received through the District Courts and not direct

(3) When the process received for service within Travancore is in a language other than English, Malayalam or Tamil, the Court issuing it may be requested to forward an English or Malayalam translation of the same

(4) The Courts of Travancore receiving processes for service from the Civil Courts in British India shall accept the certificate endorsed on the process by the Court issuing the same as sufficient proof that the proper fee for the issue thereof has been paid, and shall deliver such process to the proper officer of the Court for service and shall re transmit the process to the Court by which such process was transmitted with a return in the Form appended (Appendix II, Form No 6) and with the endorsement of the process-server showing in what manner service has been effected, and if service has not been effected, the reason for the non-service, and such endorsement shall be verified by the oath or affirmation of the process-server.

(5) All processes received from British Indian Civil Courts shall be returned to the said Courts post paid, the expenses in connection therewith being met from the contingencies allotted for 'postage'

(6) The Courts in Travancore shall send their processes for service in British India to the District Court *or the Munsiff's Court* within whose local jurisdiction the person to whom the process is addressed resides and no remittance on account of process-service fees need accompany such processes, but a note shall be entered on it that the necessary fee has been levied and attested by the signature of the presiding Judge and, in the High Court, by the Registrar

Processes intended for service within the limits of the Towns of Calcutta, Madras and Bombay shall be sent to the Court of Small Causes within whose jurisdiction the processes are to be served.

(7) The processes of the Travancore Courts for service in Malabar may be drawn up in Malayalam and those for service in the Tamil

Districts, such as Tinnevelly, Madura, etc, in pure Tamil characters. Processes for service in other Districts shall invariably be accompanied by English translations.

(8) *The processes of the Travancore Courts for service in British India shall not be sent to the persons to whom they are addressed direct by Post.*

(9) On processes to be forwarded to British India for service, the process fees prescribed by the Rules in force for processes to be served within Travancore shall alone be levied

(10) When the process issued for service in British India is for the appearance of any person as a witness, the amount of batta and travelling allowance, he is entitled to under the Rules, should be remitted with the process either in postage stamps, or currency notes or by money order

(11) Travancore processes forwarded for service in British India shall always be sent "Post paid" All expenses in the way of postage, etc, incurred in connection with service of processes shall be met from the contingencies allotted to the Court for postage *

322 (1) All processes received from the Civil Courts of Cochin for service in this State shall be served by the local Civil Courts free of charge

Rules for reciprocal service between Cochin and Travancore

(2) Processes issued by the Chief Court and the District Courts of Cochin shall be served by the local District Courts and processes issued by the Munsiffs' Courts of Cochin by the local District Munsiffs' Courts, within whose jurisdiction the person to whom they are addressed reside, as if such processes had been originally issued by the local Courts

(3) When any process received for service from Cochin is in a language other than English or Malayalam or Tamil, the Court issuing it may be requested to forward an English translation of the same

(4) The Civil Courts in Travancore receiving a process for service from a Civil Court of Cochin shall accept the certificate endorsed on the process by the Court issuing it as sufficient proof that the proper fee for the issue thereof has been paid and shall deliver such process to the proper officer of the Court for service and shall re transmit the same to the Court from which it was received with a return in the Form (Form No 6, Appendix II) appended to the Rules for the reciprocal service of processes

* Rules for the reciprocal service of processes between British India and Travancore sanctioned by His Highness the Maha Raja under the date the 11th January 1890 as since amended

between British India and Travancore dated the 11th January 1890/29th Dhanu 1065 and with the endorsement of the process server showing in what manner service has been effected and if service has not been effected, the reason for the non-service, and such endorsement shall be verified by the oath or affirmation of the process server

(5) The return, etc, referred to in the preceding Rule shall be transmitted to the Court, which issued the process, by Anchal on 'Sirkar Service'

(6) The processes of the local High Court and the District Courts for service in Cochin other than those mentioned in Sections 85 and 86, Civil Procedure Code, shall be sent by Anchal on 'Sirkar Service' to the District Courts and those of the District Munsiffs' Courts to the Munsiffs' Courts in Cochin within whose jurisdiction the persons to whom the processes are addressed reside, and no remittance on account of process-service fees need accompany such processes, but a note shall be entered on every such process that the necessary fee has been levied, and such note shall be attested by the Registrar in the High Court and by the presiding Judge or Munsiff, as the case may be, in the other Courts

(7) The processes of the local Courts for service in Cochin may be drawn up in Malayalam or English.

(8) On processes to be forwarded to the Cochin Courts for service, the process-fees prescribed by the Rules in force in respect to processes for service within Travancore shall alone be levied

(9) When the process issued for service in Cochin is for the appearance of any person as a witness, the amount of batta and travelling allowances, he may be entitled to under the local Rules, shall be remitted with the process either in British postage stamps or currency notes or by money order *

Suit by or against H H the Maha Raja of Cochin

323 His Highness the Maha Raja of Cochin may sue and shall be sued in the Civil Courts of this State in the name of His Dewan †

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* Government Notification dated the 29th September 1902

† Government Notification dated the 10th June 1896

H
RULES UNDER OTHER REGULATIONS

AMENDMENTS

(1) Regulation VI of 1087 (*Court Fees*).

Rule 344. Rule (1) of this Rule has been amended as follows —

"(1) Applications made by persons, not being parties to the suit, for the return of documents and other articles produced by them in pursuance of an order of the Court, *and applications made by parties to the suit for return of documents exempted from payment of Court fee under Rule 60*"

[See Vol III, Page 448]

(2) Regulation IV of 1080 (*Stamp*)

Rule 356 This Rule has been amended as follows —

356 When an unstamped or insufficiently stamped document is tendered in evidence before any Court, the head ministerial officer or the clerk who keeps the stamp duty and penalty register under the supervision of the above said officer shall, before the document is taken to the presiding officer for orders, duly enter the document in a register (Appendix III, Form No. 61) and note on the back of it the serial number of the entry in the register, and the head ministerial officer as well as the clerk who keeps the register shall affix their signatures below the serial number so noted in token of the entry having been correctly made The presiding officer shall pass orders directing the levy of stamp duty and penalty only after the document is given a serial number in the register and such serial number is entered on the back of the document in question over the head ministerial officer's and the clerk's signatures. As soon as the stamp duty and penalty are realised as ordered by the Court, columns 8 to 11 shall be duly filled up and the initials of the presiding officer obtained in column 12 at once and the fact of the deposit together with the amount deposited shall be noted on the back of the document and the entry attested by the initials of the head ministerial officer and the clerk The presiding officers shall, at the time of affixing their initials, satisfy themselves as to the correctness of the entries made in the register The moneys realised under this head shall, as far as possible, be remitted to the treasury that very day or, in exceptional cases, the next Court day and the date of remittance and the number of the chalan and receipt duly noted in column 13 As soon as the money is remitted to the

treasury, the copy of the document on which the stamp duty and penalty have been levied together with the usual certificate shall be sent to the Division Peishkar (Appendix III, Form No 62) and the date of such despatch duly noted in Column 14 In cases where stamp duty and penalty are not paid as ordered by the Court and also in the case of unstamped or insufficiently stamped promissory notes, bills of exchange or any instrument chargeable with a duty of one anna other than a receipt falling within proviso (c) to Section 37 of the Stamp Regulation, the original shall be sent to the Division Peishkar (Appendix III, Form No 63) *within two weeks from the date of the order or of the production of the instrument which may be extended by the Court on the application of the party who produced the document*, and the date of such despatch noted in Column 14 Whenever the stamp duty and penalty are paid by a person other than the person who produced the document the name of the payer also shall be entered in column 4 When an unstamped or insufficiently stamped document comes before a Civil Court, but is not tendered in evidence such document shall be duly impounded and the necessary entries made in the register before the document is sent in original to the Division Peishkar as required by the Stamp Regulation

[See Vol. II, Page 1412]

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(3) Regulation II of 1098 (*Destruction of Records*)

Amendments to the Appendices to Rules Nos 396 to 410 of the Civil Courts' Guide, prescribing the period necessary for the destruction of records in Insolvency Cases —

(i) Form B (of the Appendix), Part I, insert as the last item in the first column "Insolvency Cases," and in the next column opposite to that, insert

"1 Index

2. Final judgment and order (original and appellate)

3 Insolvent's application and schedule.

4. Interim orders"

(ii) Form B, Part III. Delete the full stop after "proceedings" in the first column and add "and insolvency cases."

(iii) Form D. Under sub-heading '3' in the first column, insert as last item, "(c) In insolvency cases" and in the corresponding portion in the next column, insert "6" under "Part I" and "3" under "Part III."

[See Vol V, Pages 447-451]

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(4) Regulation III of 1075 (*Vakils*)

The Rules amended are as follows —

Qualifications for enrolment

411. No one shall be eligible for enrolment as a Vakil of the High Court of Travancore unless he is a Barrister-at-Law or a member of the Faculty of Advocates of Scotland *or an enrolled Advocate, Vakil or Attorney of a British Indian High Court or in the Cochin Chief Court or a Doctor or Master of Laws or a Bachelor of Laws or such other degree in Law of any University in British India or of any other University as the High Court may by general or special order accept as equivalent to the said degrees of Law*

Provided that Bachelors of Laws, other than those already enrolled as Vakils in any of the British Indian High Courts or *in the Cochin Chief Court*, shall not be eligible for enrolment as Vakils of the High Court,

(1) *unless they have presided as a Judge of a Civil Court in Travancore for a period of not less than 3 years*, or

(2) unless they have practised as First Grade Pleaders in Travancore, *Cochin*, *Mysore* or British India either before or after graduating in law for a period of 5 years, or

(3) unless they have practised as First Grade Pleaders for a period of not less than one year previous to their application for enrolment and have produced a certificate from the Judges before whom they have practised as to their efficiency and character and have also passed either the British Indian Pleadership Examination of the First Grade or the local examination prescribed for First Grade Pleaders or the Apprentice Examination held by the High Court of Judicature, Madras, or *the* Special Examination *held* under the orders of the High Court in subjects 2, 3 and 7 prescribed for the local Pleadership Examination by the said Rules, *viz*,

	Maximum marks assigned
The Code of Civil Procedure	60
The Code of Criminal Procedure and Medical Jurisprudence	90
The Stamp, Court Fees, Suits Valuation and Limitation Regulations	30

To secure a pass in the said special examination, a candidate must obtain not less than one-third of the marks assigned to each subject and not less than one-half of the aggregate marks assigned to the three subjects together

A fee of British rupees 15 shall be charged on applications for admission to the special examination

Every applicant for the office of Vakil must, with his application, produce testimonials of good character and must, if required produce evidence of his having passed the prescribed examinations or of his possessing the requisite qualifications

No person convicted of any offence implying a defect of character or dismissed from the public service for any act implying a defect of character shall, notwithstanding anything contained in the Rule, be eligible to be enrolled as Vakil in any court of Travancore

412 (1) All applications for enrolment as Vakils of the High Court shall be made to the High Court direct in person and shall be supported by the necessary certificates

Application how to be made.

(2) No Application for enrolment as a Vakil of the High Court shall be considered unless the applicant has given at his cost two months' notice in English and Malayalam in the Travancore Government Gazette of his intention to apply for enrolment

Provided, Advocates, Attorneys and Vakils who have been enrolled in the High Courts in British India, *or in the Chief Court of Cochin* and Barristers-at-law, members of the Faculty of Advocates of Scotland *and persons who have surrendered their sanads on accepting a permanent employment under Government or persons who retired after presiding as a Judge of a Civil Court in Travancore* may apply for enrolment without previously giving the prescribed notice But they should unless the High Court otherwise direct, produce with their application papers showing that they have been duly enrolled in such Courts.

(3) If the applicant has been in public service he shall, in addition to the particulars mentioned in Rule 411, set forth in full the circumstances under which his connection with the service ceased.

421 (2) Any person who, after passing the Matriculation Examination in any of the British Indian Universities or the Madras Upper Secondary Examination or the Middle School Examination in the First Class or the late General Test Examination or any other public examination which can be accepted as equivalent to these examinations, or after obtaining in the Travancore English School Leaving Certificate Examination, 40 per cent of the marks in English and English Composition together, 33 1 3 per cent in Vernacular Composition and Translation together and 40 per cent in all the subjects taken togther, *except where a candidate has taken three optionals in which case any two of the optionals alone may be considered for calculating the total marks, the percentage being calculated either according to the public examination marks or the final marks or the*

moderated marks, shall have attended *six* consecutive terms in a recognised Law College

Provided that the High Court shall have power in appropriate cases to relax the Rule requiring that the terms that the student has to undergo should be consecutive

451. No Vakil shall obtain assignments of decrees passed or which have to be executed by the Courts in which he practises or purchase or otherwise acquire any interest by assignment in any actionable claim falling under the jurisdiction of such Courts, *or stand surety for any party to a suit, appeal or other proceedings in such Courts*

Execution and authentication of vakalats

455 (1) Every vakalat must be executed by the party himself and must be signed before, and authenticated by a Tahsildar, *President of a Municipal Council, Member of a Municipal Council or Sri Mulam Popular Assembly* or other officer not inferior in rank to a Proverthicar except in cases where the Vakil, to whom such vakalat is executed, endorses on it that he personally knows the executant and that it was signed in his presence. Every vakalat must be dated at the time of its execution and its acceptance and be attested by two witnesses No vakalat shall be authenticated by any officer unless the Vakil's name is inserted therein previous to its execution

Rule 462. [Dropped.]

[See Vol. II, Pages 1126 1127, 1130, 1136 and 1137]

RULES.

Re

REGISTRATION YADASTS

788. (1) When a Civil Court shall, by a decree or order, create, declare, transfer, limit or extinguish any right, title or interest of any person to or in any immovable property situate in any part of Travancore, such Court shall cause a memorandum of the said decree or order to be sent to the Sub-Registrar or to every Sub-Registrar within whose Sub-District, the whole or any portion of the property is situate and such memorandum shall, so far as may be practicable, describe the property in the manner required by Rule 13

Memorandum of decree or order affecting immovable property

Note—Decree relating to hereditary right to an office, when it does not involve a right to any real property attached to the office, shall not be considered as decree relating to real property for purposes of Registration of decrees under the Registration Regulation

(2) Every Court granting a certificate of sale of immovable property under Section 313 of the Civil Procedure Code shall send a copy of such certificate to the Sub Registrar or to every Sub-Registrar within whose Sub-District the whole or any portion of the immovable property comprised in such certificate is situate

Certificates under the Civil Procedure Code.

789 The preparation and transmission of the memoranda and copies aforesaid shall be the work of the copyists' establishment

Preparation and transmission.

790 The Court shall levy a fee of five and one fourth fanams in Court fee stamps, (this fee being levied at the time of the presentation of the plaint, claim petition, application for copy of sale certificate, etc, as the case may be) for every memorandum of decree or order and for every copy of a sale certificate which has to be sent to the Sub-Registrar

Fee

Provided that where the decree or order or sale certificate embraces properties situated in more sub-districts than one, separate fees at five and one fourth fanams per sub-district shall be levied and the court concerned shall, in such cases, send to every Sub-Registrar, within whose jurisdiction portion or portions of such property lie, a memorandum of such decree or order or a copy of the sale certificate.

Separate fee for separate sub-district

Provided also, that when a suit or appeal is restored to file in consequence of an order made by the Court which decided the suit or appeal or in consequence of an order of remand, registration fees, at the rates specified above, shall be levied afresh from the plaintiff or appellant as the case may be

Out of every five and one fourth fanams levied as above, three and a half fanams shall be deemed to be Registration revenue and one and three fourth fanams copying fees

Examiner to revise memorandum

791 As soon as a decree or order in respect of which a memorandum has to be sent to the Registration department is passed by the court or a sale of immovable property is confirmed and the certificate is issued, the examiner of copies or other clerk in charge shall enter the number of the case in the "B" register (Appendix III, Form No 214) and call for such of the papers as may be necessary for the preparation of the memorandum or copy from the officer of the Court with whom such papers may be When the papers are received, the examiner or other clerk in charge shall enter the case in "H" register (Appendix III, Form No 220) and entrust it to the copyists who prepare the memorandum or copy When the same has been prepared, the examiner or other clerk in charge shall carefully revise it and, after attesting it, get it signed by the presiding officer The memoranda and copies shall then be forwarded to the accountant whose duty it will be to prepare and attach thereto slips certifying that a fee of three and a half fanams has been received on account of registration revenue The accountant shall intial these slips and get them signed by the head ministerial officer. The memoranda and copies shall then be returned to the examiner of copies or other clerk in charge and he shall after getting the seal of the court affixed thereto send them to the Sub Registrars.

'J' register

792. The examiner of copies or other clerk in charge shall keep a register called the 'J' register (Appendix III, Form No 221) in respect of registration fees

Examination of registers and records by head ministerial officer and judge.

793 The registers and other records in the copyists' section shall be carefully examined by the head ministerial officer at least once a week and by the presiding Judge, and the fact of such examination shall be noted in the registers.

III

THE RULES REFERRED TO IN CASE LAW

Rules 18 & 71 —	See Regn VIII of 1100,	Or XVII, R 1 — 20 T. L J, 165.
,, 66 —	Do	Or I, R 10 — 20 T L J, 612
,, 185 —	Do.	Sec 55 — 20 T L J, 436
,, 197 —	Do	Sec 31 — 48 T. L. R, 334 (=22 T. L J, 991)
,, 250 —	Do	Sec 40 — 46 T L. R, 413 (=21 T L J., 35).
,, 301 —	,, Regn. III of 1094,	Secs, 21, & 23 — 22 T L. J., 1310.
,, 435 —	,, Regn. VIII of 1100,	Or IX, R. 13 — 49 T. L R., 358. (= 23 T. L J., 596).
,, 440 —	Do	Sec. 32 — 46 T L R, 53 (—20 T L J, 157)
,, 451 —	Do	Or XXI, R 14 — 23 T L J, 642 Or XXI, R 70 — 20 T L. J 318 Or XXI, R. 87 — 21 T L J., 257
,, 547 —	Do	Or XX, R 1 — 46 T L. R 265 (=20 T L J, 584)
,, 790 —	,, Regn. II of 1087, ,, Regn VI of 1100,	Sec. 15 — 22 T L J., 1056. Art. 166 — 23 T L J, 823

APPENDIX F.

I. HIGH COURT CIRCULARS, &c.

A. CIVIL.

(1)

As it is found that in many of the subordinate Courts the B Diaries of suits decided *ex parte* but subsequently restored to file are written up only from the date of the restoration petition, the High Court are of opinion that such a practice is irregular, and therefore direct that in future the B Diaries in such cases should be written up completely and should contain all incidents in the progress of the suit from the date of its institution

19 2-1107/5-10 1931

(2)

It having come to the notice of the High Court that a suit filed and numbered in one Court but ordered to be presented or transferred to another Court is given a fresh number when it is sent back to the first Court, the High Court hereby direct that such a suit when re presented or re-transferred to the first Court should bear the number and year given to it originally by the said Court and that whatever vicissitudes through which a suit passes, it should always bear one number and year on the file of one Court.

1-4 1107/20 11-1931

(3)

It having come to the notice of the High Court that witnesses produced before the subordinate Civil Courts under warrants of arrest are not promptly examined, that when the examination of witnesses is not completed on the day they are produced, the cases are adjourned to distant dates and in certain instances, three or four adjournments were made for completing such examination, and that warrants of arrest are issued to witnesses already examined fully on behalf of one party, for examination by the other party, thus causing much inconvenience to persons who are cited as witnesses, the High Court hereby direct that the practice referred to above wherever existing, should be discontinued forthwith and invite the particular attention of the subordinate Courts to the necessity of examining witnesses, appearing in Courts under coercive processes, on the dates

they are produced and if the examination of such witnesses is not completed on those days, the same should be continued from day to day until it is completed Any laxity on the part of the Presiding Officers in these respects will be taken severe notice of by the High Court

5-4-1107/21 11-1931

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(4)

As it has come to the notice of the High Court that stamp papers produced in Courts by parties for the preparation of certificates of sale have been used for other purposes and stamp papers of the same total value but of different denominations substituted, with the connivance of the Court subordinates and as the High Court have reason to apprehend that in the absence of a Register for entering the number, value etc, of such stamp papers, similar irregularities and malpractices are likely to recur, the High Court hereby direct that a Register called the Sale Certificate Stamp Register in the Form appended shall be opened and maintained in all the Civil Courts of the State [No 3 of 1107]

5 7-1107/18 3-1932

Serial No	No and year of suit or proceeding.	Sale amount	No of stamp papers produced.	Value of stamp papers produced	Date of production	Date of signature	Date of delivery	Signature of applicant or Vakil	Date of confirmation.	Date of payment of registration fees.	Remarks.

(5)

It having come to the notice of the High Court that there are several instances where the Record-keepers of the lower Courts have failed to duly note the receipt of records from the appellate Court after disposal of the Civil Miscellaneous Appeals in pending cases and to communicate promptly to the Vistharam Clerks the fact of receipt of such records and that consequently cases are adjourned unnecessarily from time to time for want of the records even after they have been really received in the lower Courts, the

High Court direct that the clerks concerned should pay proper attention to such matters in future and that any dereliction of duty on their part will be taken serious notice of

1-12 1107/16 7 1932

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(6)

As it has come to the notice of the High Court that in most of the lower Courts there is much unfairness in the distribution of commission orders and also inordinate delay in the execution thereof, the High Court hereby direct that hereafter the lower Courts should submit to the High Court quarterly statements showing the names of the commissioners, their designation, the amount of the fee in each case, the time allowed for sub mitting the report and the time taken [No 1 of 1108]

19 9-1932

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(7)

It has recently been brought to the notice of the High Court that some of the lower Courts do not pay proper attention to the proviso to Rule 2 of Order XLII of the Civil Procedure Code both in the matter of calling for and in sending up records for purposes of C. M Appeals The High Court therefore hereby direct that whenever the appellate Courts call for records for purposes of C M Appeals as per Order XLII, only such of the papers as are necessary for purposes of the C M Appeal need be called for, and the trial Courts also shall send up only such of the papers as are necessary for purposes of the C M Appeal as otherwise the trial Courts will not be able to proceed with the trial of cases even though there is no order for stay by the appellate Court [No. 2 of 1108]

19-9 1932

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(8)

As the High Court deem it desirable to transfer the execution clerks who have been working in that section for more than three years to some other sections of the same Court or to other Courts, the High Court do hereby direct that all clerks who have been working in the execution section of the lower Courts for more than three years should be transferred to some other sections in those Courts or to other Courts and other clerks appointed in their places.

As soon as an execution clerk completes three years' service in that section, it shall be the duty of the presiding officer to transfer him to some

other section in his Court or to bring it to the notice of the District Judge or the High Court as the case may be, in order that the clerk might be transferred to another Court in pursuance of this Circular. [No 3 of 1108.]

9 12 1932.

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(9)

It having come to the notice of the High Court that in some Courts, petition fees are levied when additional stamp sheets are produced in compliance with a requistion by the Court, the High Court hereby direct that the levy of such petition fee is unauthorised and should be discontinued wherever such practice exists [No. 4 of 1108]

27 6 1108.

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(10)

As it has come to the notice of the High Court that the entries in the B Diaries in trial cases are not as full as they should be and do not contain the necessary particulars for finding out whether the case was disposed of on the merits or for default, the High Court do hereby direct the subordinate Courts to make the entries in the B Diary sufficiently clear and comprehensive, especially in cases which have been disposed of after rejecting the applications of the parties for time in which case the entries should definitely state whether the arguments of the Vakils on both sides were heard or whether the case was disposed of without hearing them [No 5 of 1108]

19-7 1108.

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(11)

As it has been brought to the notice of the High Court that the Sirkar is put to great loss and unnecessary labour on account of the failure of some of the Judges and Munsiffs to order the plaintiffs in pauper suits to pay the requisite court fees, the attention of the Judges and Munsiffs is drawn to the strict observance of the provisions of Order XXXIII Rules 10 and 11 which enjoin that decrees in pauper suits shall provide for realization of the court fees by the Sirkar. [No. 6 of 1108]

23-11 1108|7-7 1933.

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(12)

It having come to the notice of the High Court that in some of the Munsiffs' Courts the date of first hearing in original suits is not fixed so as to allow not less than 20 clear days from the date of service of summons and the first hearing of the suit as required by Rule 632 of the Civil Courts

Guide, the High Court do hereby direct that the provisions of the above Rule should be strictly followed and that the Bench Clerks should be directed to note in the day's cause list whether the time required had elapsed so that the case may not be proceeded with contrary to the provisions of the above Rule. [No 1 of 1109]

22-1-1109/7-9-1933

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(13)

As it has come to the notice of the High Court that in some of the lower Courts suits in which preliminary decrees are passed are wrongly included in the disposal register for the purposes of statistics, the High Court hereby direct that as a preliminary decree is not a complete adjudication of the matters in a suit, it is necessary to keep it on the file of the Court and that it should not be included in the disposal register till the passing of the final decree in the case [No 2 of 1109]

23-1 1109/8-9-1933

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(14)

As it has come to the notice of the High Court that in some of the lower Courts there is inordinate delay in the matter of issue of processes to witnesses after the passing of the necessary orders by the Court, and that the hearing dates in warrants once signed by the presiding officers are corrected by the Nazirs without express order of the Court, the High Court do hereby direct that the orders for issue of processes should be promptly carried out and that the objectionable practice of the Nazir changing the dates of hearing in the warrants without express orders should be discontinued [No. 3 of 1109]

20-2-1109

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(15)

It having come to the notice of the High Court that in framing issues most of the lower Courts do not follow the procedure prescribed in Rule 64 of the Civil Courts' Guide and fail to record the pleadings in the issue paper, the High Court do hereby direct that in framing issues the pleadings should be recorded in complicated cases and that omission to do so will be taken serious notice of [No 4 of 1109]

18 7-1109.

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(16)

As the work of process servers in most of the Courts has been found to be unsatisfactory and that very few of them reach the prescribed

minimum percentage of personal service fixed by Rule 860 of the Civil Courts' Guide, the High Court do hereby direct that if the process peons fail to reach the minimum or at least three fourths of it for six months in the year, they will be liable to be transferred to other stations as a punishment [No 5 of 1109.]

18-7-1109

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(17)

The High Court do hereby direct, that the subordinate Civil Courts should strictly comply with the requirements of Section 15 of the Registration Regulation and promptly communicate to the Sub Registrars concerned, the memoranda of decrees and orders passed by them affecting immovable property, as required by Rule 788 of the Civil Courts' Guide. [No 6 of 1109.]

18-7-1109

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(18)

It having come to the notice of the High Court that, on account of the great economic distress experienced at present by the people of the State in common with other parts of the world, judgment debtors find it very difficult to discharge their decree-debts, and that consequently their immovable properties are being sold in Court auction for very inadequate prices, resulting in great loss to them, the High Court deem it necessary to impress upon the lower Courts the desirability of exercising liberally the discretion vested in them by the provisions of Order XXI, Rule 66 of the Civil Procedure Code in the granting of adjournments of Court sales etc., thereby minimising the hardships of the judgment debtors They therefore issue the following instructions for the guidance of the lower Courts —

(i) Adjournments of sales may be granted liberally by the Courts in the exercise of their discretion to prevent hardship to the debtors as far as possible

(ii) Payment into Court of a reasonable portion of the amount to be realised, should be treated as a sufficient ground for adjourning the sale

(iii) If the debtor is unable to deposit any amount into Court a receiver may be appointed so as to safeguard the creditor's interest in the property proclaimed for sale

(iv) The Courts should always see that the property is sold in Court auction for an adequate price even in the absence of the judgment-debtors

(v) The Courts should more frequently follow the directions contained in Rule 177 of the C C. Guide in conducting sales

(vi) When several properties are proclaimed for sale in execution of a decree they should be sold separately, even in the absence of a prayer to that effect from the judgment-debtor, unless the Court has reasons to think that selling them in one lot will fetch a higher price [No 7 of 1109]

3-8-1109

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(19)

Whereas a practice obtains in some of the subordinate Courts to accept copying sheets less than the number of sheets called for, on applications made for copies of documents or proceedings in the custody of the Court, and whereas this practice is irregular and is calculated to yield undesirable consequences, the High Court hereby prohibit the said practice and direct that the practice be immediately stopped If the required number of sheets are not produced in Court, as called for, *in full*, within the time prescribed by Rule 751 of the Civil Courts' Guide, the Court shall forthwith strike off the application, unless, for any sufficient reason to be recorded, the Court deems fit to order otherwise The stamp sheets ordered to be produced on any application for copies shall not be less nor far more than that required for making the copies, which the Court can grant, and they shall as far as possible approximate to the sheets requisite [No 8 of 1109]

18—11—1109

(B) CRIMINAL

(1)

As it is not possible for the High Court at present either from the Sessions Returns or from copies of judgments sent for revision of calendars by the Sessions Judges, to ascertain whether the trial of cases had been conducted promptly from day to day or whether there was an undue prolongation of the trial in them, the High Court hereby direct the Sessions Judges to specifically state in the headings of judgments the dates on which the trial was begun, continued and closed in such cases, besides entering the dates on which they were finally heard and disposed of.

28-1-1106 13-9-1930

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(2)

The Sessions Judges are hereby directed that in the case of a sentence of death, they shall immediately on receipt of the judgment of the High Court after approval by the Sovereign and of the usual intimation fixing the date of execution, issue and if the said papers are received during the annual recess, shall make the necessary arrangements to issue, under

their own signatures, a warrant of death in the prescribed form, accompanied by a copy of the judgment to the Superintendent of Central Prison

6-12 1106

(3)

Courts of Sessions are hereby directed that in all Sessions Cases charged by the Police, a typed copy of the judgment should be sent to the Commissioner of Police, Trivandrum, within three days from the date of the pronouncement of the judgment.

19-12-1106

(4)

In continuation of Criminal Circular No 4 of 1060, the High Court direct that material objects produced at the trial of Criminal Cases under the Weights and Measures Regulation (Regulation VI of 1089) and condemned thereunder, shall be retained by the Courts concerned till the expiry of the periods prescribed under the Rules, and thereafter be broken up and sold and the proceeds credited to Government [No 2 of 1106.]

(5)

As it has come to the notice of the High Court that the material objects produced in Courts are disposed of or returned to the parties on the expiry of 60 days from the date of the judgment irrespective of the disposal of appeals or applications for revision, the High Court hereby direct that the period "60 days" fixed in Crl. Cir No. 7 of 1065 shall be read as "three months" [No 1 of 1107]

19-2 1107/5-10-1931

(6)

All Magistrates are prohibited from referring to the Police under Section 180 Criminal Procedure Code, complaints against Police Officers as it is not desirable that the Police should investigate charges against members of the same force In such cases the Magistrates themselves should prosecute the enquiry [No. 1 of 1108]

23 11-1108/7-7-1933

II Rules issued for the guidance of Civil Courts of original Jurisdiction.

It having come to the notice of the High Court, that the Rules of the Civil Courts' Guide are not followed in certain matters by many of the

subordinate Courts, the High Court draw the particular attention of all Civil Courts of original jurisdiction to the said Rules and direct that the following instructions be strictly conformed to —

1. The clerks in charge of the Vistharam and Execution sections shall enter every paper, as and when they are received by them in the index of papers on record as required by Rules 641 and 698, Civil Courts' Guide. The Presiding Officers shall, as often as possible, examine the index of cases and, if they find any omission in entering any of the papers in such index, they shall take severe notice of the conduct of the clerks concerned and see that the same is invariably kept current

2 When papers are transmitted from the clerk in charge of the General Stamp Register to any other clerk, he shall not hand over the same, unless the clerk receiving it attests the fact of receipt in such register then and there Similarly, when papers, registers or books are transmitted from one section to another, the attestation of the clerks receiving such papers, registers or books shall be invariably obtained in the receipt book kept for the purpose before they are so handed over to them

3 The attention of the Presiding Officers is drawn to the necessity of themselves receiving the Anchal covers (except during the recess) and money orders addressed to their Courts They shall, under no circumstances, delegate the power of receiving money orders and registered covers addressed to the Courts to any of their subordinates

4 The presiding Officers shall take particular care to see that remittances of money orders and cash received are duly credited and debited in the cash book with detailed particulars, remitted to the Treasury by chalan and entered in the Judicial Deposit Registers after receipt of the advice list or pass book from the Treasury as required by Article 310 (*a*) of the Account Code

Note —Any delay on the part of the Treasury in sending the advice or pass book, should be reported to the Dewan Peishkar

5 The amounts under R T Rs, cash order or temporary receipts received to the credit of a particular case shall under no circumstances, be sought to be given credit to for amounts under chalans on account of any other suit R T Rs, cash orders, or temporary receipts should not be cashed but sent to the Treasury for adjustment by transfer credit only, to be credited to the deposit account of the Court.

6. In cases where remittances are made by money orders under Rule 163 of the Civil Courts' Guide towards the satisfaction of a decree or order, the Presiding Officer shall refuse to accept the same, if a lodgment schedule has not been received previously as required under the above Rule

and orders passed thereon To ensure that all remittances by money order are brought to account, the Presiding Officer shall arrange that the neces sary entries are made in the cash book and attested by him before he signs the acknowledgment. When, for any reason this is not possible, and dur ing the Court recess, a note should be kept by him of the amount received, and he should see that they are brought to account in the cash book at the earliest possible time after such receipt He shall be held personally res- ponsible for all amounts acknowledged by him The practice of receiving money orders during recess by the subordinate staff, inclusive of the Head ministerial officers, is strictly forbidden In the case of cash payments, the provisions of Rule 161 of the Civil Courts' Guide should be strictly com plied with

7 A register with printed headings and machine numbered pages shall be maintained in the accompanying form for receipts of moneys in cash, money orders, R T Rs, cash orders, temporary receipts etc, and the Presiding Officers shall be held personally responsible for the necessary entries being promptly and correctly made therein.

8 The Presiding Officers shall, every day, before affixing their initials in the cash book and the register referred to in the previous para- graph, verify and see that all amounts received towards decree debts, stamp duty and penalty and other items have been remitted to the Treasury in accordance with the Rules and append a certificate in the arrear statements to be submitted by them, that the books have been examined by them and the provisions herein set forth have been strictly complied with in their Courts.

9 Except where moneys are produced and paid to the decree holders, under the orders of the Court and in the presence of the Presiding Officers, in part or whole satisfaction of decree debts (as contemplated in Rule 164 of the Civil Courts' Guide) on the dates of such actual production, no payment shall be made in cash under any circumstances, the same having to be invariably made by remittance to the treasury and issue of cheques thereafter The cheques for this purpose should be issued in favour of the parties in each case and not of officers of the Court.

10 When any money is ordered to be paid out of the contingent amount allotted to the Courts to any person for work done, the Presiding Officers shall see that the same is disbursed on the date of the order and that too in their actual presence

11 The following registers shall be maintained by the Panavagi clerk who will strictly follow the provisions of the Account Code, Sub Treasury Manual and Civil Courts' Guide and the general instructions issued

by the High Court from time to time in keeping them correctly and up to date

1 Cash Book
2 Register of receipts of judicial deposits
3 Register of repayments of judicial deposits
4 Register of receipts of petty deposits
5 Register of repayments of petty deposits
6. Register of contingent charges
7 Register of fines
8 Acquittance roll
9 Register of undisbursed salaries
10 Register of applications for refund of judicial revenue
11. Register of impounded instruments.
12 Daily statement of accounts
13 Register of receipts of R. T Rs etc

12 Payments to the decree holders and others shall be made by means of cheques signed by the Presiding Officer The Vistharam and Execution clerks shall, before taking the payment schedules under Rule 167 of the Civil Courts' Guide or other similar applications for orders, obtain a statement in writing from the Panavagai clerk specifying the date of the payment of money in Court or treasury, the amount available for the purpose, the number in the judicial deposit register, if any, duly dated and initialled by him and verified and vouched to be correct by the Head Ministerial Officer After obtaining the orders of the Court the clerks will transmit the applications and other necessary papers to the Panavagai clerk who after a second verification, will prepare the cheque and obtain the signature of the Officer The same procedure will be followed in the case of applications for refund The Presiding Officers shall see that cheques are not prepared by any other clerk than the Panavagai clerk. A separate cheque should be issued for each individual deposit or part thereof and should be noted against the original item of credit in the registers relating thereto

13 The amounts realised on account of stamp duties and penalties on insufficiently stamped documents shall be entered by the Panavagai clerk in the register prescribed therefor at the time of their receipt under the initials of the Presiding Officer and remitted to the Treasury on the same or the following day The Presiding Officers should take particular care to see that the sums so realised have been duly remitted to the Treasury and not retained in the hands of the Head Ministerial Officers. A list of items pending realisation for more than 6 months should also be prepared at the

end of every year The Munsiffs' Courts should send their list to the District Courts and the District and Second Judges Courts should send their list to the High Court, with explanation for their non-realisation

14 All Courts of original civil jurisdiction shall forward a statement of daily accounts, in the annexed form, to the High Court and file a copy of the same in their respective offices

15 Courts should prepare the statement of Daily Accounts from the Court Accounts (Deposit Register, Cash Book, Repayment Register, Cheque Books etc,) independently of the Treasury Accounts and then verify the former with the latter when received, so that errors, if any, either in the accounts of the Courts or in those of the Treasury, may be detected and rectified. If any errors are detected on verification in either of the accounts, steps should be taken for their rectification If any cheque remains uncashed at the end of the month, the details of the same such as the No of the cheque, date of issue and the amount should be appended to the above-said statement

16 When moneys received by the public Officers under warrant of attachment of pay issued in execution of decrees against public servants employed under them are sent, the Courts concerned will receive and remit the same to the Treasury at once The Presiding Officers of the Courts should see that the amounts are properly accounted for and that acknowledgments of the receipt of such moneys to the Officers concerned are also sent immediately Any delay over a week in sending acknowledgment of the receipt of such moneys should be reported to the High Court

17 Persons to whom money is paid from Court should invariably be required to state in words in the receipts or registers the amounts received by them Presiding Officers should give every facilities to the applicants to complain to them if there is any unnecessary delay in paying out cheques or refund orders or in any other matter relating to money due to them

18 The Head Ministerial Officer of every Court will be held responsible for checking daily all the entries in the Receipt Books and the cash books. He shall, on no account, retain any money exceeding the amount of his security If the balance on any day exceeds his security amount, he should obtain special written sanction from the Presiding Officer to retain it.

19. *Register of Valuables and Register of Attached Properties (movables).*

The Presiding Officer should verify these registers periodically A certificate should be recorded therein quarterly and at every time there is a change of officers to the effect that the articles have been verified and found correct as per the registers, that those disposed of have been done so under proper authority, and that the value of those sold in auction has been

credited in the accounts A copy of the certificate should also be sent to the High Court.

Note—Receipts shall be given for all items of receipts such as live-stock, jewels, etc

20 The Presiding Officers of every Civil Court shall, on the close of every day, sign the cash book, verify the cash balance in hand, and sign the statement to be forwarded to the High Court daily They should also examine the account registers every now and then and verify with connected records some of the entries made therein which do not come under their daily purview To ensure that every item of refund has been correctly posted against the original item of deposit, they will also arrange for a list of itemwar details of outstanding deposits being taken at least once a year, when the clearance register is sent and filed after agreement with the running balance of the deposit account, under their initials These important items of work should be carefully attended to in order to guard against the possibility of any embezzlement or over payment. The liability of Presiding Officers of Courts caused by any laches on their part in this respect will in all cases be strictly enforced— *22-6 1932—9-11-1107*

STATEMENT OF DAILY ACCOUNTS OF THE COURT OF

FOR DAY THE. 110

Particulars.	Money at the credit of the Court								
	As per Judicial Deposit Register			Petty Deposits.					
				In Nazir's Register			In Personal Deposit.		
	Rs.	Ch	c	Rs.	Ch.	c	Rs.	Ch.	c.
Opening Balance									
Receipts during the day									
Total									
Payments during the day									
Closing Balance									

Certified that the balance agrees with the cash in hand

Date Presiding Officer

IN THE COURT OF

GENERAL REGISTER OF MONEYS, CASH ORDERS ETC

Date	Serial No of deposit Year and No of suit or proceeding	Name of depositor and position in the suit or proceeding	Details of deposit.	No of C M Petition or schedule, if any	Amount Rs Ch C	How received	Remittance to Treasury by challan or otherwise — Nature of remittance.	Date.	Initial of Pandvakai clerk.	Initial of Head Ministerial Officer	Initial of the Presiding Officer	Remarks.

III NOTIFICATION.

(R O C No 3123 of 32 / Judicial, dated 9th November 1932)

It is hereby notified, with the sanction of His Highness the Maha Raja, that the following ten Gazetted holidays are cancelled, so far as the *Judicial Department* is concerned —

Chingom	Vinayaka Chathurthi	1 day
Vrischigom	Thrikartigai	1 day
Makaram	Tai Pongal	1 day
	Mattu Pongal	1 day
	Vavu Orikkal	1 day
Meenom	Yugadi Pandigai	1 day
Meenom	Chithirapournimai	1 day
Msthunam	Karkadaka Sankranthi	1 day
Karkadagom	Vavu Orikkal	1 day
	Adi Aruthi	1 day

T. G G, dated 15-11-1932, Pt. I, P 382.

APPENDIX G.

RULES AND NOTIFICATIONS.

I

REGULATION V OF 1071 (*The Jenmi and Kudiyan*)

[As Amended]

NOTIFICATIONS

(1)

(*R O C. No. 2441/34/Rev, dated 18th September 1934*)

Under sanction of His Highness the Maharaja, it is hereby notified that under Section 40 (M) of the Jenmi and Kudiyan Regulation XII of 1108, the following Rules are added to the Rules passed under the same Section in G O R. O C Nos 1105/33/Rev, and 445/34/Rev, dated 4th March 1933 and 2nd April 1933 respectively

Rule 15 (i) Several cases may be included in one appeal or revision petition contemplated in Rules 13 or 14, provided the parties in those cases are the same

(ii) The Taluk Jenmikaram Settlement Officers shall, when clerical errors in the Jenmikaram cases already disposed of are observed by themselves or when they are brought to their notice by the parties, move the State Jenmikaram Settlement Officer, through the Division Jenmikaram Settlement Officers, for the revision of the orders passed by them Such revision petitions shall be disposed of only after giving both the parties notice and an opportunity to be heard.—

T. G. G, dated 25-9-1934, Pt I, P 97

[*Vide* Page 731 *Supra*]

(R Dis No 1644/34/Rev, dated 13th October 1934)

Under sanction of His Highness the Maha Raja, it is hereby notified that the form of the Jenmikaram Register prescribed in Rule 11 of the Rules dated the 4th March 1933 issued under Section 40 (M) of the Jenmikudiyan Regulation V of 1071 as amended by Regulation XII of 1108 is modified as follows —

JENMIKARAM REGISTER.

Taluk Pakuthy

Serial No.	Survey No	Survey Sub Division	Extent Lekkom	Extent Acre	Extent Cent	Tenure	Wet or dry	Settlement Pattom Paddy Para	Settlement Pattom Paddy Edangali	Settlement Pattom Money Rs	Settlement Pattom Money Chs	Settlement Pattom Money Cash	Sirkar Tax Paddy Para	Sirkar Tax Paddy Edangali	Sirkar Tax Money Rs	Sirkar Tax Money Chs	Sirkar Tax Money Cash	Settlement Pattamicham Paddy Para	Settlement Pattamicham Paddy Edangali	Settlement Pattamicham Money Rs	Settlement Pattamicham Money Chs	Settlement Pattamicham Money Cash	Particulars of the Kanom deed or other records on which the claim is based	Name of the Jenmi	Name of the Kudiyan	Jenmivaram Paddy Para	Jenmivaram Paddy Edangali	Jenmivaram Money Other Commodities	Jenmivaram Money Rs	Jenmivaram Money Chs	Jenmivaram Money Cash	Jenmikaram Paddy Para	Jenmikaram Paddy Edangali	Jenmikaram Money Other Commodities	Jenmikaram Money Rs	Jenmikaram Money Chs	Jenmikaram Money Cash	Remarks
1	2		3	4		5	6	7					8					9					10	11	12	13						14						15

T G G dated 16-10-1934, Pt I P 181

1108

RULES AND NOTIFICATIONS.

II

REGULATION II OF 1108 (*Legislative Reforms*)

I NOTIFICATIONS.

(1)

(*D Dis No 197 of 33/Legis, dated 3rd April 1933.*)

It is hereby notified that under paragraph 4 of Schedule III to the Sri Chitra State Council Electoral Rules (Notification R O C No 253 of 33/Legis, dated the 14th March 1933) the Tahsildar of each of the Taluks, mentioned at foot, is appointed the Registration officer for each Taluk, excluding the Municipal area, if any, therein

1 Kalkulam
2 Nedumangad
3 Kartikapalli

T G G, dated 4 4 1933, Pt. II.

(2)

(*D Dis No 197 of 33/Legis, dated 3rd April 1933*)

It is hereby notified that, under paragraph 5 of Schedule III to the Sri Mulam Assembly Electoral Rules (Notification R. O C No 254 of 33/Legis, dated the 14th March 1933), the Tahsildar of each of the Taluks, mentioned at foot, is appointed the registration officer for each such Taluk, excluding the Municipal area, if any, therein

1 Neyyattinkara.
2 Agastisvaram
3 Kalkulam
4 Chirayinkil
5 Quilon
6 Karunagapalli
7 Karthikapalli
8 Tiruvalla
9 Ambalapuzha.
10 Kottayam
11 Changanacherry.
12 Shertallai
13 Kunnatnad
14 Parur
15 Minachil
16 Muvattupuzha.

T G G, dated 4-4 1933, Pt II.

(3)

(*D Dis No 251/33/Legis, dated 24th April 1933*)

Under the second proviso to paragraph 4 of Schedule III of the Sri Mulam Assembly Electoral Rules issued under date the 14th March 1933, the Government have been pleased to approve the appointment of the

persons, named at foot, as Deputy Registration Officers and their exercising the powers and performing the duties of Registration Officers in the Municipalities mentioned against their names, instead of the Presidents of those Municipal Councils, in respect of all classes of constituencies

Name or Designation	*Municipal Area.*
Vice President, Municipal Council, Nagercoil	Nagercoil.
Do Do Kottayam.	Kottayam
Do Do Alwaye	Alwaye
[*] Official Councillor and the Medical Officer of the Health Unit, Neyyattinkara	Neyyattinkara

(4)

(D Dis No 251/33/ Legis, dated 24th April 1933)

Under the second proviso to paragraph 4 of Schedule III to the Sri Chitra State Council Electoral Rules issued under date the 14th March 1933, the Government have been pleased to approve the appointment of persons, named at foot, as Deputy Registration Officers and their exercising the powers and performing the duties of Registration Officers in the Municipalities mentioned against their names, instead of the Presidents of those Municipal Councils, in respect of all classes of constituencies

Name or Designation	*Municipal Area.*
Vice President, Municipal Council, Nagercoil	Nagercoil.
Do Do Kottayam	Kottayam
Do. Do Alwaye	Alwaye
[*] Official Councillor and the Medical Officer of the Health Unit, Neyyattinkara	Neyyattinkara.

T G G, dated 25-4 1933, Pt. I, P 430

(5)

(D Dis No 230 of 33/Legis, dated 19th April 1933)

In connection with the forthcoming general elections to the Sri Mulam Assembly and the Sri Chitra State Council, the Government of His Highness the Maha Raja wish it to be distinctly understood that although officials as such are not debarred from voting at the election of Members to the Assembly and the Council under the Rules passed under the Legislative

[*] The name of the Official Councillor and Medical Officer given in the above two Notifications, Nos. (3) & (4), is omitted

Reforms Regulation, II of 1108, if they are qualified to vote under the said Rules, their participation in the elections should not extend any further, and that they are strictly prohibited from influencing the elections in any way, either directly or indirectly. Heads of Departments and Offices are requested to issue strict instructions to all their subordinate Officers accordingly Every case of infringement of these instructions will be visited with condign punishment — *T G G, dated 25-4-1933, Pt I P 429*

II PROCEEDINGS OF THE GOVERNMENT OF HIS HIGHNESS THE MAHA RAJA OF TRAVANCORE

Order D Dis No 410 of 33/Legis, dated Trivandrum, 25th July 1933

A Standing Finance Committee of the Legislative Council used to be constituted for every Council under Regulation, II of 1097 Government consider that a similar Committee of the new Legislature under the Legislative Reforms Regulation, II of 1108, may also be constituted.

The Government of His Highness the Maha Raja are accordingly pleased to sanction the formation of a Standing Finance Committee of the Sri Chitra State Council and the Sri Mulam Assembly

As soon as may be after the commencement of each official year, the Committee shall be constituted

The functions of the Committee shall be (i) to examine the draft annual budget so far as the same is within the cognisance of the Travancore Sri Mulam Assembly and the Travancore Sri Chitra State Council, (ii) to examine all applications for supplementary grants under votable items of expenditure, and (iii) to examine such matters as may be referred to it by the Government

The Committee shall be a purely advisory body

The Committee shall consist of six members, *viz*,

(i) the President of the Travancore Sri Mulam Assembly and the Travancore Sri Chitra State Council who will be President of the Committee also,

(ii) three non-official members, 2 from the Assembly elected by the non official members of the Assembly and 1 from the Council, elected by the non-official members of the Council, and

(iii) two official members nominated by the Government.

The Committee shall meet as often as necessary and the dates of such meetings shall ordinarily be intimated at least seven days in advance.

Three members of whom at least two shall be non officials shall form the quorum of the Committee.

Copies of papers relevant to the discussions at the meetings shall be made available for the use of each member at least two days before the date of the meeting

A meeting of the Committee shall be held every year to consider the appropriation of the State Revenues for the following year The following records shall be supplied to each member of the Committee

(*a*) A schedule of demands showing the preliminary proposals of the Government for the appropriation of the revenues as per existing sanction with a brief explanation of the estimates

(*b*) A schedule of new items of expenditure proposed to be included in the budget

T G G, dated 25 7-1933, Pt II, P 661

III

REGULATION X OF 1108

(Amending Regulation V of 1095)

THE WILLINGDON WATER WORKS RULES

(1)

FORMS

[See Page 576, *Supra*]

FORM NO 1.

APPLICATION FOR THE SUPPLY OF WATER FROM THE WILLINGDON WATER WORKS

Account No
Application No.

To The President,
Municipal Council, Trivandrum

Dear Sir,

I, the owner/occupier of the undernoted house or premises, hereby request that you will arrange to supply me with water in house No in street/road I agree to the work of providing the necessary meters and of making the "house connection" to the public water main being estimated for and carried out by the Water Supply Department at my expense. For water taken in excess of the free allowance under Rule 19 of the Willingdon Water Works Rules, I agree to pay the lawful charges in respect of such supply I further agree to observe the Regulation, Rules and bye-laws in force, from time to time, relating to or affecting the supply of water

I remit herewith half a rupee being the estimate fee as per Rule 4.

Signature of the applicant (in full)
Address

Date
Accounts to be sent to

APPENDIX G

No Municipal Office,
Trivandrum, 19

Forwarded to the Water Works Engineer, Trivandrum, for favour of necessary action The sum of Rs. 0-14-0 remitted by the applicant is herewith sent, the receipt of which please acknowledge.

Signature
President, Municipal Council

The amount mentioned above has been received and entered in the accounts and official receipt granted The application is submitted for further action.
Manager and Head Accountant Water Works Office

Cashier Water Works Office

No.

Forwarded to the Water Works Superintendent for preparation and submission of the estimate for making the connection including therein provision for the supply and erection of a suitable water meter or meters.

Signature
Water Works Engineer

No

Returned with the necessary estimate for favour of approval and for directing the applicant to make the necessary deposits
Encl

Signature
Water Works Superintendent

Submitted to the Water Works Engineer The estimate has been checked and may be approved

Signature
Head Draftsman, Water Works Office

The estimate is approved as No of Issue Notice to the applicant asking him to deposit the amount of the estimate, namely, Rs Signature
Water Works Engineer

FORM NO 2

THE WILLINGDON WATER WORKS (*Commercial Section*)

Water Works Office, Trivandrum 19

No.

Notice to applicant to deposit the estimated cost of providing house connection.
(To be returned and lodged with the Water Works Engineer when paying the deposit, duly signed by the applicant).
Dear Sir/Madam,

With reference to your application dated 19 for providing "house connection" from the public water main to your property, House No in street/road, addressed to the President, Municipal Council, Trivandrum, you are hereby informed that an estimate for Rs. being the cost of the "house connection" has been prepared in this office and, should you desire to do so, it is open for your perusal in this office during the usual office hours on working days. You are requested, in case you accept the estimate, to deposit Rs. with the cashier of this office within a week of the receipt of this notice and produce before the undersigned, either in person

or by agent, the official receipt therefor duly signed by the undersigned, on receipt of which the work will be put in hand. Please note that the amount in question represents only the estimated cost and that the actual cost will be charged to you and necessary adjustment will be made on the completion of the work, excess if any over the amount deposited being payable by you, and balance if any from the deposited amount being returnable to you. Please also note that the supply of water to your property can be given only after the deposit account is adjusted as above.

A copy of the Rules is herewith sent for your use.

Yours faithfully,

Enclosure. *Water Works Engineer*

Dear Sir,

I accept the estimate and have this day ( ) paid the amount of deposit and obtained the official receipt which I herewith produce for your perusal and return. I agree to the adjustment of the account as stated in the notice above on the basis of the actual cost of the work on completion and I agree that any excess cost incurred may, if not paid by me on demand, be recovered from me as arrears of public or land revenue

Signature

Date *Applicant*

The official receipt is perused and returned to the applicant or his agent

Signature

Water Works Engineer

Received back the official receipt

Signature

Applicant or his Agent

(TO BE RETURNED)

No

Forwarded to the Water Works Superintendent for information. The applicant has made the deposit. Copy of the estimate is herewith sent. The work should be put in hand at once and completed expeditiously The actual cost of the work should be reported in the subjoined form.

Signature

Enclosure. *Water Works Engineer*

Details of actual cost.	House connection to Main.		
	Rs.	Chs.	C.
1 Value of pipes, fittings and ferrules used.			
2 Labour of laying and jointing pipes and fittings.			
3 Cutting and making good			
4 Masonry works			
5. Value of Meter and erecting charges.			
6. Fee for preparing estimate.			
7 Centage charges for supervision and Tools and Plant			
Total			
Deduct credits on disposal of surplus materials.			
Nett Grand total for "house connection."			
Deduct amount already deposited			
Balance due to or from the applicant			

No.

Returned to the Water Works Engineer. The work has been completed on and the actual cost is Rs For details *vide* supra.

Signature
Water Works Superintendent

Cashier and Head Accountant to note and issue receipt to the applicant in Form No 3 to pay up the balance / to receive the balance in adjustment of the deposit account

Signature
Water Works Engineer

Submitted to the Water Works Engineer. The deposit account has been adjusted.

Signature
Cashier.

Signature
Head Accountant

No

Forwarded to the Water Works Superintendent The supply of water may now be given and the date of doing so should be reported.

Signature
Water Works Engineer

No.

Returned to the Water Works Engineer The supply of water was given on

Signature
Water Works Superintendent.

Head Accountant.

Please note and enter the date in the rate book After doing so, file this with the application.

Signature
Water Works Engineer

Attended and filed

Signature
Head Accountant

FORM No. 3

THE WILLINGDON WATER WORKS (*Commercial Section*)

No.

Water Works Office,
Trivandrum 19

(Notice under Rule 6 of the Willingdon Water Works Rules).

To

Reference—Account No.
Vide Deposit Receipt No. dated

Dear Sir / Madam,

With reference to the deposit of Rs. Chs. C. made by you on ... I write to inform you that the work for which the deposit was made has been completed and the final account made up, *vide* details below The *actual* cost of the work amounts to Rs. Chs. C Thus a sum of Rs. Chs. C is still due from / is returnable to you.

You are requested to pay this amount within a week to the Cashier of this office (to receive the payment order duly passed by the Water Works Engineer for this amount within a week from the Cashier of this office)

Please note that the supply of water to your property will be postponed until you pay the balance amount due from you

Yours faithfully,
Water Works Engineer

Details of actual cost	House connection to Main.		
	Rs	Chs.	C
1 Value of pipes, fittings and ferrules used			
2. Labour for laying and jointing pipes and fittings.			
3 Cutting and making good.			
4 Masonry works			
5 Value of meter and erecting charges.			
6 Fee *for* preparing estimate.			
7 Cantage charges for supervision and Tools and Plant.			
Total			
Deduct credits on disposal of surplus materials.			
Nett Grand total for house connection.			
Deduct amount already deposited			
Balance due to or from the owner or occupier			

To

The Water Works Engineer,
Willingdon Water Works, Trivandrum.

Dear Sir,

I write to inform you that I have this day adjusted my deposit account by paying the sum of Rs. Chs. Cash as desired / receiving the payment order for Rs. Chs. Cash I request that water may be supplied to my property

Station
Date

Signature of owner / occupier.

Form No. 3 continued.

Accountant's report to the Water Works Engineer

Sir,

The deposit account above noted has been adjusted by the receipt of Rs. Chs. C. from the owner or occupier / the issue of payment order for Rs. Chs. C

to the owner and the transaction has been duly recorded in the books, *vide* Folio of

Signature
Cashier

Signature
Head Accountant

Issue orders to the Water Works Superintendent to supply water to the property

Signature
Water Works Engineer

Sir,

Orders were issued on as directed

Signature
Head Accountant

Record and file with Form Nos. 1 and 2

Signature
Water Works Engineer

FORM NO 4.

THE WILLINGDON WATER WORKS (*Commercial Section*).

Water Works Office

No. Trivandrum, 19

Notice under Rule 8 of the Willingdon Water Works Rules.

To be returned to the Water Works Engineer when paying the deposit, duly signed by the consumer

To

Reference —Account (Consumer) No

Dear Sir/Madam,

I write to inform you that the "house connection" to your property House No in street/road, is reported to stand in need of repairs, *vide* below for details regarding the nature of disrepair The cost of making the necessary repairs and putting the "house connection" in order is estimated to amount to Rs Under Rule 8, the work of repairs has been put in hand and I request that you will be so good as to deposit with the cashier of this office the estimated cost of Rs within three days from the date of receipt of this notice, and obtain the official receipt therefor, failing which the supply of water to your property is liable to be cut off with effect from 12 noon on Please also note that the deposit account is adjustable as in the case of providing the 'house connection' and that notice in Form No. 6 will issue in due course.

Yours faithfully,
Water Works Engineer

NATURE OF DISREPAIR

Dear Sir,

I have this day paid the amount of deposit and obtained the official receipt. I agree to the adjustment of the account as stated in the notice above on the basis of the actual cost of the repairs and I agree that any excess cost incurred may,

if not paid by me on demand, be recovered from me as arrears of public or land revenue.

Signature
Consumer

Trivandrum
Date

(TO BE RETURNED)

No.

Forwarded to the Water Works Superintendent for information. The actual cost of the repairs should be reported in the subjoined form

Signature
Water Works Engineer

Details of actual cost	Repairs to House connection Rs.	Chs.	C.
1 Value of pipes, fittings and ferrules used			
2 Labour for laying and jointing pipes and fittings			
3 Cutting and making good			
4 Masonry works			
5 Value of Meter and erecting charges			
6 Fee for preparing estimate			
7 Centage charges for supervision and Tools and Plant			
Total			
Deduct credits on disposal of surplus materials			
Nett grand total for connection (repairs)			
Deduct amount already deposited			
Balance due from or to the owner or occupier			

No.

Returned to the Water Works *Engineer* The actual cost of the repairs is Rs Ch. C. For details *vide* supra

Signature
Water Works Superintendent

Cashier and Head Accountant to note and issue notice to the consumer in *Form* No. 3 to pay up the balance/ (to receive the balance) in adjustment of the deposit account.

Signature
Water Works Engineer

Submitted to the Water Works Engineer. The deposit account has been adjusted on

Signature
Head Accountant

Signature
Cashier

Record in the consumer s file.

Signature
Water Works Engineer

Attended and filed in the consumer's file.

Signature
Head Accountant.

Form No. 5.

WILLINGDON WATER WORKS,
TRIVANDRUM.

Requisition to the President, Municipal Council, Trivandrum Under Rule 8 (c) for cutting off supply of water

(Duplicate)

No *Date*

To The President,

Municipal Council, Trivandrum

Sir, I have the honour to inform you that the supply of water has to be cut off from the property noted overleaf for the reasons stated therein I am enclosing herewith a notice in duplicate for favour of signature and return.

I have the honour to be
Sir,
Your most obedient servant,
Water Works Engineer

WILLINGDON WATER WORKS,
TRIVANDRUM.

Description of Property
Account No
House No
Street/Road
Name and address of owner or occupier
Reasons for cutting off supply

Form No. 5

WILLINGDON WATER WORKS,
TRIVANDRUM

Requisition to the President, Municipal Council, Trivandrum Under Rule 8 (c) for cutting off supply of water

(Original)

No *Date*

To The President,

Municipal Council, Trivandrum.

Sir, I have the honour to inform you that the supply of water has to be cut off from the property noted overleaf for the reasons stated therein. I am enclosing herewith a notice in duplicate for favour of signature and return.

I have the honour to be
Sir,
Your most obedient servant,
Water Works Engineer

WILLINGDON WATER WORKS,
TRIVANDRUM

Description of Property
Account No
House No
Street/Road
Name and address of owner or occupier
Reasons for cutting off supply

Form No. 5

WILLINGDON WATER WORKS,
TRIVANDRUM

Requisition for cutting off supply of water

(Reply)

No *Date*

To The Water Works Engineer,
Trivandrum

Sir, I have the honour to return herewith the notice in duplicate received with your requisition No Dated signed as desired The supply may be cut off from the property referred to on the expiry of the period specified in the notice.

I have the honour to be
Sir,
Your most obedient servant,
President
Municipal Council, Trivandrum

WILLINGDON WATER WORKS,
TRIVANDRUM

Description of Property.
Account No
House No
Street/Road
Name and address of owner or occupier
Reasons for cutting off supply

Form No 6

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Account No*

NOTICE (Triplicate)

Under Section 205 (1) (*a*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No. Street / Road

Whereas it has been brought to my notice that the aforesaid premises is unoccupied, I do hereby give notice that the supply of water will be cut off at your expense from the said premises after days from the date of issue of this notice.

If you require a supply of water again to the said premises you must apply therefor under Section 202.

Water Works Engineer

President, Municipal Council
Trivandrum

Form No. 6.

WILLINGDON WATER WORKS
TRIVANDRUM.

No *Dated* *Account No*

NOTICE (Duplicate)

Under Section 205 (1) (*a*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No, Street / Road

Whereas it has been brought to my notice that the aforesaid premises is unoccupied, I do hereby give notice that the supply of water will be cut off at your expense from the said premises after .. days from the date of issue of this notice

If you require a supply of water again to the said premises you must apply therefor under Section 202.

President, Municipal Council,
Trivandrum

Form No 6.

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Account No*

NOTICE (Original)

Under Section 205 (1) (*a*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No Street / Road

Whereas it has been brought to my notice that the aforesaid premises is unoccupied, I do hereby give notice that the supply of water will be cut off at your expense from the said premises after days from the date of issue of this notice.

If you require a supply of water again to the said premises you must apply therefor under Section 202

President, Municipal Council,
Trivandrum

No. Date.

Forwarded to the Water Works Superintendent for service and return.

Water Works Engineer

No. Date

Forwarded to the Inspector Division for service and return. The manner of service should also be noted

Water Works Superintendent.

No. Date.

Resubmitted after service

Inspector Division.

No. Date

Forwarded to the Water Works Engineer

Water Works Superintendent.

Form No 7

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Account No*

NOTICE (Triplicate)

Under Section 205 (1) (*b*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No Street Road

Whereas you have not paid bill No for Rs presented to you on by the Water Works Engineer within the 30 days time allowed therefor, I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after service of this notice upon you and that if the amount of the bill together with the expense of cutting off the supply *viz* Rs be not paid to me within 15 days of the service of this notice upon you the amount will be collected from you under the provisions of Section of the Municipal Regulation.

Water Works Engineer,

President Municipal Council

Form No. 7

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Account No*

NOTICE (Duplicate)

Under Section 205 (1) (*b*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No Street Road

Whereas you have not paid bill No for Rs presented to you on by the Water Works Engineer within the 30 days time allowed therefor I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after service of this notice upon you and that if the amount of the bill together with the expense of cutting off the supply *viz* Rs be not paid to me within 15 days of the service of this notice upon you the amount will be collected from you under the provisions of Section of the Municipal Regulation

President, Municipal Council

Form No 7

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Account No*

NOTICE (Original)

Under Section 205 (1) (*b*) Of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No Street Road

Whereas you have not paid bill No for Rs presented to you on by the Water Works Engineer within the 30 days time allowed therefor, I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after service of this notice upon you and that if the amount of the bill together with the expense of cutting off the supply *viz* Rs be not paid to me within 15 days of the service of this notice upon you the amount will be collected from you under the provisions of Section of the Municipal Regulation

President, Municipal Council

No Date

Forwarded to the Water Works Superintendent for service and return.

Water Works Engineer

No Date

Forwarded to the Inspector Division for service and return The manner of service should also be noted

Water Works Superintendent

No Date

Re submitted after service

Inspector Division

No. Date

Forwarded to the Water Works Engineer

Water Works Superintendent

Form No. 8

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Account No*

NOTICE (Triplicate)

Under Section 205 (1) (*c*) of the Travancore Municipal Regulation, V of 1095 as amended by Regulation X of 1108

To

House No. Street / Road

Whereas you are using the water supplied to you in the said premises or permitting the same to be used in contravention of the Regulations and Rules relating thereto *viz* you are hereby required to refrain from so doing and if you continue to so use the water or permit the same to be so used even after the receipt of this notice, the supply of water will be cut off at your expense from the said premises after days from the service of this notice upon you.

Note that action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred

Water Works Engineer

President,
Municipal Council, Trivandrum

Form No. 8

WILLINGDON WATER WORKS
TRIVANDRUM

No. *Dated* *Account No*

NOTICE (Duplicate)

Under Section 205 (1) (*c*) of the Travancore Municipal Regulation, V of 1095 as amended by Regulation X of 1108

To

House No Street / Road

Whereas you are using the water supplied to you in the said premises or permitting the same to be used in contravention of the Regulations and Rules relating thereto *viz* you are hereby required to refrain from so doing and if you continue to so use the water or permit the same to be so used even after the receipt of this notice the supply of water will be cut off at your expense from the said premises after days from the service of this notice upon you.

Note that action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred

President,
Municipal Council, Trivandrum.

Form No. 8

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Account No*

NOTICE (Original)

Under Section 205 (1) (*c*) of the Travancore Municipal Regulation, V of 1095 as amended by Regulation X of 1108

To

House No Street / Road

Whereas you are using the water supplied to you in the said premises or permitting the same to be used in contravention of the Regulations and Rules relating thereto *viz* you are hereby required to refrain from so doing and if you continue to so use the water or permit the same to be so used even after the receipt of this notice, the supply of water will be cut off at your expense from the said premises after days from the service of this notice upon you

Note that action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred

President,
Municipal Council Trivandrum.

No. Date

Forwarded to the Water Works Superintendent for service and return.

Water Works Engineer

No. Date

Forwarded to the Inspector Division for service and return. The manner of service should also be noted

Water Works Superintendent.

No Date

Re-submitted after service.

Inspector Division.

No. Date

Forwarded to the Water Works Engineer

Water Works Superintendent

Form No. 9

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Account No*

NOTICE (Triplicate)

Under section 205 (1) (*d*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No Street / Road

Whereas you have wilfully or negligently damaged the meter or the pipe, or the valve, conveying water to the said premises, I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after the service of this notice upon you.

Note that any action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred.

Water Works Engineer

President, Municipal Council,
Trivandrum

Form No. 9

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Account No*

NOTICE (Duplicate).

Under Section 205 (1) (*d*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No. Street / Road

Whereas you have wilfully or negligently damaged the meter or the pipe, or the valve, conveying water to the said premises, I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after the service of this notice upon you

Note that any action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred

President, Municipal Council,
Trivandrum.

Form No. 9.

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Account No*

NOTICE (Original)

Under Section 205 (1) (*d*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No Street / Road

Whereas you have wilfully or negligently damaged the meter or the pipe, or the valve, conveying water to the said premises, I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after the service of this notice upon you.

Note that any action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred

President, Municipal Council,
Trivandrum

No. Date

Forwarded to the Water Works Superintendent for service and return. Water Works Engineer

---

No. Date

Forwarded to the Inspector Division for service and return. The manner of service should also be noted

Inspector, Division

No Date

Re-submitted after service.

Inspector Division.

No. Date

Forwarded to the Water Works Engineer

Water Works Superintendent

Form No 10

WILLINGDON WATER WORKS
TRIVANDRUM

No. *Dated* *Account No*

NOTICE (Triplicate)

Under Section 205 (1) (*e*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108.

To

House No. Street
Road

Whereas the occupier of the said premises has refused admission to the Water Works men who proposed to enter on for the purpose of executing work, placing or removing making examination or enquiry in connection with water supply or prevented them from doing such work placing or removing or making examination or enquiry I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after service of this notice upon you.

Note that any action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred

Water Works Engineer *President,*
Municipal Council, Trivandrum

Form No 10

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Account No*

NOTICE (Duplicate)

Under Section 205 (1) (*e*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No Street
Road

Whereas the occupier of the said premises has refused admission to the Water Works men who proposed to enter on for the purpose of executing work placing or removing making examination or enquiry in connection with water supply or prevented them from doing such work placing or removing or making examination or enquiry I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after the service of this notice upon you

Note that any action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred

President,
Municipal Council, Trivandrum.

Form No 10

WILLINGDON WATER WORKS
TRIVANDRUM.

No *Dated* *Account No*

NOTICE (Original).

Under Section 205 (1) (*e*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No. Street
Road

Whereas the occupier of the said premises has refused admission to the Water Works men who proposed to enter on for the purpose of executing work, placing or removing making examination or enquiry in connection with water supply or prevented them from doing such work placing or removing or making examination or enquiry, I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after the service of this notice upon you.

Note that any action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred

President,
Municipal Council, Trivandrum

No. Date

Forwarded to the Water Works Superintendent for service and return.

Water Works Engineer

No. Date

Forwarded to the Inspector Division for service and return. The manner of service should also be noted

Inspector Division.

No. Date

Re-submitted after service.

Inspector Division.

No. Date

Forwarded to the Water Works Engineer

Water Works Superintendent

Form No 11

WILLINGDON WATER WORKS
TRIVANDRUM

Notice under Section 205 (1) (*f*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

(Triplicate)

No *Dated* *Account No*

To

House No Street

Road

Whereas the pipes, taps works or fittings connected with the Water Supply to the aforesaid premises are found on examination to be out of repair as detailed on the reverse of this notice to such an extent as to cause waste or contamination of water, I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after the service of this notice upon you

Repairs must be executed only by plumbers licensed by the Water Works Engineer

Note that any action taken under this notice will not relieve you from any penalty or liability which you may other wise have incurred

Water works Engineer *President,*
Municipal Council, Trivandrum

Details of repairs.

Form No 11

WILLINGDON WATER WORKS
TRIVANDRUM

Notice under Section 205 (1) (*f*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108.

(Duplicate)

No *Dated* *Account No*

To

House No Street

Road

Whereas the pipes, taps works or fittings connected with the Water Supply to the aforesaid premises are found on examination to be out of repair as detailed on the reverse of this notice to such an extent as to cause waste or contamination of water I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after

days after the service of this notice upon you

Repairs must be executed only by plumbers licensed by the Water Works Engineer

Note that any action taken under this notice will not relieve you from any penalty or liability which you may otherwise have incurred *President,*
Municipal Council, Trivandrum

Details of repairs

Form No. 11.

WILLINGDON WATER WORKS
TRIVANDRUM

Notice under Section 205 (1) (*f*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

(Original)

No *Dated* *Account No*

To

House No. Street

Road

Whereas the pipes, taps works or fittings connected with the Water Supply to the aforesaid premises are found on examination to be out of repair as detailed on the reverse of this notice to such an extent as to cause waste or contamination of water I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after the service of this notice upon you

Repairs must be executed only by plumbers licensed by the Water Works Engineer

Note that any action taken under this notice will not relieve you from any penalty or liability which you may otherwise have incurred *President*
Municipal Council, Trivandrum

Details of repairs.

Details of repairs

No Date.

Forwarded to the Water Works Superintendent for service and return. Water Works Engineer

No Date

Forwarded to Inspector Division for service and return The manner of service should also be noted

Water Works Engineer.

No Date Re-submitted after service. Inspector Division.

No Date Forwarded to the Water Works Engineer

Water Works Superintendent

Form No 12

WILLINGDON WATER WORKS
TRIVANDRUM.

No *Dated* *Account No*

NOTICE (Triplicate)

Under Section 205 (1) (*g*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No Street / Road

Whereas you have caused the pipes, taps, works or fittings connected with the water supply to be placed, removed, repaired or otherwise interfered with in violation of the rules, I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after the service of this notice upon you

Note that any action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred

Water Works Engineer

President,
Municipal Council, Trivandrum

No. Date

Forwarded to the Water Works Superintendent for service and return

Water Works Engineer

No. Date

Forwarded to Inspector Division for service and return The manner of service should also be noted

Water Works Superintendent.

Form No 12

WILLINGDON WATER WORKS
TRIVANDRUM.

No *Dated* *Account No*

NOTICE (Duplicate)

Under Section 205 (1) (*g*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No Street / Road

Whereas you have caused the pipes, taps, works or fittings connected with the water supply to be placed, removed, repaired or otherwise interfered with in violation of the rules, I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after the service of this notice upon you.

Note that any action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred

President,
Municipal Council, Trivandrum

No Date

Re-submitted after service.

Inspector Division.

Form No. 12.

WILLINGDON WATER WORKS
TRIVANDRUM

No *Dated* *Accout No*

NOTICE (Original.)

Under Section 205 (1) (*g*) of the Travancore Municipal Regulation V of 1095 as amended by Regulation X of 1108

To

House No Street / Road

Whereas you have caused the pipes, taps, works or fittings connected with the water supply to be placed removed, repaired or otherwise interfered with in violation of the rules, I do hereby give you notice that the supply of water will be cut off from the said premises at your expense after days after the service of this notice upon you.

Note that any action taken under this notice will not relieve you from any penalty or liability which you may have otherwise incurred

President,
Municipal Council, Trivandrum

No. Date.

Forwarded to the Water Works Engineer

Water Works Superintendent.

Form No 13

WILLINGDON WATER WORKS
TRIVANDRUM

Advice to licensed plumber of approval of the estimate of water supply installation or extension, alteration or repairs to installation.

(Triplicate)

No Date

To

Licensed Plumber

The estimate submitted by you for water supply installation or extension, alteration or repairs to installation to the undermentioned property is approved as No of

Water Works Engineer

House No

Street

Road

Name of owner

Date of submission of estimate

Form No. 13

WILLINGDON WATER WORKS
TRIVANDRUM

Advice to licensed plumber of approval of the estimate of water supply installation or extension, alteration or repairs to installation

(Duplicate)

(To be sent to the Water Works Superintendent)

No Date

To

Licensed Plumber

The estimate submitted by you for water supply installation or extension alteration or repairs to installation to the undermentioned property is approved as No of

Water Works Engineer

House No

Street

Road

Name of owner

Date of submission of estimate

Form No. 13

WILLINGDON WATER WORKS
TRIVANDRUM

Advice to licensed plumber of approval of the estimate of water supply installation or extension, alteration or repairs to installation

(Original.)

(To be sent to the licensed plumber),

No Date

To

Licensed Plumber

The estimate submitted by you for water supply installation or extension, alteration or repairs to installation to the undermentioned property is approved as No of

Water Works Engineer

House No

Street

Road

Name of owner

Date of submission of estimate

FORM No 14.

Application for supply of water for non domestic purposes from the Willingdon Water Works, Trivandrum

To, The President,

Municipal Council, Trivandrum

Dear Sir,

I/We the owner or occupier or owners or occupiers of House No Street/Road do hereby request you to furnish me/us with a supply of about gallons of water per month for purpose in house No Street/Road

I/We agree to the work of the provision of the necessary meter or meters and of making the necessary connection being estimated for and carried out by the Water Supply Department at my or our expense and also to pay the lawful charges for all water consumed I/We further agree to conform to the Regulation, Rules and bye-laws relating to or affecting the supply of water from time to time in force within the supply area of the Willingdon Water Works, Trivandrum I/We remit herewith half a Rupee being the estimate fee.

Signature

Date Address

Accounts to be sent to

NOTE —It must be understood that this supply may be cut off at any time if the water supply is found insufficient.

No.

Municipal Office, Trivandrum

Forwarded to the Water Works Engineer for favour of a reply if this supply may be given.

President,
Municipal Council, Trivandrum.

No

Forwarded to the Water Works Superintendent for report.

Water Works Engineer

No.

Returned (1) The supply may be given.

(2) The supply cannot be given for the reasons stated below

Water Works Superintendent.

Reasons

APPENDIX G

No

Forwarded to the President, Municipal Council, Trivandrum

(1) The supply can be given.

(2) The supply cannot be given for the reasons noted above

Water Works Engineer

No

Forwarded to the Water Works Engineer for favour of further action. The Council has sanctioned the supply in its resolution No dated The estimate fee of S Rs. 0-14 0 remitted by the applicant is herewith sent the receipt of which please acknowledge

President
Municipal Council Trivandrum

The amount mentioned above has been received and entered in accounts and official receipt granted The application is submitted for further action

Cashier
Water Works Office

Manager and Head Accountant

No

Forwarded to the Water Works Superintendent for preparation and submission of the estimate for making the connection including therein provision for the supply and erection of a meter or meters

Water Works Engineer

No.

Returned with the necessary estimates for favour of approval and for directing the applicant to make the necessary deposits.

Water Works Superintendent

Submitted to the Water Works Engineer The estimate has been checked and may be approved.

Head Draftsman,
Water Works Office

The estimate is approved as No of Issue notice to the applicant asking him to deposit the amount of the estimate namely S. Rs.

Water Works Engineer

Form No 15

WILLINGDON WATER WORKS
TRIVANDRUM

METER READING NOTICE AND SLIP.

(Provisional)

for the month of

Notice No Division
Meter No Date Time
Account No.
Owner
Occupier
House No Street Road
Previous reading
Present reading
Difference
Free allowance
Excess quantity to be charged

Entered in
Accounts ledger folio *Meter Reader*
Accountant. Occupier or owner

1 If the owner or the occupier wishes to be present when the meter reading is taken he should do so immediately he is informed that the meter reader is present. The latter has instructions to wait for not more than 5 minutes before reading the meter He will note the readings in a separate slip and hand it over at the time of the reading The person who is present when the meter is read is requested to initial the meter reader's book

2 Information about any change in the tenancy or ownership should be intimated to Water Works office direct

Form No 15

WILLINGDON WATER WORKS
TRIVANDRUM

METER READING SLIP (Provisional)

for the month of

Meter No Division.
Water meter reading for the month of taken on
in pursuance of
Notice No
Account No
Owner
Occupier
House No. Street Road
Previous reading
Present reading
Difference
Free allowance
Excess to be charged

Meter Reader

1. No arrangement should be proposed nor any objection preferred to the inspector or the meter reader All complaints should be addressed to the Water Works Engineer

2 Complaint re incorrect or excess reading or as regards the meter being out of order shall be made by the person concerned within 10 days of the date of the reading which is disputed Complaints regarding the non-receipt of reading slip should be made before the end of the month. Any owner or occupier of a house or property having water connection who may suspect or dispute the accuracy of the measurements indicated by the meter may apply to the Water Works Engineer to have the meter tested on payment of a fee of Re one per test If on actual test the quantity registered by the meter exceeds 10% of the correct quantity the fee will be refunded

3 Information about any change of ownership should be intimated to the Water Works office direct

Form No 15

WILLINGDON WATER WORKS
TRIVANDRUM

METER READING NOTICE

Notice No Division Date
To
Owner or occupier
House No Street Road

Sir,

I propose taking the reading of water meter in your premises on between the hours of and

Meter Reader

1 Meters will be read generally between the 1st and 5th of every Malabar month.

Form No 15

WILLINGDON WATER WORKS
TRIVANDRUM

NOTICE OF METERS TESTED (Duplicate).

No. *Date* *Account No*

To

House No

Street
Road

Ref Application dated

Sir,

The meter referred to by you has it is reported been tested on and that the error has been found to be within / excess of 10 per cent

Under Rule 25 the deposit is forfeited/will be refunded on your applying for the same

Water Works Engineer

Form No. 16.

WILLINGDON WATER WORKS
TRIVANDRUM

NOTICE OF METERS TESTED (Original)

No *Date* *Account No*

To

House No

Street
Road

Ref Application dated

Sir,

The meter referred to by you has it is reported been tested on and that the error has been found to be within / excess of 10 per cent

Under Rule 25 the deposit is forfeited/will be refunded on your applying for the same.

Water Works Engineer.

Form No 17.

WILLINGDON WATER WORKS,
TRIVANDRUM

Meter Testing Notice and Report.

Report No. Date Account No.
Work order No Date
Application No Date
Name of applicant
House No Street
Road
Notice No Date
Date and Time fixed for Test
Date and Time of Testing
Name of officer conducting the Test
Whether the applicant witnessed the Test
Name of person witnessing the Test

	Time	Index reading
Test started		
Test completed		

Discharge by Meter reading Gallons
Measured quantity Gallons
Rate of test flow gallons per hour
Correction to be made to Meter reading
Gallons
Percentage of error

Inspector Division

No. Date

Forwarded to the Water Works Engineer The error is within the tolerance of 10 per cent allowed by the Rules. The applicant may be informed and deposit forfeited.

The error is in excess of the tolerance The deposit may be refunded

Form No. 17.

WILLINGDON WATER WORKS,
TRIVANDRUM.

Meter Testing Report

No Date Account No
Work order No Date
Name of applicant
House No Street
Road
Notice No Date
Date and Time fixed for Test
Date and Time of Testing
Name of Officer conducting the Test
Whether the applicant witnessed the Test
Name of person witnessing the Test

	Time	Index reading
Test started		
Test completed		

Discharge by Meter reading Gallons
Measured quantity Gallons
Rate of test flow gallons per hour
Correction to be made to Meter reading
Gallons
Percentage of error

Inspector Division.

The meter will be taken out for repairs.

Water Works Superintendent.

Issue notice. The deposit is forfeited/may be refunded.

Water Works Engineer.

Form No. 17.

WILLINGDON WATER WORKS,
TRIVANDRUM

Meter Testing Notice

No Date

To

House No Street
Road

Ref. Your application dated

Sir,

Meter No fixed to the installation to the above mentioned property and complained of by you will be tested on between hours. Please arrange to be present so as to witness the test

Inspector,
Division.

APPENDIX G.

FORM NO 18.

THE WILLINGDON WATER WORKS, TRIVANDRUM.

Notice of an estimate of consumption on metered supplies.

No Dated Account No .....

To

House No Street/Road.

Dear Sir/Madam,

The meter fixed to the above service is reported to have gone out of order
A calculation under Rule 27 will be made

Yours faithfully,
Superintendent.

Rule 27 If, on examination, any meter be found to be out of order and not registering correctly, the consumption during the period dating from the last reading till the repair of the meter or the putting up of a correct meter shall after notice in Form No 18 be calculated at the average daily consumption registered for any previous period during which, in the opinion of the Water Works Engineer, the meter was registering correctly and the consumption of water was not abnormal

Form No 19

WILLINGDON WATER WORKS
TRIVANDRUM

Date.

Please take notice that water will be shut off from your premises during the hours mentioned below to allow of certain works being executed

Date.	Month and year	Hours. From	To

To

Inspector,
Water Works Division.

Form No. 19.

WILLINGDON WATER WORKS,
TRIVANDRUM

Date

Please take notice that water will be shut off from your premises during the hours mentioned below to allow of certain works being executed

Date	Month and year	Hours. From	To

To

Inspector,
Water Works Division.

FORM NO 20

THE WILLINGDON WATER WORKS, TRIVANDRUM

LICENSE TO PLUMBERS.

No of 11

(Current for one year only.)

Mr having paid the fee of Bh Rs. 10 (ten only), the Water Works Engineer, Trivandrum, hereby permits him to carry on business as a licensed plumber in connection with the Willingdon Water Works.

2 This license is granted with effect from the day of , 11 . and it will cease to have effect on the day of 11

3 This license is granted on condition that is a competent plumber and will employ only plumbers who have obtained licenses from the Water Works Engineer and will comply with the terms of the Regulation, Rules, Bye-laws, or orders now in force or that may be passed from time to time, in connection with the water supply. If the licensee is found guilty of any misconduct, neglect of duty or dishonesty, he shall be liable to be fined or his license suspended or cancelled with or without forfeiture of security and, in no circumstances will a refund of the fee paid for the license be allowed.

Water Works Office,
Trivandrum, 11

Water Works Engineer,
Willingdon Water Works.

FORM No. 21.

THE WILLINGDON WATER WORKS, TRIVANDRUM

LICENSED PLUMBERS.

Agreement.

I being desirous of carrying on business as a licensed plumber in connection with the Willingdon Water Works (Private services) hereby declare that I shall during the currency of my license comply with the terms of the Willingdon Water Works Rules and Regulations and any order passed by the Water Works Engineer from time to time, and I hereby further engage to furnish to the Water Works Engineer or any officer authorised by him all information required relative to the said private service.

As security for the due and proper fulfilment of the plumber's duties, I herewith deposit B Rs. 100 (one hundred) only, and I agree that this sum may be forfeited to the Travancore Government in case I am found guilty of misconduct, neglect of duty or dishonesty

Dated at Trivandrum this day the of 19

Witness,

Plumber

FORM No 22
THE WILLINGDON WATER WORKS, TRIVANDRUM.
Plumber's Journal

Month & date	House No Street & Name of owner	Description (with details) of work on which engaged

(2)

NOTICE.

(R O C No 1288/33/P W, dated 15th August 1934)

Erratum to the Notification regarding the Willingdon Water Works Rules and bye laws published in pages 1339-1375, Part I of the Gazette, dated 24th July 1934

Rule	*Line*	*For*	*Read*
29	2	A	B
30 (*b*)	3	pply	supply

On the reverse side of the meter reading slip Form No 15, para 2, add "non" between "the" and "receipt" in line 5, read "end" for "15" and add a full stop after "month" in line 6 and read "Any" for "any" in line 7

Bye law 8, line 3, read "to" in place of "of"

T G. G, dated 21 8 1934, Pt I, P 5.

IV

REGULATION IV OF 1109 [*The Travancore (Matches) Excise Duty*]

I RULES

(R O C No 1068-14/32/Devpt, dated 7th September 1934)

In exercise of the powers conferred by Section 19 of the Travancore (Matches) Excise Duty, Regulation IV of 1109, the Government of His Highness the Maha Raja are pleased to make the following Rules to provide for the grant of a rebate of the duty payable under Section 3 of the said Regulation, namely —

"1 A rebate of the duty payable under Section 3 of the Travancore (Matches) Excise Duty, Regulation IV of 1109, shall be granted on all matches to which the provisions of Chapter VII of the Travancore Matches (Excise Duty) Order 1109, apply, manufactured in any manufactory whose daily output does not exceed 100 gross of boxes at the following rates, namely —

(i) where the average number of matches in a box or booklet is 40 or less, a rebate of 10 pies per gross of boxes or booklets,

(ii) where the average number of matches in a box or booklet, is more than 40 but not more than 60, a rebate of one anna and three pies per gross of boxes or booklets, and

(iii) where the average number of matches in a box or booklet is more than 60, a rebate of one anna and eight pies per gross of boxes or booklets.

2 The rebate shall be made by a reduction in the selling price to the owner of such manufactory of the banderols required to be affixed to boxes or booklets of matches by Government Notification R O C 1068 4/32/Devpt. dated the 21st July 1934

3. An owner of a manufactory claiming a rebate under these Rules shall present to the Treasury Officer at the time of purchasing banderols a certificate from the Excise Commissioner that the daily output of the manufactory does not exceed 100 gross of boxes of matches

4 The certificate referred to in Rule 3 shall not be valid for more than three months from the date of issue and may be cancelled by the Excise Commissioner at any earlier time if it appears to the Excise Commissioner that the daily output of the manufactory to which it relates exceeds 100 gross of boxes.

5 The Treasury Officer shall on presentation of such certificate, issue to the owner of the manufactory banderols of class 1, 2 or 3 specified in clause 42 of the Travancore Matches (Excise Duty) Order, 1109, of distinctive colour at the following prices, namely —

Banderols of Class 1	Per gross of banderols, fifteen annas and two pies
Banderols of Class 2	Per gross of banderols, one Rupee, six annas and nine pies.
Banderols of Class 3,	Per gross of banderols, one Rupee, fourteen annas and four pies.

T. G G., dated 11-9-1934, Pt I, P. 69.

II NOTIFICATIONS.

(1)

(R O C No 1068-9/32/Devpt, dated 20th August 1934)

In exercise of the powers conferred by Section 18 of the Travancore Sea Customs Regulation, V of 1088, the Government of His Highness the Maha Raja hereby prohibit the bringing into Travancore by sea or land of matches in boxes or booklets containing more than 80 matches —

T G G, dated 21 8-1934, Pt I, P. 12.

(2)

(R O C No. 1068 10/32/Devpt, dated 27th August 1934)

In pursuance of Clause 84 of the Travancore Matches (Excise Duty) Order, 1109, the Government of His Highness the Maha Raja are hereby pleased to empower all Officers of the Excise Department not lower in rank than an Inspector to search any place, vessel, cart or means of conveyance for matches liable to duty and to seize and remove or detain any matches which may appear to them to have been illegally imported or manufactured —

T G G, dated 28 8-1934, Pt I, P 35

[See Page 650, *Supra*]

(3)

(R O C. No 1068-11/32/Devpt, dated 27th August 1934 and

R O C No 1068-22/32/Devpt, 15th October 1934)

In exercise of the powers conferred by Section 7 of the Travancore (Matches) Excise duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased to prohibit absolutely the bringing of matches into Travancore from the territories of the Indian States mentioned below —

Junagadh including Mongrol, Porbandar, Gondal	Western India States Agency
Sirmoor	(Punjab States)
Kotah, Palanpur	Rajputana States.

T. G. G., dated 28-8-1934, Pt I, P 36, and 16-10-1934, Pt I, P. 180.

(4)

(R. O C No 1068 12/32/Devpt, dated 3rd September 1934)

In exercise of the powers conferred by Sub sections (1) and (3) of Section 8 of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased to direct that the following amendment shall be made in Notification R O C No 1068 4/32/Devpt, dated the 21st July 1934, namely —

For the word and figures "August 1st 1934" occurring in line one of clause (1) of the said Notification, the word and figures "September 11th 1934" shall be substituted

T. G. G, dated 4-9-1934, Pt I, P 54.

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(5)

(R O C No 1068-13/32/Devpt, dated 3rd September 1934)

It is hereby notified that all Revenue Officers of and above the rank of Tahsildars are authorised to demand the licenses and inspect the licensed premises, the machinery, the stocks and the accounts of the holders of licenses in Form A (for the manufacture of matches) and in Form C (for the manufacture of splints and veneers) issued under the Travancore Matches (Excise Duty) Order, 1109 —

T. G G, dated 4-9-1934, Pt I P 54

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(6)

(R O. C No 1068-15/32/Devpt, dated 14th September 1934)

In exercise of the powers conferred by Sections 9 and 18 of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased to direct that from the date of publication of this Notification in the Gazette no person shall supply splints or veneers to any person who does not possess a license to manufacture matches issued under the same Regulation Provided that the owner of a match manufactory may issue veneers to persons other than those who hold licenses for the manufacture of matches, for the manufacture of empty boxes outside the limits of the manufactory and for the supply of the same to the manufactory, on the following conditions —

(1) A pass showing the number and description of veneers supplied shall be issued by the owner of a manufactory to the person concerned, every time veneers are supplied to such person.

(2) The pass shall be returned to the match manufactory along with the match boxes manufactured out of the veneers specified in the pass

(3) The passes shall be shown on demand, to all officers of the Excise Department of and above the rank of Sub Inspectors

(4) A register of such passes shall be maintained in each factory and shall be open to inspection at any time by any officer of the Excise Department of and above the rank of Sub-Inspectors —

T G G, dated 18 9-1934, Pt I, P 86

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(7)

(R O C. No 1068 16/32/Devpt, dated 19th September 1934)

In exercise of the powers conferred by Section 7 of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased to prohibit absolutely the bringing of matches into Travancore from the territories of the Indian States or Taluka mentioned below :—

Jasdan
Manavadar
Thana-Devli
Virpur
V S. Naja Manasia (Taluka)
} Western Kathiawar Agency

T G G. dated 25-9-1934, Pt I, P. 99

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(8)

(R O C No 1068-17/32/Devpt, dated 19th September 1934)

In exercise of the powers conferred by Section 7 of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased to prohibit absolutely the bringing of matches into Travancore from the territories of the Indian States mentioned below —

Vadia
Malia
} Western Kathiawar Agency

T. G G, dated 25-9-1934-Pt I, P 99.

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(9)

(R O C No 1068-18/32/Devpt, dated 24th September 1934)

In exercise of the powers conferred by Section 18 (2) of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja direct that all manufacturers and dealers who have, in their possession, on the 1st October 1934, any quantity of

unbanderolled matches amounting to or exceeding 50 gross boxes, shall declare that quantity to the Excise Commissioner All undeclared stocks of unbanderolled matches of 50 gross and over shall be liable to confiscation— *T G. G., dated 25-9-1934, Pt I, P 116*

(10)

(R O C No. 1068-24/32 / Devpt., dated 29th October 1934)

In exercise of the powers conferred by Section 18 (2) of the Travancore (Matches) Excise Duty Regulation IV of 1109, the Government of His Highness the Maha Raja are pleased to direct that there shall be made the following amendment in Notification R O C. No. 1068 18/32/Devpt., dated the 24th September 1934 published at page 116 of Part I of the Government Gazette dated the 25th September 1934/9th Kanni 1110, namely —

To the said Notification, the following words shall be added at the end, namely —

"and the Excise Commissioner may cause all confiscated matches to be destroyed" *T. G G, dated 30 10-1934, Pt. I, P. 237*

(11)

(R O C No. 1068-19/32/Devpt, dated 24th September 1934)

In exercise of the powers conferred by Section 8 (2) of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja, direct that the following be added as a proviso to Notification R O C. No 1068 5/32/Devpt dated the 21st July 1934 published on page 1934 of Part I of the Travancore Government Gazette dated 24th July 1934.

"Provided that the sale and the offering and keeping for sale of unbanderolled sulphur matches and matches known as "Bengal Lights" shall be permitted up to the 31st December 1934"—

T G G, dated 25 9 1934, Pt I P 116

(12)

R O. C No 1068-20/32/Devpt, dated 28th September 1934)

In exercise of the powers conferred by Section 7 of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased to prohibit absolutely the bringing of matches into Travancore from Cutch.—

T G G., dated 2-10-1934, Pt. I, P. 130.

(13)

(R O C No 1068-21/32/Devpt, dated 15th October 1934)

In exercise of the powers conferred by Section 18 of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased to direct that the following further amendment shall be made in the Travancore Matches (Excise Duty) Order 1109, as amended by Notification R O C No 1068 6/32/Devpt dated the 21st July 1934, namely —

In Chapter V II of the said Order—

(*a*) In Clause 41 for the word "sale" the word "issue" shall be substituted and to the said clause the following words shall be added, namely —

"and payment of the duty shall be made by the owners of manufactories furnishing to the Excise Commissioner the purchase price of the banderols affixed to boxes or booklets of matches issued from their manufactories"

(*b*) For Clause 46, the following Clause shall be substituted namely —

46 (1) The Excise Commissioner shall supply to any owner of a manufactory banderols for use on boxes or booklets of matches in the manufactory on such owner executing a bond or furnishing adequate security to the satisfaction of the Excise Commissioner for the price of the banderols so supplied, but no person shall, unless generally or specially so authorised by the Excise Commissioner, issue from a manufactory any box or booklet bearing a banderol so supplied without paying to the treasury the price of the banderol affixed to such box or booklet.

(2) Whoever issues from a manufactory any box or booklet of matches in contravention of the provisions of sub clause (1) shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both"— *T G G, dated 16-10-1934, Pt I, P 180*

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(14)

(R O C No 1068-23/32/Devpt, dated 15th October 1934)

In exercise of the powers conferred by Section 7 of the Travancore (Matches) Excise Duty Regulation, IV of 1109, the Government of His Highness the Maha Raja are pleased to prohibit absolutely the bringing of matches into Travancore from the territory of the Indian State of Nawanagar in the Western India States Agency —

T G G, dated 16-10-1934, Pt I, P 180
