determined with reference to the date of alienation. Future contingencies of births and deaths do not stand on the same footing as conditions and liabilities existing at the date of the alienation which are referred to in section 44 of the Transfer of Property Act. These latter incidents of a co-parcenary interest do not conflict with the principle that an alienee from one of several co-parceners takes the interest which may be carved out at the date of alienation.

I would answer the question referred to the Full Bench in the affirmative.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Krishnaswami Ayyar and Mr. Justice Ayling.

NARAYANAN CHETTY AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

MUTHIAH SERVAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1910, February 8. March 31. October 21. November 3.

Registration Act III of 1877, *ss.* 3, 17, 40—*Contract to sell—Agreement to lease—Evidence Act*, s. 91.

An agreement to execute a sub-lease and to get it registered at a future is a lease within section 3 of the Indian Registration Act III of 1877 and is compulsorily registrable under clause (*d*) of section 17.

Such an agreement to grant a lease which requires registration affects immoveable property and cannot be received in evidence in a suit for specific performance of such agreement.

It is immaterial whether possession has passed or not in accordance with the agreement.

Section 49 of the Registration Act indicates that a document should not be received in evidence even where the transaction sought to be proved does not amount to a transfer of interest in immoveable property but has only created an obligation to transfer the property.

SECOND APPEAL against the decree of Arthur F. Pinhey, District Judge of Madura, in Appeal Suit No. 458 of 1906, presented against the decree of S. Raghava Aiyangar, District Munsif of Sivaganga, in Original Suit No. 315 of 1905.

The facts are as follows :—

The lessees of the Sivaganga zamindary are entitled to collect fuller's earth that is found in the waste land of certain villages. They granted a lease of the right to collect fuller's earth in

* Second Appeal No. 7 of 1908.

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three villages to first defendant. Plaintiffs allege that first defendant agreed to sub-lease the same to the plaintiffs by agreement, dated 4th January 1905. Plaintiffs sued for specific performance of the agreement and for damages. They asked that the first defendant should be compelled to execute a registered sub-lease. Defendants Nos. 2 to 5 obtained a sub-lease from the first defendant. The plaintiffs contended that that sub-lease was not binding. Exhibit A was put forward by the plaintiffs as the agreement to sub-lease. Its terms are as follows :—

"Under the lease taken for a period of six faslis from fasli 1314 current to fasli 1319, of the fuller's earth, and saline pottus in these three villages, viz., Ain Pillor, Kalathoor and Narathakudi, from the lessees of Sivaganga zamin, and under the agreement entered into between myself and the said lessees and under the Court razinama in Original Suit No. 140 of 1904, on the file of the District Munsif of Sivaganga, my lease hold right to the earth was confirmed and the arid tracts in the said three villages remain in my possession and enjoyment. In order that you may boil the said fuller's earth and enjoy the same for the abovementioned six faslis according to my right, a sub-lease has been arranged and settled through this, and fixing the rent of the said sub-lease at the rate of Rs. 280 per fasli, Rs. 280 the rent due for the current fasli 1314 has been received by me in cash this day. In respect of this, and in respect of my having delivered the arid tracts to you to be enjoyed from fasli 1314 current, this itself shall be a receipt. After the lessees have executed a lease deed to me and got it registered according to rezinama stated above, I shall at your cost execute a lease deed according to the terms of the said deed and get it registered. Until then this shall be in force. You shall keep this itself as a record."

This document being unregistered the second to fifth defendants pleaded that it was inadmissible in evidence. The District Munsif held that Exhibit A should have been registered and as it had not been registered, it could not be admitted in evidence and further that secondary evidence of its contents could not be adduced (Indian Evidence Act, section 91).

The District Judge dismissed the appeal on the same grounds. The plaintiffs appealed to the High Court.

The case first came on for hearing before (BENSON and KRISHNASWAMI AYYAR, JJ.), who made the following order of Reference to the Full Bench.

BENSON, J.—I am not at present satisfied that the decision in the case of *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraju* (1) is not in accordance with the principle underlying the decision of the Full Bench in *Raja of Venkatagiri* v. *Narayana Reddi*(2) and does not govern the present case. It is not, however, altogether easy to appreciate the grounds on which the Full Bench proceeded. The question before us, is one of great importance and of considerable difficulty. I am therefore of opinion that a reference to the Full Bench in the terms proposed by my learned brother is desirable.

KRISHNASWAMI AYYAR, J.—The suit is to compel specific performance of an agreement to give the plaintiff a sub-lease. Exhibit A, which is called a receipt, is in terms a promise to execute a sub-lease and to get it registered on a future date. The document comes within the definition of a lease in section 3 of the Registration Act and is compulsorily registrable under clause (*d*) of section 17. The Courts below have dismissed the suit holding that the document was inadmissible in evidence and that the suit therefore was not maintainable. The appellant's vakil relies upon the Full Bench decision in *Raja of Venkatagiri* v. *Narayana Reddi* (2), and on the unreported case *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraju*(1), (WALLIS and BODDAM, JJ., not WALLIS and BENSON, JJ., as incorrectly stated in the report). If the latter case is correctly decided the appellant is entitled to succeed. In *Raja of Venkatagiri* v. *Narayana Reddi* (2), the question was as to the admissibility of a kabuliat executed by the lessee in proof of a contract on the part of the lessor to execute a cowle and to get the kabuliat registered. The action itself was for damages "for the breach of contract on the part of the defendant in refusing to register the kabuliat and to give the plaintiff a cowle and also in disturbing his possession." The contract to grant a cowle was not in writing. A draft cowle prepared by the plaintiff had not

(1) (1907) 17 M.L.J., 218.

(2) (1894) I.L.R., 17 Mad., 456.

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executed by the defendant. The contract to grant a cowle and to register the kabuliat could only be regarded as oral. No question could properly be raised with regard to the admissibility of the kabuliat in evidence of such an oral contract. The kabuliat which was in writing and came within the definition of lease required registration and was inadmissible under section 49 to prove a transaction affecting immoveable property. But it was apparently thought that there was nothing to prevent its admissibility to prove the perfectly valid oral agreement to grant a cowle and to register the kabuliat. The decision of the Full Bench therefore in allowing the kabuliat to be received in evidence of the contract to grant a cowle and to register the kabuliat is not an authority for the position that an unregistered lease or agreement to grant a lease can be used in evidence for proving the lease or the agreement to grant it; see however the judgment of SUBRAMANIA AYYAR and MILLER, JJ., in *Subbarayudu* v. *Narasimha Row* (1). It was argued that in a suit for specific performance the written agreement to grant the lease is not used as evidence of a transaction affecting immoveable property. It was also contended that it is only a lease that creates an interest in the property and not a mere agreement to give a lease and in the absence of creation of any interest in the lessee we cannot speak of an agreement to grant a lease of immoveable property as affecting the immoveable property. It is difficult to accept this argument. Section 49 provides that a document required by section 17 to be registered shall not affect the immoveable property comprised therein and further that it shall not be received as evidence of any transaction affecting such property. Can it be said that an agreement to grant a lease of immoveable property is not a transaction affecting the property? Such an agreement creates an equitable interest in favour of the promise (see Fry on "Specific Performance," 4th edition, page 589), and must therefore be regarded as a transaction affecting the property though it does not amount to the transfer of an interest under the Transfer of Property Act. Courts of Equity treat a tenant in possession under an instrument which would be specifically enforceable as in the same position as if a valid lease were in existence. See Redman's "Landlord and Tenant," page 130, and in the present case possession was given under

(1) Second Appeal No. 973 of 1904 (unreported).

Exhibit A. Section 17 of the Act requiring the registration of the agreement to lease, it is difficult to suppose that section 49, which renders the unregistered document inadmissible, allows the admissibility of the document to prove the agreement on the ground that it does not affect the immoveable property comprised in it. Why should registration of an agreement to lease be compulsory if the transaction can be proved by an unregistered instrument? It may be said that the provision for compulsory registration of an agreement to lease has sufficient scope for its operation in the fact that non-registration subjects the instrument to the risk of priority of a later instrument registered. But this is not a sufficient reason for including agreements to lease in section 17 and not in section 18. For the rule as to priority applies to optionally registrable instruments as well. It seems also proper to bear in mind that having specified in clause (*b*) of section 17 instruments creating a right in immoveable property of one hundred rupees and upwards the legislature has taken care to except from this clause "a document not itself creating such an interest but merely creating a right to obtain another document which will when executed create such an interest." The enactment of the exception is some evidence to show that but for it, a document, which is only an agreement to execute another, may be deemed to affect the property comprised in it. As an agreement to grant a lease, however, falls within clause (*d*) and not within clauses (*b*) and (*c*) in respect of which the exception referred to has been enacted, it may well be considered that by the inclusion of the agreement to give a lease in the very definition of a lease and the separate specification of leases of immoveable property in clause (*d*) of section 17 as requiring registration that the legislature has indicated that agreements to lease immoveable property do create an interest in such property or at all events affect such property so as to render the unregistered agreement to lease inadmissible in evidence of the transaction.

It is worthy of remark that the Full Bench in *Raja of Venkatagiri* v. *Narayana Reddi* (1) did not dissent from the decision in *Hurjivan Virji* v. *Jamsetji Nowroji* (2), where

(1) (1894) I.L.R., 17 Mad., 456. (2) (1885) I.L.R., 9 Bom., 63.

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the suit was to compel the defendant to produce the document for registration or to execute another document and duly register the same or to recover damages for wrongfully preventing the registration of the document already executed and the suit was dismissed on the ground that the document could not be received as evidence of the contract between the parties. The Full Bench merely observed that the High Court of Bombay had overlooked the prayer for damages for non-registration of the document. The authority of the Bombay decision as regards the non-admissibility of the document so far as the suit was for specific performance of the contract to give the lease is not rejected. But if the case of *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraju*(1) be correctly decided the appellant is entitled to judgment. That was a suit for specific performrnce of an agreement to grant a lease. This Court was of opinion that the Full Bench decision in *Raja of Venkatagiri* v. *Narayana Reddi*(2) was authority for the view "that the document embodying the agreement to lease does not require registration to be admissible in evidence where it is only used for the purpose of proving the contract for the breach of which the action is brought." The Full Bench did not use the unregistered kabuliat to prove a written contract to grant the lease but to prove an oral agreement to grant a cowle (for the draft cowle had not been executed) and to register the kabuliat. There appears therefore to have been a misapprehension in *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraju* (1), as to the true ground of decision in *Raja of Venkatagiri* v. *Narayana Reddi* (2), if I have understood it aright. I may add that we have found some difficulty in appreciating the grounds of that decision. As I entertain doubts about the correctness of the decision in *Konduri Srinivasa Charyulu* v. *Gottumukkala Venkataraju* (1), I think it desirable to refer to the Full Bench the following question: —

"Whether an agreement in writing to grant a lease which requires registration can be received in evidence in a suit for specific performance of such agreement, (1) where possession is given in pursuance of the agreement, (2) where it is not."

The appeal again came on for hearing in due course before the Full Bench constituted as above.

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(1) (1907) 17 M.L.J., 218. (2) (1894) I L.R., 17 Mad., 456.

The case was argued on the assumption that the document in question required registration.

C. S. Venkatachari for appellant.

The definition of "lease" in Act III of 1877, section 3, includes "agreement to lease" but an agreement for a lease is not a transaction *affecting* such property." It no doubt affects the parties but not the property. The words "agreement to lease" in section 3 only refer to those agreements which effect a demise. Section 49 only refers to documents which create a title or make an interest in property. *Raja of Venkatagiri* v. *Narayana Reddi* (1) read and explained.

[KRISHNASWAMI AYYAR, J.—The agreement there referred to is a previous oral agreement and not the kabuliat itself.]

The point decided was that an unregistered kabuliat could be received in evidence to prove the terms of an agreement for lease.

Subbarayudu v. *Narasimha Row* (2), *Purmanand Das Jiwandas* v. *Dharsey Virji* (3), *Bangarayya Garu* v. *Jagannatha Raju Garu* (4), *Satyendra Nath Bose* v. *Anil Chandra Ghosh* (5) (judgment of Fletcher, J.), referred to.

[KRISHNASWAMY AIYAR, J.—In 7 M.L.J., 278 a document of 1877 was put in to prove an agreement of 1871. It was given in evidence to prove an admission of a previous transaction. That agreement is not a transaction about land.]

The 1877 agreement was to take land in lieu of maintenance. The document was admitted to show the party surrendered the one for the other. It may be that the matter was arranged previously but none the less the terms are reduced to writing (Sheppard and Brown's "Transfer of Property Act," sixth edition, page 487, referred to).

In *Lalla Ram Saboy Lall* v. *Bibee Chowbain* (6), a mere agreement to lease is held not to create an interest in immoveable property. *Hurjivan Virji* v. *Jamsetji Nowroji* (7) was a suit to compel registration not a suit for specific performance.

(1) (1894) I. L. R., 17 Mad. 456.
(2) Second Appeal No. 973 of 1904 (unreported).
(3) 1886) I. L. R., 10 Bom., 101.
(4) (1910) M. W. N., 485.
(5) (1908) 14 C. W. N., 65.
(6) (1874) 22 Suth. W. R., 287
(7) (1885) I. L. R., 9 Bom., 63

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[KRISHNASWAMI AYYAR, J.—That is a suit for specific performance.]

The vakil also relied on *Nagappa* v. *Devu* (1), *Adakhalam* v. *Theethan* (2), *Kadar* v. *Ismail* (3), *Purmanand Das Jiwnadas* v. *Dharsey Virji* (4).

S. Srinivasa Ayyangar for respondent.

Section 49 is wider than section 17 because it makes all the things in section 17 compulsorily registrable and others besides. More restrictions are made in section 49. An agreement to lease is required to be registered for several purposes. These words cannot mean the lease itself or they would not have been used. The words in section 49 are not only "to effect immoveable property." There are more words than these. Both parts of the section must be considered. The legislature has treated a contract for sale as *affecting* the property. But contract for sale is not defined as a sale, whereas a contract for lease is defined as a lease in section 3. Further in a suit for specific performance the suit must affect the land (section 52, Transfer of Property Act). Reference was here made to Civil Procedure Code, section 16, clause (*d*), Indian Trusts Act, section 91, Transfer of Property Act, section 40 and Webster's Dictionary as to the meaning of the word "*affect*."

Under the Indian Stamp Act, sections 35 and 216, an agreement to lease has to be stamped with the same stamp as the lease itself (vide *Reference under Stamp Act, section* 46(5)).

Section 17 is not cut down by section 49. Documents which in fact operate *in presenti* must be registered. As regards 17 M.L.J., 280, the Full Bench decision is obscure and lays down no principle. It only discusses the document in that case.

The case *Hurjivan Virji* v. *Jamestji Nowroji*(6), is a suit for specific performance.

In *Bangarayya Garu* v. *Jagannatha Raju Garu* (7) the learned Judges found a difficulty in justifying *Subbayya* v. *Madduletiah* (8), and in 17 M.L.J., 469, WALLIS, J., is inconsistent with himself in 17 M.L.J., 456.

(1) (1891) I. L. R., 14 Mad., 55.
(2) (1889) I. L. R., 12 Mad., 505.
(3) (1886) I. L. R., 9 Mad., 191.
(4) (1886) I. L. R., 10 Bom., 101.
(5) (1894) I. L. R., 17 Mad., 280.
(6) (1885) I. L. R., 9 Bom., 63.
(7) (1910) M. W. N., 485.
(8) (1907) 17 M. L. J., 456.

Turner v. *Weight* (1), *Hadley* v. *The London Bank of Scotland* (2), *Pranjivan Govardhan Das* v. *Baju* (3) and *Mati Lal Pal* v. *Preo Nath Mitra* (4), referred to.

S. Venkatachari in reply referred to Stroud's Judicial Dictionary, Vol. 1 and the Century Dictionary as to the meaning of the word "*affecting*." *Land Mortgage Bank* v. *Sudurudeen Ahmed* (5), *His Highness Maharaja Yashvantray Holkar* v. *Dadabhai Cursetji* (6) also referred to.

OPINION.—We answer the question referred in the negative. It is immaterial whether possession has passed or not in accordance with the agreement. It is clear that the decision of the Full Bench in *Raja of Venkatagiri* v. *Narayana Reddi* (7) does not cover the point. As is explained in the order of reference what was held in *Raja of Venkatagiri* v. *Narayana Reddi* (7) was that a kabuliat signed by the lessee but inadmissible to prove the lease for want of registration was admissible to prove the karar or the agreement to lease which preceded it. The decision in *Konduru Srinivasa Charyulu* v. *Gottumukkala Venkataraju* (8) would seem to have proceeded upon a misapprehension of the Full Bench case. The learned Judges who decided it assumed that the Full Bench case was a suit for damages for the breach of an agreement in writing to let which was unregistered though compulsorily, registrable. They held and in our opinion rightly that there was no distinction between a suit for specific performance of such an agreement and one for damages for the breach of it. The learned Judges merely applied, as we venture to think, erroneously the decision of the Full Bench to the case before them. They did not discuss the provisions of the Registration Act. Mr. Justice BODDAM who was a party to this decision took the opposite view in *Venkata Narasimha* v. *Seshayya*(9) sitting with Mr. Justice SANKARAN-NAIR. The judgment of SUBRAMANIA AYYAR and MILLER, JJ., in *Subbarayudu Narasimha Row* (10) is open to the same observation as the decision in *Kondurru Srinivasa Charyulu* v. *Gottumukkala Venkataraju* (8). Our attention was invited to the

(1) (1841) 49 E.R., 252.
(2) (1865) 46 E.R., 562.
(3) (1880) I.L.R., 4 Bom., 34.
(4) (1909) 9 C.L.J , 96.
(5) (1892) I.L.R., 19 Calc., 358.
(6) (1890) I.L.R , 14 Bom., 353.
(7) (1894) I.L.R., 17 Mad., 456.
(8) (1907) 17 M.L.J., 218
(9) Second Appeal No. 525 of 1903 (unreported).
(10) Second Appeal No. 973 of 1904 (unreported).

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judgment of the learned CHIEF JUSTICE, and Mr. Justice MILLER in *Bangarayya* v. *Jaganatha Raju* (1). The document in that case was not an agreement to lease. There the instrument recited a request by the executant and an agreement by the other party to give certain lands to her and an actual grant by the same, and contained a promise to manage the lands and enjoy them subject to certain terms. The operative part of the instrument was held to require registration. The question was whether for want of registration it was admissible to prove the recital. The learned Judges held that the document was admissible to prove the recital, *i.e.*, the admission by the plaintiff of the existence of an agreement to give some lands to the plaintiff which itself was not in writing or at all events did not require registration. But there are certain observations in their judgment which have been pressed upon us. After referring to *Raja of Venkatagiri* v. *Narayana Reddi* (2) and *Konduru Srinivasa Charyulu* v. *Gottumukkala Venkataraju* (3) the learned Judges observe "that an agreement to lease immoveable property is not actually a transaction affecting land unless in cases whereby the agreement itself a right in the land is created" and that "on that ground it *may* be held that evidence can be given of such an agreement by means of an unregistered document which is compulsorily registrable." We do not think this can be regarded as an adjudication on the question which has been referred to us. The decision in *Satyendra Nath Bose* v. *Anil Chandra Ghosh* (4) is that of a single Judge sitting on the Original Side. He simply followed the decision in *Konduru Srinivasa Charyulu* v. *Gottumukkala Venkataraju* (3). As regards the suggestion made in that case that a lease is the sale of a limited interest and that an agreement to lease stands on the same footing as an agreement to sell *pro tanto*, the learned Judge would seem to have overlooked the fact that the legal incidents of the two transactions are entirely different. An agreement to lease is expressly included in the definition of lease in the Registration Act while it cannot be suggested that an agreement to sell falls within any definition of sale. Clause (*h*) of section 17 excludes an agreement to sell from the class of compulsorily registrable documents and

(1) Second Appeal No 979 of 1904 (unreported).
(2) (1894) I.L.R., 17 Mad., 456. (3) (1907) 17 M.L.J., 218.
(4) (1908) 14 C.W.N., 65.

section 54 of the Transfer of Property Act provides that a contract to sell does not create an interest in the property. It is true that an agreement to lease may likewise not create an interest in immoveable property though clause (*h*) of section 17 has no application to it, and there is no statutory provision in India which says so. But Mr. S. Srinivasa Ayyangar has in his able argument drawn our attention to the provisions of section 40 of the Transfer of Property Act and section 91 of the Trusts Act. The first of these provisions speaks of an obligation arising out of a contract and annexed to the ownership of immoveable property but not amounting to an interest therein or easement thereon being enforceable against a transferee with notice or a gratuitous transferee of the property *affected* thereby. This shows that a contract to sell or an agreement to lease immoveable property is a transaction which affects the property. In fact, the illustration to that section puts the case of an agreement to sell being enforceable against the transferee with notice, as he has taken property affected by the previous contract to sell it. Section 91 of the Trusts Act puts the same case of a person acquiring property with notice that another person has entered into an existing contract *affecting* that property of which specific performance could be enforced and consequently becoming liable to hold the property for the benefit of the other. When therefore section 49 of the Registration Act declares that a document compulsorily registrable but remaining unregistered shall not be "received in evidence of a transaction affecting such property" or, as put by the Calcutta High Court (See *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan* (1)) "of a transaction so far as it affects such property" it would seem that the legislature meant to indicate that the instrument should not be received in evidence even where the transaction sought to be proved did not amount to a transfer of interest in immoveable property but only created an obligation to transfer the property.

Section 49 consists of two parts. It provides first "that no document required by section 17 to be registered shall affect any immoveable property comprised therein, etc." The second part of the section says that such a document "shall not be received as evidence of any transaction affecting such property," *i.e.*, as we take it, the immoveable property comprised

(1) (1883) I.L.R., 9 Calc., 520 at p. 525.

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therein. As regards immoveable property other than that comprised in the instrument or a transaction in respect thereof, the section contains no prohibition against the admissibility of the instrument. We must assume that the two parts of the section deal with different subjects (See WILSON, J., in the Order of Reference to the Full Bench in *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan* (1)). The first part apparently presupposes that the document itself is the transaction or the mode in which it is carried out. The second part of the section seems to relate to cases where the document itself is not the transaction but is only a record of a transaction or being itself a transaction contains a reference to or a recital of another transaction which affects the immoveable property comprised therein. Even in the last case the document may be inadmissible to prove the other transaction provided it affects the immoveable property comprised therein. As the Registration Act deals only with written instruments it may be doubted whether the transaction referred to in section 49 can be merely oral. It is unnecessary to define the exact scope of this clause as to inadmissibility for proving a transaction affecting such property. It is enough for the purpose of this reference to say that a contract to lease immoveable property which is compulsorily registrable under section 17, clause (*d*) affects the immoveable property (see GREEN, J., in *Raju Babu* v. *Krishnarav Ramchandra* (2)) and cannot if unregistered affect the property or be received in evidence to prove the contract. Suits for specific performance of a contract to sell were referred to in the course of the argument as suits affecting property. That is no doubt true as the relief asked for is the conveyance of property. The doctrine of *lis pendens* has been held to apply to a transfer of immoveable property pending a suit for specific performance. *Turner* v. *Wight* (3), *Hadley* v. *The London Bank of Scotland* (4), *Pranjivan Govardhan Das* v. *Baju* (5), *Mati Lal Pal* v. *Preo Nath Mitra* (6). If a transaction like a contract to sell or lease immoveable property does not affect it, it is difficult to see how a suit to enforce the transaction can be regarded as affecting it. A contract to sell immoveable property in writing, though it may affect

(1) (1883) I.L.R., 9 Calc., 520 at p. 525. (2) (1878) I.L.R., 2 Bom., 273 at p. 285.
(3) (1841) 49 E.R., 252. (4) (1865) 46 E.R., 562.
(5) (1889) I.L.R., 4 Bom., 34. (6) (1909) 9 C.L.J., 95.

the property without passing an interest in it, is exempted from registration by clause (*h*) [now clause (2) (v)] of section 17 of the Registration Act. But an agreement in writing to let falling within clause (*d*) of section 17 is not. It cannot be therefore received in evidence of the transaction which affects the immoveable property comprised therein.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

RAJA KUMARA VENKATA PERUMAL RAJA BAHADUR, MINOR BY GUARDIAN MR. W. A. VARADACHARIAR (SECOND PLAINTIFF'S LEGAL REPRESENTATIVE), APPELLANT,

v.

THATHA RAMASAMY CHETTY AND OTHERS (DEFENDANTS), RESPONDENTS.*

1911. January 30, 31. February 13.

Res judicata—*Compromise decree—rescision of—Civil Procedure Code, s. 257A—Agreement contravening, rule in, not opposed to public policy—Judgment-debtor may waive rule.*

The test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise is whether the parties decided for themselves the particular matter in dispute by the compromise and the matter was expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree.

The basis of a compromise decree is a contract between the parties to the litigation and the principles applicable to contracts would often have to be considered in determining the rules of estoppel applicable to such decrees; at the same time such a decree cannot be regarded as a mere contract, and has got a sanction far higher than an agreement between parties. The parties to the decree cannot therefore put an end to it at their pleasure in the manner that they could rescind a mere contract. Nor can it be impeached on some grounds on which a mere contract could be impeached such as absence of consideration or mistake.

Jenkins v. *Robertson* [(1867) (L. H. L., Sc. & Div., 117)], distinguished.

The reason is that the Court being bound to adopt the agreement between the parties as its own adjudication the interpretation to be placed upon such adjudication ought to be the same as that to be placed on the agreement itself. A compromise decree may in some respects have a greater validity than one passed after contest

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* Appeal No. 193 of 1907.