abide by the decision of the arbitrators and there was a decision of a certain sort, that amounted necessarily to a contract not to prosecute. Speaking for myself, I think that the evidence is perfectly clear on that point: but I do not wish to decide this case on a question of evidence because we are sitting in revision of an order of acquittal. What the Subdivisional Magistrate should have done was to examine the evidence and see whether the panchayatdars decided that the complainant was to accept the promise of the accused to pay or whether the decision of the panchayatdars was that if the accused did pay, no complaint should be laid. I agree with my learned brother that this is a matter to which the Subdivisional Magistrate must direct his attention. I agree with the order proposed.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

SANKARAN NAMBUDRIPAD (PLAINTIFF), APPELLANT.

v.

RAMASWAMI AYYAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1918, January, 16, 17 and 29.

Land Improvement Loans Act (XIX of 1883), sec. 7 (1) (c), sale under—Loan, a first charge on the land—Sale, free of prior encumbrances—Improvements effected before receipt of loan, effect of—Non-completion of improvements within time and extension of time, effect of, on further advance of loan—Proviso to a section, use of, to interpret the section.

A loan advanced under the Land Improvement Loans Act (XIX of 1883) is subject to proviso to section 7 (1) a first charge on the land for the improvement of which the loan is advanced; hence a sale under section 7 (1) (c) of the Act to recover the loan is free of prior encumbrances. Neither the fact that a portion of the improvement had been effected with the help of a private loan before the loan applied for was actually advanced, nor the fact that the Government relaxed the rigour of its rules and allowed the borrower an extension of time to utilize the first instalment of the loan before the second was disbursed makes the loan any the less a loan under the Act, if in effect the loan was utilized for the purpose for which it was borrowed.

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* Appeal No. 377 of 1916.

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Though a proviso to a section cannot be used to extend its operation, yet in case of doubt or ambiguity as to the meaning of the substantive part of the section, the proviso can be looked to to ascertain its proper interpretation. *West Derby Union V. Metropolitan Life Assurance Society* (1897) A.C., 647, followed.

APPEAL against the decree of G. KOTHANDARAMANJULU NAYUDU, the Subordinate Judge of Coimbatore, in Original Suit No. 148 of 1915.

This was a suit by the plaintiff, mortgagee, to recover from the first defendant, the mortgagor, and by the sale of two items of property mortgaged, Rs. 16,000 and odd due on a hypothecation of 1912 of the suit properties. The Secretary of State who was added as the second defendant, contended that he had advanced Rs. 10,000 in 1915 on the security of the first item of the mortgaged properties to the first defendant under the Land Improvement Loans Act (XIX of 1883), that the loan was a first charge on that item, that he had sold that item for the recovery of the loan under Madras Revenue Recovery Act (II of 1864), that the purchaser was a necessary party and that the purchaser had thus acquired an absolute title to the first item. The plaintiff denied the second defendant's right so to sell the first item and added (*a*) that at least a portion of the loan was not a loan under the Act as the improvement was effected before the loan was advanced, with the help of a loan from a stranger and the portion of the Government loan went to discharge the stranger's loan and (*b*) that the Government exceeded its powers in advancing a second instalment of the loan as the first defendant had not utilized the first instalment within the time allowed by the rules. The Subordinate Judge framed only one issue, viz., "Whether the amount borrowed from Government under Madras Act XIX of 1883 should have priority over the mortgage amount?" and held that the loan advanced by the Government was a first charge under the Act, that the first item had therefore rightly passed to the purchaser, and that the last two objections of the plaintiff were not sustainable as (*a*) the first defendant had in effect utilized the portion of the loan advanced, for the improvement already effected and as (*b*) the Government had a right to relax the time limit and to lend the second instalment when the first instalment had before then been actually spent on improvements. So holding, the Subordinate Judge gave a mortgage decree as prayed for against the person of the first

defendant and against the second item and dismissed the suit as against the Secretary of State. The plaintiff preferred this appeal to the High Court against both the defendants.

C. V. Ananthakrishna Ayyar and *P. V. Parameswara Ayyar* for the appellant.

V. Ramesam, acting Government Pleader, for the second respondent.

AYLING, J.

AYLING J.—The main point for our disposal in this appeal is the general question raised in the single issue framed, whether the provisions of section 42 of Madras Act II of 1864 apply to a sale under section 7 (1) (*c*) of the Land Improvement Loans Act (XIX of 1883) : in other words whether such a sale is free of prior encumbrances.

The Subordinate Judge has decided that it is ; and in my opinion, he is right. The point is not covered by authority as the cases quoted on appellant's side *Ramachandra* v. *Pitchaikanni*(1) and *Chinnasami Mudali* v. *Tirumalai Pillai and the Secretary of State for India*(2), all relate to sales under clause (*a*) and not clause (*c*) of section 7 (1). A comparison of the various clauses (*a*), (*b*), (*c*) and (*d*) shows that the framers of the Land Improvement Loans Act considered that there was some substantial difference between a sale for arrears of land revenue of the land on which the arrears accrued and a sale for the same purpose of other lands whether belonging to the defaulter or some one else. The same distinction was present to the minds of the learned Judges in the earlier of the above cases, *Ramachandra* v. *Pitchaikanni*(1). After referring to various sections of the Revenue Recovery Act, they say

"the intention is clear that the purchase is free of prior incumbrances, only when the arrear is of public revenue of which the land is the first security by statutory declaration : " and again " arrear of abkāri revenue is not due upon any specific land owned by the abkāri renter."

This in fact seems to be the main ground on which their decision is based. The judgment in *Chinnasami Mudali* v. *Tirumalai Pillai and the Secretary of State for India*(2), also draws the same distinction. The above decisions are therefore of no help to appellant in the present case and indeed indirectly tend to a conclusion adverse to him.

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(1) (1884) I.L.R., 7 Mad., 434. (2) (1902) I.L.R., 25 Mad., 572.

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AYLING, J.

The learned vakil for appellant has argued that the words "in all or any of the following modes" and "as if" contained in section 7 have reference solely to procedure and were not intended by the Legislature to import the operation of section 42 of the Revenue Recovery Act. The weak point in this argument is that he is unable to indicate (and we are unable to detect) any difference between the procedure laid down for bringing to sale the lands on which arrears of land revenue have accrued and other lands liable to sale for the same arrears. On this view the inclusion of a special clause (*c*) is unexplained.

In this connexion reference has been made to a decision of this Court in *The Secretary of State for India in Council* v. *Pisipati Sankarayya*(1) in which MILLER and MUNRO, JJ., held that all sales of land for arrears of land revenue were free of incumbrances, whether the lands sold were those on which the arrears accrued or other lands belonging to the defaulter. It may be argued that on this view of the law the enactment of clause (*c*) in addition to clause (*a*) is in any case unnecessary. I think the explanation lies in the fact that the Land Improvement Loans Act is an Act of the Government of India and that there is no reason to suppose that it was framed with sole regard to the provisions of the Madras Revenue Recovery Act. Other Revenue Recovery Acts in force in 1883 recognized a distinction between the conditions of sale of land on which arrears had accrued and other lands belonging to the defaulter: vide sections 11 and 12 of Bengal Act VII of 1868, sections 94 (*f*) and (*g*) and 108 of the Central Provinces Land Revenue Act XVIII of 1881 and sections 133 and 135 of Act XVII of 1878 Oudh Land Revenue Act. Even assuming therefore that the framers of the Land Improvement Loans Act shared the view of the Madras Act II of 1864 taken by the learned Judges in *The Secretary of State for India in Council* v. *Pisipati Sankarayya*(1) this is not inconsistent with their having deliberately distinguished the cases having in mind the provisions of the Acts in force in other parts of India. Even in this Presidency so far as I am aware, *The Secretary of State for India in Council* v. *Pisipati Sankarayya*(1) was the first case in which the broader view of the applicability of section 42 was expressed; and with all respect

(1) (1911) I.L.R., 34 Mad., 493.

to the learned Judges in that case, I am inclined to think the learned Judges who decided *Ramachandra* v. *Pitchaikanni*(1) were inclined to take the narrower view. There is no reason to suppose that the framers of section 7 of the Land Improvement Loans Act acted under the impression that there was no difference in this respect.

I am inclined to think that while the words "in all or any of the following modes", if they stood alone, might be indicative only of procedure, some wider meaning should be attached to the words "as if" in clause (*c*) when contrasted with the words "according to the procedure, etc.," in clause (*d*). The use of the latter words is significant and shows at any rate that the framers of the Act had other words in their minds which might have been more suitably employed to express the meaning contended for by appellant's vakil.

There is, however, another argument to my mind conclusive on the point, furnished by the proviso to the section, which runs:—

"Provided that no proceeding in respect of any land under clause (*c*) shall affect any interest in that land which existed before the date of the order granting the loan, other than the interest of the borrower and of mortgagees, of, or persons having charges, on, that interest and where the loan is granted under section 4 with the consent of another person, the interest of that person, and of mortgages of, or persons having charges on, that interest."

This clearly implies that the interests of prior mortgagees are affected by a sale under clause (*c*) and is in fact incapable of any other meaning. Mr. C. V. Anantakrishna Ayyar's only argument in this connexion is that the words of a proviso cannot be used to extend the operation of the section to which it is attached. This is no doubt true, and is clearly established by the judgment of the Privy Council in the case on which he mainly relies—*West Derby Union* v. *Metropolitan Life Assurance Society*(2)—but where there is doubt as to the true meaning of the substantive part of a section it is surely legitimate to look to the words of a proviso to it in order to determine which interpretation is correct. This is recognized by Lord HERSCHELL in his judgment in the very case referred to. It cannot be said that

(1) (1884) I.L.R., 7 Mad., 434. (2) (1897) A.C., 647.

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the words of the main part of the section read so clearly in appellant's favour as not to be at any rate ambiguous: and here we have a proviso which is perfectly compatible with one interpretation, and clearly incompatible with another. It must also be noticed that one main objection of their Lordships to reference to provisos is inapplicable to the present case, viz., that provisos are frequently inserted simply to allay the apprehensions of persons against whom the Act was never intended to apply. This cannot be said of the exception against mortgagees which is contained in the proviso itself. There is nothing as far as I can see in the judgment of their Lordships in that case to preclude reference to the proviso for the interpretation of the section with which we are dealing: and it seems to me to be conclusive against appellant.

I must therefore hold that a sale of land under section 7 (1) (c) is free of incumbrances.

Two other objections raised on behalf of appellant may be briefly noticed. It is pointed out that Rs. 2,500 of the first instalment advanced was devoted to discharging a loan privately taken for the purpose of paying for an oil-engine, the installation of which on the land was part of the improvements for which the loan was granted. Appellant contends that to this extent the loan from Government cannot be said to have been taken for the purpose of making an improvement within the meaning of section 4 of the Act. No authority is quoted and I am unable to accept such a contention. A considerable time usually elapses between the application for a loan under the Act, and its disbursement to the borrower: and in the present case the borrower being anxious to set about the work arranged to purchase the engine on the hire purchase system and apparently took a temporary loan from some private person, to enable him to discharge the earlier instalments. There is nothing in all this to affect the essential object for which the loan was taken from Government of the borrower's liability under the Act.

The second objection is that because the first instalment of the loan was not utilized within the period allowed by the Government rules, the disbursement of the second instalment cannot be treated as the disbursement of a loan under the Act and to the extent of that instalment no priority can be claimed

for it over plaintiff's mortgage. This contention is also baseless; it is not denied that the first instalment had been utilized to the satisfaction of the Government Officers on the specified improvements prior to the disbursement of the second instalment: and I fail to see how the action of Government in relaxing the strict operation of the rule regarding the time limit in favour of the borrower can prejudicially affect Government's right in this connexion.

I would dismiss the appeal with costs of the second respondent.

SESHAGIRI AYYAR, J.—Although I agree with the conclusion at which my learned brother has arrived having regard to the fact that the point argued is practically one of first impression and to the important issues involved in the case, I have ventured to add a few words of my own.

The facts have been stated by my learned colleague and it is unnecessary to repeat them.

The main point for consideration is whether a sale for the loan advanced by the Government in respect of agricultural improvement of a property avoids previous existing incumbrances upon that property. I do not agree with Mr. C. V. Anantakrishna Ayyar that unless the loan is advanced for making future improvements the provisions of the Act have no application. Where in anticipation of loan from Government work which satisfied the definition of the term "improvement" is started in my opinion, the loan must be taken to have been granted for the purpose of making the improvement. The test is not whether the improvement was subsequently made but whether the money was applied for the construction of agricultural improvements upon the property. Nor do I think that the fact that time was extended for completing the work in regard to which the first instalment of payment was made in any way affects the validity of the subsequent advance. The provision in the rules for the completion of the work within the time stipulated is minatory in its nature and it is as much open to the Government to extend the time for performance as it is open to any private party to do so in respect of contracts fixing a time for performance. The rules do not compel the Government to refuse the loan if the time stipulated has been exceeded.

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SESHAGIRI AYYAR, J.

On the main question, I have been greatly influenced by the contention of the learned Government Pleader on the use to be made of clause (*a*) of Act XIX of 1883. If clause (*c*) of that section is intended to have the same result as clause (*a*) I am prepared to agree with the learned vakil for the appellant that the words, "as if they were arrears of land revenue" would *prima facie* only attract the procedure prescribed in the Revenue Recovery Act and not the substantial declaration contained in sections 2 and 3 of that Act. The decisions of this Court have been uniform on that question. See *Ramachandra* v. *Pitchaikanni* (1), *Ibrahim Khan Sahib* v. *Rangasami Naicken*(2), *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*(3) *and Muthusamier* v. *Sree Sreemethanithi Swamiyar*(4). But in clause (*c*) of section 7 we have in addition to the words, "as if they were arrears of land revenue" a preceding and a subsequent clause which give a different complexion to the policy of the Act. The first four words "out of the land" and the last five words "in respect of that land" make it clear that the loan granted is to be regarded as a first charge upon the property. In *Ramachandra* v. *Pitchaikanni*(1) which was under the Abkāri Act two eminent Judges of this Court while holding that the words "in like manner as for the recovery of arrears of land revenue" only denoted the procedure to be adopted, say :

"Arrear of abkāri revenue is not due upon any specific land owned by the abkāri renter."

That to my mind is the keynote to the construction of similar provisions in other Acts. In the case of abkāri rent, in the case of income-tax, in the case of cesses under Local Boards Act, the amount payable to the Government is not due in respect of any specified land, whereas the essence of the stipulation under Act XIX of 1883 is the loan is payable out of and in respect of the land for improving which the loan is granted. In my opinion the language of section 7, clause (*c*), amounts to a declaration that the land is charged with the payment of the loan ; and when in addition to that declaration the legislature refers to Act II of 1864, I am inclined to think that the provisions of sections 2, 5 and 42 of that Act are intended to be

(1) (1884) I.L.R., 7 Mad., 434.
(2) (1905) I.L.R., 28 Mad., 420. (3) (1903) I.L.R., 26 Mad., 230.
(4) (1915) I.L.R., 38 Mad., 356.

read with clause (c) of section 7 of Act XIX of 1883. Whatever doubt there may exist on this question is removed by the proviso which in distinct terms says that the interest in the land which is available to the Government is restricted to that of the borrower and to that of the mortgagee.

Mr. C. V. Ananthakrishna Ayyar addressed to us an elaborate argument upon the inadvisability of utilizing provisos to supplement the operative portion of a section. I adhere to what I said on this question in my judgment in *In re Mrs. Besant*(1). It is a well-known canon of construction that where the language of a section is clear and unambiguous, the proviso should not be construed as adding to any right or disability created by the section; but where there is room for doubt regarding the construction of the section it has always been the practice to invoke the aid of the proviso to help in the proper interpretation of the section. The observations of Lord WATSON in *West Derby Union* v. *Metropolitan Life Assurance Society*(2) to which the learned Government Pleader drew our attention support this principle and there is nothing in the judgment of the other noble lords to throw doubt on the correctness of the dictum of Lord WATSON. In my opinion the proviso is strictly and rightly in place in this particular instance. By the operative portion of clause (*c*) the legislature provided that out of the whole land the loan shall be realized. The proviso releases rights other than those of the borrower and of the mortgagees, e.g., the rights of an occupancy tenant. Therefore the proviso is aptly in place and has the further effect of elucidating the meaning of the operative clause.

There is only one other observation that need be made and that is this: Section 7 provides for cumulative remedies: it is open to the Government to proceed against the borrower personally; they may proceed to sell the land: lastly they may also proceed to sell the land given as collateral security. Now, under clause (*a*) when the legislature provided that the borrower can be proceeded against personally it would follow as a matter of course that his property can be attached and sold. It seems to me that even where properties other than

(1) (1916) I.L.R., 39 Mad., 1164 at p. 1195.
(2) (1897) A.C., 647.

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those upon which revenue is due is sold under Act II of 1864 all pre-existing incumbrances on such properties are wiped off. During the course of the argument I felt some little doubt as to whether the decision of Justices MILLER and MUNRO in *The Secretary of State for India in Council* v. *Pisipati Sankarayya*(1) was right. But on closely examining the sections of the Revenue Recovery Act, I feel that the effect of section 42 is not only to discharge pre-existing incumbrances upon the property on which the arrear is due but also pre-existing incumbrances upon every property which is brought to sale for arrears of revenue due from the defaulter. Section 32 to which Mr. C. V. Ananthakrishna Ayyar drew our attention does not save the incumbrances as was contended. Therefore if the Government avail themselves of the remedy provided by clause (*a*) and if the words "as if they were arrears of land revenue" were to be construed as only indicating the procedure to be adopted then it would follow that the previous existing incumbrances would subsist and that the Government would only be entitled to the surplus sale proceeds, if any, after satisfying such incumbrances. If clause (*c*) is also to be similarly interpreted the legislature must be deemed to have been guilty of redundancy. According to Mr. Ananthakrishna Ayyar under clause (*c*) also, if a sale is effected for the loan, the incumbrance would subsist. I do not think Courts will be justified in imputing to the legislature the enacting of an unnecessary provision of law where they can give a consistent meaning to it otherwise. It is clear whereas under clause (*a*) the ordinary remedy is given, under clause (*c*), the remedy of avoiding existing incumbrances is provided by the legislature. At first sight it looks as if the legislature was not aware that under the Madras Revenue Recovery Act sales of property other than those upon which arrears are due would put an end to the existing incumbrances. Very likely the Imperial Government had in mind the provision of Bengal Act VII of 1868 which by section 11 enables the Collector to sell only the tenure on which the rent is due and by section 12 to exclude previous incumbrances only in respect of that particular tenure. The Madras legislature has given a more drastic remedy for arrears of revenue than is given in Bengal. However that may

(1) (1911) I.L.R., 34 Mad., 493.

be, there can be no doubt that the effect of section 7, clause (*c*), is to make a declaration on behalf of the Government that it has a first charge upon the property for the loan advanced in respect of that property just as under section 2 of the Revenue Recovery Act, the Government has a first charge for arrears of revenue. In this view, the decision of the Subordinate Judge is right, and I agree that the appeal should be dismissed with costs of the second respondent.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

KANNUSWAMI PILLAI AND ANOTHER (RESPONDENTS), APPELLANTS,

v.

JAGATHAMBAL (PETITIONER), RESPONDENT.*

1918, January, 18 and 30.

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (2) (a) and (b); O. VII, r. 10 and sec. 115—Withdrawal of suit—Suit grossly undervalued in the plaint—Real valuation beyond the jurisdiction of the District Munsif's Court—Application by plaintiff for leave to withdraw portion of the suit with liberty to bring fresh suit—Leave, whether properly can be granted—Judicial discretion—Jurisdiction—*Ejusdem generis*—Material irregularity in exercise of jurisdiction—'Other sufficient grounds' in O. XXIII, r. 1 (2) (b), construction of.*

The plaintiffs instituted a suit in a District Munsif's Court for recovery of possession of several items of immoveable property including a house, valuing the house at Rs. 200 and the other items at Rs. 1,917 and odd for purposes of jurisdiction. The defendant objected that the house was grossly undervalued and that the suit was, on proper valuation, beyond the jurisdiction of the District Munsif. A commissioner, appointed to ascertain its value, reported that the house alone was worth Rs. 6,500. The plaintiff thereupon applied to the Court for leave to withdraw the suit in respect of the house with liberty to bring a fresh suit therefor; the Court granted the application, notwithstanding the objection of the defendant. The latter preferred a Civil Revision Petition to the High Court against the order:

Held, that, assuming that the lower Court had jurisdiction to act under Order XXIII, rule 1 (2) (*b*), it acted with material irregularity in the exercise of its jurisdiction, as it did not exercise a *judicial discretion* in passing the order;

* Letters Patent Appeals Nos. 157 and 158 of 1917.