beneficial right as *cestu que* trust under that contract then B would in a Court of Equity be allowed to insist upon and enforce the contract."

Accepting the exceptions thus engrafted on this general rule they do not cover the present case.

KRISHNAN, J.

I therefore consider for the reasons above stated, that by their nomination plaintiffs obtained no interest in the deposit money, and that their suit was rightly dismissed, and I agree therefore that the appeal fails and must be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Krishnan.

THE OFFICIAL ASSIGNEE OF MADRAS (PLAINTIFF), APPELLANT,

v.

C. SAMBANDA MUDALIAR (CLAIMANT), RESPONDENT.*

1920, March 16, 17, 18 and 26.

Presidency Towns Insolvency Act (III of 1909), sec. 55—Provincial Insolvency Act (III of 1907), sec. 36—Mortgage within two years of insolvency of mortgagor—Good faith and consideration for mortgage—Onus of proof on mortgagee—Mortgagee admitted to proof by Official Assignee—Application by Official Assignee to expunge proof of mortgage—Onus of proof.

Under section 55 of the Presidency Towns Insolvency Act, as under section 36 of the Provincial Insolvency Act, a mortgagee setting up a mortgage executed within two years of the insolvency of the mortgagor, has the onus cast on him to show that the transaction was one executed in good faith and for consideration.

The fact that the Official Assignee is moving to expunge a proof which he has admitted under section 26 of the former Act, does not shift the burden of proof from the mortgagee to the Official Assignee.

Official Assignee v. *Annapuranammal*, (1913) 20 I.C., 901, followed.

An admission of proof by the Official Assignee is in no sense an adjudication and it is open to him as well as to other creditors to have an adjudication by the Court on notice, and in such adjudication the matter has to be decided with reference to the ordinary legal presumptions which arise.

APPEAL against the judgment and order of the Hon'ble Mr. Justice COUTTS TROTTER, dated 19th March 1919, in the exercise

* Original Side Appeal No. 34 of 1919.

THE OFFICIAL ASSIGNEE OF MADRAS v. SAMBANDA MUDALIAR.

of the Insolvency Jurisdiction of the High Court in Insolvency Petition No. 153 of 1916.

The material facts are stated in the judgment of KRISHNAN, J.

D. Chamier for the appellants.

C. Madhavan Nayar for the respondents.

WALLIS, C.J. WALLIS, C.J.—This is an appeal from the judgment of Mr. Justice COUTTS TROTTER dismissing an application of the Official Assignee to expunge the proof of one Sambanda Mudaliar as a secured creditor on a mortgage alleged to have been executed in June 1916.

This case has brought to the notice of the Court, not for the first time, the existence in this city of dangerous gangs who take advantage of the fact that the Indian Majority Act enables young men to dispose of their property before they have sufficient sense to manage it, and get them to execute conveyances for little or no consideration and thus strip them of their possessions. I am not unaware of the considerations which actuated the legislature in fixing the age of eighteen as the age of majority, but I hope that this matter may receive reconsideration in the near future with the object of stopping scandals such as have come to light in this Court, in this case and in other recent cases.

In this case the insolvent, who came of age in 1916, by August of that year had been stripped of all his property and found himself in the Insolvency Court where his brother has preceded him, and in this case also we have had before us the case of another young man named Kuppuswami, who in a brief career which came to an untimely end made away with the estate which his father had acquired in the well-known firm of Messrs. Thompson & Co., in this city. The learned Judge, in another suit has already set aside two mortgages which were obtained by another gang from this insolvent, and that decision has been confirmed on appeal; and the reason why a different fate attended the present application appears to be that, as stated by the learned Judge in his judgment, the proceedings before him were conducted upon the footing that the onus was admittedly on the Official Assignee. I do not know how that view came to be taken. In law a mortgagee setting up a mortgage executed within two years of the insolvency has the onus cast on him under section 55, of this Act and section 36 of the Provincial

Insolvency Act to show that the transaction was one executed in good faith and for consideration. That has been repeatedly held as regards section 36 and it has also been held as regard ssection 55, the language of which is identical, by Sir ARNOLD WHITE, C.J., in *Official Assignee of Madras* v. *Annapuranammal*(1), and in another Calcutta case.

In this case the burden is, if anything, stronger, because we have a mortgage at the usurious rate of 24 per cent, by a young man who has just come of age, and who was squandering his property in dissolute courses. I do not know if it was supposed that the fact that the Official Assignee was moving to expunge a proof which he had admitted under section 26 of the second schedule to the Act altered the onus of proof; but I think it is clear that it has no such effect. An admission of proof by the Official Assignee is in no sense an adjudication, and it is open to him, if he thinks that the proof was improperly admitted, to have an adjudication by Court on notice. It is also open to other creditors, if they are not satisfied with the admission, similarly to obtain an adjudication and in that adjudication the matter has to be decided with reference to the ordinary legal presumptions which arise. Possibly the fact that the insolvent in his examination Exhibit K1, in April 1917 told the Official Assignee "I got the money Rs. 4,000 and odd. It was all in rupees and notes. I have spent it for drinking and women" may have influenced the view that the onus was on the Official Assignee. The difficulties of these cases are illustrated by the fact that the insolvent made that statement to the Official Assignee, under what inducement we know not, because his explanation that he was drunk when he made it is absurd. However, it is nobody's case now that on the execution of this mortgage the insolvent was paid Rs. 4,000 in rupees and notes and that circumstance cannot affect the burden. I attach considerable importance to this question of burden of proof, because from the learned Judge's judgment I think that, if the burden that was placed on the Official Assignee had not been placed on him, he would have arrived at exactly the same conclusion at which we have arrived.

[His Lordship dealt with the evidence as to bona fides and consideration and then proceeded as follows:]

(1) (1913) 20 I.C., 901.

THE OFFICIAL ASSIGNEE OF MADRAS v. SAMBANDA MUDALIAR.

WALLIS, C.J.

On the whole I have no hesitation in coming to the conclusion that the mortgagee has failed to discharge the onus that was on him of showing that the transaction was entered into in good faith and for consideration. All that is shown is that a payment of Rs. 340 was admittedly made about the time of the execution of that mortgage. But the statute says that a mortgage of this kind if executed without consideration is void. Even as to this Rs. 340, as was held by the late Chief Justice in another case, the proper course is to set aside the whole mortgage and allow the mortgagee to prove as an unsecured creditor for Rs. 340.

The appeal is allowed, except as to Rs. 340 with costs both here and below on the Original Side scale. Certify for two counsel.

KRISHNAN, J.

KRISHNAN, J.—This is an appeal from the order of COUTTS TROTTER, J., dismissing a petition of the Official Assignee, in the matter of the insolvency of a young man named Devarajulu, praying for the annullment of a mortgage executed by him to one Sambanda Mudaliar under section 55 of the Presidency Towns Insolvency Act. That section provides that a transfer of property made by a person who is adjudged an insolvent within two years from the date of the transfer shall be void against the Official Assignee, and may be annulled by the Court unless the transfer was made before and in consideration of Marriage or was made in favour of a purchaser or incumbrancer in good faith and for valuable consideration. It has been held with reference to section 36 of the Provincial Insolvency Act, which is worded exactly similarly as section 55, that if the transfer is shown to be within two years of the insolvency, the burden is on the transferree to prove that he comes within the exception by showing good faith and valuable consideration. See *Nilmoni Choudhuri* v. *Beshanta Kumar Banerji*(1). This view was approved of in *Anantarama Aiyar* v. *Yussuffji Oomer Sahib*(2), and in *Official Assignee of Madras* v. *Annapuranammal*(3). WHITE, C.J., assumed that the onus was on the transferee in a case under section 55 itself, though he did not expressly decide it. The manner in which the section is worded making an exception in

(1) (1914) 19 C.W.N., 865. (2) (1913) 31 M.L.J., 133.
(3) (1913) 20 I.C., 901.

favour of bona fide encumbrances for valuable consideration, clearly throws the onus on the person who alleges that he is within the exception. No case has been cited to us to the contrary, but it was urged that in the present case the onus was on, or had been shifted on to the Official Assignee as at an earlier stage of these insolvency proceedings he had accepted the proof of the mortgagee and admitted his claim. I do not think this contention is tenable. The Official Assignee's action was based on what he was then led to believe were the real facts of the case by the mortgagee, but now he states that he has been shown reason to think that he was wrong in his view, and he has applied to the Court to annul the mortgage under section 55. The way in which the Court has to deal with the matter when it comes before it, depends entirely on the wording of the section, and is not affected by anything the Official Assignee might have done previously. What the Official Assignee did here was merely to come to a conclusion on the evidence placed before him by the mortgagee, and that cannot be treated as an admission against him, or against the body of creditors whom he represents. It follows that the onus is still on Sambanda Mudaliar and has not been shifted.

There is a further reason why in the present case the onus should be placed on him to prove consideration for his document. The mortgagor is a young man who had come into property on his fathers's death and who had just attained his majority. It is clear from his schedule that he was borrowing recklessly. With reference to another mortgage executed by this very youth about the time that the mortgage in question here was executed, we recently held, following *Moti Gulabchand* v. *Muhomed Mehdi Tharia Topan*(1), that the burden was shifted on to the mortgagee to prove consideration. See *Shivagami Ammal* v. *N. Devarajulu Naidu* and *Narayanaswami Mudaliar* v. *N. Devarajulu Naidu*(2). The petition is the same in this case and therefore the onus is, in my opinion, on Sambanda Mudaliar, for both the above reasons, to prove the good faith and consideration for his mortgage before we can uphold it.

[His Lordship then dealt with the evidence and proceeded as follows :]

(1) (1896) I.L.R., 20 Bom., 367.
(2) O.S.A. Nos. 26 and 43 of 1919 (unreported).

THE OFFICIAL ASSIGNEE OF MADRAS v. SAMBANDA MUDALIAR.

KRISHNAN, J.

Finding then that the mortgagee has failed to prove that his mortgage was made in good faith and for proper consideration it must be annulled under section 55 of the Act. But as it is admitted that the mortgagee paid Rs. 340 to Devarajulu, he must be allowed to claim Rs. 340 from the insolvent's estate. The proper order in such a case seems to be as held by WHITE, C.J., in *Official Assignee of Madras* v. *Annapurnammal*(1), to set aside the mortgage in toto and treat the mortgagee as an unsecured creditor for the amount advanced by him.

I would therefore allow the appeal and annul the mortgage (Exhibit H) and direct Sambanda Mudaliar's name to be retained in the schedule as an unsecured creditor for Rs. 340. He must pay the Official Assignee's costs in this appeal and in the first Court. We certify for two counsel in the lower Court, costs on original side scale.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer,

1920, March 8 and 29.

SUBBIAH THEVAN, ACCUSED,

v.

THE ASSISTANT SESSIONS JUDGE OF TINNEVELLY, REFERRING OFFICER.*

Criminal Procedure Code (Act V of 1898), ss. 303 and 307—Verdict of jury—Reasons for their verdict—Power of Sessions Judge to question jury as to their reasons for their verdict—Question, if permissible, for determining whether Reference to High Court necessary.

A Sessions Judge is not entitled under section 303 of the Criminal Procedure Code, to question the jury as to the reasons for their verdict, even if he intended to make a reference to the High Court under section 307 of the Code.

Reference No. 30 of 1919, dissented from; *Emperor* v. *Siranadu*, (1907) I.L.R., 30 Mad., 469, and *Public Prosecutor* v. *Abdul Hameed*, (1913) I.L.R., 36 Mad., 589, followed.

Though a Sessions Judge is neither bound nor entitled to put such questions to the jury, still his having done so for the purpose of determining whether he should make a reference is not improper or a sufficient ground for not accepting the reference.

(1) (1913) 20 I.C., 901.

* Reference No. 7 of 1920.