APPELLATE CIVIL.

Before Mr. Justice Venkataramana Rao.

NAGARETHNA MUDALIAR (FIRST DEFENDANT), APPELLANT,

1935, December 19.

v.

SAMI PILLAI AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Indian Easements Act (V of 1882), sec. 7, ill. (i)—*Owner of land of higher level—Right of, to discharge water on to land of lower level—Nature and incidents of—If such right limited to mere rain water falling directly on land of higher level or water flowing in natural stream over that land—Customary right—Doctrine of a lost grant—If available to infer such a right—Essentials of the doctrine—Ryotwari proprietor—If a "capable grantor" as understood in English law—"Time immemorial"—Meaning of, in Indian law.*

In a suit for a declaration that the plaintiff is entitled to discharge, not only the rain water, but also the water utilised for irrigation purposes brought on to his land from an adjoining irrigation channel, into the land of the first defendant and for an injunction restraining the first defendant from causing obstruction to the flow,

held: (i) The owner of land on a higher level is entitled to send down water which naturally flows on to his land into lower land whether the said water flows in a defined channel or not. It is a natural right inherent in property. It is an incident of property arising from the relative levels of the respective lands and the strata below. This principle is embodied in illustration (i) to section 7 of the Easements Act.

(ii) Such a right is not limited to mere rain water falling directly on the land or water flowing in a natural stream over the land. It has been extended to spring water on the land and to water which the proprietor might by operations on the

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* Second Appeal No. 1282 of 1931.

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land, such as sinking a well or opening a fountain, cause to flow.

(iii) If for a sufficiently long time water brought on to the upper land by artificial means for agricultural purposes is allowed to pass without interruption by the proprietor of the lower land into it, one can easily infer a custom and that the customary conditions of the locality require such user. The doctrine of a lost grant can be invoked in aid of the inference of such a custom.

(iv) To infer the doctrine of a lost grant or a claim based on prescription all that is necessary to be alleged is "long, continual and peaceful possession".

(v) The estate of a ryotwari proprietor is an estate in the soil and possession is with him though the property may be said to be in the Government. His estate is also heritable and alienable. He has a sufficient estate to support a grant of an easement. He would be a "capable grantor" as understood in English law for the application of the doctrine of a lost grant.

The words "time immemorial" have been borrowed from English law in which they have a connotation that cannot be applied to Indian society and circumstances. In India, they must be taken to mean long user from which title may be presumed.

APPEAL against the decree of the Court of the Subordinate Judge of Tiruvarur in Appeal Suit No. 6 of 1930 preferred against the decree of the Court of the District Munsif of Tiruvarur in Original Suit No. 262 of 1927.

T. M. Krishnaswami Ayyar for *K. Swaminatha Ayyar* for appellant.

K. Rajah Ayyar and *R. Sundaralingam* for respondents.

JUDGMENT.

The plaintiff is the owner of Survey No. 148 and a portion of Survey No. 147 in the village of Amoor. The second defendant is the owner of the

rest of Survey No. 147. The first defendant is the owner of Survey No. 158 which is adjacent to Survey No. 147 and east of it but situate in the village of Overkudi. The suit is for a declaration that the plaintiff is entitled to discharge not only the rain water but also the water utilised for irrigation purposes brought on to his land from an adjoining irrigation channel into the land of the first defendant through Survey No. 147 and for an injunction restraining the first defendant from causing obstruction to the flow.

The plaintiff's case is that the lands, Survey Nos. 148 and 147, are high level lands and Survey No. 158 is land on a lower level, that for a long time the water which fell on the plaintiff's land always used to be drained through Survey No. 147, then into Survey No. 158 through a madai in a bund which divided the field No. 147 from No. 158 and then emptied itself into what is called Vadigal Odai which finally emptied itself into the river Vettar, that the first defendant who purchased Survey No. 158 recently began to obstruct the flow which has been enjoyed from time immemorial, that originally the lands were rainfed but subsequently in 1891 they became ordinary irrigated wet lands by an arrangement with the owners of the neighbouring village Poolangudi to get water through their irrigation channel and that for nearly a period of thirty years up to the date of obstruction in 1923 he has been irrigating the said lands and discharging the water through Survey No. 158 and there is no other outlet for the flow. The claim as laid in the plaint is as follows:

"From time immemorial the waters in Survey Nos. 148 and 147 used to drain themselves through

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the lands of the second defendant in the north-eastern portion of Survey No. 147 into Survey No. 158 and these waters will ultimately drain themselves through a channel lying between Survey Nos. 158 and 157 into Vadigal Odai also shown in the plan. This kind of drainage has been going on from time immemorial and the plaintiff and his predecessors in title have been enjoying such right of drainage from before the remote memory of man as a right continuously and without interruption. The plaintiff and his ancestors have thus acquired an easement right to drain the waters in Survey Nos. 148 and 147 as above indicated into the lands of the defendants.

Moreover, the geographical configuration of the lands and the relative position of the lands is such that the above lands of the plaintiff could not and did not drain themselves in any other manner. On the north of the plaintiff's lands there is the poramboke footpath (hayan karai), a very high embankment; on the west and south of the plaintiff's lands, the lands are higher in level than the plaintiff's lands."

The prayer is that it be declared that the plaintiff has got an easement right to drain the waters of his lands in Survey Nos. 148 and 147 in the village of Amoor into Survey No. 158 of Overkudi village through the lands of the second defendant in the north-eastern portion of Survey No. 147.

The defence is that the plaintiff never had any right to drain the water in the manner contended for nor was such right exercised as is alleged in the plaint, that the geographical configuration is

not as alleged by the plaintiff, and that he has always been draining the water through an escape sluice into the Vettar along the north-west of Survey No. 148.

The learned District Munsif dismissed the plaintiff's suit but the learned Subordinate Judge gave a decree for the plaintiff.

The geographical configuration of the land has been found to be as described by the plaintiff. Survey Nos. 148 and 147 are admittedly on a higher level than Survey No. 158. The general slope of the lands is from west to east. All the said lands are south of the river Vettar and there is a high embankment on the north of Survey Nos. 148 and 147. The western boundary of Survey No. 148 is on a higher level. It is also found that the water from the plaintiff's lands drains itself eastward into the first defendant's field and empties itself into the Vadigal Odai. The Vadigal Odai starts from Survey No. 158 and goes in a northerly direction, joining the Vettar in the east after passing through Survey Nos. 154 and 157. Survey Nos. 148 and 147 were till 1891 admittedly manavari and they were not irrigated by any irrigation channel. In 1891 an agreement was entered into between the mirasidars of Poolangudi, the adjoining village on the west, and the predecessors of the plaintiff by which water from Poolangudi channel was taken to irrigate the plaint lands. It may also be noticed that Poolangudi irrigation channel is shown in the diglot register as an irrigation source for Survey No. 148. At the time of the agreement with the Poolangudi mirasidars there was no other course for the water to drain itself from the plaint lands than by

passing through the village of Overkudi. It has also been found by the learned Subordinate Judge that until 1921 even the drainage water from the fields of Poolangudi passed through the plaint lands in an easterly direction and then to the village of Overkudi to the land of the first defendant and then emptied itself into the Manjadi Odappu, a breach in the Vettar, and when that Odappu was closed the Poolangudi mirasidars by approaching the Government had a portion of the bund cut on the northern side of that village at the northern extremity of Survey No. 148 and had a sluice built for the water to escape through it, and it is also found by the learned Subordinate Judge that the drainage water from the plaintiff's lands cannot pass through the sluice which the Poolangudi mirasidars have provided for themselves as the escape lies in a westerly direction. The learned Subordinate Judge also found that from 1891 to 1923 all the water on the plaintiff's lands, both rain water as well as water brought on for irrigation purposes, was being sent down through the lands of the first defendant openly and without interruption. On these findings the learned Subordinate Judge was of opinion that the right of easement as claimed by the plaintiff was proved. He held that the enjoyment for thirty years gave rise to an easement, that the enjoyment had been as of right and that such rights have been generally recognized as customary rights and were not governed by section 15 of the Easements Act. Mr. T. M. Krishnaswami Ayyar for the first defendant raised the following contentions: (i) Though the plaintiff might have a natural right to drain rain water which fell on his land, he had no right

to discharge water brought on to his land for irrigation purposes. (ii) The inference of a customary right by user for thirty years should not have been drawn as no lost grant or custom was pleaded in the plaint and in the absence of such pleading it would be practically making out a new case for the plaintiff. (iii) Such a customary right based on a lost grant cannot in law be inferred having regard to the fact that the lands in suit are ryotwari lands.

It is settled law that the owner of land on a higher level is entitled to send down water which naturally flows on to his land into lower land whether the said water flows in a defined channel or not. It is a natural right inherent in property and, as described by LORD WATSON in *John Young & Co.* v. *Bankier Distillery Company*(1) :

> "It is an incident of property arising from the relative levels of their respective lands and the strata below."

This principle is embodied in illustration (*i*) to section 7 of the Easements Act, which runs thus :

> "The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land, to run naturally thereto."

This right is not limited to mere rain water falling directly on the land or water flowing in a natural stream over the land. It has been extended to spring water on the land and to water which the proprietor might by operations on the land, such as sinking a well or opening a fountain, cause to flow. In *Ramasawmy* v. *Rasi* (2) the following passage from Kerr on

(1) [1893] A.C. 691.

(2) (1913) I.L.R. 38 Mad. 149, 150.

Injunctions was cited to show the extent of the right as understood in English law :

"The owner of land lying on a lower level is subject to the burden of receiving water which drains naturally or in the course of ordinary agricultural operations, such as by deep ploughing, from land on a higher level."

SADASIVA AYYAR J. in *Doraiswami Muthiriyan* v. *Nambiappa Muthiriyan*(1) was inclined to extend this right even to water brought on to the land for irrigation purposes. He observed :

"I think also that even if the water is brought according to the custom and usages of the country along irrigation channels upon the land, the right to pass it on to a land of a lower level may be spoken of as a 'natural right' without much violence to language."

Of course, in this view PHILLIPS J. did not concur because he was of opinion that the words "natural right" could not be extended to water brought on to the land for irrigation purposes. The learned Judge's view is in accordance with the principle laid down in the English cases noticed in *Sheik Hussain Sahib* v. *Subbayya*(2). As stated by LORD WATSON in *John Young & Co.* v. *Bankier Distillery Company*(3) :

"The lower heritor is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means."

Whether this doctrine should be strictly applied to an agricultural country like India is a matter for consideration. In fact the observations of SADASIVA AYYAR J. must be deemed to have been made with reference to the conditions of this country. In *Kasia Pillai* v. *Kumaraswami Pillai*(4) MADHAVAN NAIR J., after referring to the dictum of SADASIVA AYYAR J., observed that except

(1) 1918 M.W.N. 167.
(2) (1925) I.L.R. 49 Mad. 441 (F.B.).
(3) [1893] A.C. 691.
(4) (1928) I.L.R. 52 Mad. 426.

this dictum there is no authority to support the view that the natural right can be applied to water coming on to the upper land for agricultural operations. But he nevertheless laid down:

"It appears to us that, in India, the right of an agriculturist to drain off into the lower lands the water brought into his land for ordinary agricultural operations is a customary right. He is entitled to do so by custom; otherwise, it will be impossible to carry on agricultural operations successfully."

Thus MADHAVAN NAIR J., though he was not inclined to support the right as a natural right, would do so on the basis of custom, having regard to the conditions of this country. No doubt in that case custom was pleaded. But the learned Judge enunciated the principle as a matter of general application. In my opinion, if for a sufficiently long time water brought on to the upper land by artificial means for agricultural purposes is allowed to pass without interruption by the proprietor of the lower land into it, one can easily infer a custom and that the customary conditions of the locality require such user. The doctrine of a lost grant can be invoked in aid of the inference of such a custom. An illustration of a case where a customary right was inferred by the application of the doctrine of a lost grant is *Derry* v. *Sanders*(1), where a right of way was asserted by one copyholder against the land owned by another copyholder, both holding under the same lord of the manor. In that case, BANKES L.J. observed as follows:

"In view of the rule that a legal origin must be presumed, if such an origin is possible, I think that the length of user in the present case of the disputed way is sufficient to found the

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(1) [1919] 1 K.B. 223.

presumption that the necessary custom existed in the manor of Longdon."

The principle upon which the doctrine of a lost grant is based is explained by CHANNELL J. in *East Stonehouse Urban Council* v. *Willoughby Brothers, Limited*(1) thus :

"I should be glad to be able to decide the case by the doctrine commonly referred to as that of a lost grant, that is, the rule which says that on long continued user or possession being proved anything requisite to give that user and possession a legal origin ought to be presumed by the Court. This doctrine has long been known to our law, but in recent times it has been applied more widely and to a greater variety of cases than formerly. It is, in my opinion, a most useful doctrine and enables the Court to avoid interfering with user and possession in cases not covered by the statutes of prescription and limitation, though within the mischief these statutes were intended to remedy."

To invoke the doctrine of a lost grant, no length of time is necessary. In *Chintamanrao Appasaheb* v. *Ramchandra Govind*(2) it was presumed from user extending over a period between 1886 and 1910. In *Kunjammal* v. *Rathinam Pillai*(3) and *Muthu Goundan* v. *Anantha Goundan*(4) twenty years' user was held sufficient. In *Rambhai Dabhai* v. *Vallabhbhai Jhaverbhai*(5) SHAH J. observed :

"It has been suggested in the course of the argument before us that immemorial user or ancient right cannot be inferred from user extending over a period of thirty-five years, but no case has been cited to us in which the minimum limit of time, which would justify the inference as to immemorial user, has been laid down. It would appear from the observations in the case of *Rajrup Koer* v. *Abul Hossein*(6) that their Lordships did not lay any particular emphasis upon the number of years so long as it was in excess of twenty years."

(1) [1902] 2 K.B. 318, 332.
(2) (1931) I.L.R. 56 Bom. 82.
(3) (1921) I.L.R. 45 Mad. 633.
(4) (1915) 31 I.C. 528.
(5) (1920) I.L.R. 45 Bom. 1027, 1034.
(6) (1880) I.L.R. 6 Cal. 394 (P.C.).

CRUMP J. in the same case observed at page 1037 :

"With reference to the ancient user which the District Judge has held established, he came to the conclusion that from the evidence in the case, which shows an user of at least thirty-five years, as also from the situation of the property considered in the light of the plaintiff's admitted right to use water from the well, the inference was that when the well was built, the persons using the well, of whom the plaintiff's ancestor was admittedly one, agreed between themselves that the plaintiff should take water by the shortest route to his land. That appears to me to be a finding of fact and I do not see that in arriving at that finding the learned District Judge has fallen into an error of law."

In this case, having regard to the plaintiff's admitted right by reason of the situation of the property to discharge water falling on his land on to the land of the first defendant, it may well be said that, when the plaintiff by reason of the agreement with the Poolangudi mirasidars brought on the water from the Poolangudi channel for agricultural purposes and let down the water, the first defendant's predecessor in title agreed that such water can be discharged in accordance with the mamool which existed in regard to the rain water. The learned Subordinate Judge found as a fact user for nearly thirty years. As CRUMP J. said in the Bombay case, the Subordinate Judge here in arriving at this finding has not fallen into any error of law.

In this connection I have to notice two main arguments of Mr. T. M. Krishnaswami Ayyar. One is that there is no pleading of any customary right or a right based on a lost grant. I do not agree with him in this view. He has also contended that what was alleged in the plaint is only immemorial user which can only mean user to let

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down rain water and not water which in 1891 by arrangement with the neighbouring landowners was brought on to the land by artificial means. No doubt, in so many words a lost grant or customary user is not mentioned in the plaint. The distinction between water brought on to the land by artificial means and water naturally falling on the land was also not made. But the necessary allegations to found such a right are there. To infer the doctrine of a lost grant or a claim based on prescription, all that is necessary to be alleged is "long, continual and peaceful possession". Where these incidents are found the Court will, if possible, presume a grant of the right in question.

The contention of Mr. T. M. Krishnaswami Ayyar based on the use of the words "time immemorial" as referring only to discharge of rain water is again not tenable because you cannot give a literal interpretation to the words "time immemorial". They are words borrowed from English law and, as explained in *Chintamanrao Appasaheb* v. *Ramchandra Govind*(1) by TYABJI J.,

> "they have a connotation that obviously cannot be applicable to Indian society and circumstances."

They must be taken to mean long user from which title may be presumed.

The other argument of Mr. T. M. Krishnaswami Ayyar based on the fact that the land is ryotwari land requires some notice. His argument is that all the lands are held under the Government, a common landlord, and no title by prescription or a lost grant can be acquired by one tenant

(1) (1931) I.L.R. 56 Bom. 82, 88.

against another, as prescription or a lost grant presupposes a grant by an owner in fee and an acquisition by an owner in fee. He relied very strongly for this proposition on *Wheaton* v. *Maple & Co.*(1), *Kilgour* v. *Gaddes*(2) and also *Chinnasami Goundan* v. *Balasundara Mudaliar*(3). He relied upon the following passage of LORD LINDLEY L.J. in *Wheaton* v. *Maple & Co.*(1):

"The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee",

and that of LOPES L.J. in the same case at page 68:

"It must be such an easement as absolutely binds the fee in the land."

Wheaton v. *Maple & Co.*(1) is a case upon the English Prescription Act under which, in the words of A. L. SMITH L.J. at page 72,

"a person cannot obtain an absolute and indefeasible right within the meaning of the statute unless by the user he can get a right against all. If he does not, he gets no absolute and indefeasible rights within the section."

Under English law, the three legal methods by which prescriptive rights can be claimed are: (i) prescription at common law; (ii) claims based on a lost grant; and (iii) prescription under the Prescription Act, 1832. As regards prescription at common law, the time prescribed by law is "time whereof there is no memory of man to the contrary". Later it was cut down by statutes but, as it was found in practice that a claim by prescription at common law could often be defeated by showing that the grant originated since 1189, what is called the doctrine of a lost modern grant was resorted to. The Prescription Act was also

(1) [1893] 3 Ch. 48.
(2) [1904] 1 K.B. 457.
(3) (1934) 67 M.L.J. 262.

passed to lessen the period of prescription. As stated in Halsbury's Laws of England, Vol. II, page 300 :

"The doctrine of a lost modern grant is in general only used as ancillary to a claim to prescription at common law, and is resorted to in cases where for some reason prescription at common law or under the provisions of the Prescription Act of 1832 cannot be adopted."

Prescription under the statute was only one of the modes by which a person could lay claim to his title and it did not preclude a person from claiming acquisition of an easement by any other mode. In English law there seems to be a difference of view as to whether the acquisition of an easement by prescription or a lost grant should only be by an owner in fee, i.e., whether the presumed grant must be an absolute one. That it should be so seems to have been the view taken in *Wheaton* v. *Maple & Co.*(1) and *Kilgour* v. *Gaddes*(2). But there is also authority for the view that it need not be absolute. In fact, in *Bright* v. *Walker*(3) PARKE B. observes :

"Before the Prescription Act this possession would indeed have been evidence to support a plea or claim by a non-existing grant from the termor, in the *locus in quo*, to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence",

though under the statute it must be absolute and valid against all. The same view was taken in *East Stonehouse Urban Council* v. *Willoughby Brothers, Limited*(4) by CHANNELL J.:

"It can be applied between termors when there is a difficulty in applying the statutes owing to the freeholder not being bound."

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(1) [1893] 3 Ch. 48.
(2) [1904] 1 K.B. 457.
(3) (1834) 1 C. M. & R. 211, 221; 149 E.R. 1057, 1061.
(4) [1902] 2 K.B. 318, 332.

But even in English law, where the nature of the interest is such that it can be practically assimilated to that of an owner in fee though not strictly an interest in fee, such a presumption can be made. In *Derry* v. *Sanders*(1), where the question arose with reference to a copyholder acquiring a right of easement against another copyholder holding under the same lord of the manor, BANKES L.J., after referring to the rule that a tenant for years or for life could not make a grant of a right of way over land in his occupation by virtue of his interest as such tenant, was inclined to the view that the same may not be applicable to a case of a copyholder. He observes :

> "One question, however, in the present case is whether a tenant by the copyhold is in the same position. . . . In *Eardley* v. *Granville*(2) JESSEL M.R. states the position of the copyholder thus: 'The estate of a copyholder in an ordinary copyhold (for it is an estate) is an estate in the soil throughout . . . . The possession is in the copyholder; the property is in the lord.' I think that there is considerable ground for saying that a tenant by the copyhold where by the custom of the manor his estate is an estate of inheritance has a sufficient estate to support a grant by him of a right of way over his copyhold lands."

The known methods of acquiring an easement by prescription under the Indian law are : (i) prescription under the Easements Act where it is applicable, (ii) prescription under sections 26 and 27 of the Indian Limitation Act, and (iii) claim founded on a lost grant. Prescription at common law as understood in England cannot be availed of in this country. Before the Limitation Act of 1871, the Courts were requiring twenty or thirty years' user following the English precedents. As

(1) [1919] 1 K.B. 223, 231. (2) (1876) 3 Ch. D. 826, 832.

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the Privy Council, referring to prescription under the statute, observed in *Rajrup Koer* v. *Abul Hossein*(1):

> "The statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of aoquiring easement."

There is thus nothing to prevent a claim to title by a lost grant being made under the Indian law apart from section 15 of the Easements Act and no claim is founded on section 15 of the Act in this case and Mr. Rajah Ayyar conceded that he is not setting up any claim under the section. The question therefore is whether the strict principle of English law that only where an absolute grant is possible you should invoke the doctrine of a lost grant should be applied to India. I may say at once that in *Koyyammu* v. *Kuttiammoo*(2) divergent views have been taken, ABDUR RAHIM J. holding that English law should be applied and PHILLIPS J. holding that, having regard to section 8 and other sections of the Easements Act, the strict theory of English law is not applicable. Whichever view is correct, in my opinion, the principle applied by BANKES L.J. to the case of a copyhold can legitimately be applied to the case of a ryotwari proprietor. Though a copyhold is not a freehold, BANKES L.J. stated a copyholder has sufficient estate to make a grant of easement for making the theory of a lost grant applicable. It may equally be said that the estate of a ryotwari proprietor is an estate in the soil and possession is with him though the property may be said to be in the Government. The estate of a

(1) (1880) I.L.R. 6 Cal. 394, 403 (P.C.). (2) (1919) I.L.R. 42 Mad. 567.

ryotwari proprietor is also heritable and alienable. He has a sufficient estate to support a grant of an easement. He would be a "capable grantor" as understood in English law for the application of the doctrine of a lost grant. Therefore in this view it is unnecessary to consider in this case the correctness or otherwise of the interpretation placed by VARADACHARIAR J. on section 15 of the Easements Act in *Chinnasami Goundan* v. *Balasundara Mudaliar*(1). I am therefore of opinion that on the findings in this case the view of the learned Subordinate Judge, that the enjoyment having been for more than thirty years it should be deemed to be of right and the plaintiff's claim should be upheld, is correct; *vide* also *Kunjammal* v. *Rathinam Pillai*(2).

In the result the second appeal fails and is dismissed with costs.

G. R.

APPELLATE CRIMINAL.

Before Mr. Justice Pandrang Row.

IN RE ABDUL GANI SAHEB (ACCUSED), APPELLANT.*

1936, August 20.

Indian Penal Code (Act XLV of 1860), *sec.* 75—*Old offender—Sentence to be passed on.*

There is no rule that the sentence on an old offender should always be at least a little more severe than the sentence just previous.

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(1) (1934) 67 M.L.J. 262. (2) (1921) I.L.R. 45 Mad. 633, 639.

* Criminal Appeal No. 352 of 1936.