ever, seems to be rather a case of estoppel or approbating and reprobating than of res judicata. Moreover, the observations on which Mr. Thakor relies (which have been quoted by my learned brother) seem to imply that the facts were the same at the material times, and the party was held to be estopped by a previous admission from changing the basis of his claim based on those facts. The other case seems to me to be much more in point. A question very similar to the present came before my learned brother in S. A. No. 892 of 1939.[6] He overruled the plea of res judicata there on the ground that the adopted son, who in that case brought both suits, was not litigating under the same title. With respect, I think, there is much to be said for this view. It is true that "litigating under the same title" has generally been interpreted to mean "in the same capacity." The plaintiff here is litigating in the same capacity in this suit as in the suit of 1928, namely, in the capacity of an adopted son. All the same, I doubt very much whether he can be said to be litigating under the same title. One of the matters to be considered must, I think, be whether the claim put forward in the second suit could have been put forward in the first, and obviously plaintiff could not have set up his adoption in 1935 in the suit of 1928.

Mr. Thakor relies on the fact that the decree in the former suit directed that the then plaintiff, now defendant 1, was to take possession of the property on the death of defendant 2. He argues that that implies that no future adoption could be made and that the former decree would not be affected if the present adoption is now upheld. But it is well settled that the validity of an adoption is not dependent on any question of vesting or divesting of property. The plaintiff here asked for a bare declaration of the validity of his adoption, and, in our opinion, he is entitled to it. We are not called upon to consider any question of right to property.

R.K. *Appeal allowed.*

A. I. R. (29) 1942 Bombay 326

BEAUMONT C. J. AND WASSOODEW J.

Emperor

v.

Karsandas Govindji Ved — Accused.

Criminal Appeal No. 6 of 1942, Decided on 17th June 1942, against order of acquittal passed by Bench of Honorary Presidency Magistrates, Mazagaon, Bombay.

(a) Bombay City Municipal Act (3 of 1888), S. 390 (1) — Offence under — Summons to accused—Accused should be charged in words of section—Accused instead of being charged with having worked factory in which mechanical power was used charged with working fifty-five electric motors for conducting textile mill without permission under S. 390 (1) — No objection to form of summons held could be taken as it sufficiently informed accused of act complained of.

In a summons to the accused in respect of an offence under S. 390 (1) it would be better to charge the accused in the words of the section, with having worked without permission a factory in which mechanical power was used. But where, the accused was charged in the summons under S. 390 (1) with working 55 electric motors for the purpose of conducting a textile mill without permission no serious objection can be taken to the form of the summons as it sufficiently informed the accused of the offence complained of. [P 327c,d]

(b) Bombay City Municipal Act (3 of 1888 as amended by Act 1 of 1916), S. 390 (1) — Construction — S. 390 (1) constitutes two independent offences of establishing new factory in which mechanical power is intended to be employed without permission and working factory in which mechanical power is intended to be employed without permission.

The reference in the last part of S. 390 (1) to working "any such factory" must relate back to the description of the factory contained in the earlier part of the section, and the only description of a factory is of one in which it is intended that steam, water or other mechanical power shall be employed. The first part of the section constitutes as an offence the newly establishing of a factory, but the reference to such newly establishing does not form part of the description of the factory. The second part of the section applies generally to any person, and not merely to the person who has newly established a factory. Thus, S. 390 (1) constitutes two quite independent offences; one, establishing a new factory in which mechanical power is intended to be employed without permission, and the other, working such a factory, that is to say, a factory in which mechanical power is intended to be employed, without permission. The expression "such factory" found in subss. (2) and (3) of S. 390 makes it perfectly plain that in those sub-sections the reference is to the description of the factory contained in sub-s. (1) as a factory in which steam, water or other mechanical power is to be employed. [P 327e,f]

(c) Bombay City Police Act (3 of 1888), Ss. 390 and 514 — Meaning of "continuing offence" explained—Establishing of factory without permission is offence committed once for all when factory is established — But working of factory without permission is an offence which arises on every day on which factory is so worked.

Since under S. 390 the working of a factory without permission constitutes an offence, every day on which the factory is so worked an offence is committed. The expression "continuing offence" means that if an act of the accused constitutes an offence, and if that act continues from day to day, then a fresh offence is committed on every day on which the act continues. If the act prohibited is that of working a factory an offence is committed on every day on which the factory is worked. It may not strictly be a continuing offence, because the owner of the factory may cease to work it for a longer or a shorter period and then re-open it; but on any day on which he is shown to have worked the factory without the requisite permission, he has committed an offence, and it is immaterial to consider whether he committed an offence by working the factory on some previous occasion. Under S. 390 the establishing of a factory without permission is an offence committed once and for all when the factory is established, but the working of a factory without permission is an offence which arises on every day on which the factory is so worked. [P 327g,h; P 328a,b]

(d) Bombay City Municipal Act (3 of 1888), S. 390 — Offence of working factory without permission — Previous acquittal cannot under S. 403, Criminal P. C., bar subsequent charge of working factory without permission.

Under S. 390 an offence is committed on every day on which the factory is working without per-

mission and, therefore, the acquittal of so working the factory in July 1939 cannot operate as a bar under S. 403, Criminal P. C., to a charge against the accused of so working the factory in January 1941. [P 328*b*]

Cr. P. C. —

('41) Chitaley, S. 403, N. 5 Pt. 14.

('41) Mitra, Page 1277, N. 1092.

R. A. Jahagirdar, Government Pleader — for Government of Bombay.

B. R. Ambedkar and H. D. Thakor — for Accused.

BEAUMONT C. J. — This is an appeal by the Government of Bombay against the acquittal of the accused by a Bench of Honorary Presidency Magistrates of an offence under S. 390 (1), City of Bombay Municipal Act, 1888. The learned Magistrates acquitted the accused on four grounds, and the Chairman of the Bench wrote a long and carefully reasoned judgment, for which we are indebted. The fact that we differ from the conclusions reached by the learned Magistrates should not be taken as detracting from our appreciation of the usefulness of their work. The facts which are not in dispute, are that in 1938 the accused applied for permission to start a factory in which mechanical power was to be employed, and in March 1939, he was prosecuted for establishing that factory, without the permission of the Municipal Commissioner as required under S. 390(1). Subsequently, an arrangement was come to between the Commissioner and the accused, and the prosecution was withdrawn, and the accused was acquitted on 27th July 1939. The actual charge of which he was acquitted was of working a silk mill, without obtaining previous written permission from the Municipal Commissioner, on 23rd March 1939. On 25th January 1941, the present prosecution was launched, and the accused was charged with working fifty-five electric motors for the purpose of conducting a textile mill on the premises described, without obtaining previous written permission from the Municipal Commissioner, on 22nd January 1941. One objection which the learned Magistrates upheld was to the form of the summons. I do not think that the summons is very cleverly worded. It would have been better to charge the accused in the words of the section constituting the offence, with having worked a factory in which mechanical power was used, instead of charging him with working fifty-five electric motors for the purpose of conducting a textile mill ; but I think it clear that the summons sufficiently informed the accused of the act complained of. In my view no serious objection can be taken to the form of the summons.

The real question which arises for decision is as to the proper construction to be placed on S. 390, sub-s. (1), City of Bombay Municipal Act, 1888. That sub-section provides that no person shall newly establish in any premises any factory in which it is intended that steam, water or other mechanical power shall be employed, without the previous written permission of the Commissioner, nor shall any person work, or allow to be worked, any such factory without such permission. The latter sentence was added by amendment in 1916. The learned Magistrates consider that the second portion of the section only applies to a newly established factory. They think that the section prohibits the establishment of a new factory, and further prohibits any person from working such newly established factory. I am quite unable to extract that meaning from the section. The reference in the last part of the section to working "any such factory" must relate back to the description of the factory contained in the earlier part of the section, and the only description of a factory is of one in which it is intended that steam, water or other mechanical power shall be employed. The first part of the section constitutes as an offence the newly establishing of a factory, but the reference to such newly establishing does not form part of the description of the factory. It is to be noticed further that the second part of the section applies generally to any person, and not merely to the person who has newly established a factory. I have no doubt, whatever, that the section constitutes two quite independent offences : one, establishing a new factory in which mechanical power is intended to be employed without permission, and the other, working such a factory, that is to say, a factory in which mechanical power is intended to be employed, without permission. The expression "such factory" is also found in sub-ss. (2) and (3) of S. 390, and it is perfectly plain that in those sub-sections the reference is to the description of the factory contained in sub-s. (1) as a factory in which steam, water or other mechanical power is to be employed. It is moreover obvious that for practical purposes, it would be almost impossible to say when a factory ceases to be newly established. Therefore, I am not prepared to accept the view of the learned Magistrates that no offence was committed here, because at the time when the accused was charged with working a factory, it had ceased to be a newly established factory.

The learned Magistrates also held that the prosecution was barred under S. 514, which, so far as material, stipulates that no person shall be liable to punishment for any offence under S. 390, except within three months next after the commission or discovery of such offence. The learned Magistrates held that the offence was committed once and for all, when work was commenced in the factory. But on the construction which we have put upon S. 390, the offence consists of working a factory and every day on which the factory is worked, an offence is committed. The learned Magistrates were, I think, somewhat misled by 32 Bom. L. R. 768[1] and particularly by the headnote. The real question in that case was whether the offence charged was, what is known as a continuing offence, and the Court held that it was not. As I ventured to point out in 38 Bom. L. R. 1164,[2] a continuing offence is not a very happy expression, because a person must be charged with committing an offence on a particular date, and he cannot be charged with committing an offence *de die in diem*. But the expression has a well recognized meaning. It means that if an act of the accused constitutes an offence, and if that act continues from day to day, then a fresh offence is committed on every day on which the act continues. If the act prohibited is that of working a factory an offence is committed on every day on which the factory is worked. It may not strictly be a continuing offence, because the owner of the factory may cease to work it for a longer or a shorter period and then reopen it; but on any day on which he is shown to have worked the factory without the

1. ('30) 17 A. I. R. 1930 Bom. 340 : 127 I. C. 181 : 31 Cr. L. J. 1159 : 32 Bom. L. R. 768, Emperor v. Bechardas.

2. ('37) 24 A. I. R. 1937 Bom. 1 : 166 I. C. 7 : 38 Cr. L. J. 156 : I.L.R. (1937) Bom. 183 : 38 Bom. L. R. 1164 (F. B.), Emperor v. Chottalal Amarchand.

requisite permission, he has committed an offence, and it is immaterial to consider whether he committed an offence by working the factory on some previous occasion. The headnote in 32 Bom. L. R. 768[1] says : "Limitation for a prosecution for a continuing offence runs from the time when the offence is first committed." If the expression "the offence is first committed" refers to the date when the act constituting the offence first took place, the statement is obviously wrong, because it would abolish altogether the distinction which has been recognized over and over again between an act which constitutes an offence once and for all, and an act which continues, and, therefore, constitutes a fresh offence on every day on which it continues. Under S. 390 the establishing of a factory without permission is an offence committed once and for all when the factory is established, but the working of a factory without permission is an offence which arises on every day on which the factory is so worked; and as the prosecution in this case is for working the factory two days before the date of the summons, it is plain that S. 514 is no bar to the prosecution.

Then the other point on which the learned Magistrates held that the accused was entitled to acquittal was that his previous acquittal in 1939 constituted a bar to his conviction in 1941 under S. 403, Criminal P. C. But that really raises the same point. It is obvious that if an offence is committed on every day on which the factory is working without permission, the acquittal of so working the factory in July 1939, cannot operate as a bar to a charge against the accused of so working the factory in January 1941. In my opinion none of the grounds set up on behalf of the accused are sound, and I think, therefore, that we must convict him. But this seems to be a case in which the accused has acted bona fide. He is, I gather from the evidence, working a factory which, no doubt, employs a certain number of people, and is to some extent useful to the public. The difficulty is that he has not succeeded in coming to terms with the Municipal Commissioner as to the manner of working the factory. It is to be hoped that this difficulty will be overcome and that it will not be necessary for the accused to close his factory altogether. We convict the accused, and fine him Rs. 10.

WASSOODEW J. — I agree.

G.N./R.K. *Accused convicted.*

A. I. R. (29) 1942 Bombay 328 (1)

BEAUMONT C. J. AND WASSOODEW J.

Emperor

v.

Ismail Karimbhai Mansuri.

Criminal Appeals Nos. 63 and 64 of 1942, Decided on 6th July 1942, against order of acquittal passed by First Class City Magistrate, Ahmedabad.

Press (Emergency Powers) Act (1931), S. 18 (1) — Printer of news-sheet cannot be said to make it within S. 18 (1).

In the case of a newspaper the printer cannot be described as the maker within the meaning of S. 18 (1). A newspaper is made by the combined efforts of several persons, including the author of the article, report or other subject-matter of the newspaper, the editor and sub-editors who arrange the subject-matter for publication, and finally the printer who prints the newspaper. A news-sheet is, no doubt, a simpler type of publication, but in that case also it is impossible to say that the printer is the maker within the meaning of S. 18(1). That would eliminate the author, who, more than any other single person, can be described as the maker. [P 328*g*]

R. A. Jahagirdar, Government Pleader — for the Government of Bombay.

I. I. Chundrigar and K. T. Pathak — for Accused.

BEAUMONT C. J. — These are appeals by Government against the acquittal of the accused of an offence under S. 18(1), Press (Emergency Powers) Act 23 of 1931. For the purpose of the present appeals, I will assume that accused 1 published an unauthorized news-sheet, and that the present appellant, who is the keeper of a printing press, printed that news-sheet. Section 18(1) provides that whoever makes, sells, distributes publishes or publicly exhibits or keeps for sale, distribution or publication, any unauthorized news-sheet or newspaper, shall be punishable. A 'newspaper' is defined as meaning any periodical work containing public news or comments on public news, and 'news-sheet' is defined as any document other than a newspaper containing public news or comments on public news or any matter described in sub-s. (1) of S. 4; and an 'unauthorized news-sheet' means any news-sheet, publication of which has not been authorized under Section 15.

The only question which arises on these appeals is whether the printer of a news-sheet can be said to make such news-sheet within the meaning of the section. The other provisions of the section clearly do not cover a printer. In the case of a newspaper, it seems to me perfectly plain that the printer cannot be described as the maker. A newspaper is made by the combined efforts of several persons, including the author of the article, report, or other subject-matter of the newspaper, the editor and sub-editors who arrange the subject-matter for publication, and finally the printer who prints the news-paper. A news-sheet is, no doubt, a simpler type of publication, but in that case also it seems to me impossible to say that the printer is the maker. That would eliminate the author, who, more than any other single person, can be described as the maker. If the Legislature intended to make the printer liable for printing an unauthorized newspaper or news-sheet, it would have been easy so to provide, instead of using so vague a word as 'makes', with reference to a newspaper or news-sheet. In my opinion, the learned Magistrate was right in holding that accused 2, who was merely the printer of the news-sheet, has not committed an offence under S. 18 (1). The appeal will, therefore, be dismissed.

WASSOODEW J.—I agree.

G.N./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Bombay 328 (2)

CHAGLA J.

Bayabai — Plaintiff

v.

Bayabai and another — Defendants.

Suit No. 151 of 1942, Decided on 7th July 1942.

(a) Cutchi Memons Act (1938), Ss. 2 and 3— Act applies not only to wills made after but also before Act.

The Act applies not only to wills made after the passing of the Act but also to those made before it was passed. [P 329*c*, *d*, *e*]