Broomfield J.—I think the common-sense view is that proceedings relating to prosecutions for criminal offences alleged to have been committed in Court are proceedings of a criminal nature, whether the alleged offence took place in a Criminal, Civil or Revenue Court. It is for that reason presumably that the provisions of Ch. 35 have been made applicable to all Courts. Prima facie it seems reasonable that the procedure as to revision should be the same as in all other criminal proceedings. The difficulties which have given rise to this reference are mainly due to the fact that the provisions of the Code dealing with revision, i. e. Ch. 32, do not in terms deal with revision of criminal proceedings but with the revision of proceedings of inferior Criminal Courts. A Subordinate Judge who decides to make a complaint or not to make a complaint under S. 476 is engaged in a criminal proceeding. But he does not for that reason become a Criminal Court. A District or Assistant Judge who hears an appeal in such a case is engaged in a criminal proceeding, but is not a Criminal Court, that is to say, if the words are used in their strict or ordinary meaning. One argument for holding that S. 439, Criminal P. C. applies in these cases is that that section gives the High Court power to deal in revision with any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge. It is true that this section, when it speaks of proceedings which have been called for or which have been reported for orders, is obviously referring back to Ss. 435 and 438, and in that respect it appears that it is intended to apply to proceedings of Criminal Courts only. But, although S. 439 must be read in connexion with S. 435, I am not prepared to say that the words "any proceeding" in S. 439 are not wide enough to include at any rate any proceeding under the Criminal Procedure Code. If so, they would include proceedings under Ch. 35 even in the case of Civil and Revenue Courts.

Another alternative is to say that in Ch. 32 the words "inferior Criminal Courts" are used rather loosely in a sense wide enough to include proceedings of Civil and Revenue Courts when engaged in criminal matters. This again is not a view which it is altogether easy to accept, but in my opinion it is not impossible. As the learned Chief Justice has pointed out, the way in which the other High Courts have dealt with the matter is somewhat illogical. They agree that the criminal procedure is to be applied in the case of appeals. But if so, it is difficult to see why it should not be applied in the matter of revision also. There is a rather curious point about the provisions relating to contempt of Court which are contained in this same Ch. 35. These provisions apply Civil and Revenue as well as to Criminal Courts, and there is a provision for appeals in S. 486 just in the same way as an appeal is provided in S. 476-B. In these provisions the subordination of Courts is the same, that is to say, an appeal from a Subordinate Judge lies to the District Judge and so on. It seems obvious therefore that it was not the intention of the Legislature to make Civil and Revenue Courts subordinate to the Criminal Courts in such matters. But in S. 486 it is expressly provided that the procedure for hearing appeals and the powers of the Appellate Court in dealing with the appeals are to be in accordance with the provisions of Ch. 31, Criminal P. C. The convenience of the practice of dealing with these matters under S. 439, which practice I think is as well established here as in Lahore, seems to me to be obvious. As far as I can see there is nothing in the Code which can be said to prohibit the application of that section. I agree therefore with the learned Chief Justice and with the answers which he proposes to the questions referred.

Wassoodew J. — I agree that the answers to the questions referred should be as stated in the judgment of my Lord the Chief Justice.

R.M./R.K. *Answer accordingly.*

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BARLEE AND MACKLIN JJ.

Vithabai Dattu Pattar and others — *Defendants* — Appellants.

v.

Malhar Shankar Kulkarni — *Plaintiff* — Respondent.

First Appeal No. 83 of 1934, Decided on 7th September 1937, against decision of Joint First Class Sub-Judge, Belgaum, in Suit No. 129 of 1930.

(a) Evidence Act (1872), S. 108—Person not heard of for more than seven years cannot be presumed to have died at particular date.

When the Court has to determine the date of the death of a person who has not been heard of for a period of more than seven years, there is no presumption that he died at the end of the first seven years, or at any particular date: *A I R 1926 P C 9 and AIR 1920 Bom 85, Rel. on.* [P 230 C 1]

*** (b) Transfer of Property Act (1882), Ss. 43 and 6—Erroneous representation by transferor that he is full owner though in fact entitled merely to spes successionis—S. 43 operates.**

Where an erroneous representation is made by a transferor that he is the full owner (though in fact he has merely a spes successionis), then if the transferor happens later to obtain the real interest, previous transfer can operate on that interest. The operation of S. 6 is confined to cases in which the transfer purports to be that of spes successionis, or where the transferee knows that the transferor has no more to give. [P 230 C 2 ; P 231 C 1]

P. V. Kane — *for Appellants.*

Dr. B. R. Ambedkar, S. A. Desai and S. A. Kher — *for Appellant No. 6.*

G. N. Thakor and B. D. Belvi — *for Respondent No. 1.*

Barlee J.—The property in dispute in this case belonged to two brothers Ramchandra and Laxman, and it is not now disputed that they were joint. Ramchandra died first leaving a widow Bhagubai. Laxman died in 1902 leaving a widow Kalava, who succeeded to a widow's estate. She died in 1909, and after her came Bhagubai as the widow of gotraja sapinda. Bhagubai had a step-daughter Vithabai, and in the year 1918 she transferred the whole of her interest in the estate in suit to Vithabai, and shortly afterwards it is common ground that she obtained from Vithabai some document (not on record) which secured her a pension of Rs. 100 a year. Bhagubai's interest was a life interest, and it is the case of the plaintiff that she died by drowning in the year 1921-22 and that defendant 12 Shankar became entitled to the estate as the nearest heir of Laxman. There was some litigation in connexion with a mortgage in 1925. The land mortgaged is not now in dispute. The contest was between one Hazarat Patil who had purchased the equity of redemption from Shankar (defendant 12) and one Potdar, an assignee of Vithabai's rights. In that suit it was held that Shankar's alienee could not succeed inasmuch as it was not proved that Bhagubai was dead. The suit ended in 1929, almost immediately and Shankar (defendant 12) sold his right, title and interest in the rest of the estate of Laxman to the present plaintiff, who filed the present suit on 4th April 1930, joining as defendants Vithabai who was in possession as defendant 1 and amongst others his vendor Shankar. The learned Judge found on the evidence that (1) Bhagubai had not been heard of by persons who ought to have heard of her if she were alive for seven years prior to the sale to the plaintiff on 1st May 1929; (2) that Laxman, whose next reversioner was Shankar, had been the owner of the entire property, and (3) that Shankar was the owner at the date of the sale by him to the plaintiff. Accordingly he made a decree for the plaintiff for possession and mesne profits on the ground that Vithabai was in possession without title.

In this appeal the first question which we have to decide is whether Bhagubai is dead or may be presumed to be dead. The plaintiff called as witnesses a number of persons from the village of Sankeshvar in which the property is situated and where Bhagubai's husband used to live and she herself used to live until she disappeared. Their evidence has been attacked on the ground that they are Brahmins or that for other reasons they are interested in the plaintiff who is a Brahmin. I need not discuss these objections in detail since we find that the defendant, Vithabai, has not chosen to contest their evidence. She asserted in her pleadings and deposed later that Bhagubai had left Sankeshvar and gone on pilgrimage, that she had herself met her in 1929 (that is four years before she gave evidence) at the village of Kapshi, and that she had met her also at Nipani, but she never alleged at any time that Bhagubai had ever returned to Sankeshvar where she had lived before. It is in evidence that some time after Bhagubai transferred the property to Vithabai she (Vithabai) left Kapshi which was her husband's village and came to Sankeshvar. She had no connexion with Kapshi except that it was her husband's village, and it is 24 miles from Sankeshvar. Bhagubai too had no other connexion with Kapshi, and it is not understood why if she returned from pilgrimage at any time during the seven years before suit, she should have gone to Kapshi or to Nipani avoiding Sankeshvar where her husband had lived and her step-daughter was living. We think that there can be no doubt that the learned Judge was correct in his view that Vithabai's evidence and the statements made by her witnesses who said that they had seen Bhagubai during the seven years following 1922 were false. The

only evidence on which we have been asked to rely is a post card which is said to have been written by the witness Bhagoji from Pandharpur about three years before the suit. He deposed that he had written it on behalf of Bhagubai ; but the learned Judge has held that it is not genuine. It may be genuine but it cannot be relied on for at the time there was in progress the litigation about the mortgage in which Bhagubai's existence was a relevant fact and it may have been written to create evidence in that suit.

I need not discuss the evidence any further. We are satisfied with the conclusion at which the learned Judge arrived that Bhagubai had not been seen or heard of in Sankeshvar where she would naturally have been heard of if she had been alive. We agree with him too that the evidence that she was drowned was unconvincing. Only one witness has deposed to having identified the body, and his statement is contradicted by another witness for the plaintiff. That only one witness has come forward to say that he saw the body is itself a justification for our believing the plaintiff's evidence generally for none of the witnesses seem to have exaggerated his case. The learned Judge however was wrong in law. S. 107, Evidence Act, lays down a rule that there is presumption that when the question is whether a man is alive or dead, and it is shown that he was alive within 30 years, the burden of proving that he is dead is on the person who affirms it. S. 108 adds a proviso that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. The burden of proving (as Bhagubai had not been heard of by her neighbours for seven years before suit) that she was alive was on Vithabai, and she failed to satisfy that burden. But it has been held by the Privy Council in 53 I A 24[1] that when the Court has to determine the date of the death of a person who has not been heard of for a period of more than seven years, there is no presumption that he died at the end of the first seven years, or at any particular date : *see also* 22 Bom L R 771.[2] The presumption then in this case is that Bhagubai was dead at the date of the suit, and not at the date of the sale as the learned Subordinate Judge has held. Mr. G. N. Thakor accepts this view of the law and agrees that it is sufficient for the plaintiff's purpose. The learned counsel relies on S. 43, T. P. Act. He contends that defendant 1's title was extinguished at the date of the suit, that it passed to defendant 12, the plaintiff's vendor, and that the sale of 1929 then operated on defendant 12's title and transferred it to the plaintiff, so that he acquired a right to sue at the moment when he filed his plaint. He points to the illustration to the section which reads :

> *A*, a Hindu, who has separated from his father *B*, sells to *C* three fields, X, Y and Z, representing that *A* is authorized to transfer the same. Of these fields Z does not belong to *A*, it having been retained by *B* on the partition ; but on *B*'s dying *A* as heir obtains Z, *C*, not having rescinded the contract of sale, may require *A* to deliver *Z* to him.

Mr. Kane and Dr. Ambedkar on the contrary rely on S. 6 of the same Act and maintain that the illustration is bad law since it contradicts that section. S. 6 provides that the chance of an heir-apparent succeeding to an estate cannot be transferred. In 1929, they say, it must be presumed that Bhagubai was alive since this is clearly the effect of S. 107, Evidence Act; and they claim that all that defendant 12 had to transfer at that date was a spes successionis, a mere hope which is not transferable property.

We have been referred to no exact parallel to this case in the authorized series of reports. In 39 Mad 554[3] an attempt was made to obtain specific performance of the contract by a reversioner and in 34 Bom 165[4] a reversioner had relinquished all her rights of inheritance. Neither of these cases is parallel. But we have found an exact parallel case in A I R 1935 All 244.[5] The sale there, as here, was not the sale of a reversionary right but of an estate which the vendee believed to be property of the vendor and a Bench of the Allahabad High Court held that where an erroneous

1. Lalchand Marwari v. Ramrup Gir, (1926) 13 A I R P C 9=93 I C 280 = 53 I A 24=5 Pat 312 (P C).
2. Jeshankar v. Bai Divali, (1920) 7 A I R Bom 85=57 I C 525=22 Bom L R 771.
3. Lakshmi Narayana Jagannada Raju v. Varada Lakshmi Narasimma, (1916) 3 A I R Mad 579 =29 I C 241=39 Mad 554=28 M L J 650.
4. Pilu v. Babaji, (1909) 34 Bom 165=4 I C 584 =11 Bom L R 1291.
5. Shyam Narain v. Mangal Prasad, (1935) 22 A I R All 244=153 I C 163=57 All 474= 1935 A L J 13.

representation is made by a transferor that he is the full owner (though in fact he has merely a spes successionis), then if the transferor happens later to obtain the real interest, previous transfer can operate on that interest. We agree with the reasoning of this case for we think that it reconciles S. 43 with S. 6 and it is our duty to reconcile these sections if possible and we would confine the operation of S. 6 to cases in which the transfer purports to be that of spes successionis, or where the transferee knows that the transferor has no more to give. On this view defendant 12's interest which accrued at the date of suit passed to the plaintiff who can evict any person in possession without title.

Mr. Kane has complained that this was not the case of the plaintiff in the lower Court and that his clients had no chance to meet it. It appears that the plaintiff did not plead S. 43, but it is not necessary for a party to plead law and it is not clear why a person in possession without any title should be allowed to plead that there was no consideration or any other defence which might have been open to defendant 12 when he himself was on record and did not choose to make such defence. The result is that this appeal must fail except that Vithabai will not have to pay any mesne profits. The decree of the lower Court is therefore amended in this respect. The plaintiff will get a decree for possession with such mesne profits as may be found to be due to him after the inquiry under O. 20, R. 12, which has been ordered. The appellants must pay the plaintiff's costs of this appeal.

D.S./R.K. *Decree amended.*

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FULL BENCH

BEAUMONT C. J., BROOMFIELD AND WASSOODEW JJ.

Gangadhar Gopalrao Deshpande and another — Defendants — Appellants.

v.

Sripad Annarao Deshpande and another — Plaintiffs — Respondents.

First Appeal No. 153 of 1934, Decided on 2nd December 1937, against decision of First Class Sub-Judge, Dharwar, in Civil Suit No. 124 of 1932.

*** * (a) Civil P. C. (1908), S. 11, Expl. V, S. 47 and O. 20, R. 12—Suit for partition, possession and mesne profits, past and future—Decree not awarding future mesne profits—Second suit to recover mesne profits from first suit or date of decree till delivery of possession is not barred :** *44 Bom 954=A I R 1920 Bom 39=58 I C 419, Overruled.*

The relief referred to in the Expl. V to S. 11 means relief arising out of a cause of action accrued at the date of the institution of the suit, and such relief does not cover future mesne profits in respect of which the cause of action accrued subsequently to the suit. Thus after a suit for partition and possession of lands and mesne profits, past and future, has been brought and decided and the decree fails to award the claim to future mesne profits, a second suit to recover mesne profits from the institution of the suit or the date of the decree till delivery of possession is not barred under S. 11, Expl. V : *44 Bom 954=A I R 1920 Bom 39=58 I C 419,* **Overruled**; *17 Cal 968; 21 All 425 (F B); 19 Bom 532; A I R 1918 Mad 484 (F B) and A I R 1918 All 412, Foll.* [P 231 C 2; P 232 C 2]

(b) Interpretation of Statutes—Re-enactment of Act with same words—Construction upon words in later Act must be same as one placed upon those in old Act, unless rest of later Act negatives such conclusion.

Where a certain construction has been placed by the Courts upon words in an Act, and the Act is subsequently re-enacted in a later Act which uses the same words, the Legislature must be taken to have known of the construction placed upon the old Act and to have intended to adopt it, unless there is something in the rest of the Act, which negatives such a conclusion. [P 232 C 2]

R. A. Jahagirdar — *for Appellants.*

S. A. Desai and G. A. Desai for A. G. Desai — *for Respondents.*

Beaumont C. J. — In this case the following question has been referred to a Full Bench :

Whether after a suit for partition and possession of lands and mesne profits past and future has been brought and decided and the decree fails to award the claim to future mesne profits, a second suit to recover mesne profits from the institution of the first suit or the date of the decree till delivery of possession is barred under S. 11, Expl. V, Civil P. C.

The facts giving rise to the question are these. In 1923 a suit was brought by the plaintiff claiming partition of immovable property, possession and mesne profits from the date of suit. In 1926 there was a compromise decree under which the plaintiff was to get two-thirds of the property and the defendant one-third, and the defendant was to effect partition and give delivery to the plaintiff of his two-thirds within fifteen days, and the plaintiff abandoned his claim to mesne profits. A dispute arose as to the partition which the defendant effected, and eventually the plaintiff filed darkhast proceedings to execute the decree and he finally got possession of his two-thirds in 1931. In 1932 he filed the