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MAKING REVERSIONERS PARTIES TO MORTGAGE SUITS AGAINST HINDU WIDOWS.

In the course of the judgments in *Bhagirathi Das* v. *Baleshwar Bagarti* [1] and *Kutti Goundan* v. *Mahali Ammall* [2] there are some questions suggested and observations made in reference to the above subject which deserve more than a passing notice. The opinion expressed by the learned judges being such as manifestly to necessitate a multiplicity of suits and aggravate the uncertainty of titles derived from judicial sales, we hesitate to accept the same unreservedly ; and we venture to think that on principle there is much to be said against their view while of authority there is little in favour of it.

In connection with the question of the position and rights of reversioners, there is a well-established distinction between cases in which a mortgage has been made by the last male-holder and those in which it has been made by a female-holder entitled only to a limited estate. In the former, the mortgage is unquestionably binding on the inheritance (if it was valid against the mortgagor) whereas in the latter, the charge may be good as against the mortgagor but inoperative as against the inheritance. This difference in substantive law must needs have its parallel in processual law. In the first class of cases, it is now well-established that when the mortgagee sues for sale or foreclosure, the female-holder (or widow, to take a typical instance) sufficiently *represents* the inheritance and any decree passed against her and proceedings in execution thereof will (in the absence of fraud, collusion, *etc.*,) bind the reversioners. In the second class of cases, the proceedings in the mortgagee's suit will be effective to cut off the rights of the reversioners, if the mortgage has been executed for certain purposes recognised by the Hindu law *but not otherwise.* The validity of the mortgage executed by the widow and the extent of interest taken by the execution purchaser under a decree

1. (1913) I. L. R. 41 C. 69. 2. (1911) 22 M. L. J. 364.

based on such mortgage can be *finally* settled only in the presence of the *actual* reversioner, that is, after the widow's death. But it cannot be denied that it may often be very much to the advantage of the mortgagee to have the question *tried* during the widow's lifetime. It is on a similar ground that the law gives to the *presumptive* reversioner a right to impeach the validity of the mortgage by way of a declaratory suit; and the utility of the adjudication will be quite as much in the one case as in the other. It is therefore manifestly desirable that the mortgagee should be at liberty to have this question also tried during the widow's lifetime and preferably in the mortgage suit itself.

But the propriety of the mortgage is not a point arising between the widow and the mortgagee and it can be put in issue only by adding the presumptive reversioner. Is there anything in law to preclude this? This then is the *first* question. If the presumptive reversioner is to be added and the question of necessity or no necessity allowed to be raised, further questions arise. (ii) Is the presumptive reversioner, when brought before the court, *bound* to plead on the question of necessity or no necessity; and (iii) if either on account of the presumptive reversioner's *omission* so to plead or his failure to displace the plaintiff's case as to necessity, the court finds the mortgage to have been made for a proper purpose, what is the effect of such finding as against the *actual* reversioner?

The learned Judges of the Calcutta High Court, (in the case abovementioned) suggest the first question but do not decide it. With reference to the other two questions, they observe: "It does not follow that a reversionary heir when drawn into the litigation is not entitled to urge that as he cannot be called upon to redeem, he would prefer to be left alone with liberty to contest the title of the mortgagee or of the purchaser at the sale in execution of the mortgage decree, if he should ever succeed as the actual reversionary heir"; beyond this, the learned Judges express no definite opinion. But in judging of the soundness of the implication contained in the above extract, it must be borne in mind that if the presumptive reversioner chooses to come forward as plaintiff praying for a declaration of the invalidity of the mortgage, as against the reversioners the mortgagee is not allowed the option to say that as the reversioner is not then entitled to, nor bound to redeem (even if the

mortgage is shown to be good), he will wait till the reversion actually falls in and see who turns out to be the actual reversioner.

In the Madras case, Justice Sundara Aiyar, dealing with the first of the above questions, observed that the reversioner is not a 'necessary' party to the mortgagee's suit and added, "indeed it is doubtful whether he can be held to be a proper party at all." The learned judge was however prepared to hold that the reversioner had a sufficient interest in the property to entitle him to discharge the mortgage debt after decree so as to prevent the loss of the property to which he would be entitled to succeed after the death of the widow. He reconciles the two positions by drawing a distinction between cases in which the reversioner claims of his own accord to redeem (as one having 'an interest in the property' within the meaning of S. 91 of the Transfer of Property Act) and those in which he tries to save the property for the estate upon the mortgagee attempting to sell it. This distinction would itself go a great way to justify the mortgagee in making the reversioner a party *defendant* to a suit for foreclosure or sale; but the learned judge thinks that such a course is not warranted by the language of S. 85 of the Transfer of Property Act (now O. 34, r. 1, Civil Procedure Code) which only requires the addition of 'all persons having an interest in the property' (in the present rule, 'all persons having an interest either in the mortgage security or in the right of redemption'). He holds that the 'interest' referred to in S. 85 must be of the same kind as that recognised for the purposes of S. 91 (a), and as to S. 91 (a) he refers to the decision of the Allahabad High Court in *Ramchandar* v. *Kallu* [1] that the presumptive reversioner cannot claim to redeem.

With reference to the first of the questions stated above, it is submitted that there are good grounds for recognising the presumptive reversioner as a *proper* party to the suit. The view is also supported by the authority of Dr. Ghose who in this connection observes "Reasoning from analogy, a Hindu widow in this country is entitled to represent the estate in an action by the mortgagee upon a mortgage made by the husband. But where the mortgage is made by the widow herself, the reversioners ought to be added as parties if the mortgagee wants to bind the husband's estate" (Law of Mortgages, 4th Edn. Vol. I p. 588). The learned

1. (1908) I. L. R. 30 A. 497.

author does not however discuss the question at any length; and there being no direct authority on the point, it is desirable to examine the matter for a moment on principle and with reference to the practice in England and in India, before the Transfer of Property Act.

The principle of the rules as to the parties to be brought before the Court in any action is thus stated in Daniell's Chancery Practice :—"A person may be affected by the demands of the plaintiff in an action either immediately or consequentially. Where a person is in the actual enjoyment of the subject matter or has an interest in it either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claims, he has an immediate interest in resisting the demand and all persons who have such immediate interests are necessary parties to the action." (Ch. III S. 3). One of the applications of the above principle is that "wherever real estate is sought to be recovered or a right is sought to be established or a charge raised against real estate, it is necessary that the person or persons entitled to the inheritance should be before the court (*ibid*). Hence it is that in mortgage actions, when the person in possession is only a qualified owner, it is not always sufficient to make him alone a party. If he is a tenant for life, it is well established both in England and in America that the first person *in esse* who has a vested estate of inheritance should also be added as a defendant. If, on the other hand, he is a tenant in tail, it is enough to have him before the Court, for, as Lord Camden said (*Reynoldson* v. *Parkins* [1]) 'he sustains the interest of everybody.' Again, even if the person in possession be the present owner in fee, if his estate is precarious, as for instance subject to defeasance by way of conditional limitation, executory devise *etc.*, the inheritance is not represented by him but the persons claiming in contingency upon the defeat of the estate in fee should also be made parties (Daniell's Chancery Practice Ch. III, S. 3; Fisher on Mortgages S. 1654 *et seq*; Jones on Mortgages S. 1401; Ghose on Mortgages 4th Edn. p. 587).

It would thus be seen that the real test by which to determine the propriety of bringing a person before the Court is to see whether the plaintiff's claim threatens to destroy or diminish some interest of his (whether in possession or in expectancy)

1, (1769) Amol. 564.

and if so, whether such interest is *represented* by a person already before the Court (or as is sometimes put, is it one that can be *defeated* by the person already on record). The statement that the holder of a subsequent interest need not be added, if his interest is only contingent is merely a part of the rule (and not the whole rule) and is apt to be misleading if taken by itself.

Bearing these principles in mind the rule as stated by Dr. Ghose will be intelligible. Where the creditor is content to proceed against the widow's limited interest, the reversioners are not concerned at all, for in the words of the rule above quoted from Daniell, the plaintiff's demand does not affect the interests of the reversioners. Where the mortgagee seeks to bind the full estate, his suit (against the widow) : threatens the full estate (including the rights of the reversioners). But if the suit is on a mortgage executed by the last male holder, the reversioners are nevertheless not required to be made parties because, it has been the established rule since the *Shivaganga case* [1] that in such suits the widow sufficiently represents the inheritance. No such general right of representation is recognised in cases where the action is based on a cause of action personal to the widow or relates to a debt incurred by her. That in such cases, it is not only not improper but quite appropriate to bring the presumptive reversioner before the court is clear from the observations of the Judicial Committee in *Nagender chunder Ghose* v. *Kamini Dosse* [2]. Their Lordships first reaffirm the 'general rule' that in a suit brought by a third person the object of which is to recover or charge an estate of which a Hindu widow is proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. But where the interests of the widow and the reversioner are antagonistic, where the reversioner charges that the widow has been seeking to destroy the estate, they say it would be obviously inequitable for the creditor (in certain circumstances) "to seek its destruction by a sale of the whole estate under an ordinary execution, *without giving the reversioners the means of protecting their interests by making them parties to a suit the object of which*, by a mortgagee who advances to save the estate, *should properly be to have an additional charge declared in his favor on it subject to redemption* and in default only of redemption

1. (1863) 9 M. I. A. 539. 2. (1867) 11 M. I. A. 241.

seeking a sale" (the italics are ours). The addition of the presumptive reversioners as parties to a suit against the widow when the creditor seeks to bind the estate is distinctly contemplated in numerous cases [see for instance. *Brij Bhukun Lall* v. *Mahadeo Dobey* [1], *Mohuna Thunder* v. *Ram Kishore* [2], *Srinath Dass* v. *Haripada Mitter* [3] *Marudaga Nachiar* v. *Savadi Tirumalai Kolundu Pillai* [4].]

In *Srinath Dass* v. *Hari Padamitter* [3] Jenkins, J. (as he then was) after referring to the fact that under certain circumstances Courts have permitted the expectant reversioners to be represented by a Hindu widow, adds, "when and how this rule of practice was established is not clear". Adverting to the 'general rule' of representation by the widow, as affirmed by the Judicial Committee in Nagender Chunder's case, the learned Judge points out that the basis of the rule must be that 'the defendant on record, by reason of common interest, is as much concerned to resist the particular claim as those who are not parties and that it is but reasonable to suppose that she will fairly and honestly contest the right (suit?) and uphold and maintain the several interests which are adverse to those of the plaintiff'. He then proceeds, "where there is a charge created by the ancestor from whom the widow and the reversioners alike derive their title, I can well understand that there is such identity of interest as will justify the widow being treated as the substantial representative of the inheritance, but is there any case which goes the length of deciding in favour of the sufficiency of her representation where she is the person who has created the charge? I have searched the reports for such a case but without success * * * * If the matter be looked at on principle there is an obvious distinction... .....The distinction is one recognised by Lord Eldon (with reference to tenants in tail)." [See also the observations to a similar effect in *Brij Bhukun Lal* v. *Mahadeo Dobey* [1].]

As to the early practice in India, Sir Edward Hyde East writing in 1819, and speaking of remedies for debts *due by the husband himself*, mentions it as his belief that in bills for foreclosure *etc.*, it has been most usual to add the first male heir in remainder, but he adds that 'this may have been done in parti-

1. (1872) 17 W. R. 422.
2. (1875) 23 W. R. 174.
3. (1899) 3 C. W. N. 637.
4. (1910) I. L. R. 34 M. 188.

cular cases *pro-majori cautela' (Cossinath Bysack* v. *Hurro Soondary Dosse* [1], referred to by Jenkins, J.).

In a note of his to an earlier case *Gopey Mohan* v. *Seban Cower* [2] (referred to both by Dr. Ghose and by Jenkins, J). Sir Edward East suggests a distinction between suits for foreclosure and suits for sale, in the following observations :—It is her duty to pay off the mortgage debt as well as all other debts of her husband.....and if she alone may sell, why may not she alone be sued. If the creditor had sued for the money lent, at law, and recovered judgment against her alone, he would have been entitled to take the lands in execution for the debt of the husband. Why then should it be necessary to sue different persons in equity for the same purpose, assuming that purpose to be for *sale* of the land for the payment of the debt? If, indeed, the purpose were for a foreclosure merely (which is to acquire an interest *ultra* the debt) the case might admit of a different consideration". As to the pratice in suits for sale, he states that a search for precedents was made but he 'did not derive any satisfaction from the result, the instances referred to being scanty and recent.' It may be noted in passing that the above remarks of Sir Edward East were made with reference to debts due by the husband and will not apply to claims in respect of debts incurred by the widow herself.

Is there anything in the Transfer of Property Act then, which indicates an intention to depart from the principles above discussed or otherwise renders it improper to add the presumptive reversioner as a party to a suit for sale or foreclosure when the mortgagee suing on a mortgage created by the widow herself seeks to bind the inheritance. Section 85 is not in terms limited to persons having a 'vested' interest; but Justice Sundara Ayyar imports the limitation from S. 91 (*a*) and the decision in *Ramchandar* v. *Kallu* [3].

(To be continued).

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1. (1819) 2 Morley's Digest 198 at p. 210. 3 Ind. Dec. O. S. at p. 916.
2. (1817) 2 Morleys Digest 105. 3 Ind. Dec. O. S. at p. 846.
3. (1908) I. L. R. 30 A. 497.

SUMMARY OF ENGLISH CASES.

Harris *v.* **Taylor**, (1915) 2. K. B. 580 C. A.

Foreign judgment—Enforceability—Voluntary submission to jurisdiction—What amounts to—Conditional appearance—Effect.

It is an entire misconception to say that there is a voluntary submission to the jurisdiction of a foreign court only when the defendant by appearing in the action in the technical sense has consented to the jurisdiction. If the defendant has applied for the exercise of the protection of the foreign court on his behalf, he has brought himself under an obligation to obey its ultimate judgment, and the same is therefore enforceable against him in England.

The action was to enforce a judgment obtained by the plaintiff against the defendant in an action in the Isle of Man for the recovery of damages for criminal conversation by the defendant with the plaintiff's wife. The question for decision was whether the defendant had so acted as to submit to the jurisdiction of the court of the Isle of Man and the judgment of that court was enforceable against him in England. The facts found were: The plaintiff was domiciled and resident in the Isle of Man: the defendant was resident in England and was not subject to the jurisdiction of the Isle of Man court. The plaintiff applied *exparte* for and obtained leave to issue a writ and to serve it on the defendant out of the jurisdiction. A writ was issued and was duly served on the defendant in England. The defendant's advocate subsequently appeared "conditionally" and applied to the court to have the service of the writ out of the jurisdiction set aside on various grounds. That application was heard and dismissed. The defendant took no further part in the proceedings and a decree was passed in favour of the plaintiff for damages and costs. *Held*, that the defendant submitted himself to the jurisdiction of the Isle of Man court and that its judgment could therefore be enforced against him in England.

Kenski *v.* **Peet.** (1915) 1 Ch. 530.

Restraint of trade—Master and servant—Agreement not to solicit customers—Too wide—Service terminable on a week's notice —Dispensed with on payment of a week's salary—Wrongful dismissal—Repudiation.

Where defendant entered the plaintiff's service on a weekly salary and subject to termination by a week's notice and the plaintiff dispensed with the services of the defendant by paying one week's salary in advance and not permitting her to work for the week, in the absence of an obligation to provide work for the week, the dismissal of the defendant was not wrongful.

Where the defendant agreed " not at any time during or after the determination of the employment directly or indirectly either on her own account or for any other person or for any firm or company to solicit, interfere with or endeavour to entice away from the master any customer of or any person or persons in the habit of dealing with the master," the form of the covenant is too wide, as it is unlimited in time and extends to all customers who either at the date of the contract or at the date of its determination or at any time thereafter may be customers or in the habit of dealing with the master. The extension of a covenant of this kind to customers at any future date is not reasonable. The covenant in the case not being severable is wholly bad.

Goldstein *v.* **Sanders.** (1915) 1 Ch. 549.

Landlord and tenant—Covenant not to assign without the consent of the lessor "such consent not to be unreasonably or vexatiously withheld"—Covenant running with the land—Agreement for underlease.

A covenant in the lease-deed, that the lessee is not to assign or demise without the consent of the lessor, " such consent not to be unreasonably or vexatiously withheld " is a covenant running with the land and binds the assigns and demisees of the lessee.

A person who agrees to take an assignment of the lease from the lessee of the property is bound by the covenant though no assignment of the lease is executed, in the same way as he would be bound if the assignment were executed.

Adams *v.* **Thrift.** (1915) 1 Ch. 557.

Company—Directors—Liability for misrepresentation—Reasonable ground to believe in the truth of statements—Reliance on the statements of a promoter—Companies' Consolidation Act, S. 84, —Allotment—Damages.

Where the directors of a Company issued a prospectus containing untrue statements and a person took shares relying on those statements, the directors to exonerate themselves from liability to those that took allotments of shares under S. 84 of the Companies' Consolidation Act, 1908, should prove that with respect to every untrue statement they had reasonable ground to believe and did up to the allotment of shares believe that the statement was true.

The uncorroborated statements of a vendor and promoter do not by themselves afford no reasonable ground for believing them to be true. The existence of a reasonable ground for belief in the truth of any statement is established by the proof of any facts or circumstances which would induce the belief in the mind of a reasonable man, that is to say, a man who stands between the careless and the easy-going man on the one hand and the over-cautious and skin-splitting man on the other. The measure of damages in such a case is not the difference between the amount paid and their present value; but the difference between the amount paid and the value of the shares at the date of the allotment.

In re **Groos. Groos** *v.* **Groos.** (1915) 1, Ch. 572.

Conflict of laws—Will—Law of Holland restricting testamentary capacity—Personalty—Subsequent acquisition of English domicil—Extended testamentary capacity—Effect on former will.

A testatrix being a Dutch subject domiciled in Holland, who by the law of Holland had power to dispose of only one-fourth of her property by will in the circumstances under which her will was executed, made a will in the Dutch language and according to the formalities of the law of Holland disposing of all the properties over which she had a disposing power by will, in favour of her husband. She subsequently acquired an English domicil and under English law she could dispose of her whole property by will. Under such circumstances, her testamentary capacity became extended and her husband was entitled to the whole of her property under the will.

Hatten *v.* Car Maintenance Company, Limited. 1915, 1 Ch. 621.

Lien—Motor Car—Agreement to maintain Car and supply Chauffeur and materials.

By an agreement between the owner of a car of the Motor Maintenance Company, the latter was well and sufficiently to maintain the car and supply petrol, &c., for the proper running and repair breakdowns and provide a driver who was to be the Company's servant; and the owner was to make some payments for the same, a fixed annual sum up to a certain mileage and at a certain rate for every mile above that. The owner took the car with her wherever she went out of London; while in London, it was in the Company's garage. A sum of money had became due under the agreement and the Company claimed a lien on the car for the amount.

The car having only been maintained in its former condition, the Company was not entitled to any lien on the car. A claim to a lien will only arise in the case of any improvements effected to the car. Even if the Company had a lien originally, that lien would be lost by virtue of the arrangement under which the owner was to be at liberty to take the car away and did take the car away as and when she pleased.

JOTTINGS AND CUTTINGS.

Reprisals and War-Crimes:—Reprisals in war, to which public interest has been of late much directed by discussion in Parliament and in the Press, are a means of compelling a belligerent to observe the laws of warfare whether on land or sea, and may in general be described as the sanction of the rules of war. It is sometimes loosely stated that international law is too weak to stand the strain of the violence of combatants. This is not so; for the sanction afforded by the due use of reprisals acts in a more direct and in a more immediate manner than does any protest against an international wrong made in times of peace. But the use of reprisals contains an obvious danger. It may so easily degenerate into a mere competition of barbarism that it has been hedged round with the most severe restrictions. And this makes it necessary to draw a distinction between reprisals in war and war-crimes. 'War crimes,' says Professor Oppenheim (2 Int. Law, p. 309), 'are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture

of the offenders.' Thus the essence of the war-crime is that it is an isolated and unauthorised act of certain members of the enemy's forces; the offender if caught is liable to be tried by court-martial and the penalty is generally death. Reprisals, however, are directed against acts of illegitimate warfare which have recieved the ratification, either expressed or implied, of the enemy authorities. If the subject of one State in time of peace commits an offence against the subjects of another, or against the other State itself, it is *prima facie* for his own Government to punish him. But in the case of a war-crime, the sanction acts directly; the criminal is dealt with by the military authorities of the injured State. Thus any person who abuses the white flag, or robs the wounded or prisoners, or in general commits any breach of the laws of war, is tried by court-martial and punished. But there is as yet no case for reprisals. That can only arise if and when it becomes clear that the acts complained of are part of a system authorised or acquiesced in by the enemy authorities. The war-crime is shifted from the individual to his Government, and the only way to deal with a Government which makes itself responsible for such methods of barbarism is by way of reprisals. The efforts of the Brussels Conference of 1874 (which produced an unratified convention) and of the Institute of the International Law to restrict the use of reprisals have met with little success; and in the absence of any sanctioning power to enforce the clear practice of civilised states, it is to be feared that the matter will be largely regulated by violence rather than by rule.—*Law Journal.*

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Authors and their manuscripts:—Among the curiosities of literature in its legal relations the recent settlement of the four years' litigation over Tolstoi's manuscripts and copy-rights will certainly take a high place. When the great humanist died it was a surprise to Russian society and the world that he had shortly before his death made a will, in regular legal form, leaving all his manuscripts and the copyright of all his works to his favourite daughter—the youngest—ignoring the claims of the countess, his widow, and his other children to participate in this most valuable property. Tolstoi had all his life been a determined opponent of copyright, and of all such devices for securing property in products of the brain, and here he was found to have consecrated his own legal rights by conferring them on one member of his family to the

exclusion of all the others—and to the exclusion, of course, of the public. The great preacher of peace, the denouncer of all litigation, had by his own act created one of the bitterest of family and legal conflicts, and his executors were forthwith involved in a fierce struggle for the upholding of the will in the interest of the favoured daughter, against the attacks of the widow and elder children. The Senate, the highest Russian tribunal, has now given its final decision against the will, and awarded the property in dispute to the author's widow; but this award is accompanied by the curious announcement that the Dowager Countess has at the same time made a free gift of the collection of manuscripts to the Moscow Museum, and has consented to the Academy at Petrograd publishing, without payment or royalty, a complete edition of Tolstoi's works. In this way a settlement is arrived at satisfying both public and family claims in a way which is quite characteristic of the author's country, where law and public policy are inextricably involved, and large views of 'morals' are constantly allowed to override considerations of legal right or justice. Under our own system, of course, such a result would have been impossible; due effect would naturally have been given to the will of the deceased author, who had full power to dispose of his manuscripts and copyrights in the same way as with any other part of his property. But there is, perhaps, in the result a sort of consistency with Tolstoi's own principles: for his devotion to things of the mind and soul made him all his life—and why not in death?—oblivious of all legal considerations.—*Ibid.*

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Effect of 'Guilty but Insane' on Successions:—Mr. Justice Joyce has applied to a case in the Chancery Division the decision of the House of Lords in *Rex* v. *Felstead* (1914)—one of the few cases in which a decision of the Court of Criminal appeal has been carried to the House of Lords. This can only be done by the special leave of the Attorney-General, given in view of the importance of the point. In the case before Mr. Justice Joyce (*In re* Houghton; May 9) the question arose whether or not a Criminal lunatic who had killed his father could benefit under the latter's intestacy. Houghton had killed his father and brother, had been tried for the crime after a coroner's jury's inquisition of murder, had been found 'guilty but insane' under section 2 of the Trial of Lunatics Act, 1883, and had been ordered to be detaine

during His Majesty's pleasure. Now, it is well settled law that a murderer cannot benefit from the death of his victim (*In re Crippen* [1911]) ; and it is equally well settled that the verdict of a Criminal Court will be accepted in a Civil Court as *prima facie* evidence of the crime. It follows, therefore, that if a verdict of 'guilty but insane' means one of 'guilty,' the prisoner is excluded from any participation in the estate of his victim. But in *Rex* v. *Felstead* the House of Lords overruled the view of the Court of Criminal Appeal that such a verdict is one of guilt (although it affirmed the decision below on other grounds), and declared that this special verdict is one of acquittal. The effect of this view is twofold : it prevents a prisoner from appealing against such a verdict—since there is no appeal against an acquittal; but it also—so Mr. Justice Joyce has just held—removed from him the taint of murdering his benefactor, and so permits him to take his share under the deceased's will or on his intestacy.—*Law Journal, May 15th.*

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Somnambulism as a defence :—It is often easy to see that a certain line of defence must in common sense be open to the prisoner, and yet puzzling for counsel and judge to discover the precise legal category under which the plea is admissible. An example is afforded by the successful appeal of J. E. H. Zimmerman, which came before Mr. Wallace at London Quarter Sessions last week. Zimmerman (the well-known tennis player) is a British-born subject, the son of a German who was naturalised so long ago as 1870. He was convicted and sentenced to six months' imprisonment in the second division at Westminster Police Court for trespassing on the Brighton Railway line at Grosvenor Road, a place forbidden under the defence of the Realm Act; nothing else of a suspicious nature was alleged against him. His defence was that he and three of his brothers and sisters are addicted to sleep-walking, that they keep bells outside their bedroom doors to wake them if they attempt to walk out in their sleep, and that he had been the victim of a fit of somnambulism on the night of the offence. His defence was supported by Medical evidence of a Harley Street specialist, and was accepted by the Court of Quarter Sessions, which quashed the conviction. Now, in what way does somnambulism excuse the commission of acts which, if committed by a person who is

awake, would undoubtedly be criminal ? It cannot be said to be a form of 'insanity'. The answer is supplied by the late Sir James Fitz James Stephen in his 'General view of the Criminal Law of England' (Ed. 1863, pp. 78-81). He there points out that, wherever deliberate intent is an essential ingredient of a crime, the action consists of a series of stages, namely, (1) occurrence to the mind of the contemplated action as a possibility, (2) deliberation, (3) resolution, (4) intention, (5) will, and (6) execution by 'a set of bodily motions co-ordinated towards the object intended'. Now psychologists, in criticising this passage, have taken exception to this description of the mental process of action (cf. Arnold's 'Psychology in relation to Legal Evidence' at p. 121) but in substance it may be accepted as good for all practical purposes. Now, as Stephen points out, both (4) 'intention' and (5) 'will' must be present in order to constitute a 'criminal intent'. They are different things, and 'will' may be present without having been preceded by 'intention'. 'Secondly', he says, 'will may exist without intention.....the case is illustrated by the motion of an infant: a new-born child moves its hands and arms and lays hold of anything between its fingers..... these motions are voluntary.....probably somnambulism and other movements during sleep are of the same kind..... they are voluntary, but as they are not co-ordinated with a view to any definite result, they are not accompanied by any intention'. Hence it is that 'somnambulism', since it precludes the existence of 'intention', one of the essential ingredients of 'criminal intent', is a valid defence; but in view of the clause the onus of proof is, of course, on the accused.—*Law Journal.*

Public Policy and the Press:—In dealing with the law relating to trustees, Lord Lindley once said: 'It is the function of a trustee to commit judicious breaches of trust'. So in the remarkable journalistic case before the Court of Appeal last week *(Neville* v. *The Dominion of Canada News Co.)* Lord Justice Pickford, while expressing his agreement with the view that a newspaper has no more duty to say defamatory things than a private individual, added: 'but it is not clear that the same considerations apply to a newspaper carrying on the business of advising investors'. While the learned Lord Justice shrank from laying down affirmatively that there is any duty even on such a newspaper to defame, he was emphatic in his endorsement of the view expressed by Mr. Justice Atkin,

whose judgment was under appeal, that 'for a newspaper to stipulate for a consideration that it will refrain from commenting upon fraudulent schemes, when it is the ordinary business of the company to comment on fraudulent schemes, is in itself a stipulation which is quite contrary to public policy, and which cannot be enforced in a court of law.' This is an extension of the doctrine of 'public policy' which it is important to note. According to Anson ('Principles of the law of Contract,' 13th Edn, p. 232) one of the main heads of the cases to which the doctrine applies is 'agreements to do that which it is the policy of the law to prevent'. We must now add to this 'agreements to refrain from doing that which it is the policy of the law (or of the State) to encourage.' For the freedom of the Press, though it has been described as a 'limited freedom'—that is, it is free, subject to the law of libel—is certainly an object of public interest, and it is the policy of the State to preserve it. In the case under consideration the proprietors of the newspaper had agreed for an advance of money not to comment on a land company of which the plaintiff was a director, or on any of its capital investments, with a provision that a certain proportion of the advances was not to be called in so long as the agreement was observed. It was because of alleged breaches of this honourable understanding that the plaintiff now claimed repayment of his advances, but Mr. Justice Atkin held, and the Court of Appeal confirmed his view, that, the agreement being invalid, there had in law been no breach of contract by the defendants and the events had not happened upon which the advances became repayable under the agreement. In this indirect way the superior claims of a free press over freedom of contract were established, and the interest of the public in the preservation of the journalistic 'right to defame'—in proper cases, of course—was triumphantly vindicated.—*Law Journal, 17th July 1915.*

CONTEMPORARY LEGAL LITERATURE.

The Journal of Comparative Legislation for July opens with appreciations of that great Judge and International lawyer Sir William Kennedy by Lord Justice Phillimore and Sir Courtney Ilbert. "He was a successful lawyer and an eminent Judge" says Sir Courtney Ilbert "but he was much more than either of these. His interest in law was not merely professional but genuinely scientific. He always sought and never wearied of seeking the

never despaired of finding the immutable and fundamental principles of law which underlie differences of creed, race, history and country." In his latest contribution to this journal, that was in July last, he was trying to estimate the drift of sentiment in the civilised world in regard to peace and war and thought that "enough has happened, small though it be, to encourage all right minded persons in all countries to work on for the world's peace with quiet practical endeavour and as men not without hope." The subjects in which he was generally found taking interest were questions of maritime law or broad issues in connection with peace and war. As to the latter, he took what was considered a retrograde view *i. e.*, to say he was opposed to the view that war was a matter between soldiers only; it was an affair between nations and in the long run it was more humane that it should be so. So that both on the question of the right of capture of enemy's property and the effect of war on contracts, be preferred the English view.

Mr. Ronald F. Roxburgh considers the legal position of the Declaration of London. He points out that it was intended to be a treaty, but has no binding force as it remains unratified by the high contracting parties. Though the "declaration" purports to lay down only rules substantially in conformity with the law of nations, in fact it is a work of compromise and mutual concession. Art. 65 of the declaration specially provides that the declaration must be treated as a whole. It was expected that the rules therein declared would become by consent which is after all the basis of international law recognised rules of law. For instance, during the Turko-Italian War, the belligerents adhered to its stipulations. The belligerents in the present war have departed for one reason and for another, largely from its provisions. There is in fact a fear that at the end of the war, it might remain "a monument of not what the law is but of what the law is not."

Mr. Norman Bentwich advocates the extension of "the Hague Conventions Private International Law" to non-Christian countries." It would be among the great benefits of such an extension that it would secure for members of non-Christian communities living in Europe some reciprocity of treatment with the privileges which members of European countries enjoy in non-Christian countries. The existing absence of that reciprocity is one of the blots on the jurisprudence of the European-Imperial Nations, a point in which

it is notably inferior to the Roman System which recognised the perfect autonomy of every community in matters of personal law.

Naturalisation is the process by which one who is the subject of one state becomes by reason of acquisition of territory or otherwise, the subject of another while expatriation is the reverse process by which one who is a subject ceases to be so by reason of cession of territory. According to the theory of the English law, in the absence of any provision in the treaty by which the acquisition or cession takes places, all the subjects of the old sovereign attached to the acquired or ceded territory become the subjects of the new sovereign. If the subject has any option at all, that option must be exercised either simultaneously with or before the change of sovereignty. This forms the subject of an informing article in the Journal by Mr. F. B. Edwards.

Mr. James Edward Hogge discusses the relation of adverse possession to registration of title and suggests a uniform legislation on the matter. As it is, there are three different systems in the British Empire. According to one, the right to acquire title by adverse possession notwithstanding registration is preserved; in the second, it is expressly taken away and in the third there is no express provision dealing with the matter.

Mr. R. G. Marsden discusses the sources and the growth of *Prize law.* It has been made almost wholly by the Crown in the exercise of its prerogative which does not seem to have been materially affected by disuse or lapse of time or by the legislature. The High Court of Admiralty grew out of and early in the 15th century superseded local Courts held by the admirals. The exclusive jurisdiction of the Admiralty Court to decide questions of *Prize* has been unquestioned since. An appeal lay to the King until it was transferred to the Judicial Committee. In the beginning the Judge was considered a nominee of the Lord High Admiral to do his bidding but during the course of the 17th and 18th centuries, such interference became less and less marked and the practice came into vogue of consulting the Judge on the propriety of individual acts. This also ceased from the time of Lord Stowell. The decision has to be by reference to the law of nations but the King has still power to make rules by orders in Council to meet new conditions. The subject can have no interest in the prize except in so far as the claim is based on a grant from the Crown.

Mr. C. E. A. Bedwell recommends the formation of our Imperial Legislative Reference Bureau after the manner of similar Bureaus in America. Major Tremearne points out some of the difficulties that arise in British West Africa by the clash of the premitive customs of the native and the complex procedure of the West. The late Dr. Blyden, a native was so impressed by these difficulties that he recommended the adoption of the Mahomedan Law instead.

Mr. Samuel Rosenbarum describes the adaptation of the English system of rule-making in the other parts of the Empire and the modification that the system had undergone in the process.

Air warfare is one of recent introduction and of necessity, the rules of such warfare are only in the making and have to be fashioned on the analogy of the rules of naval and military warfare. Mr. Piccio endeavours to indicate the lines on which he law is likely to settle itself.

The cases of the *Nieuve Vriendschap* decided in 1783, and *Minerva* decided in 1807 must, according to Mr. J. E. G. Duemont-morceny govern those of the type of Dacia. According to those rulings, nothing short of the clearest proof that the transfer of the ship was *bona fide* and not intended to evade capture would suffice to prevent condemnation.

The views of Franciscus Victoria (1480-1546), the great Salamanca jurist whose life is dealt with in this issue of the Journal of Comparative Legislation are remarkably in advance of his age, for the toleration that he exhibits for the non-Christian communities which according to him as much as Christian communities are units in international life to be dealt with on the basis of the same international law. He repudiated the pretensions of the Pope as well as those of the Emperor to Empire over the Indians. He was equally against any claims to forcible conversions of infidels. He condemns is the practice of reprisals, when accepted irregularly and indiscriminately. In his "De Jure Belli" he denounces those who are ever ready to seek causes and occasions for war; he says that it is illegitimate to declare it without just grounds that when begun it must be prosecuted with strict moderation, that a clear distinction is to be made between combatants and non-combatants and that all belligerent operations should be carried out only to the extent demanded by the imperious necessity of self-defence and general security. By his cogent and scientific

presentation of these and other questions, he shows himself to be an invaluable precursor of Grotius, and an able builder of international law.

An interesting attempt is made in America to maintain peace and harmony in poor homes by the institution of a special court of domestic relations and a probation department to act in connection with it which prevents summons from issuing in desertion cases without the cases being thoroughly examined by the latter and steps taken to restore harmony where possible or at least procure amicable settlement between parties. It is intended similarly to have juvenile courts, etc., with homes to commit the offenders. Night Courts are another institution peculiar to New York and Philadelphia. Women take part in all these institutions with great resulting benefit for the best class of women would rather suffer great misery than complain to men or come into open Court.

The subject of contraband has just at present acquired great importance. Mr. Phillimore gives a list of the articles which are contraband according to the various belligrents in this war and points out the extent to which these lists deviate from the declaration of London. The principle of retaliation for which there is precedent in past wars, has added considerably to the list of contraband. England has refused to accept the proposed *modus vivendi* of the United States of America to superintend through licensed vendees the destination of food stuffs to civilian population.

In the *Juridical Review* for May, Mr. J.W. Brodie Innes points out the difference between the history of the English and the Scotch Law in respect of the *origins* of Courts. While the English High Court has grown up, by a natural and inevitable process of development, from the very first primeval type whereby disputes were settled among the nomad tribes wandering over the great central plains of Europe, while the inferior or country Courts are the modern creation of statute, in Scotland, the reverse has been the case. The Court of Session practically almost as it exists to-day was created by James V in 1533 but the inferior and local courts have grown, through many stages of development, to their present condition. Scotland was largely indebted for the idea as well as nomenclature of her courts to France. Difference in the origin of the courts led also to a difference in the substantive law; the Digest and the Canon law being authority in Scotland in case of

doubt while both these were anathema in England. The humble clerk who sat at the table of the Lord Chief Justice who was in charge of the records and was expected to keep the judges properly informed about precedents and by slow process was himself raised to a seat among the judges under the name of the Master of the Rolls now occupying an important place among the Judges as the President of the Court of Appeal has his analogue in the Scotch system in the Lord Clerk Justice who however never attained to the dignity of the Master of the Rolls. The writer describes graphically the convenient fictions by which the various courts in England acquired concurrent jurisdiction in all matters. If the plaintiff desired to bring his case before the Exchequer, he would state upon his writ (1) that the defendant owed him money, (2) that he owed money to the King, (3) that by reason of the defendant's not paying him he was the less able to discharge his debt to the King. No proof was asked of these statements. Because the payment of the King's Taxes was in question, the matter became an Exchequer matter. This fiction was called the Writ of Quo Minus. Similarly, if it was intended to bring the case before the King's Bench which had mainly to do with criminal work, one had only to allege that the defendant had punched his head when the debt was demanded. The Scotch Court never went through this process of development. The sheriff's courts in Scotland have a longer history and a more varied jurisdiction than the County Courts in England.

Mr. James Hogg, who has contributed an article on an analogous subject to the Journal of Comparative Legislation pleads for legislation on Registration of title enacting clear provisions as to the effect of registration on adverse possession, equitable estates, &c. which may lead to considerable reduction in litigation.

In the course of the administration of a trust, the trustee incurs a liability on a contract or in tort or otherwise to one other than the *cestui que trust*. What are the rights and remedies, legal and equitable of the person to whom the liability is thus incurred? This question is elaborately dealt with in an article in the *Harvard Law Review* for June, by Mr. Austin V. Scott. In the absence of an express stipulation relieving him from liability (even about the effect of this, there is some difference of opinion), the trustee is personally liable on contracts made by him whether he was acting with authority or without. Similarly

he is personally liable for torts committed by himself or by his agent. Except where the debt was properly incurred and is expressly entered an behalf of the trust in which case an action in equity is permitted against the trust estate; the only way the trust estate can be made liable is throughthe trustee's right of indemnity. The trustee has got the right to be reimbursed after payment; he has similarly the right in advance to be relieved from the liability. His general creditors also can proceed against his former right while only the particular creditor in respect of whose liability, there is this right of exoneration can avail himself of it to reach the trust estate. In most jurisdictions, such a suit will not lie when the trustee has other available assets. At common law, even if a person contracts as executor, the decree can only be against him personally. This right of exoneration or indemnity is held generally not to be available when the general account is against the trustee, though in some jurisdictions it is held that the creditor is entitled to proceed against the trust estate if in respect of his debt, the trustee has the right of indemnity. The trustee as such is not an agent of the *cestui que trust* and the *cestui que trust* cannot be made liable on that footing. If the trustee has given a charge or pledge, then the right of the creditor is to be determined by reference to the propriety of that transaction and need not be tested by reference to his right of indemnity. Where the trustee carries on business unauthorisedly, he has no right of reimbursement but where he has done so in good faith, and there has been an enrichment of the estate, to that extent his a right to exoneration is recognised.

Discussing the maxim—No presumption upon a presumption the writer of a note in the Harvard Law Review thinks that like numerous other impressive legal phrases which serve but to obscure the maxim may profitably be disregarded. In all cases of circumstantial evidence, the ultimate conclusion from the facts is arrived at through a series of inferences. It is only when the evidence is insufficient to support the verdict that this maxim is relied upon. It is only a statement of the truism that an inference ought not to be merely conjectural.

In the Canadian Law Times Mr. Silas Edward tracing the evolution of parliamentary Government in England the process by which the present Cabinet system with a constitutional sovereign acting

on the advice of his ministers has come to govern the country and the way in which the system was purged of the various abuses that crept in seems to be hard on his own country. "Bribery" he says "not only among the lectorate but graft on the part of those entrusted with the sacred duty of directing the affairs of the State, is the crying evil of the day and that too, in our very midst, permeating and corrupting all classes from the highest to be lowest .....If unchecked this cankerous growth will surely sap the vitality of the body politic of our fair dominion." The drooping hearts among the Indian political workers may take cheer from charges like these.

The *Central Law Journal*, (April 9), has an interesting study on the legal notions of Mark Twain. His father and grandfather were lawyers and his brother also was a lawyer and Mark Twain himself knew law. He in fact makes few slips in his works. Possibly it was the indifferent success of his father and the failures of his brother that turned Mark Twain away from law and made him indulge in gibes at lawyers. No other writer has turned so much to the environment of the law to find material with which to embellish a joke or point a moral. He was never-done praising the jury system of course, satiriscally as the "pallidium of our liberties" and hea ssured an English audience that its efficiency was only marred by the difficulty in finding twelve men every day who do not know anything and cannot read." "Extraordinary Twins" is an extravagant tale based on a trial in which the court is busy endeavouring to solve which half of the Twin body was responsible for an assault Twain has made use of the dramatic interest of murder trials in several of his works. But his *Joan of Arc* which according to his own estimate and according to the estimate of many of his critics is his best work, is a series of trials in which the subject is dealt with in all seriousness. Thus sums up the writer of this article, a conclusion highly interesting to the legal profession "his whole work from *Joan of Arc* to Tom Sawyer proclaims that he rests his fame more than any other writer of his time, upon what he knew of law and lawyers." In the issue of May '15, we have a dicsussion as to whether a murderer could take under a will or by inheritance from the murdered. There seems to be some difference of opinion in the American Courts as to whether the principle *Nullus Commodiem Capere potest de injuria sua*'—No one shall profit by his own wrong—can overid

statutory declarations as to the effect of wills or rules of devolution. The writer thinks that there is no conflict between the two. In some cases in America, the argument is advanced that this rule cannot stand in the face of the abrogation of the law as to corruption of blood and forfeiture by reason of felony or treason.

BOOK REVIEW.

THE SPECIFIC RELIEF ACT, *(Lawyers' Companion Series). 1915.* This book published at the Law Printing House gives under appropriate headings the case law that has grown under each of the sections and will be useful as a book of reference both to the Lawyers and Judges who want to get a collection of all the cases on point within the shortest time without having to run through several volumes of the Digests. The case law on the Act has been brought up to the end of 1914. The index to the book as is characteristic of Sanjiva Rau's publications, gives direct reference to the particular passages in the pages where it is found. The publishers have spared no pains in bringing out this revised edition of the Lawyer's Companion Series on the Specific Relief Act.

THE INDIAN EASEMENTS ACT—*(Lawyers' Companion Series). 1915 Edition.* This Edition of the Indian Easements Act has made a wholesome departure from its predecessor in incorporating largely references to English treatises and decisions. Consistently with the object of the publishers, there is no discussion of cases or principles. To add to the utility of the book, an appendix has been annexed where the law both English and Indian regarding each well-known class of Easements has been collected together giving the reader an idea of each of the classes of Easements apart from the mode of treatment in the Act. The appendix will be particularly useful to the practitioners and Judges in provinces to which Indian Easements Act has not been extended.

THE PRESIDENCY TOWNS INSOLVENCY ACT. (*Lawyers' Companion Series*) *1915 Edition.*

We welcome this edition of the Presidency Towns Insolvency Act. The Act itself is a very recent one and the notes to the preamble give a clear idea of the object of the Act, the prior legislation on the subject, and the improvements effected by the Act on the pre-existing law. By this volume the publishers have placed within easy reach of the legal profession, the decisions in England on the subject which will have to guide largely the courts in the working of the Act. As appendices to the book are given the English Bankruptcy Acts of 1883, and 1890 and the Rules framed by the various High Courts under the Act. The case law has been brought thoroughly up to date by a supplement which gives the most recent decisions.

THE INDIAN DECISIONS (OLD SERIES), VOL. II. SUDDER DEWANNY ADAWLUT REPORTS, BENGAL. VOLUMES VI & VII.—*Law Printing House, Madras.*

We congratulate the publishers for the expeditiousness with which they bring out these volumes. The legal profession in this country is under great obligation to them for republishing these rare collections of cases.

SANJIVA RAO'S *All India Civil Court Manual: Local Acts (Madras).*

The profession was badly in need of an up-to-date collection of the local Acts, the Madras Code being long out of date and is, therefore, sure to welcome this well-timed publication. Needless to say that it exhibits all the neatness and finish which we have learnt to associate with Lawyer's Companion Office publications.

PROBATE & ADMINISTRATION ACT *by Alexander Kinney, 2nd Edition. Published by Thacker, Spink & Co.*

As a handy book of reference, we trust this book will be found useful by the profession; the utility of the book is considerably enhanced by the improvements carried out in this edition. The

notes under each section are fairly full and accurate references to the appropriate pages of leading Text books will be found specially useful. A complete list of regulations that dealt with inheritance and wills before the act is given at the beginning which will be helpful in the critical study of early Indian decisions.

LAW OF SPECIFIC RELIEF, *by T. R. Desai : 3rd Edition.*

The number of editions that the book has gone through must be at least some index to its popularity. As an analytical commentary, it is likely to be appreciated by students for whose benefit the book is mainly intended. The notes cover all points which require elucidation ; the references are discriminating and will be found useful not only by the student but also by the practitioner. The get up leaves very little to be desired.

INDIAN ARMS ACT *by F. C. Widge.*

We in this part of India have very little to do with arms but from that it does not follow that we need not be acquainted with the Arms Act. It is easy for people all unwittingly to come within some section of Act—with very serious consequences. Even then, we did not suspect that there was material for 300 pages. But Mr. F. C. Widge's book shows that there is so much to know if one wants to know all about the Arms Act.
