The Madras Law Journal.

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The Madras Law Journal.

PART II.] JANUARY, 1916. [VOL. XXX,

With this issue the Journal enters upon its twenty-sixth year. We take this opportunity to thank our subscribers—both those on the bench and those at the bar—for the support they have so far given us and to express the hope that the same may be continued, if possible in an even larger measure. We may be permitted also to express our sense of gratitude to the Honorable the Judges of the Madras High Court for all the facilities and encouragement that they have been pleased to afford to us. And in this connection there is only one word that we would beg leave to say, in respect of certain observations that have occasionally fallen from the bench as to the selection of cases for reporting. We certainly do not pretend to have made no mistakes but we may assure their Lordships and the profession as well, that every effort is being made to report in these pages only such decisions as may fairly be described as 'considered Judgments' and are found to do more than merely follow existing precedents. As to the complaint, that one frequently hears, against there being a multitude of legal Journals, it behoves us not to speak except to repeat the following words of the eminent founders of this Journal (with reference to the 'Indian Jurist'):—'The field of law is so wide and there are so many questions which admit of being discussed from different points of view that we think there is ample room for the existence of both the Journals'. We leave it to our readers to see whether the stress of competition has in any degree deflected us from the course or standard hitherto associated with this Journal. Except for the substitution of the weekly for the monthly issue and of two volumes a year for one —both of them, changes necessitated by the natural expansion of work—the main lines of the Journal still remain as they were laid down by the founders; and if the help and guidance of those great men are unfortunately no longer available to us, we have

at least the benefit of their labours and the lessons of their work; and it will be our constant endeavour to make the Journal continue worthy of that high parentage.

Vaiyapuri *v.* **Sonamma Bai** (29 M. L. J. 645 F. B.)

Apropos the above decision, we have great pleasure in publishing the following notes—in the form of query and answer—which, we trust, our readers will find instructive.

Querist :—

In *Vaiyapuri* v. *Sonamma Bai* a Full Bench has decided that in the case of a simple mortgage possession of a trespasser adverse to the mortgagor is not adverse to the mortgagee.

That may be right in principle, though the rule may in practice work more injustice than it will remedy, for as Abdur Rahim, J. points out in *Ramasami Chetti* v. *Ponna Padayachi* [1] the trespasser who has peacefully and openly held possession for 12 years and more may for an indefinite period be uncertain whether he is liable to be sold up by a mortgagee whose mortgage has been kept alive by payments of interest or acknowledgements of which the trespasser in possession my have no knowledge. Whereas, on the other hand, if the mortgagee remains awake he must know who is in possession of the mortgaged property and can, except possibly in a few rare cases, realize his security before the mortgagor's title is lost, or if he is anxious to retain the investment, can require the mortgagor to recover possession from the trespasser financing the suit, if he is very anxious not to realize.

This by the way: accepting the decision of the Full Bench the result in the particular case does not seem altogether clear. The Division Bench giving no reasons, beyond stating that they follow the decision of the Full Bench, confirm the decree.

The decree was a decree for possession without mesne profits, the plaintiff being the mortgagee's representative suing in the capacity of purchaser at the sale in execution of the decree in the suit on the mortgage.

The possession of the trespasser began in 1890; the suit on the mortgage was in 1900: the decree was in the same year but

1. (1910) I. L. R., 36 M. 97=21 M. L. J. 397.

the sale was not until 1906. The trespasser was not a party to the suit on the mortgage: he had twelve years adverse possession in 1902: and he was sued by the purchaser in 1910. The result seems to be that he gained nothing by his adverse possession except the right to resist the mortgagor if he tried to enter into possession himself. How is this?

The mortgagee never had even so much as a contingent right to possession and the mortgagor's right to possession was extinguished in 1902: how then did the purchaser obtain a right to possession?

Did the filing of the suit on the mortgage operate to stop the running of time in favour of the trespasser who was no party to the suit and probably never heard of it?

If not, what did the purchaser buy? apparently the mortgagee's right *plus* the extinguished right of the mortgagor, *i. e.*, *plus* nothing: and he would seem to have acquired nothing more than the right to ask the court to sell the property if the owner of the right to redeem failed to do so when called upon by the court. In other words he would have to sue the trespasser on the mortgage for sale giving him an opportunity to redeem. The mortgagee had already had the property sold once but choosing to ignore the man in possession had sold an extinguished right instead of the possessor's right; and whatever may be theoretically the correct position of a person who without title or permission remains in possession for more than 12 years, his possession must practically be held to give him the right to redeem the mortgage; for, if as the Full Bench holds the mortgage remains alive, the right to redeem it must remain alive in some one; the extinction of the mortgagor's title can hardly confer on the mortgagee a title to take possession of the mortgaged property without further ado; can it convert the right of sale into a right of possession? It seems easier to hold that the trespasser's possession for more than twelve years gives him the right to redeem, whether the mortgagor has lost that right or not; at any rate no one has the right to turn him out of possession, not the mortgagor for he has lost his right to possession; not the mortgagee, for he never had that right; not the purchaser for he could buy only the rights of the parties to the suit.

It would seem that the purchaser must have a suit for sale on the mortgage against the man in possession, in spite of the

former sale. But he has been allowed a suit for possession. How?

Is it as a suit on the judgment in the mortgage suit: the purchaser was in fact the decree holder but the judgment did not decide that any one had a right to possession; the transfer of the right to possession is the effect of the sale not of the judgment.

Or is the trespasser a transferee pendente lite?

On the theory that on the expiry of the period of 12 years' adverse possession, the trespasser acquires the title lost by the person or persons entitled to possession during that period, it might possibly be so held, provided that in 1902 there was an appeal or an application for execution pending in respect of the decree of 1900. How matters stood in those respects does not appear from the papers in the case.

Is the matter so clear that the learned Judges of the Division Bench would have wasted time had they given reasons for their decision?

If we take the case where the trespasser has before the suit on the mortgage been in possession adverse to the mortgagor for more than 12 years, it would seem clear that he cannot in that case be ousted by the purchaser if he was not a party to the suit, unless it be held that the existence of a simple mortgage on the property nullifies altogether the effect of adverse possession, and not only keeps alive the mortgagee's right to sell the property, but also causes the right of redemption to remain unimpaired in the mortgagor, and in no one also. It is bad enough for the trespasser if long peaceful possession is to be no protection against simple mortgagees; but if the mere existence of some old mortgage kept alive by acknowledgments or payments (to him unknown,) is to have the effect that the purchaser in some suit on the mortgage (to him unknown) is to be entitled to turn him out without any opportunity to redeem, hardship is veritably piled upon hardship.

There is a third case, where the trespasser's possession reaches its duration of 12 years after the sale, but before the purchaser's suit or attempt to take possession. In that case the purchaser has no doubt bought the right of the mortgagor as well as that of the mortgagee and consequently his suit could not be a suit for sale but for possession. But still there would seem to be a bar: if articles 136 and 137 be held to apply only where the

person whose title is transferred is *not* entitled to possession at the date of the sale, still 142 or 144 would seem to bar the suit.

The mortgagee can apparently avoid all these difficulties by making the man in possession a party to the suit on the mortgage. *Vigilantibus non dormientibus.*

Answer :—

The principle of the decision of the Full Bench is analogous to a case where adverse possession is acquired against the widow in possession. It is now settled law that that possession should not affect the rights of the reversioner. The mortgagor in possession had only a limited right when adverse possession commenced. The right to bring the property to sale is outstanding in the mortgagee. Consequently the mortgagor had only a limited right in the property ; and the adverse acquirer can possess himself of that right.

This still leaves open the important question whether the mortgagee can recover possession without giving the trespasser an opportunity to redeem. It must be allowed that this right subsisted in the mortgagor and passed on to the stranger. The mortgagee having purchased the property behind the back of the person who had a subsisting right to redeem, it was open to the trespasser in a suit for possession to claim to redeem. There are cases where a first mortgagee purchases the property without bringing in the second mortgagee, and the latter in a suit for possession has been allowed to plead that he has a right to redeem. The converse case of a second mortgagee getting the property sold over the head of the first mortgagee has also occurred. In this case, in a suit for possession the first mortgagee will have the right to say that the property should be sold. Or again where the members of a joint Hindu family are not impleaded in a suit on the mortgage and the property is sold, it is open to the sons to claim if they fail to show that the mortgage is not binding on them, that they should be given an opportunity to redeem. For all these reasons, the trespasser who acquired a limited right, if he puts forward the plea is entitled to ask that he should be allowed to redeem. The sale behind his back should not bind him. The decisions of the High Courts have also settled on what footing the rights of the purchaser should be adjusted.

It does not however seem necessary that the purchaser should be driven to a fresh suit for sale on the mortgage. The second

suit for possession ignores no doubt the right of the person who acquired the limited right of the mortgagor. It is not a suit on the judgment. It is a suit as purchaser against one whom the purchaser regards as a trespasser. Suppose that in a Court auction under a money decree, properties are purchased and there is on them a person who had acquired by adverse possession an occupancy right against the original owner. The purchaser would take the property subject to this tenant right. Similarly, the mortgagee purchaser would recover possession subject to the stranger setting up a right to redeem. This would work out the equities more satisfactorily than driving the purchaser to a fresh suit on the mortgage.

It may be that if adverse possession was completed only when the suit on the mortgage was pending, the acquisition by the trespasser would be *pendente lite*. Even then the rights acquired will remain subject to the right litigated. That would be the only consequence.

The Madras Law Journal.

PART IV.] JANUARY, 1916 [VOL. XXX.

ADMINISTRATION OF JUSTICE IN THIS PRESIDENCY.

1. THE HIGH COURT.

One of the early articles in the pages of this Journal (1 M. L. J. 569 reprint p. 591) dealt with the administration of civil justice in 1890 ; and it is remarkable how most of the observations then made, remain true and applicable even at the present day. 'In 1888, a fifth puisne judge was appointed to assist in working off the heavy and increasing arrears in the Court' and reviewing the work of the year 1890, the Local Government of the day remarked that 'the falling off in the out-turn of work on the part of the High Court is observed with regret.....the work done in the High Court during 1890 showed a decided falling off in quantity as compared with 1889' It was then deemed necessary to protest in these pages 'against the sort of criticism levelled against the High Court by the local Government.

The fifth puisne judge was made permanent in 1896, a sixth was added in 1907 and a seventh towards the end of 1909. Early in 1912 the strength of the Court was increased by the addition of 2 temporary Judges and since July 1914 we have 4 temporary judges sitting. How do we find ourselves now ? In January 1906 there were pending in the High Court 740 first appeals, 2767 second appeals, 452 Civil Revision Petitions and 218 original suits (to mention only these leading heads of work on the civil side). In January 1915, the pendency had increased to 937 first appeals from the mofussil, 157 appeals from decrees on the original side, 46 from decrees of the City Civil Court, 4631 second appeals, 1510 Civil Revision petitions and 381 original suits. There remained besides, 592 C. M. A's 172 C. M. S. A's and 333 L. P Appeals.

The average pendency of cases disposed of in 1914 is stated to have been 883 days in the case of first appeals and 570 days in the case of second appeals. Small wonder then, that the state of work in the High Court gave rise to serious uneasiness in many quarters and led to interpellations and discussion in the Legislative Council.

It nevertheless behoves us to raise our voice against ill-advised criticism however well meant. We have no doubt that 'there is not wanting in our judges an anxiety to do as large a quantity of work as possible'. They yield to none of their predecessors in the honest endeavour to get through their work, and we venture to repeat what we said on a former occasion, that 'adverse criticism regarding the speediness of disposal can only lead to perfunctory judgments'. What is even worse, it may give rise to a deplorable tendency to mutual fault-finding between the Bench and the Bar—for longwindedness and shortwittedness. Indeed we are not without doubts if recent circumstances have not already had some unwholesome effect in these directions. With reference to what we believe are the prevalent ideas as to the comparative merits of judges past and present, we would ask our readers to bear it in mind that the impression is to some extent the result of our natural tendency to seek for the golden age in the past. Not that we wish to be understood as belittling the arguments for changes in the system of recruitment for the judicial service in this country, but we would observe that any suggestion by way of an early remedy for the present state of things must rest not on *a priori* theories or calculations of judicial capacity or forensic brevity but on practicable conditions.

To begin with, we must state that the present state of work in the High Court is not one merely of 'temporary congestion' but, as observed by the Government in the recent G. O. of 'steady increase in the volume of business coming before the Court'. It is beside our present purpose to investigate the causes of that increase but we may remark in passing that they do not seem to be temporary either. The following figures (taken from the Annexure to the recent G. O.) will tell their own tale :—

ANNEXURE I.

Number of cases instituted during the years 1900 to 1914.

——	1900.	1901.	1902.	1903.	1904.	1905.	1906.	1907.	1908.	1909.	1910.	1911.	1912.	1913.	1914.
Original Side.															
Suits ...	213	240	198	223	253	279	249	291	397	436	402	424	495	412	465
Insolvent petitions ...	273	261	256	221	127	172	250	280	300	283	244	310	319	325	354
Sessions cases ...	39	42	41	49	43	44	43	70	47	36	34	59	53	48	71
Appellate Side (Civil.)															
First appeals from mufassal ...	228	242	197	187	220	228	179	222	220	297	260	291	324	376	433
,, from Original side ...	35	41	43	29	53	75	85	52	75	63	52	39	110	104	118
,, from City Civil Court ...	25	20	7	17	48	53	17	27	37	31	31	36	33	28	29
Letters Patent appeals ...	42	22	61	69	42	102	92	89	111	166	103	144	255	199	410
Second appeals ...	1,323	1,686	1,630	3,077	1,631	1,504	1,266	1,60 ?	1,977	1,713	2,190	2,028	2,635	3,083	2,628
Appeals against orders under section 244, Civil Procedure Code. ...	69	85	76	93	78	64	67	124	89	102	85	57	118	145	157
Other appeals against orders ...	88	84	109	93	176	142	128	141	181	167	148	214	225	231	265
Appeals against appellate orders ...	71	94	66	113	110	102	00	00	00	00	06	110	130	98	148
Revision petitions ...	417	491	497	1,054	634	538	671	749	872	891	899	937	1,079	945	1,121
Miscellaneous petitions ...	1,325	1,396	1,319	1,590	1,880	2,899	2,081	2,156	2,375	2,497	2,515	2,606	2,810	3,280	3,690
Referred cases ...	27	14	21	17	24	20	9	21	22	12	16	19	19	7	19
Appellate Side (Criminal.)															
Referred trials ...	64	72	69	69	68	52	71	77	70	62	55	56	60	64	60
Appeals ...	1,022	865	832	946	796	705	779	793	928	867	715	701	780	35	715
Revision cases ...	516	534	597	491	618	549	591	531	644	738	697	768	795	850	882
Miscellaneous petitions ...	152	213	257	225	261	207	250	291	310	375	451	411	567	549	568
References under section 307, Criminal Procedure Code.	29	22	30	27	16	17	19	38	21	25	28	22	24	20	23
Total ...	5,988	6,424	6,306	8,590	7,081	7,752	6,946	7,645	8,772	8,849	9,021	9,234	10,883	11,496	12,156

ANNEXURE II.

Number of cases disposed of during the years 1900 to 1914.

—	1900.	1901.	1902.	1903.	1904.	1905.	1906.	1907.	1908.	1909.	1910.	1911.	1912.	1913.	1914.
Original Side															
Suits ...	253	232	208	175	234	234	259	283	286	368	403	275	535	496	551
Insolvent petitions ...	261	218	234	129	182	141	133	179	250	334	279	238	209	274	231
Sessions cases ...	38	47	40	49	44	43	43	66	49	38	35	58	54	47	67
Appellate Side (Civil).															
First appeals from mufassal ...	139	182	212	104	151	190	152	129	151	207	311	170	330	246	513
,, from Original side ...	40	32	39	44	33	36	93	53	52	85	34	47	77	103	75
,, from City Civil Court ...	20	26	5	16	23	38	54	13	3	57	23	8	80	27	14
Letters Patent appeals ...	32	33	41	75	44	55	108	87	60	193	78	70	211	156	345
Second appeals ...	1,253	1,008	1,641	1,027	2,521	2,109	839	1,165	1,584	1,883	2,745	1,904	2,595	1,985	2,488
Appeals against orders under section 244, Civil Procedure Code ...	48	69	90	91	81	64	56	63	64	149	57	60	100	119	159
Other appeals against orders ...	86	88	99	109	86	175	114	163	151	142	169	155	179	192	230
Appeals against appellate orders ...	47	83	87	72	111	120	92	99	70	90	81	94	87	120	122
Revision petitions ...	512	341	520	545	961	632	452	608	785	895	835	704	758	1,007	1,062
Miscellaneous petitions ...	1,321	1,341	1,366	1,334	2,028	2,643	2,316	2,003	2,413	2,492	2,370	2,201	2,809	3,196	3,666
Referred cases ...	35	18	14	20	13	30	13	12	22	13	14	14	15	22	9
Appelate Side (Criminal).															
Referred trials ...	63	71	69	69	66	53	69	78	65	63	57	54	60	68	61
Appeals ...	1,059	880	812	816	149	674	824	806	847	867	751	664	803	757	726
Revision cases ...	519	510	579	505	623	545	572	535	587	672	745	763	807	883	874
Miscellaneous petitions ...	149	215	253	225	262	210	246	292	293	381	457	411	480	629	565
References under section 307, Criminal Procedure Code. ...	...	18	31	26	19	16	19	31	28	22	26	24	22	23	23
Total ...	5,875	5,412	6,385	5,431	8,426	8,038	6,454	6,615	7,760	8,951	9,470	7,914	10,211	10,360	11,781

We may add for facility of comparison the figures (of institution) for 1890, which were as follows :—First appeals (including those from the original side) 353 ; second appeals 1,408 ; Civil Revision Petitions 454 ; original suits (when there was no City Civil Court) 386. It must also be noted that the growth of arrears has been a matter of at least these 25 years if not more.

What is the remedy ? The order of Government dated 5-10-1915 reviewing the Judicial administration for 1914, studiously refrains from making any reference to work in the High Court, and the later G. O., about the High Court arrears, concerns itself with justifying what has so far been done to cope with them and says little as to what is proposed to be done. The alternatives of reducing the pressure of work in the High Court by taking away the right of appeal or revision in certain classes of cases is comparable only to the proverbial suggestion of making the head fit the cap and may, we hope, be safely left out of consideration for the present. We are glad to find that government recognise what we have often pressed—that 'the power of revision which the High Court possesses is a useful safeguard and that 'there is no evidence of any abuse of the right to apply to the High Court for revision of the decisions of Small cause courts.' The proposal to increase the jurisdiction of the City Civil Court—whatever may be its own merits—does not seem likely to afford any considerable relief, in view of the proportion of its result to the total work of the High Court. The only possible remedy would therefore seem to be to increase the strength of the High Court. It is agreed on all hands that a strength of seven puisne Judges is altogether inadequate for the present needs and it is we believe equally well recognised that it is not desirable to resort to the system of temporary Judges. We hope that the authorities both here and in England will soon make up their mind to increase the permanent strength of the Court.

We have reason to believe that the question of the strength to be fixed is attended with difficulties of its own. We have all along pleaded—and all right-thinking men will admit the force of the plea—that financial considerations should not be allowed to stand in the way of such an indispensable reform; and in view of the extent of revenue for which judicial administration is responsible in this country, it is but bare justice to demand that the needs of that department shall have the first claim on

that revenue. Dealing then with the question on its own merits, the following seem to be the principal considerations to be taken into account. The number of working days in the year may be approximately taken to be between 190 and 200 and allowing on an average for the disposal by a Bench, of 7 or 8 regular appeals a week, and about 30 second appeals a week, it will require 6 Judges to cope with the annual approximate institution of over 500 first appeals (including O. S. and C.C.) and over 2,500 second appeals, after allowing for about 1,500 S. A's which may be dismissed under O. 41 R. 11. A further bench of two judges continually sitting will be barely sufficient to meet the requirements of the criminal and miscellaneous appeals and references that have to be heard by a Division Bench and it would therefore be necessary to find other means of providing for the work that has to be dealt with by a single judge. Taking the number of Civil Revision Petitions at an average of 1,200 per annum, we think that this and the criminal revision work would afford work for one judge for about three-fourths of the year and there is besides, plenty of other work to be attended to by a single judge, such as admission of cases, petitions for stay of execution and other miscellaneous work. As to the requirements of the original side, we believe we are right in stating it to be the general feeling that a single judge cannot cope with the work there. Provision has also to be made for sessions work and insolvency business and for Full Bench sittings. Over and above these items of what may be called current work, the accumulated arrears have to be slowly worked off. It only remains to add that a great deal of important work has to be done by the judges out of the court-room and their court work has to be so arranged as to permit of their having time for such work. These considerations clearly point to the conclusion that 12 judges or at least 11 will be necessary not as a temporary measure, but as the permanent strength of the High Court.

Coming now to matters of internal economy, the new system (introduced early last year) of admission of second appeals by the Judges themselves (and by a Division Bench, in cases taken under O. 41 R. 11 Civil Procedure Code) seems to have worked on the whole satisfactorily. We think it may be usefully extended to miscellaneous cases and Civil Revision Petitions as well, so that delay in admission may be almost completely avoided.

We cannot however help repeating what we have said on a former occasion (28 M. L. J. 117) that the other rules introduced in October last, as incidental to this change, can be substantially improved, without any loss of efficiency but yet greatly to the advantage of both practitioners and clients. We believe a memorial in respect of this matter was prepared by a Committee of the Vakils' Association for submission to the Honorable the Judges but we are not aware what has since happened to it.

Again, the translation and printing rules stand in urgent need of reform, if clients are not to be dealt with on the principle that they deserve to be punished for presuming to seek redress in the High Court. If printing is to continue imperative in all cases, an experiment may at least be tried of giving parties the option of making their own arrangements for getting the papers ready, according to certain standards to be prescribed. Even as regards translation, there should be little difficulty in practitioners agreeing upon the correctness of translations made by competent outsiders. Recent changes introduced in the practice of serving notices, bills etc., upon practitioners seem to us, with all respect, steps in a wrong direction, especially when one bears in mind the consequences attached by the rules to any default in due compliance with them. Neither the expense entailed by the employment of some additional clerks or peons nor even the possible delay (which has sometimes been alleged) on the part of practitioners or their clerks in receiving notices etc., seems to us sufficient justification for the change.

We have now and then heard some hints of drastic changes in rules being under contemplation. We would beg leave to remind their Lordships that rules of procedure are after all meant to be and must be but a handmaid to Justice and not a means of denying Justice. We would mention here a recent instance which to any layman must have given the impression that the ways of Justice in the High Court are strange indeed. One learned Judge dismissed an appeal, involving considerable interests, because batta for service of notice on the respondent was not paid within the seven days fixed by the rules and the appellant (the Official Assignee) did not appear, when the case was posted for orders to explain the default. Every petition conceivable under the code or the rules was afterwards attempted to set the matter right before the same

Judge, but to no purpose. The case was carried before two other learned Judges, but one of them felt himself unable to do anything in the matter because the appeal purported to be from an order passed at the later stage and not from the earlier. It required a further resort to a Full Bench, to decide whether or not the Official Assignee should be allowed an opportunity of explaining the delay in payment of batta. We are not at present concerned to say whether or not the learned Judges who dealt with the matter in its different stages, construed and applied the rules rightly. We only wish to point out how lamentable a state of things it would be if the default complained of in the case should have the result of depriving the insolvent's estate *i. e.*, his innocent creditors, of a considerable sum of money. It is sometimes suggested that the persons injured have their remedy over against the persons whose default has caused the injury; but it certainly cannot be difficult for any one to realise what a poor consolation or justification this is. Assuming even, that practitioners or their employees or sometimes the clients, are not sufficiently alive to their responsibilities in the conduct of an action, it is submitted that it rests as much upon His Majesty's Judges to see, as far as lies in their power, that justice is denied to no man for sins that are venial; and not even the oppression of the sense of accumulated arrears should induce them to deviate from this sacred duty.

As regards the constitution of Benches, we venture to press upon the attention of His Lordship the Chief Justice, the desirability of having a strength of 5 judges on Full Bench sittings arranged to decide questions of general importance or points on which there may be a marked conflict of judicial opinion. The recent practice as to the composition of the Judicial Committee when sitting to hear appeals affords a true parallel.

SUMMARY OF ENGLISH CASES.

Venners Electrical Cooking and Heating Appliances, Limited *v.* **Thorpe**: 1915, 2 Ch. 404. (C. A.)

Company—Winding up—Landlord and Tenant—Rent payable in advance—Distress for, commenced before winding up—Can be proceeded with.

Where a Company holds as a tenant under an agreement to pay rent in advance and when after the rent has accrued due, though the period for the same is yet to run, the landlord levies a distress, any subsequent winding up of the Company does not stop the further proceeding with the distress to sale to realise the rent.

The result of the authorities is that a creditor who has issued execution or a landlord who has levied a distress, before the commencement of the winding up will be allowed to proceed to sale, unless there is established the existence of special reasons rendering it inequitable that he should be permitted to do so.

In re **Peruvian Railway Construction Company Limited.** 1915 2 Ch. 442 (C. A.)

Company—Winding up—Fully paid up shares—Insolvent shareholder—Debts to the Company—Executor cannot set off against the share of surplus assets, the debts in full.

A shareholder who had fully paid-up shares in a Company and who was also indebted to the Company, died and his estate being found to be insolvent, an administration decree was passed. Under the Articles of Association, the Company had no lien on the fully paid up shares for the debts due by the shareholders; and the Company proved for the debt due by the shareholder.

Subsequently the Company was wound up and the rateable share of surplus assets was ascertained.

The liquidator could not under such circumstances claim, as against the executor of the insolvent shareholder, to retain the testator's share in the surplus assets against more than the proper dividend on the ascertained debts.

In re **Dacre. Whitaker** *v.* **Dacre.** 1915 2 Ch. 480.

Administration—Trustee in default—Retainer—Legacy under will—Original or derivative title.

Where a trustee under a will misappropriated some of the trust-moneys and his wife who was a legatee under the will died

without receiving the legacy leaving to her husband all her properties as the universal legatee, the other trustees under the will have a right of retainer over the amount of the legacy to the extent of the amount misappropriated. (It is immaterial whether the title under which the defaulter claims a benefit is an original title or a derivative title.)

The principle of the rule as laid down in the cases of *Cherry* v. *Boultbee* [1] *and In re Akerman* [2], is that a person entitled to participate in a fund and also bound to contribute to the same fund cannot receive the benefit without discharging the obligation.

Williams *v.* **Lewis**, (1915) 3 K. B. 493.

Landlord and Tenant—Agricultural Land—Implied obligations on part of tenant—Breach of—Damages—Measure.

The law implies an undertaking or covenant on the part of an agricultural tenant to cultivate the land in a husbandlike manner according to the custom of the country, unless there is an express agreement dispensing with that engagement. The tenant is not under an obligation to deliver up the land at the termination of the tenancy in a clean and proper condition, properly tilled and manured; nor is he bound or entitled to leave the land in the same condition as when he took it. In the case of a breach of the obligation on the part of the tenant, the measure of damages is the injury to the reversion occasioned by the breach *i.e.*, the diminution in the rent that the landlord will get on re-letting or the allowance he will have to make to the incoming tenant.

O'Driscoll *v.* **Manchester Insurance Committee** (1915) 3 K. B. 499 (C. A.)

Rules of the Supreme Court, 1883—O. 45, R. 1—Attachment—"Debt owing or accruing" from third person to debtor—Meaning—Debt debitum in presenti *but* solvendum *in futuro.*

There is a distinction between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not. "Debts owing or accruing" include debts *debita in presenti solvenda in futuro.*

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1. (1839) 4 Myl. and Cr. 442. 2. 1891 3 Ch. 212.

Held, that a debt to which the debtor was absolutely and not contingently entitled at the time the garnishee order *nisi* was served was a "debt owing or accruing" within the meaning of O. 45, R. 1 of the Rules of the Supreme Court, 1883, though it was not presently payable and the amount was not ascertained.

Bradshaw *v.* **Waterlow and Sons, Ltd.**, (1915) 3 K. B. 527 (C. A.)

Malicious prosecution—Action for—Question as to want of reasonable and probable cause—Question as to honest belief of defendants—If and when may be left to jury—Practice—Fiat of Attorney-General—Effect.

Where, in an action for malicious prosecution, there is no dispute about the facts, the question whether the defendants took reasonable care to inform themselves of the facts before instituting the prosecution ought not to be left to the jury unless there is some evidence of the defendants not having made proper inquiries. In the same way the question as to the honest belief of the defendants should not be left to the jury unless there is evidence of the absence of such belief.

Where the facts had been fairly put before the Attorney General and he had granted his fiat, *held* it could not be said that there was an absence of reasonable and probable cause.

Neville *v.* **Dominion of Canada News Co. Ld.** (1915) 3 K. B. 556 (C. A.).

Agreement—Validity—Restraint of trade—Public policy—Newspaper—Undertaking not to comment under any circumstances on matter coming within legitimate scope of paper—Undertaking for consideration—Enforceability—Privilege of newspaper—Nature and extent of.

In this case a question arose as to the validity of an agreement between the proprietors of a newspaper, which dealt with Canadian affairs generally and which advised people as to investments in the Dominion, and the plaintiff, a director of a Company which was engaged in selling land in Canada. The proprietors undertook, in consideration of a sum of money to be paid to them by the plaintiff, not to make any comments at all under any circumstances on the plaintiff's Company, its directors, business

or land, or upon any company with which the proprietors had notice that the plaintiff's Company was connected or concerned. *Held* that the undertaking was unenforceable because (1) it was in restraint of trade and was wider than was reasonably necessary for the protection of the plaintiff and (2) it was opposed to public policy inasmuch as it was not consistent with the proper conduct of the defendant's newspaper.

Per *Lord Cozens-Hardy, M. R.*—It is for the Court, and not for a jury, to decide as to the reasonableness of a covenant in restraint of trade.

Per *Pickdford, L. J.* a newspaper has no more right of comment than any other member of the public.

JOTTINGS AND CUTTINGS.

Humour of the Law.—A lawyer who was sometimes forgetful, having been engaged to plead the cause of an offender, began by saying: "I know the prisoner at the bar, and he bears the character of being a most consummate and impudent scoundrel." Here somebody whispered to him that the prisoner was his client, when he immediately continued: "But what great and good man ever lived who was not calumniated by many of his contemporaries?"—Case and Comment.

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An action was brought against a farmer for having called another a rascally lawyer. An old husbandman, being a witness, was asked if he heard the defendant call the plaintiff a lawyer.

"I did" was the reply.

"Pray," said the judge, "what is your opinion of the import of the word?"

"There can be no doubt of that," replied the fellow.

"Why, good man," said the judge; "there is no dishonor in the name, is there ?"

"I know nothing about that," answered he, "but this I know, if a man called me a lawyer I'd knock him down."

"Why, sir," said the judge, pointing to one of the counsel, "that gentleman is a lawyer and that I, too, am a lawyer."

"No, no," replied the fellow; "no, my Lord; you are a judge, I know; but I'm sure you are no lawyer."—

Conditions on Passenger's Tickets :—Since the decision of the House of Lords in *Henderson* v. *Stevenson* (1875) it has been generally regarded as accepted law that the mere delivery of a ticket, with conditions endorsed on it excluding liability for negligence, is not binding upon the passenger, unless there is clear evidence of the notice having been brought to his knowledge and of his having assented to it. This view displaced the older one laid down by Chief Justice Cockburn, that 'when a man takes a ticket with conditions on it he must be presumed to know the contents of it and must be bound by them. In reversing the judgment of Mr. Justice Darling in the 'Runo' case (*Cooke* v. *Wilsons* Dec. 7) the Court of Appeal seems rather to have reverted to the earlier line of authorities and introduced a fresh element of uncertainty into the relations between railway and shipping companies and the public. The defendants had admitted negligence in the departure of their ship from the route prescribed by the Admiralty for vessels crossing the North Sea, in consequence of which the vessel struck a mine and foundered, and their sole defence was a condition printed on the ticket issued to the plaintiff that they should be free from liability for loss or damage to passengers in any circumstances. On questions put to them by the judge at the trial—which the Court of Appeal agreed were the proper deciding questions—the jury found (*a*) that the defendants did not do what was reasonably sufficient to give the plaintiff notice of the conditions; (*b*) that the plaintiff was aware generally that there were conditions relating to contracts to travel, but that there was nothing to show she was aware of those printed on her ticket. These findings were substantially the same as those in the more recent House of Lords case, *Richardson* v. *Rowntree* (1894), in which the passenger was held entitled to recover, and Mr. Justice Darling entered judgment for the plaintiff accordingly. As we pointed out at the time (*ante* p. 168), whether this judgment could be upheld depended on the question whether, in view of the plaintiff's admission, the first finding of the jury could be supported. The Court of Appeal has now held that the jury were wrong in their view, and that the company, having set out their conditions on the ticket in plain type, had done all that was necessary on their part to give reasonable notice, and that the *onus* was on the passenger to read what was printed on the ticket. Having regard to the conditions of modern travel, this decision may be regarded

by many as practically a character of exemption from all liability for negligence on the part of railway and other carriers, and we do not suppose that it will be allowed to stand unchallenged.—*The Law Journal.*

CONTEMPORARY LEGAL LITERATURE.

Negligence is often defined as consisting of a breach of duty. This is wrong, says Mr. Henry Terry writing in the "Harward Law Review." The duty in such a case can be defined only as a duty to use care *i.e.*, not to act negligently. To define negligence in that way is, therefore, to define in a circle. The misconception arises from a failure to distinguish between a negligent wrong which, like all other wrongs, involves a breach of duty and the negligence itself, which is one element in the wrong. There are many cases in which the law does not require care; negligence is not legally wrong and therefore negligence. Negligence is conduct which involves an unreasonably great risk of causing damage. Due care is conduct that does not involve such risk. Negligence is conduct, not a state of mind. A man may be heedless or reckless but yet his conduct may not be negligent when viewed from the standpoint of the ordinary man. When a man is reckless and is also guilty of negligent conduct, his conduct may be characterised as wilfully negligent. Negligent conduct may consist in acts or omissions, in doing unreasonably dangerous acts or in omitting to take such precautions as reasonableness requires against danger. The test of reasonableness is what would be the conduct or judgment of what may be called the standard man in the situation of the person whose conduct is in question. A standard man does not mean an ideal or perfect man but an ordinarily careful, reasonable and prudent man. Every man, whether he is a standard man or not is required to act as a standard man would. The situation of the actor is subjective, not objective. It consists of such facts as are known to him. When however a person knows that he is ignorant of essential facts, it may be unreasonable for him to act at all. Sometimes he is charged with the knowledge of certain facts that is for instance when a person is under duty to take precautions against possibly danger, there is usually an ancillary duty to find out what precautions are needed and for the purpose of the principal dute he is charged with the knowledge of all the facts he would have known if he had performed his ancillary duty. A custom is usually

evidence that conduct in accordance with it is reasonable. In emergencies, which would perturb an ordinary man's judgment he is excused certain things for which in ordinary circumstances he would not be excused. In certain cases, skill or special knowledge is an element in the case, if it is unreasonable for a person who has not competent knowledge or skill to do certain acts. There is a negative duty of due care of very great generality resting upon all persons and owed regularly to all persons not to do negligent acts *i. e.*, acts which are unreasonably dangerous to persons or tangible property. There is some conflict of opinion as to whether this duty is owed to persons in the position of trespassers or licensees. There is no affirmative duty of equal generality that is to say no general duty to do acts, take precautions to prevent injury to others The following are the cases in which there is such a duty (1) A person who has done or is doing an act that will be unreasonably dangerous unless precautions are taken against the danger, must use due care to take such precautions as reasonableness requires.

(ii) A person who delivers a thing to another or furnishes a thing for another's use, has a duty not to deliver or furnish a thing which is unreasonably dangerous or to take the necessary precautions against the danger.

(iii) In some circumstances, a person having a dangerous thing in his possession in a place attractive to children or animals is bound to take reasonable precautions against its proving dangerous. There is a conflict as to whether this duty extends to trespassers.

(iv) The possessor of a dangerous thing must take due care to prevent its doing harm.

(v) A person who invites another to a place of danger must take all reasonable precautions to protect him against the danger.

(vi) Bailees owe certain duties even apart from contract Similarly people standing in certain relationships as husband and wife, parent and child etc.

(vii) Such duties may be imposed by contract.

(viii) Many equitable duties are of this kind *e.g*, duties of trustees.

A writer in the *University of Penysylvania Law Review* describes the part taken by the United states *in the expansion of the law between nations.* The right and the duty of the neutral to prevent

one of the belligerents in making the neutral country serve as basis for operations against the enemy was first asserted by the United states during Napoleonic war. Similarly the right to trade with the enemy subject in the case of arms or munitions, to the risk of being captured by the other side. The extent of the territorial sea, was, for the first time, fixed by Secretary Jefferson at three miles and it was subsequently adopted in the treaty between England and America in 1818. The United States were also first to substitute judicial machinery for the settlement of disputes between nations. But this machinery is possible only in cases where the dispute is *legal* and cannot avail when the dispute is *political*, that is to say as in the present great war, where each nation is striving for mastery. The foreign jurists who had great influence in America were *Grotius* and *Vattel*.

In the Central Law Journal for December 10th, we have an interesting discussion on the state of the law in America as to the relevancy of blood hound evidence in criminal cases. While certain courts admit it subject to all the preliminaries such as the training and the capacity of the blood hound, and that the hound was properly laid on the trail etc. being strictly proved other courts altogether reject it. The writer is afraid that on account of the unknown exercise of the mysterious power by the hounds, not possessed by man, there is a direct tendency to enhance the impressiveness of the performance and this influence might tend to prejudice the jurors against the accused. Such evidence is at best of a dangerous and unsafe nature and of no substantial value asa means of arriving at ultimate facts.

BOOK REVIEW.

THE LAW OF LAND ACQUISITION—*Lawyer's Companion Series Published at the Law Printing House, Madras.*

This book is a fitting complement to the other books in the same series and places within easy reach of the legal profession and all others who have anything to do with land acquisition, a ready reference to the precedents on the subject.

[The following changes have been introduced in the Rules of Practice.]

Under the provisions of Part X of the Code of Civil Procedure, 1908, and all other powers hereunto enabling, and with the previous sanction of His Excellency the Governor in Council, the High Court has made the following additions to, and amendments of, the Civil Rules of Practice, 1905, the Appellate Side Rules, 1905, and the Code of Civil Procedure, 1908; *viz.*:—

I. At the end of sub-rule (2) of Rule 10 of the Civil Rules of Practice, 1905, *insert* the following words "in which the same is filed or of the District Court in which the party ordinarily resides."

II. *Insert* the following rule after Rule 29 of the Civil Rules of Practice, 1905:—

"*29-A. Address for Service.*

(1) Every party who intends to appear and defend any suit, appeal or original petition, shall, before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service.

(2) Such address for service shall be within the local limits of the Court in which the suit, appeal or petition is filed, or of the District Court in which the party ordinarily resides.

(3) Where any party fails to file an address for service, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, be liable to have his defence, if any, struck out, and to be placed in the same position as if he had not defended; and any party may apply for an order to that effect, and the Court may make such order as it thinks just.

(4) Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the notice or process had been personally served.

(5) Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by Order

III, Rule 5, unless the Court directs service at the address for service given by the party.

(6) A party who desires to change the address for service given by him as aforesaid shall file a verified petition and the Court may direct the amendment of the record accordingly. Notice of every such petition shall be given to all the other parties to the suit.

(7) Nothing in this rule shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

(8) Nothing contained in this rule shall apply to the notice prescribed by O. XXI, R. 22 of the Code of Civil Procedure, 1908.

III. *Insert* the following rule after rule 276 of the Civil Rules of Practice, 1905, namely :—

"276-A. Every vakalat shall unless otherwise ordered by the Court be in Form No. 121 and shall authorise the pleader to appear in all execution and miscellaneous proceedings in the suit or matter subsequent to the final decree or order passed therein."

IV. *Insert* the following as Form No. 121 in Appendix II to the Civil Rules of Practice, 1905, namely :—

FORM No. 121.

RULE 276-A—VAKALAT.

(*Cause-title.*)

I do hereby appoint and retain to appear for me in the above $\frac{\text{Suit}}{\text{Original}}$ Petition and to conduct and prosecute (or defend) the same and all proceedings that may be taken in respect of any application for execution of any decree or order passed therein. I empower my Vakil to appear in all miscellaneous proceedings in the above suit or matter till all decrees or orders are fully satisfied or adjusted and to obtain the return of documents and draw any moneys that might be payable to me in the said suit or matter.

Accepted. The address for service of the said (pleader) is ."

V. *Substitute* the following rule *for* the present Rule 21 of the Appellate Side Rules, 1905, namely :—

"21. No Vakil or Attorney of the Court shall be entitled to act or be heard in any civil case unless he files a Vakalatnama in

the form appended hereto. Such Vakalatnama shall authorise the Vakil or Attorney to appear in the appeal, petition, or other proceeding including all interlocutory or miscellaneous proceedings connected with or arising out of the same matter and also in appeals under S. 15 of the Letters Patent and in applications for leave to appeal to His Majesty in Council.

FORM OF VAKALAT.

(Cause-title.)

I, $\frac{\text{Appellant}}{\text{Respondent}}$ in the above $\frac{\text{Appeal}}{\text{Petition}}$ do hereby appoint and retain $\frac{\text{Vakil}}{\text{Attorney}}$ of the High Court to appear for me in the above $\frac{\text{Appeal}}{\text{Petition}}$ and to conduct and prosecute (or defend) the same and all proceedings that may be taken in respect of any application connected with the same or any decree or order passed therein, including all applications for return of documents or the receipt of any moneys that may be payable to me in the said $\frac{\text{Appeal}}{\text{Petition}}$

Accepted. The address for service of the said $\frac{\text{Vakil}}{\text{Attorney}}$ is ."

VI. *Add* the following as Chapter III-A after Chapter III in the Appellate Side Rules 1905 :—

CHAPTER III-A.

Address for Service.

33-B. (1) Every appellant or petitioner shall in his memorandum of appeal or petition also state an address for service which shall be within the Town of Madras or within the district, as defined by the Code of Civil Procedure, 1908, in which he ordinarily resides.

(2) Every party who intends to appear and defend any appeal or petition or other proceeding shall, before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service. Such address for service shall be within the Town of Madras or within the district in which he ordinarily resides.

(3) Where any party on being served with summons or notice as aforesaid fails to file an address for service, he shall, if an

appellant or petitioner, be liable to have his appeal or petition returned for amendment or dismissed for want of prosecution, and, if a respondent, to be placed in the same position as if he had not appeared; and any party may apply for an order to that effect, and the Court may make such order as it thinks just.

(4) Where a party is not found at the address given by him for service, and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the notice or process had been personally served.

(5) Where a party who has given an address for service, engages a pleader, notices or processes for service on him shall be served in the manner prescribed by Order III, Rule 5, of the Code of Civil Procedure, unless the Court directs service at the address for service given by the party.

(6) A party who desires to change the address for service given by him as aforesaid shall file a verified petition and the Court may direct the amendment of the Record accordingly. Notice of every such petition shall be given to all the other parties to the suit, appeal or petition.

(7) Nothing in this rule shall prevent the Court from directing service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so. "

VII. *Insert* the following note in red ink in Form No. 1 of Appendix B to Schedule 1 of the Code of Civil Procedure, 1908; namely—

" Also take notice that in default of your filing an address for service before the day bofore mentioned you are liable to have your defence struck out."

VIII. *Insert* the following note in red ink in Form No. 6 of Appendix G to Schedule 1 of the Code of Civil Procedure, 1908, namely :—

" Also take notice that if an address for service is not filed before the aforesaid date, this appeal is liable to be heard and decided as if you had not made an appearance."

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PROCEEDINGS FOUNDED ON UNCERTIFIED ADJUSTMENTS OF DECREES.

Quite recently, in *Hansa* v. *Bhawa* [1], Sir Basil Scott, C. J. and Heaton, J. held that the court should not 'allow a clear case of fraud to be covered and condoned by the provisions of O. 21 R. 2 of the Civil Procedure Code' and they accordingly allowed an uncertified payment to be pleaded *in bar of execution*, thus going even further than *Ramayyar* v. *Ramayyar* [2]. In his anxiety to save 'the reputation of our courts,' Heaton, J. in *Trimbak Ramakrishna* v. *Hari Laxman* [3], broadly laid down that the last clause of S. 258 (now O. 21 R. 2) only enacted a *presumption* and did not preclude a judgment-debtor from proving the prior uncertified payment or adjustment which the decree-holder fraudulently ignored. The Punjab Chief Court still appears to adhere to the view (taken by Banerjee, J. in *Azizan* v. *Matuk Lal Sahu* [4]) that though the uncertified payment or adjustment cannot directly be pleaded in bar of the execution, the judgment-debtor may *in a separate suit* obtain a declaration that the decree has been satisfied and hence cannot be executed (See *Mussammat Jamna* v. *Beli Ram* [5], *Jamun Ram* v. *Kishen Ram* [6]). Much as we sympathise with these attempts to obviate the injustice arising from a literal application of O. 21 R. 2, we must recognise that the preponderance of authority is in favour of the view that however reprehensible may be the decree-holder's conduct in executing the decree in spite of the prior uncertified payment or adjustment, such payment or adjustment cannot directly or indirectly be relied on to prevent execution. The only remedy allowed to the judgment-debtor in such a case is to claim compensation; but though his right to maintain a suit for the purpose has long been recognised, the precise basis on which the claim rests has not even yet been clearly defined, and this accounts for the uncertainty attending the decision of the two principal questions

1. (1915) 18 Bom. L.R. 22.
2. (1897) I. L. R. 21 M. 356.
3. (1910) I. L. R. 34 B. 575.
4. (1893) I L. R. 21 C. 437.
5. (1913) 21 I. C. 557.
6. (1914) 42 P. R. 1914=25 I. C. 642.

arising in connection with such suits, *viz.*, when and under what circumstances can the judgment-debtor maintain such a suit and (ii) what is the rule of limitation governing it. Thus in *Sriramulu* v. *Dalayya* [1], it was held by Benson and Moore, JJ. that a mere application for execution, ignoring the prior adjustment, did not give the judgment-debtor a cause of action for recovery of the sum originally paid and *Deno Bundhu Nundy* v. *Hari Mati Dassee* [2] inclines to the same view. But in *In re Medaikalliani, Anni* [3]. Mr. Justice Subramanya Aiyar was of a different opinion. And on the question of limitation, the decision in *Marappa Chetti* v. *Shunmugappa Chetti* [4], creates more difficulties than it helps to solve. It seems therefore desirable to examine the true nature and basis of the claim for compensation in such cases.

The question was raised in one of the earliest cases on the point—but unfortunately it has not even yet been clearly answered —whether, when the judgment-debtor has been compelled to pay a second time *i. e.*, by process of execution, he should seek to recover the first (uncertified) payment or the second, (*Arunachella* v. *Appavu* [5]). Scotland, C. J. and Holloway and Collett, JJ. thought that the first payment was rightful and the claim if any should be for the second. Innes, J. was for somehow allowing an action, and did not feel quite certain as to the ground. Holloway, J. seems to have felt that the principle of *Marriot* v. *Hampton* [6], would be a bar to the recovery, but the other Judges held that it was distinguishable. When the matter came up before a Full Bench of the Calcutta High Court *Goono Monee Dosse* v. *Pran Kishore Dosse* [7], Couch C.J. preferred to deal with the case as one to recover the amount *originally* paid (so as to steer clear of *Marriott* v. *Hampton* [6]) and Mitter, J. also appears to have been of the same view. The Full Bench in *Vira Raghava* v. *Subbakka* [8], had to deal with a suit to recover the first payment, but the Court seems to have sustained the suit as one for damages generally. In *Haji Abdul Rahiman* v. *Khoja Khaki Aruth* [9], the question was incidentally discussed by the Bombay High Court and both West and Farran, JJ. would seem to regard

1. (1905) 16 M. L. J. 54.
2. (1903) I. L. R. 31 C 480.
3. (1907) 1. L. R. 30 M. 545.
4. (1911) 21 M L. J. 518.
5. (1866) 3 M.H.C.R. 188.
6. (1797) 2 Sm. L.C. 421; 7 T.R. 269=101 E.R. 969.
7. (1870) 13 W. R. F. B. 69.
8. (1881) I. L. R. 5 M. 397.
9. (1886) I. L. R. 11 B 6.

the judgment-debtor's remedy as one to recover the sum originally paid. And likewise, the Allahabad Court (see *Shadi* v. *Ganga Sahai* [1]). But the decision in *Mœrappa Chetti* v. *Shunmugappa Chetti* [2], suggests that there may be two kinds of suits, one based on the first payment, the other, arising out of the second.

As to the *legal basis* of the judgment-debtor's suit, Scotland, C. J. in *Arunachella* v. *Appavu* [3] rested the right to relief on the ground that in taking out execution, in spite of the prior adjustment, the decree-holder committed a gross fraud and that the debtor was in equity and good conscience entitled to recover the sum so levied. Innes, J., is indecisive. According to him, the claim is 'for recovery of neither the former nor the second payment but of the debt which results from defendant having received double what was due to him'; and if necessary he would fall back on the rule of the Civil Law as to *causa*, holding that 'the cause for payment of the first sum was that it might be appropriated in discharge of the debt and so soon as the second sum was paid in execution, the first sum ceased to be a sum so appropriated'. Holloway, J. points out some of the difficulties in the way of this view. In *Goono Monee Dossee's case* [4], Mitter, J., relied alternatively on the ground of breach of contract or of fraud, but Couch, C.J., preferred to put it as a case of trust rather than damages (whether for breach of contract or for fraud); the decreeholder, he said, by taking out execution and obliging the debtor to pay again, became 'a trustee for the plaintiff of the money which had been previously paid'. *Shadi* v. *Ganga Sahai* [1], merely refers to the different views above adverted to. In *Viraraghava* v. *Subbakka* [5], Kindersley, J. seems to have thought that the theory of breach of contract could be relied on only where there was a distinct promise by the creditor to certify. In other cases, he would base the action on the decree-holder's fraud or negligence in not fulfilling the *duty* of certifying cast on him by the statute. He recognises (with Holloway, J.,) the difficulty of applying to such cases the ordinary count of 'money had and received upon a consideration which has failed'; for the consideration for the payment was the decree itself. The other Judges however relied on 'the breach of the implied promise to certify'

1. (1881) I. L. R 3 A. 538.
2. (1911) 21 M. L. J. 518.
3. (1866) 3 M H. C. R. 188.
4. (1870) 13 W. R. F. B. 69.
5. (1881) I. L. R. 5 M. 397.

(See also *Bairagulu* v. *Bapanna* [1]). *Sriramulu* v. *Dalayya* [2] throws no light on the question and Justice Subramania Aiyar in *Kalliani Anni's case* [3] evidently relies on the theory of the decree-holder's duty to certify and the breach thereof. In Bombay, Farran, J., did not look upon the trust theory with much favour. But he would not accept the 'breach of contract' theory either, because of the difficulty of 'implying a promise', the duty to certify being cast only by the law. Mr. Justice West evidently approved of the theory of 'failure of consideration' for the (first payment). In *Hanmant* v. *Subbabhat* [4] where the action was to recover the second payment, *i.e.*, the amount levied in execution, Farran (then) C. J. expressed himself ready to follow the view indicated in *Hukum Chand Oswal* v. *Taharunnessa Bibi* [5]; and according to the view taken in the latter case, the mere omission of the decree-holder to certify would not of itself constitute a failure of consideration or breach of contract in respect of the adjustment, but if the decree-holder executes the decree, the judgment-debtor would be entitled to recover 'the money realised in execution with such damages as he might have sustained by reason of the wrongful act of the creditor'. In *Marappa Chetti* v. *Shunmugappa Chetti* [6] it was observed that if the judgment-debtor sued to recover the amount originally paid (by way of adjustment) it must be on the footing of 'money paid on a consideration which has failed'—but the learned Judges had not to decide this question. Where, by reason of the omission to certifiy, the debtor is compelled to pay a second time (*i.e.*, in execution) his suit, they said, would be one to recover loss sustained by reason of the judgment creditor having failed to discharge the duty cast upon him by the law.' In a very recent case Seshagiri Iyer, J. held that the debtor was entitled to get back the amount levied by execution by way of damages *Raghava Aiyangar* v. *Athanambalam* [7].

The result of the above resume may now be shortly stated.

(i) The theory of the right to get back the amount first paid on foot of a trust or even on the ground of failure of consideration, has not found general acceptance. The force of Justice Hollo way's argument that the original payment was rightly received at the time and that the entering up of satisfaction was at

1. (1892) I. L. R. 15 M 302.
2. (1905) 16 M. L. J. 54.
3. (1907) I. L. R. 30 M. 545
4. (1898) I. L. R. 23 B. 394.
5. (1889) I. L. R. 16 C. 504.
6. (1911) 21 M. L J. 518.
7. (1914) M. W. N. 174.

best only an expectation and not the *consideration* for the payment, cannot be denied.

(ii) The theory of a recovery by way of damages has been more generally recognised ; but while some cases speak of it as damages for 'breach of contract' it is more frequently dealt with as a question rather of tort in the nature of fraud. With reference to the argument of 'breach of contract' it must be admitted, as pointed out by Kindersley, J. and Farran, J. that a *presumption or implication* of an agreement *to certify* may not be well-founded in fact, but a contract *not to put the decree into execution* may reasonably be implied from the private adjustment. It would accordingly follow that the mere *omission* of the decree-holder to certify can give the judgment-debtor no cause of action on this footing. Even as to the ground of 'tort,' while the cases rely on the breach of the 'statutory duty' to certify, no case has sustained an action on the mere ground of such breach, without more. It must also be remembered in this connection that there is no period *fixed by the law* within which the decree-holder is bound to certify. If, however, he goes further and puts in an application for execution, ignoring the prior adjustment or payment, that will amount to a breach of the contract not to execute or to a tort, in the sense of a fraudulent suppression of the prior adjustment which he was bound under the law to certify. And in this view, *that* would be the judgment-debtor's cause of action and not the subsequent realisation of the amount which is but the natural result of the execution, though this circumstance will have a material bearing on the question of the *quantum* of damages.

(iii) A third position is, however, possible and is hinted at in some of the cases, *viz.*, that the debtor has no reason to complain and therefore no right of suit, till he is made to pay a second time. There is something to be said in favour of this view also ; for the execution proceedings may be dropped or may fail for so many reasons. And as for the vexation caused to the debtor by the mere initiation thereof, he has as much to thank himself, seeing that he could have prevented it by taking steps in time to have satisfaction entered up.

We are, however, unable to agree with the view suggested in *Marappa Chetti's case* [1], that there may be *two* different causes of action, at different stages.

1. (1911) 21 M. L. J. 518.

Coming now to the question of limitation, it is noteworthy that the point is singularly bare of authority, *Marappa Chetti* v. *Shunmugappa Chetti* [1], being so far as we are aware, the only reported decision on the point. In accordance with the views above summarised, as to the basis of the suit, the answer to the question of limitation will be as follows :—

i. (a) On the footing of trust suggested by Couch, C. J., the cause of action would seem to arise only on the *second* realisation, for he declines to found the claim on the mere failure to certify. The case cannot of course be brought under S. 10 of the Limitation Act; nor is it governed by Art. 62, there being nothing at the time of the *original receipt* to make it money received by the defendant for the plaintiff's use, see *Gurudas* v. *Ram Narain* [2]. Art. 120 must be invoked. (*b*) If the argument of failure of consideration is to be adopted, the case will of course fall under Art. 97; but it is by no means easy to say when the consideration fails. There is no basis for the assumption made in *Marappa Chetti* v. *Shunmugappa Chetti* [1] that limitation would commence to run on the expiry of 90 days from the date of the original payment; for as already observed, there is no time limit for the decree-holder to certify.

ii. If the suit is viewed as one for damages, the rule of limitation applicable will differ according as it is taken to be a claim for breach of contract or in respect of a tort. (*a*) If breach of contract, the further question arises, what is the contract? Where there is an express contract there is of course no difficulty; but what about the 'implied contract' referred to in the cases ? If we only imply a contract to certify, the cause of action under Art 115 must be held to arise on failure to certify *within a reasonable time* (cf. *Dorasinga* v. *Arunachalam* [3], *Gopala* v. *Ramasami* [4].) If, however, the contract to be implied is one not to execute the decree, it must be held to be broken by the presentation of an application for execution. It is difficult in this view to date the cause of action from the realisation of the decree amount in execution, for that is only a matter of 'damage arising from the breach' and is not the breach itself (cf. S. 24 of the Limitation Act) See also *Raghubar Rai* v. *Jaij Raj* [5]. Nor is it even possible to start limitation from the service on the judgment-

1. (1911) 21 M. L. J. 518. 2. (1884) I. L. R. 10 C 860.
3. (1899) 1. L. R. 23 M. 441. 4. (1911) 22 M. L. J. 207.
5. (1912) I.L.R. 34 A. 429.

debtor of notice of the application for execution; for knowledge is no element under Art. 115. Questions may arise as to what is to happen if the decree-holder applies for execution, but allows the application to be dismissed before notice to the defendant, thus keeping him in ignorance of the breach till more than 3 years have elapsed from the first application for execution. It is difficult to found a cause of action on each *successive* application for execution and the hardship can be met only by the application of S. 18.

ii. If the claim is regarded as one in respect of a tort, fraud is generally assumed to be the basis of the right to relief and the case will therefore be governed by Art. 95; but even on this footing, it is not easy to see how the cause of action arises or limitation commences to run (as held in *Mcrappa Chetty* v. *Shunmugappa Chetty* [1]) from the time when the judgment-debtor is obliged to pay over again, as a result of the execution proceedings.

iii. It is only if the third of the views above indicated as to the basis of the action is accepted, that the realisation in execution will furnish the starting point for limitation; and Art. 62 will then be the proper article to apply.

SUMMARY OF ENGLISH CASES.

Fox *v.* **Jolly**: (1916) A. C. 1.

Landlord and Tenant—Forfeiture—Covenant to repair—Notice of breach—Notice bad as regards some breaches, good as regards others—Action in respect of latter good—Conveyancing Act.

Where a landlord gives notice of several breaches of covenant to repair in respect of each of which he is entitled to re-enter but the notice is defective in respect of some of the breaches, *held* that that does not prevent the landlord from re-entering for breaches in respect of which the notice is not defective.

Before the Conveyancing Act, the landlord was not bound before re-entering for breach of the covenant to repair, to give the tenant an opportunity to effect the needed repair but now under that Act, the landlord is bound to serve on the tenant a notice specifying the particular breach complained of and if the breach is capable of remedy, requiring the lessee to remedy the

1. (1911) 21 M. L. J. 518.

breach. It was contended in this case that not only are the breaches to be specified in the notice but also that the nature of the repairs necessary should be indicated. Their Lordships held that there was no such duty cast on the landlord. All that he has to do is to specify with reasonable particularity the breaches complained of.

Hammerton *v.* **Earl of Dysart**: (1916) A. C. 57.

Ferry — Right of — Scope of — Disturbance—New traffic —Declaration only.

This was an action for declaration that the plaintiff was entitled to an ancient ferry and for an injunction restraining the defendant from disturbing plaintiff in the enjoyment of it. Their Lordships held that upon on the facts there was no disturbance, the traffic served by the defendant being an entirely new and different traffic from that served by the plaintiff.

There is an interesting discussion in the case as to the exact scope of this right of ferry, the territorial limits within which ferrying by others can be restrained and the precise circumstances under which the right can be held to be disturbed. On the questions to what is the right basis of action in such cases there was some difference of opinion between the learned Law Lords that took part.

Their Lordships having held that there was no disturbance they refused to give a declaration of the plaintiff's right on the ground that it might be prejudging other cases.

The Roussuniar: (1916) A. C. 124.

Prize—Enemy cargo of oil on British ship—Shipped before war—Discharged after war into tank on shore—Liability to seizure and condemnation.

A cargo of petroleum oil owned by a German company was shipped at a neutral port on board a British vessel bound for Hamburg. While on its way, war broke out between England and Germany and the oil was discharged by the ship-owners into a tank on shore in England. It was subsequently condemned as a prize and the question was whether it was rightly condemned. Sir Samuel Evans and the Privy Council on appeal held that it was. The contentions on the other side were (i) the cargo being shipped on a British vessel before war broke out was not seizable as Prize (ii) that the oil not being captured while afloat on sea was

not subject to condemnation. Their Lordships held that neither of these circumstances was a bar to the seizure.

The Odessa: The Woolston: (1916) A. C. 145. (P. C.)

Prize Court—Cargo of enemy—Pledgee of goods—Right of—Not saved—Bounty of Crown—Not affected by legislation.

In this case, their Lordships agreeing with Sir Samuel Evans held that the Prize Court pays no regard to the rights of neutral or British pledgees of enemy cargo seized as prize. All that it has to consider is, who is the legal owner of the goods at the date of the seizure? If an enemy-subject is the owner, they are condemned and the effect is to divest the enemy subject of his ownership as from the date of seizure and to transfer it to the Sovereign. The thing is then his (*i.e.*, the Sovereign's) to deal with as he thinks fit and none other has any right to it or its proceeds. The rule by which ownership and not any special right created by contracts or dealings between individuals is taken as the criterion of national character is not a mere rule of practice or convenience. It lays down a test of universal application, not complicated by considerations of the effect of the numerous interests which under different systems of jurisprudence may be acquired by individuals either in or in relation to chattels. All the world knows what ownership is and that it is not lost by the creation of a security upon the thing owned. If in each case, the Court of Prize had to investigate the municipal law of a foreign country in order to ascertain the various rights and interests of every one who might claim to be directly or indirectly interested in the vessel or the goods seized and if in addition it had to investigate the particular facts of each case, the Court would be subject to a burden it could not well discharge. There is a further reason for the adoption of the rule. If special rights of property created by enemy-owner were recognised it would be easy for such owner to protect his own interest on the shipment of goods by borrowing upon the credit of such goods and if a neutral pledgee were allowed to use the Prize Court as obtaining a payment of his debts, that would practically be allowing the enemy a means of obtaining banking credit in neutral countries.

In special cases, the Crown of its bounty might make reparation to individual pledgees and this power of the Crown has not been taken away by any statute.

A. K. A. S. Jamal *v.* **Moolla Dawood, Sons & Co.**: (1912) A. C. 175.

Contract for sale of shares of Company—Breach by buyer—Measure of damages—Difference between market price and sale price at date of breach—Subsequent fall or rise in price, immaterial.

In a contract for the sale of shares of a company the measure of damages upon a breach by the buyer is the difference between the market price of the shares at the date of the breach and the sale price with an obligation on the seller to mitigate the damages by getting the best price he can upon that date. If the seller retains the shares after that date, he cannot recover from the buyer the loss due to subsequent fall in the market nor is he bound to account for the profit earned by a rise in the market.

In re **Backhouse Salemon** *v* **Backhouse,** (1916) 1 Ch. 65.

Will—Construction—Legacies, original and additional or substituted—Conditions and incidents of—Rule—Applicability to cases where substituted legatee different from original legatee.

Any inference that an additional legacy is to be on the same terms as an original legacy is an inference that yields to and is displaced by any express language to the contrary.

The general rule of construction that a substituted legacy is *prima facie* payable out of the same funds and is subject to the same incidents and conditions as the original legacy applies also to cases where the legatee under the substituted gift is a different person from the original legatee.

Watkins *v.* **Bottell.** (1916) 1 K. B. 10.

Carrier—Common carrier—Private carrier—Distinction—Person exercising public employment if liable as common carrier—Furniture remover—Liability of—Extent.

The point for decision in this case was whether the defendant, although admittedly not a common carrier, had in relation to the plaintiff's goods undertaken the liability of a common carrier and was liable for the loss of the goods owing to a fire that broke out among them while they were in course of carriage on the defendant's lorry. The facts found were: that the defendant was an ordinary remover of household furniture; that the plaintiff applied to him to remove his furniture from one place to another;

that the defendant before undertaking the work inspected the furniture and having done so agreed to remove it for a certain sum; and that there was no other express term in the contract. *Held*, that there was no evidence that the defendant undertook the liability of a common carrier.

Quaere.—1. Whether there is a class of persons who, without being common carriers, are under the liability of common carriers, namely, persons who exercise a public employment of carrying goods for hire.

Per Rowlatt, J.—2. Whether the doctrine that a person, who is not in fact a common carrier, can be a common carrier, is applicable to carriers by land.

Distinction between "common carriers" and "private carriers" pointed out.

London and Northern Estates Co. v. Schlesinga (1916) 1 K. B. 20.

Contract—Performance—Impossibility—What amounts to—Tenancy of house—Condition against assignment or under-letting without landlord's consent which cannot be reasonably withheld—Tenant prohibited by law from residing in District—Effect on his liability for rent.

The defendant was an Austrian subject. Before the outbreak of the war the plaintiffs let to the defendant a house for a term of 3 years from 1914. The agreement provided that the defendant was not to assign or under-let the house without first obtaining the consent of the landlords which should not be unreasonably withheld. After the outbreak of the war an Order in Council was made which prohibited alien enemies, of whom the defendant was one, from residing within specified areas covering the suit house. In a suit for rent for the period subsequent to the date of the Order in Council, the defendant pleaded non-liability on the ground that the agreement between the parties was that he should reside in the house and that the order had rendered the performance of that agreement impossible.

Held, that the personal residence of the defendant was not the foundation of the contract and that the fact that his personal residence was prohibited by the order did not make the performance of the contract impossible.

Hoole Urban District Council *v.* **Fidelity and Deposit Company of Maryland.** (1916), 1 K. B. 25.

Surety-Bond—Construction—Bond for due performance of contract—Litigation between the parties to contract—Judgment against contractor for costs—Liability of surety.

As a rule when costs are to be paid as the result of an action or of proceedings before an arbitrator they fall to be paid by reason of the Judgment given in the action or of the arbitrator's award, and not by reason of any stipulation in the contract out of which the dispute arose which formed the subject-matter of the action or reference.

Where the defendants stood surety to the plaintiffs for a person, who entered into a contract with them for the execution of certain works, and gave a bond to the plaintiffs conditioned for the due performance by the contractor of his contract, *held*, in an action by the plaintiffs against the defendants for the recovery of the costs decreed to the plaintiffs in a litigation between them and the contractor as to the performance of the contract, that the defendants were not liable as the liability of the contractor arose not under his contract but under the Judgment.

Crane *v.* **South Suburban Gas Co.** (1916) 1 K. B. 33.

Highway—Nuisance—Negligence—Dangerous thing placed on or near highway—Liability of person placing—Nature and extent—Injury to innocent party—Effect.

A person doing something on a highway or on land adjacent to it, which he may lawfully do if he takes proper precautions to guard the public from injury, is guilty in law of a nuisance if he fails to take proper steps. Where therefore a dangerous thing is placed on or near a highway and a passer-by accidentally knocks against it, thereby causing injury to another, the person who placed the thing there is the effective cause of the injury, if he ought to have foreseen that the result of placing it there would be to endanger persons lawfully using the highway, and is liable to the injured party. The question of a trap has nothing to do with such a case, because the necessity of considering it only arises where the person who is said to have created it gave a licence or invitation to others to enter the premises where the alleged trap existed.

Bank of Australia *v.* **Clan Line Steamers, Limited:** (1916) 1. K. B. 39 C. A.

Bill of Lading—Construction—Provision for possible transhipment of goods—Contract of liability for unseaworthiness—Provision for time within which claims for damages should be made. Unseaworthiness of ship—Loss due to—Claims in respect of—Applicability of time limit—Transhipment of goods to another vessel—Claim in respect of goods transhipped—Time limit if applies to. Observations on express and implied contracts and effect of express contract regarding matters with respect to which law implies contract.

The action was by the indorsees of a bill of lading against the shipowner for breach of contract and for damages for injury to the goods carried by the ship. Clauses of the bill of lading material for the decision of the case were Clause 3 which provided for possible transhipment of the goods, Cl. 12 which provided that "No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the port of delivery within seven days from the date of *steamer's arrival* there" and Cl. 14 which provided that "The shipowners shall be responsible for loss or damage arising from any unseaworthiness of the vessel when she sails on the voyage." The goods were shipped at Wellington upon a ship called the "Clan Maclaren." She sailed to Port Pirie where she transhipped some of the goods into a ship called the "Geelong." The goods on board both the vessels were damaged by unseaworthiness. No claim was made by the plaintiffs upon the defendants till more than seven days after the arrival of either vessel. The questions for decision were (1) whether Cl. 14 contained an express contract as to unseaworthiness and, if so, the limitation of time provided for by Cl. 12 applied and (2) what was the true meaning of Cl. 12 *i.e.* whether the limitation of time fixed by it applied to claims in respect of goods shipped on board the "Clan Maclaren" only or the "Geelong" also. *Held* that (1) Cl. 15 provided for an express contract as to unseaworthiness and Cl.12 applied and(2)by Pickford, and Bankes L. JJ. (Buckley L.J. dissenting) that the limitation of time fixed by Cl. 12 applied to claims in respect of goods shipped on board the "Clan Maclaren" only inasmuch as the clause was not clear and unambiguous.

Observations on express and implied contracts and the effect of express contracts regarding matters with respect to which the law implies contracts.

If a shipman puts in a clause which he intends for his protection, and which is ambiguous and not clear, then it does not operate to protect him.

Jefferson v. **Paskell** (1916) 1 K. B. 57 (C. A).

Marriage—Breach of promise—Action for—Plea of illness of plaintiff at date of intended marriage—Proof—Onus—*Plea of defendant's honest belief of her unfitness — Sustainability—Illness of plaintiff if justifies breach by defendant—Jury—Misdirection—What amounts to.*

Where, in an action for breach of promise of marriage, the defendant raises the plea that at the date of the intended marriage the plaintiff was so ill from the disease of tuburculosis that she was not able to be married, the burden is in the first instance upon the plaintiff to prove that she was ready, in the sense of being in a state of bodily fitness, at the date of the marriage or within a reasonable time thereafter. But very slight evidence is sufficient to discharge that *onus* such as that she was in a good state of health within a short time after the fixed date. The burden then is on the defendant to prove that she was suffering from tuberculosis. The fact that the defendant honestly and on reasonable grounds believed that the plaintiff was unfit, though it might affect the amount of damages, would not affect the plaintiff's right to recover, not being a defence in law, if the plaintiff was as a matter of fact not unfit.

Per Phillimore, L.J.—Quœre: Whether the plaintiff's ill-health is not a justification for refusal to perform the promise to marry.

Per Pickford, L. J. The Judge is entitled to give the jury his views of the evidence and is not obliged to detail to them every part of it, or every view which each party wishes them to take, so long as he does not mislead them as to the matters they have to consider, or the evidence in the light of which they must consider them.

JOTTINGS AND CUTTINGS.

The Arrest of the Consuls at Salonica:—The recent arrest and placing under guard of certain enemy consuls by the Allied military authorities at Salonica raises questions of international law of great nicety and importance. To say that there is no precedent by which this act may be tested is of little assistance, for the present relation between Greece and the Allies is in itself entirely *sui generis*. As between the Allies and the enemy States whose consuls were arrested there is no question of violation of right. The act was one arising out of the exigencies of the military situation, and there is no exemption from arrest of any diplomatic officer of an enemy State in such cases; he may, by virtue of his office alone, be made a prisoner, as is laid down in the Manual of Military Law, which correctly states the conclusions of writers on international law on the point. The material question is that of Greek territorial sovereignty—a point already taken by the Greek Government in its protest to the Allied Powers. But in addition to this territorial sovereignty, and superimposed upon it, is the right of the Powers whose army of occupation has, by acquiescence, been allowed to establish itself there, to take all measures for their safety which are incidental to the occupation. A neutral state has, of course, a *prima facie* right to preserve its machinery for diplomatic intercourse with both sets of belligerents unimpeded. But even this right may have to yield before the needs of war. The same principle was involved in the dispute between Prussia and the United States in 1871, when the Prussian military authorities refused to allow the United States Minister in Paris to send despatches to London unless the bag containing them was left unsealed. The State Department entered a protest; but in the opinion of Hall (International Law, pp. 311-313) there was much to be said for the Prussian claim. And this was in some ways a stronger assertion of the belligerent's right than the present, for the person interfered, with was a diplomatic envoy, while at Salonica consuls only were arrested. This is a distinction of some importance, since the consul possesses in general none of that large immunity with which the diplomatic envoy is invested as embodying the majesty of his State. He has no rights of exterritoriality, nor of independence of the civil and criminal law of the country to which he is accredited From the point of view

of the State to which he is accredited, he is not so sacrosanct a person as the envoy, nor as necessary to the maintenance of intercourse between the central State and the belligerents. Whichever way, therefore, the question be viewed, whether as an interference by belligerents with neutral intercourse or as an act of sovereignty on Greek soil, the protest against it would not seem to be well-founded. The first may be justified on the ground of the superior claims of the belligerents; the second, on the ground that, the Allied armies being *defacto* planted on Greek territory, the acquiescence of the local sovereign must carry with it an implied right to do all things reasonably necessary to their safety.—*The Law Journal, 15th January, 1916.*

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Miscellany:—A lady who described herself as 'Lady Eliza Rose,' and who was wearing a barrister's wig and gown, appeared in Mr. Justice Neville's Court on Tuesday morning and said that she wished to make an application to his Lordship. Mr. Justice Neville: Are you a member of the Bar? The applicant: I am a barrister and I am not. I obtained judgment from Mr. Justice Joyce and I now desire to take the matter to the King's Bench Division. Mr. Justice Neville: You are not a member of the English Bar, and in these Courts the garb that you are wearing is reserved for those who have been called to the Bar by one of the Inns of Court. I cannot allow you to masquerade here in a costume which you are not entitled to wear. The applicant: I am a barrister here in my own cause and I had the permission of Mr. Justice Joyce to go into any Court I like. Mr. Justice Neville: I decline to hear you in that costume and I order you to leave the Court. The lady then gathered together the documents which she had brought with her and left the Court.—*Ibid.*

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A Lawyer-Viceroy.—English lawyers can afford to disregard the guerulous attacks being made in certain quarters upon their calling while they see members of their profession appointed to some of the highest positions in the State with the unmistakable approval of the public. They can claim even the new Viceroy of India as one of their calling. Not only is Lord Chelmsford the grandson of a Lord Chancellor; he is himself a member of the Bar, having been called at the Inner Temple in 1893. Constitutional questions of the greatest importance will arise in India in

the immediate future, and it is fortunate that the new Governor-General possesses, by virtue of his legal training, a special qualification for dealing with them.—*The Law Journal, 22nd January 1916.*

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The Appellate Courts:—The work of both the House of Lords and the Judicial Committee is being notably affected by the war. In the latest House of Lords' list only seven appeals are entered, of which four are from England and three from Scotland. The number of Colonial appeals in the Judicial Committee's list is even smaller. Only four stand for hearing, British Columbia, Seychelles, Mauritius, and the Straits Settlements being the four Colonies from which they come. Neither Australia nor New Zealand supplies a single case, nor does South Africa. But, although the number of Colonial appeals is unprecedentedly small, the Judicial Committee's list is not shorter than usual. The number of Indian appeals, so far from being reduced by the war, has become larger; as many as twenty-one are entered. This increase in the Indian work of the Committee is an additional reason for welcoming the appointment of Sir Lawrence Jenkins, until recently Chief Justice of Bengal, to a seat in the Court in Downing Street. Two distinguished Indian jurists who had rendered much valuable service on the Committee have recently passed away. Both Sir Arthur Wilson and Sir Andrew Scoble, however, had long ceased to take an active part in the work of the Court, and, though, thanks to the changes introduced by Lord Haldane, the constitution of the Judicial Committee was never stronger than it is to-day, there was obvious need for the services of another distinguished lawyer experienced in the administration of Indian law.—*Ibid.*

CONTEMPORARY LEGAL LITERATURE.

A writer in the Juridical Review for October tries to give some idea of Lord Coke as a person. It is curious that the great lawyer was in his own actions at times wilful and whimsical, and even broke the ordinary rules of law. In his hurry to get married to Lady Hatton lest his rival Bacon should be beforehand with him he had the ceremony performed in a private house and at the wrong time instead of at the Parish Church between eight and twelve in the forenoon with the result that he was prosecuted and

had to make most abject submission before he was pardoned. He had the common failing of the lawyer, the overmastering desire to win a weak case. Having once taken up a point or become engaged in a case, he believed in it heart and soul and was ready to resort to every device to bolster it up. Though his sense of propriety in certain directions was wrong, he had a high conception of his duty and he carried it out without fear or favour. It is to this respect for the law and his courage in giving effect to it, exhibited in the wider field of constitutional politics that he owes the respect with which after every just detraction, later times have regarded him. He wished to stand well with the powers, also had a keen regard for his interest yet he would not go beyond a certain distance. He was at his books from early morning till night. His learning was admired even by Lord Bacon, rival as he was. Coke on the whole had a fortunate life. He was strong and active in body. When quite an old man and somewhat ailing he was moved to declare that he had never taken physic and that he was not going to begin it then. He accepted the current beliefs of the day. Along with Bacon and Shakespeare he believed in astrology and witchcraft. He was somewhat of a Puritan and considered play-acting as a kind of vagrancy to be suppressed by the stocks and the scourge.

Limitation of liability under contracts is another article of interest in the same Journal. When a person enters into a contract he may lawfully limit his liability thereunder provided the limitation is clearly and expressly mentioned. This limitation may take various forms. One important form of limitation is that only certain property shall be liable. Again it may be stipulated that a sum of money shall be payable only out of certain funds; the existence or sufficiency of the funds may be a condition precedent to the liability or the whole contract may be contingent on the existence of the fund, or the promisor may be personally liable while the funds are in his possession or under his contract—the liability being limited however to the extent of the funds. Again certain property may be charged with the payment of money with no personal liability whatever in the person charging. Another way of limiting the liability is to make it enure only so long as a person fills a particular capacity. The mere fact that a person is a trustee, an executor, an administrator, a manager or a receiver is not sufficient to limit the liability.

Even a contract "as trustee, manager or receiver" is insufficient. The words which purport to limit the liability must not be repugnant to or inconsistent with the words which impose the liability. The rule that the words of a covenant ought to be taken most strongly against the covenantor would require any limitation on the liability *prima facie* imposed by the words of the covenant to be clearly made out.

Another article in the same Journal contains a discussion as to the law of negligence in its application to children. It is well settled that the mere fact of being the owner of a subject from which damage arises does not of itself impose liability for the damage; one is entitled to rely on the protection of one's own ground against those who have no right to be there. Children therefore, who are trespassers though unable to appreciate the risks they run are, as regards the liability of owners of private ground in the same position as adults who, as trespassers take the risk of their trespass. But of this general rule there are qualifications. If the plaintiff can show actual fault on the defendant's side such as proceeding to shunt, though knowing that a child is on the line, or placing something in the nature of a 'trap' to children, that will be a ground of liability. What actually constitutes a trap is a difficult question but, before anything can be called a trap, it must be shown not only to be a danger but a concealed danger known to the owner and not known to the injured person, or in the case of a child beyond its capacity of appreciation. A thing is not a trap when not dangerous till tampered with but on the other hand everything must be secure enough to stand the risks to which it may be open in the particular place where it happens to be. Where for instance a ground is adjacent to a public road, the owner is not entitled to carry out dangerous operations on his ground in the immediate neighbourhood of the road without taking precautions for the safety of those who go there; for though he is entirely within his rights in what he is doing and anyone on the ground is a trespasser, yet the fact of its being near the public way constitutes, as it were, a sort of presumptive invitation to stray off the road which it is the duty of the owner to rebut by erecting notice boards, etc, Lord M'Laren considered such obligation to arise from the law of neighbourhood. The position of people who are on the land upon invitation is higher and they are entitled to

reasonable protection from danger. Though ordinarily, where the defendants are acting within their rights and reasonable protection for public safety is taken, no liability attaches, there is a special duty where the place is frequented by children to render it harmless to them. Drivers of vehicles are bound to bear in mind the disposition of children to get in the way of carriages and take the necessary precautions. Tram cars are shown some more concession in this matter as it is not as easy to regulate their movement, as that of the ordinary vehicles. There has been some discussion and some difference of opinion in Scotch Courts as to whether the doctrine of contributory negligence is applicable to children. The prevailing opinion seems to be that the capacity to neglect is as much a question of fact in any individual case as negligence itself. If the child is capable of taking care of itself that is a case of contributory negligence. If it is not, there is no contributory negligence. Where there is no special duty owed to children, the fact that they are injured would not make one liable, for it is then the duty of the parents to take care of them.

A writer in the "American Law Review" (November-December) tries to analyse the causes for Democracy coming to be impatient with the law. He warns lawyers that unless they live up to professional standards higher than ever set before, they must be prepared for more and more of meddling and officious supervision by the ignorant Demos.

"The Law" said Lord Haldane "is a calling notable for the individualities it has produced". Lord Cairns according to a writer in the same Review, is one that has made the legal profession notable. Viscount Brice calls him "unquestionably the greatest judge of the Victorian Epoch". Mr. Benjamin pronounced him the greatest judge before whom he had ever argued a case. At the same time in the words of Lord Halsbury "he was equally great as a statesman, as a lawyer and as a legislator." Disraeli rated his political services very high and called his speech as Attorney-General one of the greatest speeches ever delivered in Parliament. The Judicature Act owes most to him. The Conveyancing Act, the Married Women's Property Act and many other acts also are in a large measure his work.

Another writer describes the state of the law as to religious meetings in America. In England the meetings of dissenting churches have but grudgingly been protected from disturbance by

Toleration statutes while the meetings of the Established Church have always enjoyed the protection of Common Law. As there is no Established Church in America all churches are equally regarded and their meetings are protected by the Common Law as well as by the statutes. Their meetings are protected not only while the services are being carried on but a reasonable time before and after. The statutory minimum of a meeting is a single member. To be punishable, the disturbance must be wilful that is to say the intent must be evil; it need not be an intent to disturb the meeting. Under certain statutes, even sweetmeat vendors and hawkers are not permitted within a radius of sometimes one or two miles of the religious meetings. What acts will disturb a meeting, must depend upon the circumstances of each case.

Mr. E. A. Adler writing in the *Harward Law Review* deplores the general failure of lawyers to recognise the true relation of *labour, capital* and *business* as between themselves and with reference to society. The community has the right to insist on law and order in industry no less than outside of it. Industrial order can come only when means are provided by which all the grievances based on a just conception of communal interest which are now left to settle themselves outside the pale of the law may be disposed of within it. The Common Law viewed the subject in its proper perspective and insisted on each man exercising his calling "rightly and truly as he ought" and "to serve the public as far as the employment extends". Under that regime, if the landlord had his rights, so had the serf If the owner of the mill had his rights, so had the public to see that he maintained proper machinery and that he did his work properly and promptly. That the members of the community have no interest in how profits from community services shall be divided, no right to participate in the rendering of that service, no control of the time, manner and conditions under which that service shall be performed, are purely modern ideas.

In another article the question as to how far clauses in pledge agreements relaxing the common law restrictions on pledgee's action are valid is discussed. As a general rule, such agreements are enforceable to the extent they fairly facilitate the collection of the creditor's due. When however they provide for forfeiture of the security, they are like all other agreements for a penalty invalid

on grounds of public policy; even when upheld, they are regarded by courts with suspicion and dislike. A strict construction is put on them and a waiver of the right to proceed according to the letter is readily inferred. In addittion to it, the Court insists always on the strictest good faith in the performance of these agreements and a pledgee will never be permitted to shelter himself behind a bare compliance with the powers conferred.

BOOK REVIEWS.

THE INDIAN DECISIONS (NEW SERIES) *by the Lawyer's Companion Office. Bengal Law Reports Vol. II. Price Rs. 7. Law Printing House, Madras.*

We note with pleasure the expeditious way in which the publishers are bringing out these series. The present volume is the reprint of the 3rd and the 4th volumes of the Bengal Law Reports.

THE TRANSFER OF PROPERTY ACT AND EASEMENTS ACT *by Mr. T. R. Desai, Vakil, High Court, Bombay.*

To have gone through five editions is some guarantee as to the usefulness of the book. We are glad to vouch that in fact it is a useful publication. Not confusingly over-burdened with matter, the commentaries are yet sufficiently full and comprehensive to enable the student to get an intelligent grasp of the principles of these Acts. The cases are up to-date and carefully selected. There are 8 appendices to the book; one of them gives a summary of the Act; another gives the leading English cases and a third deals with important maxims and so forth. These are likely to be appreciated by students. The clear analysis of case law by the author is likely to benefit even practitioners. The book is certainly cheap for the matter it contains.

BOOK REVIEWS.

LAND TENURES IN THE MADRAS PRESIDENCY *by S. Sundararaja Aiyangar B. A., B. L., High Court Vakil. Modern Printing Works, Mount Road : Price, Rs. 10.*

A treatise dealing adequately with South Indian land tenures has long been a *desideratum*. On account of the very largeness of the area covered by Baden Powell's book, the treatment given to these has been necessarily meagre and one had to cast about for information in a variety of quarters such as District Manuals, Fifth Report, Board's Standing Orders, Wilson's Glossary Maclean's Manual, Mirasi Papers, Madras Code, the Law Reports, *et hoc genus omne*, with no assurance even then that all the available information has been gathered. To have put together all the detached items of information and presented a lucid and accurate description of the infinite variety of tenures prevailing in this Presidency (every District, every Taluk for the matter of that seems to have some peculiar tenure or other) is a service for which the profession as well as the student should be deeply grateful to the author. The book consists of 14 chapters. The first and second chapters deal with the conception of property as it prevailed at different times. For instance, the author examines the basis for the theory of State ownership of land which once had the vogue but has since been given up even by the State. He shows conclusively that that theory is in accord neither with the immemorial practice of this country nor with the approved doctrines of Hindu and Mahomedan Law. In the succeeding chapters, the author takes up the various types of property more or less in the order of their content. In chapters III, IV and V he deals with the Mirasi, Ryotwari and Zamindari tenures ; Chapter VI to IX, deal with beneficial tenures known comprehensively as Inams. The tenures governed by the Estates Land Act are dealt with in Chapter X. Chapters XI and XII deal with the ordinary leasehold and other interests. Some of these tenures are quite as valuable as and hardly distinguishable from occupancy tenures (cf. the Mulgeni tenure of Canara, or the Saswatom of Malabar). The tenures of Malabar are given a separate chapter for themselves. This is in accordance with the conventional view as to these tenures being a genus apart. In the last chapter the remedies of the State for the recovery of arrears of revenue and other kindred subjects are dealt with. From this brief summary, one must be able to judge the comprehensive nature of the treatise. But without by any means, detracting from the

merits of the other chapters of the work which are carefully compiled and contain very valuable and accurate information (cf. for instance, the chapter on Malabar Tenures in which more detailed information is given about them than in any single book that we are aware of), the chapters on Inams are a special feature of the book and are particularly valuable. As for these Inams, their names are a legion and the objects for which they are given are hardly less numerous. There are inams of both revenue and land, and inams of revenue alone; of the latter there are inams of half revenue, quarter revenue, and three-quarter revenue, subject to jodi and not subject to jodi, subject to money jodi and jodi in kind. Again there are major inams and minor inams, pre-setlement inams and post settlement inams, inams for private service, and inams for public service. There are secular grants and there are religious grants and there are grants for village service. There are grants to Brahmans, non-Brahmans and to Mahomedans. All these various kinds of tenures are known by distinctive names, and according to the locality where they are found and the language that is prevalent there. Their incidents also differ. In some cases, the grantor has the right to resume. In others he has not. The nice line that separates a grant burdened with service from a grant of an office which is remunerated by the use of the land has been the subject of consideration in numerous cases. Then there are the complications introduced by the Pensions Act. All these subjects have been dealt with by the author in great detail, setting forth in fact all the available information, to the credit of the author it must also be said, very clearly and with no verbiage of any sort. The chapter on the Estates Land Act is an admirable summary of the Act as interpreted in judicial decisions which are exhaustively noted at the foot. While dealing with the Mirasi tenure, the author gives a clear account of the village system as it obtains in Southern India with its many local varieties. The work besides exhibiting very considerable research, is remarkable for clearness of arrangement and lucidity of exposition. The important acts that bear on the subject are printed as an Appendix. An exhaustive glossary of the terms used in South India is also given. The index which seems to be very carefully prepared also deserves special mention as it is a thing which cannot be said of many Indian publications. On the whole we have no hesitation in recommending the book to the public and venture to hope that it will soon be recognised as a reliable text book on the subject it deals with.

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NOTES OF INDIAN CASES.

Sheo Nandan Lal *v.* **Zainalabdin**, I. L. R. 42 C. 849.

The learned judges rightly lay down that the lien under S. 55 (4) (b) of the Transfer of Property Act is not a mere 'personal' right of the seller and can be availed of by a transferee of the amount due. But we cannot help feeling that the judgment does not adequately deal with the questions which seem to arise on the facts of the case. The amount in dispute is said to have been left with the purchaser for payment to a creditor of the vendor. If so, it is at least doubtful whether in such a case the vendor's right against the purchaser who fails to pay the money to the creditor is a claim for unpaid purchase money and the statutory lien covers such a claim also. The judgment under review makes no reference to this question. The decisions in *Abdulla Beary* v. *Mammali Beary* [1] and *Sivasubramanya Mudaliar* v. *Jnanasambanda* [2] negative the existence of the lien in such circumstances. If again, the vendor's remedy against the purchaser is not one for unpaid purchase money but for damages for breach of the contract to pay the creditor, the question may also arise whether a claim of that kind is assignable (See *Gopala Iyer* v. *Ramaswami Sastriyal* [3]) On the answer to these questions will depend the answer to the question of limitation which also seems to have been raised in the case.

Hari Kaishen Bhagat *v.* **Kashi Pershad Singh**, I. L. R. 42 C. 876 (P. C.)

The reference in the course of argument to *Debi Prosad Chowdhury's case* [4] should have drawn their Lordships' attention to the chaotic state of the Indian decisions on the point and it is

1. (1910) 7 M. L. T. 376.
2. (1911) 21 M. L. J. 359.
3. (1911) 22 M. L. J. 207.
4. (1913) I. L. R. 40 C. 721.

much to be regretted that the Board should have contented itself with merely re-affirming the doctrine laid down in *Raj Lukhee Debea's case* [1]. The reference to the rule, as one of stringent equity, does not afford any clue as to the true basis of the legal operation of the consent of reversioners. The decision however makes it clear that an alienee relying on the reversioners' consent to validate the widow's transaction should satisfy the court that the reversioners 'concurred in binding their interests' and not merely that they took some part in the transaction.

East Indian Railway Company *v.* **Changai Khan**, I. L. R. 42 C. 888.

It is scarcely necessary to say that it is not in the best interests of Justice that a second bench before whom a case may come up for hearing after an interlocutory decision by another bench on a former occasion, should lightly set aside the order of the former bench. It will of course be a different matter if the case comes up by way of appeal from the former order or from a decree passed in pursuance of the former order. Though the former order in the present case is described as one of 'remand'—the word seems to be loosely used in many other similar cases—it seems really to have been one calling for a finding on an issue framed by the High Court. If the order had formally set aside the Lower Court's decision and sent the whole case back to it for disposal, such an order would be conclusive between the parties and cannot be modified except on an appeal against the order of remand. (See S. 105 cl. 2 C.P.C.) Where however the court pronounces an interlocutory decision on certain points and then calls for findings from the Lower Court on certain *other* points, the position is somewhat different. The principles which should guide the court in such cases will be found considered at some length in a recent judgment of the Calcutta High Court. *Hira Lal Pal* v. *Etbar Mandal* [2]. An intermediate situation is presented by the case now under notice. The interlocutory order called for a fresh finding from the Lower Court on what was practically the *sole* point in the case; and the question was whether at the later hearing this order could be ignored as incompetent and the former finding of the Lower Court accepted. The

1. (1869) 13 M.I. A. 209. 2. (1915) 20 C. W. N. 43.

decision on this point in the present case as also in *Haitunnessa Bibi* v. *Kailash* [1], is to a large extent coloured by the fact that the former order was that of a single Judge from which a Letters Patent appeal would have been permissible in the ordinary course and the Division Bench which dealt with the case later practically put itself in the position of an appellate bench to avoid circuity of proceedings. The decisions cannot therefore be safely regarded as of general applicability.

Kedar Nath Mitra *v.* **Dinabandhu Saha**, I. L. R. 42 C. 1043.

There can be no doubt that the conclusion arrived at by the learned Judges in this case is the only one consistent with the business sense of a progressive community. When a cheque is given in payment of a debt, the payee never feels that it is anything less than a payment in money, so long as he has no reason to think that it will be dishonoured and the cheque may pass several hands before it is presented for payment. We therefore see no legitimate reason why it should not be regarded as a part payment for the purpose of the Limitation Act and we do not understand *Mackenzie* v. *Tiruvengadathan* [2], to lay down that the giving of a cheque does not *amount* to a payment. Difficulty was there felt as to the application of the language of the proviso to S. 20; and as to this, we are unable to agree with the observation in the case under notice that it is capable of distinction from the present.' The 9 Madras case held that the cheque does not *evidence* a payment, because it is only an "order for payment." This will apply as much to the drawer of a cheque as to an indorser. The answer to that observation would however seem to be that while a cheque is no doubt an order for payment of *money*, it is *by itself another kind of payment*, for payment need not be in money *alone*; and the drawing or indorsing of the cheque is sufficient evidence, in writing, of that kind of payment. Muthuswami Aiyar and Brandt, JJ. went further and held that according to the proviso, not merely should the fact of payment appear in writing signed by the person paying, etc., but *also the fact that such payment was a part payment.* This, of course, no cheque would of itself show. But with all respect we must say that that view (followed implicitly in

1. (1904) 16 C. L. J. 259.

2. (1886) I. L. R. 9 M. 271.

Ramchunder v. *Chandi Pershad* [1] imports additional words into the section (See *In the matter of Ambrose Summers* [2] *Mandardhar Aitch* v. *Secretary of State for India* [3] *Jada Ankamma* v. *Nadimpallee Rama* [4] *Mukhi* v. *Coverji* [5]) and it must be noted that the Legislature has not, even in 1908, adopted the suggestion of Dr. Stokes that the proviso should be so worded as to make the words 'as such' applicable both to 'part payment' and to interest payment. It is true that before a plaintiff can successfully rely on a payment as saving the bar of limitation in respect of the balance claimed, he must satisfy the court not merely as to the alleged payment, but also that (i) it was on account of the debt sued for and (ii) as part only of what was due (see Darby and Bosanquet Part I Ch. V); but the section does not require that all this must appear in writing or must (as held by Russell, J. in *Ranchordas Tribhowandas* v. *Pestonji Jehangir* [6]) be inferable from the writing, without evidence *aliunde*.

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1. (1897) I. L. R. 19 A 307.
2. (1896) I.L.R. 23 C. 592.
3. (1901) 6 C. W.N. 218.
4. (1883) I.L.R. 6 M. 281.
5. (1896) I.L.R. 23 C. 546.
6. (1907) 9 Bom. L.R. 1329.

NOTES OF INDIAN CASES.

Beasant *v.* **Narayanaiha**: I. L. R. 38 M. 807.

There is an essential distinction between the nature of the jurisdiction exercised by the Court in ordinary suits and that exercised in guardianship proceedings see *Scott* v. *Scott* [1]. Procedure by way of suit is likely to obscure this essential distinction Suit for the recovery whether of a wife or of a child is strongly reminiscent of an order of things which is happily past under which human beings were regarded as chattels. It is never too much to insist on this aspect of the case and their Lordships have done valuable service by holding that remedy by way of suit does not lie concurrently with that given by the Guardians and Wards Act. Once the matter is before the Court under the Guardians and Wards Act, things will be viewed in their proper perspective and we will hear less of the rights of the guardian and more of the interests of the minor and the duties of the guardian. Thanks to the slovenly ways of the Indian Legislature, their Lordships' view is likely to raise some difficulties in practice and one such difficulty has already arisen with reference to obtaining the custody of minors by reason of the unhappy language of S. 25 of the Act. There can be no doubt about the soundness of the policy approved by their Lordships and the legislature may well take note of it and make the necessary modifications.

Krishna Bhoopathi Deo *v.* **Raja of Vizianagaram**: I. L. R. 38 M. 832.

His Majesty in Council is undoubtedly a Court, *Pitts* v. *La Fontaine* [2] and having regard to S. 37, unless there is something repugnant in the context or subject, the expression "Court which passed the decree" would include the Court of the First Instance and as such that Court would have power to recognise a transfer under O. 21 R. 16. Can the provisions of O. 45 R. 15 and 16 be said to make the use of the expression in that sense repugnant to the subject or the context—though it is not put exactly that way—seems to be the only question. Under R. 15, the High Court is given power to give directions; R. 16 provides for appeal. It might be argued that R. 16 was unnecessary if execution of Privy Council decrees was already provided for. But it may be

1. (1913) A. C 417. 2. (1880) I. L. R. 6 A. C. 482.

the result of an imperfect carrying out of the scheme of the new Civil Procedure Code or what is more likely, *ex abundanti cautela*, R. 16 provides for cases where the Privy Council has directed by its order that the execution is to be by some other Court than the Court which passed the original decree. R. 15 is probably a survival without any distinct object or reason.

Ponnusami Padayachi v. **Karuppudayan:**—I. L. R. 38 M. 843.

Whatever the doubts or difficulties as regards tenants of old waste holding under leases which did not expire before the coming into operation of the Estates Land Act, it seems to be perfectly clear that persons holding under time-expired leases at the time have no defence to an action in ejectment in the Civil Court. "Ryot" is a person who holds for the purpose of agriculture ryoti land on condition of paying rent. A person holding under a time-expired lease at the time of the coming into force of the Act could not be appropriately described as such. Explanation to S. 6 which gives an extended meaning to the term for the purpose of the section seems to be conclusive against the adoption of that meaning for all purposes. This does not mean as Mr. Justice Spencer's judgment would seem to suggest that a tenant can be evicted on any ground not mentioned in S. 153 or 155 by the application of S. 163. This view, we do not think, is warranted by the Act. Subject to the effect of the proviso which we will consider later the conjoint effect of Ss. 153,157 and 187 cl. (g) is that a person who fills the character of a *ryot* at the time of the passing of the Act or at any time subsequently cannot be evicted except on the grounds and in the manner provided by the Act. The argument that a ryot that was but is not, is a trespasser and therefore can be evicted under S. 163 is opposed in the first place to the language of S. 163 which refers only to occupation which from the commencement is wrongful and would also seem to ignore cl. (e) of S. 153 the inclusion of which is justifiable only on the footing that the section is applicable to such people. Again S. 157 which bears on this question, refers to S. 48 which obviously covers cases of time-expired leases. The only way in which effect can be given to the proviso to S. 153 would seem to be by reading S. 157 subject to the legislative declaration in S. 153, that the Act does not affect contracts before the Act respect of non-occupancy ryots in that one matter.

We may justify the conclusion arrived at in the case also from looking at the question from another point of view. There is nothing in the Act to indicate that the right of action vested in the landlord at the date of the Act was intended to be interfered with and applying the principle of *Raja Kumara Venkata Perumal* v. *Ramudu* [1] and *Raja of Pittapur* v. *Gani Venkatasubbarao* [2] the right of the landlord would be saved.

Mr. Justice Miller puts his judgment on the very much broader ground that whenever the tenant is found to have no occupancy right it must be presumed either that the Inamdar had it from the commencement or subsequently acquired it, in either of which cases the land would not be part of an estate. There are many difficulties in accepting this point of view and they have been all pointed out by Sadasiva Aiyar and Seshagiri Aiyar, JJ. in *Venkatasastrulu* v. *Sitaramudu* [3].

Venkatasastrulu *v.* **Sitaramudu,** I. L. R. 38 M. 891.

Unless we adopt some such theory as has found favour with Mr. Justice Sadasiva Aiyar, however inconsistent as pointed out by Mr. Justice Seshagiri Aiyar, with the assumption and even express declarations in various legislative enactments (see land Encroachment Act S 2) cl. S. 3 cl. (2) *d* would be a dead letter for it should be fairly impossible to find a village in which there is no waste land or private land. There is nothing unreasonable in the theory ; in fact we should think it best accords with the ancient Hindu notions about the Sovereign's rights in respect of land. The Sovereign had his right to a fixed share but the land belonged to the occupier. The land was not the Sovereign's. The grantee from the Crown, therefore, took only the Sovereign's right *i. e.*, the right to collect the share of the produce in the land. He might assign the uncultivated land to a stranger ; he might do that even in his own favour. His rights in respect of waste land were remarkably like that of a person having general power including power to appoint in his own favour. It is very nearly property and yet not property. However proper such a presumption in the case of Saranjams, Jaghirs or even Mokhasas which are in their nature temporary grants there is considerable amount of incongruity in applying it to grants like Agraharam, and Devadayam or other similar grants. By

1. (1913) 28 M. L. . 81. 2 (1915) 29 M. L. J. 1.
3. (1914) 26 M. L. J. 85

such grants, revenue ceases to have the character of revenue with no chance of reversion to its original character. In the case of Zemindaries, such a presumption is inconsistent with the terms of the Regulation XXI of 1802. The proper presumption would rather seem to be the grant of the melwaram in the case of occupied lands and a grant of both the land and the revenue to the grantee in the case of waste lands. Mr. Justice Seshagiri Aiyar has applied this theory but we must confess we are not convinced that he has succeeded in making the clause intelligible on that basis.

Periya Aiyar Ambalam *v.* **Shumunga Sundaram.** I. L. R 38 M. 903.

Although one cannot help remarking that *Cholomondely* v. *Clinton* [1] has been unduly pressed into service this case has done somewhat to clear the air by defining the conditions under which adverse possession can be found against the mortgagor. Their Lordships would have helped in saving considerable litigation if they had clearly defined what the remedies of the mortgagor under these circumstances would be. In fact, decision on the question of adverse possession against the mortgagor must be necessarily incomplete without an investigation into the means open to the mortgagor to prevent such adverse possession. The order of reference raised another interesting question as to limitation in the case of suits for declaration whether each distinct denial gives rise to a fresh cause of action or whether there is a cause of action once for all on the first denial and a suit brought more than six years thereafter though within six years of another distinct denial is barred. There is considerable difference of opinion on this point. For instance there might first be a verbal denial of title ; then a denial involved in a sale deed. There might first be an attachment, then a sale. Do these give rise to different causes of action ? or is there in each case, only one cause of action ?

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1 (1821) 4 Bligh 1

NOTES OF INDIAN CASES.

Tribhovandas *v.* **Abdul Ally**, I. L. R. 39 B. 568.

The learned Judge appears to us to have expressed himself too generally when he says that in the circumstances of the case no cause of action survived against the insolvent and that the suit against him ought to be dismissed at once and an *ex parte* decree passed against the estate in the hands of the Official Assignee. It is true that after the vesting order, all the property of the insolvent vests in the Official Assignee, but that does not *ipso facto* put an end to the insolvent's relation to the cause of action on which pending suits against him rest. It is noteworthy that while O. 22 R. 8 provides for the insolvency of a 'plaintiff,' there is no corresponding provision applicable to cases in which the insolvent is a *defendant*. The only rule covering this is O. 22, R. 10 under which it has been held that the Official Assignee can be made a party defendant only in certain classes of suits *i. e.*, where there is a devolution on him of the subject-matter of the suit (see *Miller* v. *Budh Singh* [1] *Punithavelu* v. *Bhashyam Iyengar* [2] *C. E. Grey Official Assignee* v. *Haziri Lal* [3].) Under the law as it stood in 1864 there was not even such a provision and hence Sir Joseph Arnold and his colleagues held that the Assignee has 'no power whatsoever of continuing to defend (an action) in substitution of the insolvent, far less any power of getting himself added as co-defendant together with the insolvent.' *In re Hunt Monnet & Co.* [4]. Even under O. 22, R. 10 C. P. C. it would seem open to the plaintiff to continue the suit against the original defendant alone, in spite of the insolvency, though a decree thus obtained may not bind the estate in the hands of the Official Assignee *Punithavelu* v. *Bhashyam Iyengar* [2]. If however the Assignee is brought on the record under O. 22, R. 10 (whether by the plaintiff or on his own application) the question then arises whether the suit is to be continued *only* against the Assignee or against the original defendant also.

The corresponding rule in Act XIV of 1882 (S. 372) provided for the suit being continued against the Assignee 'either in addition to or in substitution for' the original defendant as the case may require. This qualification has been omitted in the Code of 1908 and the rule now runs substantially

1. (1890) I. L. R. 18 C. 43.
2. (1901) I. L. R. 25 M. 406.
3. (1907) I. L. R. 30 A. 486.
4. (1864) 1 B. H. C. R. 251.

in the same terms as O. 17, R. 3 of the English Supreme Court Rules (except for the requirement of the leave of the Court). Under the English practice, it would seem, that where the suit relates to property which has devolved on the Assignee and the result of the action is not likely to affect the insolvent personally, the Assignee alone is allowed to continue the defence of the suit; and this is probably what led the learned Judge to hold that the suit cannot any longer proceed against the insolvent defendant. But we are not by any means sure whether the language of O. 22 R. 10 (even when taken with S. 146 of the new Code) would enable the Assignee to take steps to set aside an *ex parte* decree passed against the insolvent before his insolvency; and if in spite of the supervening insolvency, the original defendant is to be recognised as having a sufficient *locus standi* to apply to get the *ex parte* decree set aside, we do not see why he cannot be allowed to continue to defend the suit, after the *ex parte* decree is set aside, at any rate when the Official Assignee, for whatever reason it may be, declines to defend the suit. The insolvent is certainly interested in reducing his liabilities as far as possible and protecting his assets, so that he may have the benefit of any surplus that may remain after payment to his creditors and it will not therefore be right to say that after his insolvency he has no interest in any litigation that may concern his property.

Secretary of State for India *v.* **Bapuji Mahadeo**, I. L. R. 39 B. 572.

Whether it would not have been more graceful on the part of Government not to set up the defence of limitation in answer to the plaintiff's claim is another matter; but we cannot help feeling that the present is an instance of a hard case inducing a court to lay down doubtful law. We find it difficult to see how, on the facts appearing in the report, the moneys sued for could be held to have become vested either in the Native Ruler or later on, in the East India Company 'in trust for a specific purpose' as understood in connection with S. 10 of the Limitation Act. The view taken by the learned Judges is certainly at variance with the opinions expressed by the majority in *The Secretary of State for India* v. *Guru Proshad Dhur* [1]. The fact that on several occasions the officers of Government expressed themselves ready to

1. (1892) I. L. R. 20 C. 51 (F. B.)

pay over the amount to the persons entitled won't make them 'trustees' in respect thereof. Acts 25 of 1866 and 5 of 1870 throw no light on the question of limitation. As for *Scott* v. *Bentley* [1], the Vice-Chancellor no doubt describes the admission there as amounting to 'a declaration of trust' but the question before him related only to the jurisdiction of the Court of Equity to deal with the case and for that purpose, it was immaterial whether it was an 'express' trust or only a 'constructive' trust.

Suleman Haji Usman *v.* **Sheikh Ismail** I. L. R. 39 B. 580.

We quite agree that before granting a certificate under S. 92 C. P. C. the Collector or Advocate-General must be satisfied that there is a *prima facie* case for resort to Court; but it seems to us going too far to hold that a doubt felt by the sanctioning officer, as to whether the institution in question is a private institution or a public trust, will invalidate the consent given by him for the institution of the suit, however much he may be convinced as to the necessity for the suit on the merits. The public or private character of religious or charitable institutions is sometimes a nice question and if the Collector or Advocate-General is to be held precluded from sanctioning a suit in respect of an institution, because of his doubts on this point, there will be no means of redress in such a case, for the decision of the Court on the point cannot be invoked except in a suit instituted with such consent. Whether the view taken in *Sagedur Raja* v. *Gour Mohun* [2] that the defect in the certificate in that case only amounted to an 'irregularity' is to be unreservedly accepted or not, it seems to us needless technicality to hold that even when the sanctioning officer has fully applied his mind to the case, his certificate is useless if he is not able to come to a definite conclusion on the *legal* questions involved in S. 92 or is candid enough to indicate his doubts in the certificate.

Parvati Bai *v.* **Bhagwant,** I. L. R. 39 B. 593.

It seems to be the necessary result of the observations of the Judicial Committee in *Lakshman Dada Naik's Case* [3] that a man cannot by testamentary acts exercise the same powers over joint property as he could by acts *inter vivos*; and in the absence of

1. (1855) 1 K. and J. 281. 2. (1897) I. L. R. 24 C. 418.
3. (1880) I. L. R. 5 B. 48.

testamentary *power*, the *object* of the disposition is immaterial. Reference may be made in this connection to observations to the same effect in *Lakshmi* .v. *Subramanya* [1] and *Totempudi Venkataratnam* v. *T. Seshamma* [2].

The Municipality of Ratnagiri *v.* **Vasudeo Balakrishna,** I. L. R. 39 B. 600.

We venture to doubt the correctness of this decision. The plaintiff claimed damages from the Municipality for wrongful dismissal from office, *viz.* on the footing of breach of 'contract', and the judgment does not even refer to cases like *Mayandi* v. *McQuhae* [3]*The President Dt. Board, Malabar* v. *Kantikandram* [4] and *the Municipality of Faizpur* v. *Manak Dulah Shet* [5] which hold that such claims are not covered by the short period of limitation provided in respect of suits for damages for alleged *excess of statutory powers*. On the facts of the case there seems to arise another question to which again we find no reference in the judgment. The order of dismissal was first made on 10-11-1910, but this seems to have been done without hearing the plaintiff and in contravention of an express rule which directed that he should be heard in defence. When this was pointed out to the Municipality, it seems to have given the plaintiff an opportunity for explanation and this, we think, may reasonably be said to have taken away the effect of the previous *ex parte* order so as to give the plaintiff a fresh starting point on the date of the subsequent order passed after hearing the explanation—in which view, the suit was within 6 months of the dismissal. It would be unfortunate if the plaintiff should, in order to escape the bar of limitation, be obliged to rush into court even when the Municipality recognised the mistake in its procedure and expressed itself willing to deal with the matter in due course. The fact that *in form* the final order purports to be not a substantive order of dismissal by itself but merely a re-affirmation of the former order should not be allowed to make any difference in respect of legal consequences.

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1. (1889) I. R. 12 M 490.
2. (1903) I. L. R. 27 M. 228.
3. (1878) I. L. R. 2 M. 124.
4. (1906) 17 M. L. J. 390.
5. (1897) I. L. R. 22 B. 637.

NOTES OF INDIAN CASES.

Prem Nath Tiwari *v.* **Chatarpal Man Tiwari**, I. L. R. 37 A. 638.

In this case, the same view is taken as in *Ramana Reddi* [3] v. *Babu Reddi* [3] *viz.*, that minority is not a ground of exemption from the bar provided by S. 48 Civil Procedure Code. This is by reason of the reference in S. 7 of the Limitation Act to the schedule and does not as pointed out by Mr. Justice Sadasiva Aiyar in *Kumara Venkata Perumal* v. *Velayuda Reddi* [4], involve the exclusion of the other general provisions of the Act.

Qasim Beg *v.* **Mahammad Zia Beg**, I. L. R. 37 A. 640.

No doubt, it is one thing, as Mr. Justice Piggot points out, to say that notwithstanding a colorable deed of sale, a suit for possession may be maintained within 12 years and quite another thing to say that a declaration as to its invalidity may be had though more than 3 years have elapsed from the date of its execution. This is made perfectly clear by the succeeding article (Art. 92). There could be no pretence that under any circumstances, a forged deed could be the foundation of any right; nevertheless that Article provides only 3 years for a suit for declaration that it is forged, thus indicating that actions in respect of deeds are intended to be brought early though framed as suits for declaration. But article 91 being worded as it is, and in the view of our High Court the addition of a prayer as to cancellation not being compulsory under S. 42 of the Specific Relief Act, it is difficu t to see on what legal ground the court can reject the plaint as barred by limitation, if the suit is within 6 years of hostile assertion of title under the deed. This is the view taken in *Nagathal* v. *Ponnusami* [1]. When there is a claim for cancellation, then no doubt Article 91 would apply and then the question would arise whether as held in *Singarappa* v. *Talari Sanjivappa* [2], the existence of circumstances giving rise to reasonable apprehension of injury is not one of the "facts entitling the plaintiff to sue". To say that S. 39 of the Specific Relief Act is subject to the limitation provided in the Limitation Act would seem to be arguing in a circle. The question as to what facts constitute reasonable apprehension is a question of fact in each case.

1. (188) I. L R. 13 M. 44. 2. (1904) I. L.R 28 M. 349=15 M. L. J. 228.
3. (1912) I. L.R. 37 M. 186=24 M. L. J. 96. 4. (1914) 27 M. L. J. 25.

Abdul Hakim *v.* **Karan Singh**, I. L. R. 37 A. 646.

Although the point is by no means clear, we do not think that the view of the learned Judges in this case is right. In the first place the claim for the rescission of the usufructuary mortgage and the claim for damages in respect of the breach of the covenant forming consideration therefor are not we think in respect of the same cause of action. Secondly, O. 2, R. 2 refers only to cases where a party while entitled to more than one relief sues only for one of such reliefs and not to cases where he is entitled to only one relief but sues for another. We do not think that the fact that "a party knew perfectly well what relief he was entitled to and he deliberately omitted to claim the right relief" mattered, seeing that the question was one of pure law.

Kundan Lal *v.* **Jagannath**, I. L. R. 37 A. 649.

This case questions the assumption generally made (see *Kripasindu Sahu* v. *Raja of Kalikota* [1]) that as regards the creditor's right of appropriation, there is no difference between the English Law as laid down in the *Mecca case* [2] and the Indian Law as enacted in S. 60 of the Contract Act. The learned Judges hold that the Indian Contract Act embodies the rule of Civil Law which required the creditor to exercise his option within a reasonable time of the payment. We must confess we see little warrant for this in the section. The section does not either expressly or by necessary implication impose any such limitation as to time. Though it is true that the rule as understood in England is likely to reduce the practical necessity for a rule like that in S. 61 to a minimum, it can by no means be said that there would be no occasion for the application of the rule. Not to speak of cases where parties fail out of sheer ignorance to exercise the option, there must be a large number of cases of persons under disability without any person empowered to exercise the option so as to bind them. The rule of English law is in fact not stated differently.

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1. (1915) 29 I. C. 718.
2. (1897) A. C. 286, 293.

CRITICAL NOTE.

[**Brijnandan Singh** *v.* **Bidyaprasad Singh**, I. L. R. 42 C. 1068 (F. B).]

In spite of the logical weaknesses of the rule and of even occasional dissents from it, it must now be taken as settled law, in all the High Courts, that under the Mitakshara, a mortgage of joint family property by the father is binding in respect of the sons' interests therein *only* if it was made (or believed to have been made) in connection with an 'antecedent debt' or for family necessity. But this rule gives rise to certain anomalous situations when worked with the other well-established rule that as a 'debt,' the transaction is nevertheless binding on the sons (to the extent of the family property) unless incurred for illegal or immoral purposes. A father mortgages family property (under circumstances which do not make the mortgage binding *as such* against the sons) and dies: What is the mortgagee's remedy and what is the rule of limitation governing it?

In the case under notice, the Full Bench have dealt with these questions not on the merits but from a much narrower point of view, *viz.*, whether the earlier Full Bench decision in *Luchman Doss* v. *Giridhar Chowdhury* [1] has in effect been overruled by the later decisions of the Judicial Committee or superseded by subsequent legislation; and they hold that it has not been so overruled or superseded. On the question of limitation, the learned Judges content themselves with laying down that Art. 120 and not Art. 132 will apply to the mortgagee's suit, but they found it unnecessary to decide when time would commence to run in such a case, for the purpose of Art. 120. Even in *Luchman Doss's case* no reasons are given, the opinion of the Full Bench being delivered in the form of a set of categorical answers. So far as other Provinces are concerned, these decisions are not *in themselves* binding and the points above raised, being of general importance, deserve a fuller and freer discussion.

To arrive at the correct answer to these questions, it is necessary to see how the law stands in respect of an action by the mortgagee *during the father's lifetime.* In so far as *Luchman Doss's case* laid down broadly that the mortgagee, purchasing in execution of a decree obtained against the father *alone*, will not be entitled to the sons' shares, it can no longer be accepted as good

1. (1880) I. L. R. 5 C. 855.

law, in view of the decision of the Judicial Committee in *Bhagbut Pershad Singh* v. *Girja Koer* [1]. See also *Nanomi Babuasin's case* [2]. Whether the creditor seeks to enforce a mortgage claim or a mere money claim, he is not, apart from the provisions of S. 85 of the Transfer of Property Act (now, O. 34, R. 1, C. P. C.) *bound* to implead the sons on pain of being necessarily unable to bind their interests otherwise. If the mortgagee sues the father alone within 12 years (under Art. 132) he can effectually sell the *whole* interest of the family in the mortgaged property, though the personal remedy (under O. 34, R. 6, C.P.C.) be barred because of the lapse of 6 years under Art. 116. If the sons should *afterwards* question the execution sale, they can succeed, not on the ground that the suit was not instituted within 6 years—the mortgage being *ex hypothesi* not binding upon them *qua* mortgage—but only by showing that the debt, *even as a debt* was not binding upon them. Why then should it make any difference, if the sons are impleaded along with the father?

It is pointed out in several cases that the *onus* of proof, as to the binding character of the transaction, will differ according as the action is one *by the mortgagee* to enforce the mortgage or *by the sons* to recover property lost to the family in execution of the decree against the father (see *Kishen Pershad Chowdhury* v. *Tipan Pershad Singh* [3], *Chandra Deo Singh* v. *Mata Prasad* [4].) But even accepting this, why should any difference arise, on the question of *limitation*. The sons are impleaded in the mortgagee's suit, not because their shares cannot be sold in their absence, but because they are persons interested in the property (within the meaning of O. 34, R. 1, C. P. C), or because the creditor does not desire that any objections on the score of the character of the debt (on whomsoever the *onus* may lie) should be left to lie over for a future occasion. It seems reasonable to say that 'relief' is asked for only as against the father—the sons' rights being affected only through him—and the question of limitation has therefore to be decided only with reference to him Cf. *Biswanath* v. *Jagdip Narain* [5].

Of course, if on the principle of the prohibition of *voluntary* alienation of an *undivided* share (obtaining in some provinces) the mortgage is to be held either valid

1. (1888) I. L. R. 15 C. 717.
2. (1885) I. L. R. 13 C. 21.
3. (1907) I. L. R. 34 C. 735.
4. (1909) I. L. R. 31 A. 176.
5. (1912) I. L. R. 40 C. at pp. 353, 4.

as a whole or *bad in toto* (*i.e.*, even as regards the father's share), the action cannot succeed as a mortgage action *to any extent*, *i.e.*, even as against the father and the *whole* suit will then be governed by the six years' rule (see per Stanley, C. J. in *Chandra Deo Singh's case* [1]). But, curiously enough, this is not the view taken in Calcutta. That Court seems to allow a mortgage decree in such cases, so far as the father's share is concerned, even when the action is brought after the father's death (see *Kishen Pershad* v. *Tipan Pershad* [2]). If, so far as the father is concerned, the action is allowed to be a 'mortgage action', it would seem to follow that the 12 years' rule would apply to the *whole* action and not merely in respect of the relief to the extent of the father's share. Can it reasonably be contended that even as between the mortgagor and the mortgagee, the mortgagor can plead that the transaction is good only to the extent of his share or that the sons' shares in the mortgaged property can in such cases be made available to the creditor only in enforcement of the *personal* remedy (under O. 34, R. 6) against the mortgagor? Further is it not the right view, that so long as the father's liability is subsisting (whether enforceable under Art. 116 or Art. 132) the creditor's right against the sons subsists too? Does not a "mortgage decree" against the father itself constitute a 'judgment debt' enforceable against the sons, on the principle of the decision in *Periasami Mudaliar* v. *Seetharam* [3]. And if the sons' interest in the family property can be reached by a suit on such 'judgment debt,' it is certainly odd that it should be impossible of being reached by the original action itself.

What then is the effect of the father's death on the creditor's remedy? The *substantive rights*, of parties undergo no change thereby. As observed in *Ramayya* v. *Venkatrathnam* [4] 'the obligation devolves on the son in the condition in which it would be enforceable against the father if he had been still alive.' Is there then any reason for holding that the law of limitation works differently according as the mortgagee institutes his suit during the father's lifetime or after his death? Whatever might have been the position prior to 1908, S. 52 of the New Code seems to us to place the matter fairly beyond doubt. If, as above submitted, the whole property could have been made liable the moment before the father's death—in spite of the lapse of 6 years—the

1. (1909) I. L. R. 31 A. 176.
2. (1907) I. L. R. 34 C. 735.
3. (1902) I. L. R. 27 M. 243.
4. (1893) I. L. R. 17 M. 122.

sons' position in respect of those properties, after the father's death, is declared to be that of 'legal representatives' and the suit against them will therefore be governed by the same rule of limitation as would have applied to the suit had it been brought against the father himself. If, again, in spite of the father's death, the creditor can obtain a mortgage decree to some extent, the reasons above adduced would equally apply here so as to make the *whole* action governed by Art. 132 and not by Art. 120 or Art. 116. Whether the action is brought during the father's lifetime or after his death, it is not one to enforce any 'independent liability' of the sons or one based on 'any cause of action' arising out of *their* acts. It is always one to enforce their father's liability, though directed against property that otherwise would have gone to them, and there is no valid reason for applying at any time a separate rule of limitation so far as the sons are concerned (Cf. *Beck* v. *Pierce* [1], referred to in *Periasami* v. *Seetharama* [2]). If the father's liability has ceased to be enforceable (for instance under Art. 115) the son's comes to an end too, though the period allowed by Art. 120 may not have elapsed, *Abhoyi* v. *Pomanion Ammal* [3]; if that liability is kept up, by acknowledgment or part payment or by judgment, the son's liability continues to subsist too, though he may not be a party to any of those acts. What then is the object or significance of bringing in Art. 120 so far as the sons are concerned, if its operation is to be always controlled by considerations as to the continuance or cessation of the father's liability?

We are not aware of any case in which *two* different articles have been applied against the father and the sons respectively, in an action brought *during the father's lifetime*. Such a course was, so far as we have been able to see, first adopted in *Surja Prasad* v. *Golab Chand* [4], in which the action was instituted *after the father's death*. The same was the case in *Chandra Deo Singh* v. *Mata Prasad* [5]. *In Maheswar Dutt* v. *Kishen Singh* [6]. Brett and Sharfudin, JJ. applied the 12 years' rule in respect of the whole claim, the suit being brought after the father's death; and in *Kishen Pershad Chowdhury's case* [7] Mookerjee and Holmwood, JJ. left the question of limitation open, the suit there

1. (1899) L. R. 23 Q. B. D 316.
2. (1903) I. L. R. 27 M. 243.
3. (1900) 10 M. L. J. 248
4. (1900) I. L. R 27 C. 762.
5. (1909) I. L. R. 31 A. 176.
6. (1907) I. L. R 24 C. 184.
7. (1907) I. L. R. 34 C. 735.

having been brought within 6 years, though the father was dead at the time. The decision of Coxe and N. R. Chatterjea, JJ. in *Sheo Narain Roy* v. *Mokshoda Das Mitra* [1] adds little by way of reasoning.

The question has not, so far as we are aware, been dealt with in the present form in any reported decision in Madras or Bombay. The view taken in the earlier Madras case, that Art. 120 would apply to the remedy as against the sons or that the father's death furnished the starting point for limitation, (see *Natesayyan* v. *Ponnusami* [2]) has been overruled by the decisions in *Mallesam Naidu* v. *Jugala Panda* [3] and *Periasami Mudaliar* v. *Seetharama* [4] We may point out, in passing, that the ruling in the last mentioned case, as to the maintainability of a suit on the Judgment, has now ceased to be operative, by reason of the change introduced by S. 52 of the new Code; for as pointed out by Justice Bhashyam Iyengar himself (in the course of the argument in that case), if the decree against the father could be *executed* against the family property in the sons' hands, a *suit on the basis of that decree* would be barred by S. 47, C. P. C. But the principle there laid down that the same rule of limitation will govern the remedy both against the father and against the son goes a long way to support the views herein submitted.

If the father's death affords no basis for starting the sons' liability afresh, it is equally difficult to find any principle on which it can be held that a right to proceed against the sons accrues from the time when the proceeds realised by sale of the father's share are found insufficient to discharge the debt.

It only remains to add that it would not follow from the views above submitted that there will cease to exist 'any distinction between a case in which a Hindu son is sued on the basis of his pious obligation to pay his father's debts and a case in which a mortgagee of the father seeks to enforce a mortgage against the son by sale of the mortgaged property' (per Stanley, C. J. in *Chandra Deo Singh's case* [5]). The son's right to alienate his undivided share or to become divided from the father (where there is no question of fraud, etc.) will prevail as against a simple contract

1. (1913) 17 C. W. N. 1022. 2. (1892) I. L. R. 16 M. 99
3. (1899) I. L. R. 23 M. 292 (F. B.) 4. (1903) I. L. R. 27 M. 243 (F.B.)
5. (1909) I. L. R. 31 A. at p. 194.

liability of the father or the liability arising under a mortgage not made for a binding purpose but not as against a valid mortgage created by the father.

NOTES OF INDIAN CASES.

Muthu Ramakrishna Naiken v. Marimuthu Goundan :—I. L. R. 38 M. 1036.

This case raised a very interesting point of Hindu Law but we do not think it has been adequately dealt with. Once it is granted that the property is the joint property of the husband and the wife, the conclusion, no doubt, should follow, having regard to the supreme authority conceded to the Mitakshara in Southern India that the property quoad her share is stridhana. As regards the saying of Manu that a wife, a son and a slave have no property and that the property acquired by them belongs to the person to whom they belong, Vijnaneswara is clear that it does not lay down that a wife cannot own property. According to him, it only indicates her dependence. (Commentary on Yajnavalkya Vyavaharadhyaya verse 49 ; Gharpure's translation p. 75). Subject to the right of the husband to use them in time of distress or for maintenance all kinds of property acquired by married women are their stridhana. Apparently, the husband is not bound to return the amounts taken by him if he had no property of his own at the time. Is only this analogy to be applied to the services rendered by the wife to the husband when those services lead to the acquisition of wealth and the husband's right of user in the wife's share in the acquisition limited to occasions of necessity such as are indicated above? Under the Hindu Law, though the general rule is that the husband is not bound to pay the debts of the wife, where however, his maintenance is dependent upon the wife's exertions, as in the case of washermen, cowherds and actors, he is bound to pay them. It is also recognised by most of the text writers that the husband has got greater control on this species of acquisition than others (Smriti Chandrika Chap. XI-16. Vyavahara Madhava S. 94) while Viramitrodaya (Chap. V-2) and Vivada Ratnakara (Chap. XV) would seem to place acquisitions by mechanical arts out of the category of stridhana on the strength of the text of Manu above referred to. The author of Viramitrodaya does not consider that such acquisitions come within Devala's text. He seems to restrict "gains" in his text to gifts. Whatever

the nature of the sole acquisitions of the wife by mechanical arts, it is certainly incongruous to consider acquisitions by the husband with the aid of his wife to belong to both because that is possible only on the supposition that the wife rendered her services with the idea of getting *quid pro quo*. If the proper presumption in the case of joint acquisitions by members of an undivided family is that the property belongs to them as *joint family property*, the proper presumption to make in the case of joint acquisition by husband and wife is that they intended to hold the property in the manner in which a husband and wife hold property under the Hindu Law—namely with a right of user ordinarily and an inchoate ownership in the wife to mature under certain circumstances to maintenance, in others to ownership in whole or in part. *Lakshman Ramachandra* v. *Satyabhama Bai* [1]. It is not certain that the proper presumption to make even in the case of other female members of the family is not similar *Seshayya* v. *Narasamma* [2]. The very position that the widows of the family can participate in the improvement of the family condition which may partly be due to the exertions of the male members of the family and that by acquiescence in the dealings by the male members might have their claims postponed to the claims of creditors, would seem to require an assumption like the one we suggest. It is the duty of the wife to serve the husband and that the husband can forbid the wife from acquiring property by serving others does not seem to admit of doubt. Under the circumstances, the proper presumption to make is, we think, that the services were rendered gratuitously and with no intention of getting any return for them. Under the English Law, when the income of the wife's property goes into the hands of the husband with her knowledge, courts readily draw the inference that a gift of the same was intended by the wife. Whether there should be such a presumption in the case of wife's money here in India or not (Vijnaneswara seems to cast a duty on the husband, in ordinary circumstances, to return the money) there must be a presumption in the case of services that they were gratuitously rendered. Of course the question would be different if the husband recognised her right by either putting her forward as a partner in the trade or purchasing property in her name. This latter circumstance appears to have existed in this case and might justify the actual decision.

1. (1877) I. L. R. 2 B 494, 507. 2 (1899) I. L. R. 22 M. 357.

Kesar Kunwar *v.* **Kashi Ram** : I. L. R. 37 A. 634.

The decision in this case seems to be colored to a large extent by the view taken by the Allahabad High Court that each mortgage furnishes a separate and independent cause of action whether the suit is one for redemption or for sale. Our High Court while conceding that for purposes of sale, the causes of action are separate, would seem to consider it obligatory on the mortgagor to redeem all the mortgages on the land in favour of the mortgagee if the latter should so insist. In the former view, the claim of the mortgagee on his outstanding mortgage would, if at all, be pleadable only as a sort of counter claim to which rules of limitation might be applicable. In the latter view, on the other hand, the mortgage is only pleaded as a defence and in the absence of any rule of limitation extinguishing the right under the mortgage or declared applicable to defences, the defence would always be open. As it is, S. 28 of the Limitation Act applies only to rights to *possession* and there is no general provision that all rights which are barred are extinguished. Similarly, S. 4 bars only institution of suits and has no reference to defences. (See *Lakshmi Doss* v. *Roop Laul*[1] *Ramanasari* v. *Muthusami Naik* [2]).

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1. (1906) I. L. R. 30 M. 169. 2. (1906) I. L. R. 30 M. 248.

NOTES OF INDIAN CASES.

Khimji Vassonji *v.* **Narsi Dhanji** I. L. R. 39 B. 682.

The analysis by Beaman, J. of the English law as to liability for inducing a breach of contract, is marked by his characteristic clearness and freedom of thought; but we do not feel sure as to the soundness of his broad proposition that in an action of conspiracy to procure a breach of contract, malice is an essential ingredient of the cause of action. On the findings of fact come to by the learned Judge, the discussion of the legal question appears however to be almost wholly *obiter*.

Towards the close of his judgment, Mr. Justice Beaman starts another interesting question which however he disposes of very summarily. Referring evidently to the rule stated in the Mitakshara (Ch. II S. xi pl. 27) the learned Judge observes that a promise by a Hindu to give his daughter in marriage creates in the other party only a kind of 'conditional right' and that the latter can have no legal remedy if the girl is given away to a preferable suitor. We beg leave to take exception to the rule stated in this form.

To begin with it seems to us open to question, whether *betrothal* (which was the case before Beaman, J.) can be held to involve the elements necessary in law to constitute a binding *contract*. It is true that for a long time the Bombay High Court has treated a betrothal as a contract which, though it cannot be specifically enforced, may support an action for damages against the parent (see *Umed Kika* v. *Nagindas* [1] and the precedents there cited, *Mulji* v. *Gomti* [2]. In the matter of *Ganpat Narain Singh* [3]; and in *Purushothamdas Tribhuvandas* v. *Nathubhoy* [4], Candy, J. awarded damages against a father who could not complete the marriage because of the girl's unwillingness. We venture nevertheless to doubt if, under a system which allows and in fact requires, marriages to be arranged not by the spouses themselves but by their parents or guardians, a suit in the nature of the English law action for breach of promise can be recognised at all. Even in England, it would appear that an action of the kind could not have been maintained before the 17th century *i.e.* so long as marriage remained exclusively a matter of spiritual jurisdiction (per Bowen, L. J.

1. (1870) 7 B. H. C. R. O. C. 122
2. (1887) I. L. R. 11 B. 413.
3. (1875) I. L. R. 1 C. 74.
4. (1895) I. L. R. 21 B. 23.

in *Finlay* v. *Chirney* [1]). Under the Hindu Law, marriage cannot even now be properly regarded as a matter of temporal contract and it seems to us inconsistent with its true spirit to recognise an action for breach of promise. And when the contract relied on is merely one between the parents (or guardians) of the spouses, there is even less justification for allowing a right of action. Under the English Law, the action for breach of promise is 'strictly personal and though in form, it is an action for breach of contract, it is really an action for a breach arising from the personal conduct of the defendant and affecting the personality of the plaintiff' (per Lord Esher in *Finlay* v. *Chirney* [1]). The considerations applicable to such an action cannot apply to an action between the parents or guardians of the spouses. And even in so far as there may be a 'contract' between the parents or guardians, the principle recognised in *Devarayan Chetti* v. *Muthuraman Chetti* [2], is against the enforcement of such contracts. To attach a penalty, whether by agreement or by law, to the breach of the contract, is to create in the parents a pecuniary interest in the marriage of their children, because of the probable desire to escape the penalty. Green, J. in *Umedkika's case* [3], relies on the passage in the Mitakshara as an authority in support of the claim for damages in such cases; but this, as we shall presently show is reading too much into that text.

The rule of Hindu Law in question is laid down by Yajnavalkya first in Ch. I. V. 65 and later Ch. II. V. 146. The first text provides 'Once is a damsel given; he who withholds her (after such gift) shall incur the punishment of a thief; but he may so withhold her if a worthier bridegroom offers.' It is fairly clear from the context that the text deals with the ceremonial act of giving that precedes the marriage rite and has no reference to any 'contract' to give in marriage. (see observations of Sundara Aiyar, J., on the previous verse, in *Ranganaiki Ammall* v. *Ramanuja Aiyangar* [4]). The penalty provided for improper retraction is criminal punishment and not civil liability and the exemption also is only from such punishment (Cf. also the next verse which lays down the punishment for a man who gives a girl in marriage without disclosing her defects, for one who abandons a girl (after receiving her in gift etc.) In the corresponding rule in Narada, the privilege of retraction would seem to be limited to the

1. (1888) L. R. 20 Q. B. D. 494.
2. (1912) 24 M. L. J. 310.
3. (1870) 7 B. H C. R. O, C. 122.
4. (1912) I. L R. 35 M. 728.

unapproved forms of marriage. Adverting to the subject again in Ch. II. V. 146 Yajnavalkya adds that the withholder' should also make good the expenditure together with interest' *i. e.*, the expenditure incurred by the bridegroom or by his father or guardian. From the comment of Vijnaneswara on this text it would appear as if this liability to make good the expenses is not limited to cases in which the retraction is without proper cause (See Ch. II S. XI pl. 28); and anyhow there is nothing in the provision either resembling an award of damages for breach of contract in the sense of damages for loss of prospect, loss of reputation, personal suffering etc., or negativing liability for such damages where the breach is due to the appearance of a preferable suitor.

Joharmal Ladhooram *v.* **Chetram Harising**; I. L. R. 39 B. 715.

We drew attention on a former occasion to some of the legal aspects of what are called joint family firms (29 M. L. J. Notes of Indian cases p. 14). The decision under notice lays down substantially the same views as there submitted, in respect of the liability of the members of the family for the firm's debts. We may in this connection invite attention to a recent decision of the Madras High Court which deals with another aspect of the matter *i. e.*, where a joint family is interested in a partnership comprising outsiders as well. *Ramanathan Chetti* v. *Yegappa Chetti* [1].

Kanaran *v.* **Churutha** I. L. R., 38 M. 954:

In this case, the question was whether a simple mortgagee was entitled to sell the improvements effected by a tenant introduced into the land by the mortgagor after the date of the mortgage. In effect, the question was, whether a purchaser in execution of a decree on the mortgage would be bound to pay compensation for the improvements effected by such a tenant before he evicts him. If he would be bound, the mortgagee would not be entitled to sell them; if he would not be, it would be otherwise. Section 5 of the Malabar Compensation for Tenant's Improvements Act declares the right of every tenant to compensation for improvements on ejectment. It does not say who is liable to pay, apparently because the legislature intended that whoever the

[1] (1915) 30 M. L. J. 241.

plaintiff, compensation should be paid provided the defendant is a *tenant* within the meaning of the Act. Except, therefore, in so far as the definition of the word "tenant" imposes any limitation, all persons ejecting are liable to pay compensation. Section 3 includes within the definition of that term not only a person who is a lessee, sub-lessee, mortgagee or sub-mortgagee, but also one who in good faith believes himself to be such. What is the exact signification of these words? Is the *formal* validity or belief in the formal validity of the lease all that is required?. Don't they also connote that the person granting the lease should have the power to grant it or should be believed to possess that power. It is impossible to say what the judgment in this case decides on this point. The only point on which the judgment seems to be clear is that the liability to pay the compensation is not restricted to the lessor but whether the learned Judges agree with Sadasiva Iyer, J. and hold that in the particular case the lease being one for a short period, the lease was good or at least was such that the tenant might have in good faith believed that it was good or whether they go further and hold that if the tenant is in fact a lessee or believes that he is in fact a lessee, he would be entitled, it is not clear. The question when it arises, we are afraid, will have to be decided without any guidance or light from this judgment. Their Lordships have not at all explained the significance of the words " in good faith believing to be lessee". Do they signify no more than "*bona fide* intention of attorning and paying rent to the person entitled." This latter clause may apply to property subject to mortgage; it is therefore no doubt just possible that the earlier part of the section also was intended similarly to apply. Whatever the construction that comes ultimately to be adopted, the language of the section can, by no means, be said to be happy.

Mohideen Bee v. **Syed Meer Sahib** I. L. R. 38 M. 1099.

In so far as this case decides that Article 123 is applicable to a suit by a Mahomedan co-heir for his share it is opposed to the Full Bench judgment in *Khadersa Hajee Bappu* v. *Putten Vittil Ayissa Ummah* [1] and seems to be insupportable.

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1. (1910) I. L. R. 34 M. 511.

NOTES OF INDIAN CASES.

Pranjivandas *v.* **Ichharam** I. L. R. 39 B. 734.

This case raises an interesting question of Hindu Law. In a joint Hindu family consisting of several branches, each branch in turn having several members, some members, from different branches, become divided and walk away with their shares. The rest continue joint and there happen of course the usual changes due to subsequent births and deaths in the family. If, then, a division is to be effected in the family, what are the principles on which the shares of the various members are to be fixed?

With reference to the *property* to be divided, it is the settled rule (subject to a few exceptions as to exclusion, misappropriation, &c.) that it must be taken *as at the date of the division.* The learned Judges in this case apply the same principle to the calculation of shares as well, ignoring all past events. In doing so, they depart, as they themselves recognize, from the method adopted by the Madras High Court in *Manjanctha* v. *Narayana* [1], the point of difference arising out of the manner in which the *per stirpes* rule is to be worked. The Madras case held that in assigning shares to each branch in the new division, the allotments made to the members of that branch in the former division, should be taken into account, so as to secure equality of division as far as possible. We must agree with the Bombay Judges that this attempt at securing equality is unsupported by any textual authority or legal principle and that many instances may be put in which the method applied in the Madras case would lead to manifestly inequitable results. There is also much force in the Bombay criticism of the theory (suggested in the Madras case) of a final 'mental division' between the branches for certain purposes, while recognising for other purposes (including survivorship between the branches) the *continuance* of the joint family (as distinguished from a reunion). We are, however, unable to agree that the principles laid down in *Appoovier's case* [2], as to the characteristics of a joint family, necessarily militate against the view taken in *Manjanatha* v. *Narayana* [3]; for the latter gives a kind of definiteness only to the shares of the *branches* and not to those of individual members. But it must be admitted that the Bombay view better accords with

1. (1882) I. L. R. 5 M. 362. 2. (1866) 11 M. I. A. 75.
3. (1882) I. L. R. 5 M. 362.

the spirit of the notion of a joint family, whose continuance, in spite of the partial division, is assumed in both the cases.

In so far as reliance is placed in both the decisions on the law considered to be respectively applicable, in the two Presidencies, to the analogous case of a division among 're-united' co-parceners, we venture to doubt if the texts of the Smriti Chandrika or the Mayukha dealing with this matter, really afford any help in the solution of the present question. The point of difference between the two works, on that subject, arises out of the difference in their respective views as to the true nature and effect of 're-union.' The Mayukha allows re-union among all persons who may be parties to a division see also the Viramitrodaya Ch. 4 S. 3 while the Chandrika, putting a narrow construction upon Brihaspati's text, holds that a re-union is possible only among the three specified relations and here, it accords with the view of Vijnanesvara (Mit. Ch. II. S. IX. p. 3) and Jimutavahana (Dayabhaga Ch. XII. p. 4). As to the effect of a re-union, the Mayukha seems to regard the re-united members as constituting a 'joint family', a partition amongst whom will be governed by the same rules as apply to an ordinary partition effected for the first time; but the Chandrika deals with the new status rather as a contractual relation, with certain special incidents and provides that in a partition between the re-united members, the shares shall correspond to the share capital (so to say) brought in by each member at the re-union.

We may point out that the Smriti Chandrika view as to the effect of re-union has not been accepted by the Madras High Court in *Kristraya* v. *Venkatramayya* [1] followed in *Narasimmacharlu* v. *Singaramma* [2] and if the re-united members are to be regarded as 'co-parceners,' it would be introducing a *new* kind of co-parcenary, to hold that in the event of a division amongst them, it should be on principles different from those applicable to an ordinary co-parcenary under the Hindu Law (See Observations in *Jogeswar Narain Deo's case* [3] against introducing a new kind of survivorship).

It is true that the text of Yagnavalkya as to division *per stirpes* (Ch. II. 121) has reference only to an ordinary general partition but all the commentators seem to agree that that

1 (1903) 19 M. L. J. 723, 2. (1909) 19 M. L. J. 719.
3. (1896) I. L. R 23 C. 670 s. c. 6 M. L. J. 75.

text applies to a second division also, between re-united co-parceners. And taking it with the text of Manu (Ch. 9 V. 210) which ordains equality of partition even amongst re-united co-parceners, it seems reasonable to hold that the texts justify a '*per stirpes* equality' in the second division and that there is no warrant for 'moderating' this, as it were, by reference to the allotments made at the first division.

Subramanya v. **Balasubramanya**: I. L. R. 38 M. 927.

The Judgment of the Full Bench in this case removes the hardship that used to be caused by the case in *Dorasami* v. *Venkataseshayya* [1] without any apparent compensating advantage. The new Civil Procedure Code has removed what little foundation there was for the older view. On the judgment of the Full Bench two points strike one. The first is whether the rule would hold good when both the mortgages have fallen due and can be sued upon. The case under consideration was one of that sort though no reference is made to that fact. Apparently no importance was attached to it. In the case of successive leases it has been held that though each lease furnishes a separate cause of action, one action should be brought for the whole amount if at the time of the suit, the rent for more than one year has accrued due *Shanmugam Pillai* v. *Syed Ghulam Ghose* [2]. The second thing is, would the rule adopted by the Full Bench *viz.*, that each mortgage furnishes a distinct cause of action justify the reservation of the claim on the second mortgage when a suit is brought on the first? We fancy not for the second mortgagee is certainly a necessary party to the suit on the first mortgage and is bound to have his claim provided for in the decree. It need hardly be said that this judgment leaves unaffected the other rule laid down in *Dorasami* v. *Venkataseshayya* [1] that the mortgagor is bound to redeem all the mortgages existing on the property in favour of the mortgagee.

Kimber v. **The British India Steam Navigation Co., Ltd.**, I. L. R. 38 M. 941.

In this case, following the judgment of the Privy Council in *Chartered Bank of India Australia and China* v. *British India*

1. (1901) I. L. R. 25 M. 108. 2. (1903) I. L. R. 27 M. 116.

Steam Navigation Co. [1] their Lordships declined to follow *Shaik Mahomed Rawuther* v. *British India Steam Navigation Co.* [2]. As Mr. Justice Tyabji rightly points out, the judgment in the latter case is not a Full Bench judgment. Anyhow, the decision of the Privy Council on the direct point involved though on an appeal from another part of the King's Dominions must bind the Indian Courts. His Majesty in Council is one tribunal whatever the quarter from which the appeal comes.

Yellammal v. **Ayyappa Naick** I. L. R. 38 M. 972.

Though the term "movable" in Art. 29 would seem to include a debt (see S. 3 of the General Clauses Act) and the Full Bench in *Chidambaram Pattar* v. *Ramasami Pattar* [3] has seen nothing incongruous in applying the word *possession* to debt, the close affinity between the Civil Procedure and the Limitation Acts and the *a priori* likelihood of the use of the term in both the Acts in the same sense predisposes one in favour of the view taken by the Judges in this case which has the additional recommendation of giving the word its natural meaning.

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1. (1909) A. C. 369. 2. (1908) I. L. R. 32 M. 95.
3. (1903) I. L. R. 27 M. 67.

NOTES OF INDIAN CASES.

Drigpal *v.* **Kallu:** I. L. R. 37 All. 660.

Referring to the provisions of S. 5 of Act XIV of 1859 (which corresponds to Art. 134 of the present Limitation Act) Lord Cairns said "Their Lordships cannot fail to observe that the provisions of this section are of an extremely stringent kind. They take away and cut down the title which *ex hypothesi* is a good title of a *cestuique trust* mortgagee, &c.***. They cut down that title as regards the number of years that the person would have had a right to assert it; from a very great length of time, sixty years, they cut it down to twelve years. It is, therefore, only proper that any person claiming the benefit of this section should clearly and distinctly show that he fills the position of the person contemplated by this section as a person who ought to be protected." *Radanath Doss* v. *Gisborne* [1]. The change of language in Art. 134 does not in any way affect the force of their Lordships reasoning. We may, therefore, take it that even under the present Act the burden of proving the requisites necessary for claiming the benefit of the article is on the defendant. Observations to the contrary in this case are opposed to their Lordships' view and must be disregarded. (See *Muthu* v. *Kambalinga* [2], *Veerabadra Tevan* v. *Veerappa Tevan* [3], *Vythilingam Pillai* v. *Kuthirvatta Nair* [4], The first requisite according to their Lordships for the application of the article is that the defendant should be a purchaser, that is to say, one that not merely purchases a mortgage as mortgage but one that purchases that which is *de facto* a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title. Their Lordships expand the same idea by referring to the averments necessary to constitute a plea of purchase for value. The very first averment in such a plea is that the person selling was either seized or alleged that he was seized for an absolute title, and then it goes on to say that being so seized or alleging to be seized, he contracted to sell and did sell and convey that absolute title asserting it to be such to the purchaser who paid the money for that which was thus sold. A person that purchases with the knowledge that the seller has not the title which he purports to convey could not be said either to believe that full title passes to him or to pay for the full title. The

1. (1871) 14 M. I. A. 1
2. (1889) I. L. R. 12 M. 316.
3. (1906) I. L. R. 29 M. 501.
4. (1912) 16 I. C. 609.

reasoning of their Lordships it will be noticed is not based on the words "in good faith" which are now deleted but on the word "purchaser". The omission of those words can justify at best only the letting in of people with constructive notice of the defect of title *Pandu* v. *Vittu* [1]. The retention of those words would have excluded a number of persons who may have honestly believed in the title but for want of due care and caution (See Sec. 3), might be unable to take the benefit of the article. The case where both the parties know the source of title, for instance in the not unfamiliar case of mortgages by conditional sale but believe on a mistaken construction of the document that the title of the vendor has become absolute, is somewhat on the line but we should fancy that it would, notwithstanding protestations of the parties to the contrary, be only a case of assignment and Art. 148 would apply. The alteration of the word, "purchase" into "transfer" designed as well-known to neutralise the effect of *Abhiram Goswami* v. *Shyamacharan Nandi* [2] cannot have the effect of also reversing the whole course of decisions on the construction of the article. Such a violent change of policy would have been more clearly indicated if really meant. (See 3 L. W. 19). Even apart from the history behind it, the words of the article "property mortgaged and afterwards transferred by the mortgagee" could only apply to *actual dealings* with the *property* mortgaged and not to dealings *in fact* with the *mortgage* though ostensibly with the *property*. The instance put by us above would on the parties' own showing be a case of dealing with the *mortgage* though they protest that it is a dealing with the *property*.

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1. (1894) I. L. R. 19 B. 140. 2. (1909) I. L. R. 36 C. 1003.

NOTES OF INDIAN CASES

Abdul Ghafer *v.* **Nur Jahan Begam** : I. L. R. 37 All. 434.

The Allahabad High Court had to consider in several cases recently, the proper article of limitation applicable to suits brought by one of the heirs of a deceased Mahomedan against his co-heir for his share of the money realised by the latter out of the debts due to the estate. *Masiuddin* v. *Imtaz Unnisa* [1], *Amina Bibi* v. *Nagin Unnisa Bibi* [2], *Parsotam Rao Tantra* v. *Radha Bai* [3]. Their Lordships uniformly applied Art. 62 of the Limitation Act. Such suits ought, we think, to be carefully distinguished from suits for partition of movables belonging to the estate which are governed according to the Madras Full Bench case in *Khaderesa Haji Bapper* v. *Putter Vittil Syissah Ummah* [4], by Art. 120. The money realised by one of the co-heirs is not money belonging to the estate though it is money representing the estate. The movable property belonging to the estate is the debt and not the money recovered. In the absence of a succession certificate payment to one of the co-heirs may not at all bind the other co-heirs and adoption of the payment by the other co-heirs is entirely optional with them. This aspect of the case seems to be overlooked in *Addul Rahiman* v. *Pathummal Bibi* [5]. Again, though action for a share of the money realised may be barred, it may well be when a suit for partition is brought by the member who has made the collection or for the matter of that even when he is a defendant, his collection might be taken account of in distributing the property See *Nooroodin Saheb* v. *Ibrahim Saheb* [6]. Again in this country, where Mahomedan co-heirs live together and one of them acts as manager, the court may well deal with him on the footing of an agent, or *de facto* guardian, according as the other heirs are majors or minors, liable to account *Parsotam Rao Tantra* v. *Radha Bhai* [7]. It may even be that when one co-heir receives the money as *co-heir* on behalf of himself and the other heirs, his further possession of the amount should be treated as adverse only on a refusal by him to account

1. (1914) I. L. R. 37 A. 40.
2. (1915) I. L. R. 37 A. 233.
3. (1915) I. L. R. 37 A. 318.
4. (1910) I. L. R. 34 M. 511.
5. (1915) 30 M. L. J. 104.
6. (1916) 20 M. L. J. 964.
7. (1915) I. L. R. 37 A. 313.

for the same. See *Marian Biviammal* v. *Kadir Mira Saheb Tangan* [1], and *Abdul Rahiman* v. *Pathummal Bibi* [2]. It must at least be open to them to ratify his act on their behalf and call upon him to account for the amount got. Again, as held in *Subbarao* v. *Ramarao* [3], a suit for account is not governed by Art. 62; wherever an accountable relationship is established, the application of that article would be excluded. Where no such accountable relationship exists, we think the Allahabad High Court is right in holding that that article would apply. We are not quite certain, however, that the case under review was not a case of such accountable relationship. Though *Mahamad Rissat Ali* v. *Hasain Banu* [4] is not an authority for holding that Art. 62 is not applicable to a case like the present it is an authority for the position that an action against a person who takes possession of the movable property of a deceased man by another claiming as heir is not an ordinary action for specific movables against a person wrongfully taking possession to which Art. 49 would apply but an action to establish title as heir governed by Art. 120. That could be only on the ground that defendant's possession is that of an executor *de son tort* liable to account to the rightful heir. Both trustees *de son tort* and guardians *de son tort* are known to law and are subject to all the liabilities of trustees and guardians *de jure*. The position of the defendant in the case under review was one very closely resembling that of an executor. The defendant had taken out a succession certificate which gave him an exclusive title to collect the debt and had collected the debt and S. 25 of the Succession Certificate Act contemplates a liability to account, though it cannot be said to impose it.

Ali Haffiz *v.* **Abdur Rahaman** I. L. R. 42 C. 1135.

We do not quite follow the learned Judge when, with reference to *Budh Singh* v. *Niradbaran Roy* [5] and *Budree Doss* v. *Chooni Lal* [6], he says, "I am quite in agreement with them in so far as they decide that relief such as is asked for here against defendant No. 2 does not come within the scope of S. 539 of Act XIV of 1882 * * * * but I see no reason why * * * * * * he

1. (1915) 29 I. C. 275.
2. (1915) 30 M. L. J. 104.
3. (1915) 30 M. L. J. 341.
4. (1893) I L. R. 21 C. 157 (P.C.)
5. (1905) 2 C. L J. 431.
6. (1906) I. L. R. 33 C. 789.

should not in this suit be declared to be a trustee of the trust property and be directed to convey the property." So far as we can gather from the report, the relief asked for against defendant No. 2 was a declaration of the invalidity of the alienation in his favour and an order that he and the trustee should deliver up the conveyance for cancellation and execute releases, etc.

Taking the question of 'reliefs' there is little difference in substance between those which, in the cases cited were held to fall outside S. 539 and the one suggested by the learned Judge *viz.*, a direction to the alienee to convey. If the decisions merely rested on the ground that, as the plaintiffs suing under S. 539 have themselves no title to possession, they cannot get a decree in ejectment, it may be another matter. But in so far as they proceed on the footing that that section warrants any reliefs or directions being given, only of the nature and to the extent specified in the sub-clauses of the section, it cannot be consistently held that a declaration of invalidity in respect of a particular alienation or a direction to the alienee to reconvey to the trustee will be covered by that section. The learned Judge evidently holds that though the declaration and direction referred to by him are beyond the scope of S. 539, there is nothing to prevent a prayer for such relief being combined with a suit under that section, and in support of this view he relies on O. 1, R. 3, C. P. C. (old S. 28).

On this question of joinder we are not sure if the rules of O. 1 which were intended to apply to cases in which the suit is, as ordinarily happens, brought by a person to vindicate some right of his own, can be held to govern suits under S. 92 (old, 539.) And this will apply to the reliance placed by Seshagiri Aiyar, J. in *Raghavalu Chetty* v. *Pellati Sitamma* [1] on R. 10 of O. 1. As for arguments of convenience and expediency, they seem to be advanced on both sides. The objection to a joinder of the kind in question would really seem to rest not on any particular rule but on the ground that in creating a special procedure and an exclusive jurisdiction under S. 92, the legislature is not likely to have intended to allow the inclusion in such suits, of questions which do not strictly relate to the 'execution' of the trusts or matters which under the ordinary law may be agitated in courts of other grades.

1. (1914) 27 M. L. J. 266.

The law is at present in a state of regrettable uncertainty as to the place of alienees in suits under S. 92 C. P. C. In the Legislation of 1908, the conflict of cases as to the question of the removal of trustees was set at rest, but the legislature has not dealt with the present question, though judicial opinion was as sharply divided on this point also We must, however, point out that the argument based on the analogy of the English decisions under Romilly's Act cannot have much weight in future, for that has been expressly departed from by the legislature, in including 'removal' under S. 92. We may also add that many cases like *Zafaryah Ali* v. *Baktawar Singh* [1], *Sheoratan Kunwari* v. *Ram Pargash* [2], *Dasondhay* v. *Muhammad Abu Nasur* [3], *Lakshman Das Parashram* v. *Ganpatrav Krishna* [4], *Kariz Hassan* v. *Sagun Balkrishna* [5], though sometimes referred to in this connection, have really no bearing on the question under consideration; for rightly or wrongly, the claims were there made and the reliefs awarded on foot of the personal rights of the plaintiffs and quite independently of S. 539. Nor is any analogy afforded by decisions that only hold that suits *by trustees* to recover possession of trust properties are outside that section. Cf. *Vishvanath Govind Deshmane* v. *Rambhat* [6], *Shri Dhundiraj Ganesh Dev* v. *Ganesh* [7], *Muhammad Abdul Majid Khan* v. *Ahmad Said Khan* [8], *Ayatunnessa Bibi* v. *Kulfu Khalifa* [9]. Amongst the relevant cases, the Madras view seems to be that alienees should not be made parties to suits under S. 92 (Cf. per Wallis, C. J. in *Raghavalu Chetti* v. *Seetamma* [10]. That was also the view indicated by Mookerjee, J. in *Budh Singh's case* and by Woodroffe, J. in *Budree Doss's case*. The inclination of the Allahabad High Court was also at one time, in the same direction See *Huseini Begam* v. *The Collector of Moradabad* [11]. In *Sajedur Raja Chowdhuri* v. *Gour Mohun* [12], Banerjee and Rampini, JJ. went to the other extreme and held that the general words of the last sub-clause in S. 539 will cover a claim to recover possession from third parties to whom trust properties

1. (1883) I. L. R 5 A. 497.
2. (1896) I. L. R. 18 A. 227.
3. (1911) I. L. R. 33 A. 660.
4. (1884) I. L. R. 8 B. 365.
5. (1899) I. L. R. 24 B. 170.
6. (1890) I. L. R. 15 B. 148.
7. (1893) I. L. R. 18 B. 721.
8. (1913) I. L. R. 35 A. 459
9. (1914) I. L. R. 41 C. 749.
10. (1914) 27 M. L. J. 266.
11. (1897) I. L. R 20 A. 46
12. (1897) I. L. R. 24 C 418.

may have been improperly alienated. This view however has not found general acceptance.

Recent decisions tend to something like an intermediate view. While recognising that no relief, whether by way of possession or by way of declaration, can be awarded in such suits as against alienees or trespassers in possession, they hold that they would be proper parties to such suits, so that the Court may be enabled effectually to adjudicate on the character of the property in their possession or the propriety of the alienation under which they claim. Cf. *Ghazaffar Hussain Khan* v. *Yawar Husain* [1] *Manohari* v. *Muhammad Ismail* [2] *Collector of Poona* v. *Bai Chanchal Bai* [3] and per Seshagiri Aiyar, J., in *Raghavalu Chetti's case* [4]. This immediately raises the question whether the finding arrived at in the suit under S. 92 will be *res judicata* in any subsequent suit for possession by the trustee against the trespasser or alienee. In view of the difficulty in holding that the trustees—plaintiffs in the later suit—are persons 'claiming under' the plaintiffs in the earlier suit and in giving a conclusive effect to 'findings' against which as mere findings the trespasser or alienee could not have appealed, there is a natural hesitation to apply the rule of *res judicata* in such cases see however *Manohari* v. *Muhammad Ismail* [2]. It is also for consideration whether the rule laid down in *Ramados* v. *Hanumantha Row* [5] as to the conclusiveness of a scheme will have any and what bearing on this question.

Tarakumari *v.* **Chaturbhuj Narayan Singh** I. L. R. 42 C. 1179 (P. C.)

There was practically no dispute about the facts in this case, but the courts have successively differed as to whether or not they warrant an inference of an 'intention to become separate.' We must, with all respect, confess our inability to see in the extracts cited from the Judgment of the High Court, any fallacy of the kind with which their Lordships seem to charge the learned Judges of the High Court, *viz.*, a notion that 'there could have

1. (1905) I. L. R. 28 A. 112.
2. (1911) I. L. R. 33 A. 752.
3. (1911) I. L. R. 35 B. 470.
4. (1914) 27 M. L. J. 266.
5. (1911) I. L. R. 36 M. 364.

been no complete separation of the joint family as the impartible estate had not been partitioned.' We would also venture to say that to the Indian mind, the circumstances relied on in their Lordships' judgment seem by no means convincing proof of an intention to become divided, in the sense, as the High Court put it, of 'sacrificing the expectancy to succeed" to the impartible estate, by (or on the analogy of) survivorship. The non-existence of co-parcenary rights in the impartible estate or the recognition of the Zemindar's right of alienation does not bear on the question of the joint character of the *family*; and in view of the decisions of the same Board in the *Belgaum case* [1] and the *Devara Kota maintenance case* [2] the present ruling, it seems to us, cannot be regarded as an authority except on the facts of the particular case.

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1. (1897) I. L. R. 20 M. 256 P. C. 2. (1900) I. L. R. 24 M. 147 P. C

NOTES OF INDIAN CASES.

Majidmian *v.* Bibisaheb I. L. R. 40 B. 34.

Though the right of a widow, under the Muhamadan Law, to *retain* possession of her husband's estate till her dower-debt is discharged, has long been recognised, the incidents of that right seem to remain as yet unsettled; and the decisions collected in the Judgment of Tudball J. in *Ali Buksh* v. *Allahdad Khan* [1] afford striking proof of the prevailing confusion and conflict of case-law on the point. The basis on which the right was originally founded has now nearly ceased to be given effect to, *viz.*, the general right under the Muhamadan law of *any* creditor of a deceased person to help himself to the property of the deceased with a view to repaying himself—and the matter accordingly falls to be decided not so much by the logical application of definite principles as by the interpretation of particular *dicta* to be found in reported cases. The observations of the Judicial Committee in *Bebee Bachun's case* [2] are clear enough, so far as they go, but they do not exhaust all aspects of the question. Neither the analogy of a lien nor that of a mortgage (whether simple or usufructuary) is complete and the conception of the right as a 'personal' privilege has proved equally misleading. On the question of 'transferability', some confusion has arisen from the omission to take note of the distinction between a transfer of the 'property' itself by the widow and the transfer of the 'right to remain in possession' as incidental to a transfer of the dower-debt. On the point of heritability, the cases do not seem to have always kept in view the difference between the right of the widow's heirs to sue *for the first time* to get possession on the strength of her claim to dower and their right to get back the possession of which they or the widow might have been deprived. As to the origin of the widow's possession, it does not seem necessary to show that it was *with the consent of the heirs*; only it should not have commenced in fraud or by force. As to the remedies of the widow in possession to recover her dower, reference may be made to *Mohammad Sharafat* v. *Wahida Sultan Begum* [3]. We are, however, not sure if one of the assumptions made in the case under notice can be regarded as beyond question, *viz.*, that the widow or her heirs may be entitled to continue in possession even after a suit for the dower has become barred.

1. (1916) I. L. R. 32 A. 551. 2. (1871) 14 M. I. A. 377.
3. (1914) 19 C. W. N. 505.

Madappa Ganappa *v.* **Joki Ghosal**; I. L. R. 40 B. 60.

While there are several cases which hold that a claim though barred may be available as an equitable set-off in a *suit*, a recent decision of this Court has laid down a different rule, *Vyravan Chetti* v. *Daivasikamani* [1]. As regards, *execution*, there are two classes of cross-claims, provided for respectively by Rr. 18 and 19 of O. 21 Civil Procedure Code. Where the claims are under *different* decrees, there can be, it would appear, no set-off with reference to a barred decree for R. 18 can apply only if the two decrees are capable of execution at the same time, *i. e.*, it is only if steps had been taken in time, that the two decrees would have operated as mutual satisfaction *pro tanto*. Where the cross claims arise under the *same* decree, the party entitled to the smaller amount has no right to take out execution and no question of limitation can therefore arise so far as he is concerned. As for the direction to enter up satisfaction, this seems to be a direction to the Court and in any event, it is not subject to the limitation prescribed by Art. 174. The rule proceeds to say that the party entitled to the larger sum can take out execution only for the difference between the two amounts.

The principle is simple enough, but difficulties may arise in its practical application, in cases where the amounts are ascertained at different times. The solution will depend upon the manner of applying Art. 182 to cases in which a decree is 'partly preliminary and partly final.' This is a complication introduced by the new Code. What is the starting point for execution of that portion of a decree which is 'final.' There can be no doubt that it *can* be executed as from the date of its passing; if so, why not start limitation immediately and if this is to be the rule, we venture to doubt if the passing of a further final decree several years later in respect of the other party's claim, can resuscitate the right under the original final decree so as to bring the case within O. 21, R. 19.

Nazaralli *v.* **Babamiya** I. L. R., 40 B. 64.

This case illustrates the rule that it is not every administrative prohibition that will invalidate a sub-contract. The prohibition against sub-letting must be based on statutory authority, so as to have the force of law, before a violation of it can bring a case under S. 23 of the Contract Act.

1. (1907) I. L. R. 31 C. 329. (P. C.)

NOTES OF INDIAN CASES.

Kameswaramma *v.* **Venkatasubbarao**: I. L. R. 38 M. 1120.

Ordinarily a decree for debt obtained against the father before partition is not executable after partition against the son and the family property allotted to him. The foundation of the Court's jurisdiction to execute the decree against the family property being the father's power to alienate for his debt, on that power ceasing to exist, the Court's jurisdiction also must cease and the only remedy open to the creditor is, we think, to sue the sons upon the decree-debt if he is in time for it. Where the decree is against the father in his representative capacity or the partition is fraudulent, other considerations apply and the decree would be executable against the family property notwithstanding the partition. What exactly will constitute fraud which will vitiate a partition may be a point of some nicety and has not been the subject of judicial consideration. It is doubtful if a *real* partition, the allotment being *fair*, can be ignored merely on the ground that the object of the partition was to defeat the execution of the decree.

Meenakshi *v.* **Muniandi Panikkan**: I. L. R. 38 M. 1144.

If the Mitakshara provided rules of inheritance for only specified kinds of married woman's property and left other cases unprovided for, there would then have been scope for the application of the rules of equity and good conscience. But, as it is, Vijnaneshwara, having defined stridhana so as to include all kinds of property belonging to a woman the rule of inheritance prescribed by him should be followed however unmeritorious the particular mode of acquisition might be. In the line so prescribed, neither the illegitimate son nor the illegitimate daughter find a place. By prostitution a woman does not cease to be a married woman and as such the acquisition of a married woman who has turned prostitute will have to devolve according to the rules prescribed for the devolution of the property of a married woman. The case of a woman who is neither a married woman nor a maiden but a prostitute, is one unprovided for and in such a case, the Court may well have regard to some of the equitable considerations referred to in the earlier cases though the foundation of those considerations requires more elaborate consideration than has been given them.

Muthukaruppan Samban *v.* **Muthu Samban**: I. L. R. 38 M. 1158.

Having regard to the fact that sales of "reversions" as "intangible property" require registration irrespective of their value though it cannot be said that they are incapable of possesssion (See *Inasi Pillai* v. *Sivagnana* [1]) we do not think that cases like *Palani* v. *Selambara* [2] can be looked upon as safe guides for the construction of S. 54 of the Transfer of Property Act. While we agree that *Sibendra Pada Banerjee* v. *Secretary of State for India in Council* [3] went too far if it decided (which is doubtful) Cf. *Sonai Chutia* v. *Sonaram Chutia* [4] that a property in the prior occupation of the vendee cannot be sold by delivery of possession, and that for such delivery it may not be necessary "to have recourse to the expedient of quitting the property at one moment and entering upon it at another", and "appropriate acts or declarations" on the spot may be sufficient (Cf. *Shaik Ibhram* v. *Shaik Subman* [5], *Humera Bibi* v. *Naimunnissa Bibi* [6]. Ex parte v. *Fletcher* [7]), we do not think that mere request by the vendor to the vendee to remain in possession in the capacity of vendee not made on the premises, would be sufficient. In cases where the prior possession is under a registered document which cannot be validly cancelled without writing (*See* S. 92 of the Evidence Act, Proviso 4), we should think that even the quitting of possession by the mortgagee or the lessee and then entering upon it would be insufficient. Publicity being one of the objects of insisting on delivery of possession, courts should so construe the section as to secure the largest amount of publicity to the transaction without getting into metaphysical niceties about "possession."

On another point decided in the case also, we entertain doubts. Though S. 4 of the Transfer of Property Act makes S. 54 supplemental to the Registration Act, it does not make it a part of S. 17 in which case only S. 49 would prohibit the use of the unregistered sale deed as evidence of the terms of sale. S. 91 of the Evidence Act also does not prohibit its use for the purpose. But the question remains whether when the deed is the mode in

1. (1894) 5 M. L. J. 96.
2. (1886) I. L. R. 9 M. 267.
3. (1907) I. L. R. 34 C. 207.
4. (1915) 20 C. W. N. 195.
5. (1884) I. L. R. 9 B. 146.
6. (1905) I. L. R. 28 A. 147.
7. (1877) L. R. 5 Ch. 809.

which the parties wanted to convey property, it is permissible to rely upon other elements that might, if the parties so intended, have sufficed to convey title. On the whole, we should think, in the absence of clear evidence that title was intended to be conveyed by the *deed* and not otherwise, *ut res magis valeat, quam pereat* the transaction should be upheld *Kathari Narasimha Ragu* v. *Bhupathi Ragu* [1].

Arunachala Aiyar, *v.* **Ramaswami Aiyar** I. L. R. 38 M. 1171.

In *Kovuri Basavvi Reddi* v. *Tallapragada Nagamma* [2], the distinction between actions on covenant for title and those for the refund of purchase money based on failure of consideration was not sufficiently borne in mind and we think the view therein taken is rightly dissented from in this case. The action on the covenant is an action for damages and the breach takes place on the date of the sale whereas the other is an action for the restoration of the benefit obtained by the defendant under a contract which has become void (see Ss. 64 and 65 of the Contract Act) and is governed by Art. 62 or 97 according as the failure of the consideration is from the date of the sale itself or later. It is open to the vendee to frame his action as it suits him, there being no rule of law compelling him to frame it one way or the other but having once elected to frame his action in one way, it may be he would be bound by it. There is a similar option allowed to parties in some cases to sue in *tort* or to waive the *tort* and sue in the form of "money had to the use of" Where the failure of consideration is on the date of the sale itself, it is more advantageous to the vendee to rely upon the covenant for title, the period of limitation being longer than under Art. 62 and a larger amount being also generally recoverable under ther former kind of action than under the latter but where there is some consideration to start with, as for instance where possession is transferred to the vendee and he is evicted only later, it is generally more advantageous to the vendee to rely upon Art. 97 as under that Article time runs only from the date of the failure of consideration. On the other hand, it is doubtful if an action in this form will lie unless there is a total failure of consideration while damages on the covenant can be had for any defect in the title, however small.

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1. (1915) 29 M. L. J. 721 2. (1912) I. L. R. 35 M. 34.

Venkatesha Malia *v.* **Ramaja Higde**: I. L. R. 38 M. 1192.

In *Srinivasa* v. *Venkata* [1] it was held that where sanction is obtained from the District Court for two reliefs, a suit cannot be maintained for only one of them. This case extends the principle further and holds that where sanction is obtained by two persons, one of them alone cannot maintain the action relying upon the sanction. The extension may be sound enough but the question is to what extent the suit brought must tally with the petition presented before the District Judge. S. 18 does not say that a copy of the proposed plaint should be filed and sanction obtained for the same as is the case in England where Attorney-General's leave is to be obtained to a Relator's action. Section 18 of the Religious Endowments Act it will be noticed, does not give the Court any discretion in the matter provided it is satisfied that there are *prima facie* grounds, it is bound to give sanction. Is the party bound also to confine himself to the grounds that found favour with the Judge? At any rate, it cannot be that the Court is bound to disregard all considerations other than those that weighed with the Judge that gave sanction.

If one of the parties that obtained sanction dies before suit, is the other precluded from suing? We have the authority of the Allahabad High Court on S. 92 Civil Procedure Code that a suit under S. 92 C. P. C. may be continued even though the parties obtaining sanction die but their Lordships hold that Court's leave must be obtained by the new parties. This is an extension of S. 92 on English analogies and seems to have little justification in S. 92. Having regard to the practice of submitting plaints for the sanction of the Attorney-General and the large powers of intervention possessed by him we think that the English analogies are not likely to help us much in the matter. But on the wording of the section, leave being for the *suit*, any substantial alteration of the suit either in respect of the parties, or the reliefs or the substantial grounds for relief might require a sanction from the Court before the suit is instituted in an altered form but when once the suit is instituted, further procedure, we should think, be entirely governed by the rules of the Civil Procedure.

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1. (1887) I. L. R. 11 M. 148.

NOTES OF INDIAN CASES.

Subbareddi *v.* **Venkatrami Reddi:** I. L. R. 38 M. 1187.

We must confess we are unable to appreciate the distinction made in this case between the contract by an individual member of a joint Hindu family to assign his share in the entire family properties and the contract by him to assign his share in a portion only of the family property. In strict theory, the one is as little assignable as the other *Sadaburt Pershad Sahoo* v. *Foolbash Pershad Sahoo* [1]. The interest of the individual member in the entire family property is not in essence different from that in any portion of it and in theory the objections to enforcing his contract in respect of the latter are equally applicable to the former. To specifically enforce contracts for the sale of individual member's shares is an advance upon the law as laid down by the earlier decisions which only recognise alienations actually effected and one is not certain if in so doing the Courts have not contravened the rule laid down by the Privy Council in *Luxman* v. *Ramachandra* [2]. It is hardly fair that the Court should lend itself to create an equity in favour of the vendee against the family. The course suggested in *Vosuri Ramaraju* v. *Ivalury Ramalinga* [3] of enforcing specific performance of the contract for the sale of specific property (not merely the share of the individual member) against the individual who entered into it without deciding whether the sale is binding against the family is specially objectionable from this point of view, although it avoids the decision of difficult questions of equity between the family and the stranger in advance before an actual suit for partition is brought. If the courts should be inclined to specifically enforce such contracts we think that all questions as regards the binding nature of the contracts as against the other members should be decided in the suit for specific performance itself and there does not seem to be any thing against principle in its being so done especially when possession is claimed (see S. 27 cl. (c) Specific Relief Act. *Shunmugham Chetty* v. *Subba Reddy* [4]. *Alagappa Mudaliar* v. *Sivaramasundara Mudaliar* [5]. *Merbai* v. *Perozbai* [6]. *Krishnaswami* v. *Sundarappayya* [7]. L.R. 5 Esq. 917. Daniell's Chancery Practice vol. i. p. 194 Fry on Specific Performance para. 209. Even where the contract is only

1. (1869) 12. W. R. 1. F. B.
2. (1880) I. L. R. 5. B. 48 (P. C.)
3. (1902) I. L. R. 26. M. 74.
4. (1915) 31 I. C. 1.
5. (1895) I. L. R. 19. M. 211.
6. (1881) I. L. R. 5 B. 268 at 277.
7. (1894) I. L. R. 18 M. 415.

for the sale of the share of an individual member, the Court must have the other members of the family before it and go into the question if the share contracted to be assigned could be equitably and without prejudice to the other members be assigned to the vendee and order specific performance only in the event of its finding that it could be so done. If having regard to the value of the property or otherwise the work of determining the equities is disproportionately heavy or unfair to the vendor or the family the Court should reject the claim for specific performance. It will be observed that these considerations would not generally apply to contracts for the sale of the share in the entire family properties and ordinarily speaking, they could be specifically enforced without any injustice.

Mancharam *v.* **Panabhai** I. L. R., 40 B. 51.

We have nothing to say against the result of the case; but it seems to us desirable to point out that the judgment should not be understood to imply that in cases where a Hindu widow's transaction is not fictitious but operative, Art. 91 of the Limitation Act will apply to a suit for possession by the reversioner. The learned Judges might well have rested their decison on the ground that where a reversioner impeaches a widow's transaction as beyond her powers, it is not necessary for him to 'set it aside' within the meaning of Art. 91, *Bijoy Gopal Mukerjee* v. *Krishna Mahishi Debi* [1].

Hanuman Pershad *v.* **Judu Nandan Thakur** I. L. R. 43. C, 20.

As early as 1872 the Judicial Committee emphasised the need for a strict construction of the provision in the Civil Procedure Code against *benami* purchases in execution sales (*Buhuns Kowar* v. *Buhooree Lal* [2] and they recognised that the real owner *if in possession* may rely on the benami character of the purchase *as a defence*. (*See also Lokhee Narain* v. *Kallypoddo* [3]). Their Lordships' observations do not cover the intermediate case, of the real owner in possession suing *as plaintiff*, for a declaration or injunction, as against the certified purchaser. Such were the cases in *Sasti Churn* v. *Anopurna* [4] and *Bishon Dial* v. *Ghaziuddin* [5], where the courts differed in their view; and in the present case, Coxe J, expresses his agreement with the Allahabad view. We cannot help feeling that the decision in *Sasti Churn's case* is inconsistent with the express language of S. 317 C. P. C.; for the section is not confined to suits for 'possession'. We have also to state that the reasoning of the Madras High Court

1. (1907) I. L. R. 31 C. 420.
2. (1872) 14. M. I. A. 496.
3. (1875) L. R. 2 I. A. 154.
4. (1896) I. L. R. 23. C. 699.
5. (1901) I. L. R. 23. A. 175.

in *Monappa* v. *Surappa* [1] is, if possible, even more directly opposed to the section, for there the suit was for possession. The argument of waiver or transfer of title, by the giving up of possession to the real purchaser, is met by the remarks of the Privy Council in *Buhuns Kowar case*; and as pointed out in the Allahabad case, the learned Judges of the Madras High Court have evidently misread some of the observations of the Judicial Committee. The decision must be taken to have been dissented from, in *Kandasami* v. *Nagalinga* [2] and *Kamurudeen* v. *Noor Mahomad* [3]. It is scarcely necessary to add that cases like *Bodh Singh Doodhooria* v. *Ganesh Chunder Sen* [4] and *Narasimha Razu* v. *Veerabhadra* [5] rest on a different principle, *viz.* that in virtue of the pre-existing relation between the parties, the purchase by the one enures, in whole or in part, to the benefit of the other. The recent decision of the Judicial Committee in *Ganga Sahai* v. *Keshri* [6] is another illustration of the same principle.

Puncha Thakur *v.* **Bindeswari Thakur**, I. L. R. 43 C. 28.

Recent decisions on the question of the alienability of offices connected with religious institutions are far from easily reconcileable. Cf. *Sundarambal Ammal* v. *Yogawana Gurukkal* [7] with *Mahamaya Debi* v. *Haridas Haldar* [8], and the present case seems only calculated to add to the confusion. We note with some surprise that the Judgment makes no reference to *Mahamaya Debi* v. *Haridas Haldar* [8]. The sale of the office had been directed by a decree and so far as parties bound by that decree are concerned, the rule of inalienability cannot reasonably be held to prevail (cf. *Suppa Bhattar* v. *Suppu Sokkayya Bhattar*, [9] where *Lakshmanaswami* v. *Rangamma*[10] is doubted. As to the offerings, the right to share which was sold, being voluntary, we do not see that that circumstance bears on the question of alienability, if the offerings formed part of the emoluments of an office in a temple. (Cf. *Saripaka* v. *Mathura*[11].) The uncertainty of the 'income will not bring the case under S. 6 (*a*) of the Transfer of Property Act, for the "right" transferred is an existing right. We find it difficult to agree with the interpretation placed by the learned Judges on the decision in *Dino Nath* v. *Pratap Chandra*[12]. In so far as reliance is placed on *Kashi Chandra* v. *Kailash Chandra*[13] we would point out that even Dino Nath's case (though

1. (1886) I. L. R. 11. M. 231.
2. (1912) I. L. R. 36 M. 561.
3. (1914) 28 M. L. J. 251.
4. (1873) 12 B. L. R. 317 (P. C.)
5. (1893) I. L. R. 17 M 282.
6. (1915) I. L. R. 37 A 545.
7. (1914) I. L. R. 38 M. 850
8. (1914) I. L. R. 42 C. 455.
9. (1915) 29 M. L. J. 558.
10. (1902, I. L. R. 26 M 31.
11. (1914) 26 M L. J. 482.
12. (1899) I L.R. 27 C. 30.
13. (1899) I. L. R. 26 C. 356

it attempts to distinguish it) is scarcely consistent with it and, as observed by the Madras High Court in *Bheemacharyulu* v. *Ramanujacharyulu* [1], the ground of the decision in that case is not 'altogether satisfactory.'

Rameswar Malla *v.* **Sri Sri Jiu Thakur**, I. L. R. 43 C. 34.

In view of the observation of the Privy Council in *Ishwar Shiam Chund* v. *Ram Kanai Ghose* [2], the learned Judges were of course justified in holding that Article 134, as amended, in the Limitation Act of 1908 would apply to *leases* as well. Their conclusion that a lease is an alienation 'for valuable consideration' even when no premium is paid, is in accord with the opinion expressed by *Sundara Iyer and Sadasiva Iyer, JJ.* in *Narasaya Udapa* v. *Venkataramana Bhatta* [3]. We are however unable to agree with the reason given by Fletcher, J. for holding that S. 30 of the Limitation Act did not apply to the case. It is not correct to say that the decisions of the Judicial Committee in *Abhiram Goswami's case* [4] and *Ishwar Shiam Chund's case* [5] 'show that no period of limitation was prescribed for a suit of the present nature under the Act of 1877.' It is well established that the scheme of the Indian Law of Limitation is that every suit is governed by some rule of limitation, the residuary article applying where there is no specific article to meet the case. All that the Privy Coumcil laid down in the cases mentioned was that Art. 134 of the Act of 1877 would not apply to the case of a lease. As pointed out in *Naraya* v. *Venkatramana* [6] Art. 142 or at any rate 144 would certainly have governed the case under the older Act and this, it seems to us, suffices to let in the operation of S. 30. It is of course a different question, whether, for the purpose of applying that section the present case is one in respect of which the period prescribed by the new act is *shorter* than that prescribed under the earlier Act. The number of years is the same i. e. 12 years, both under Art. 134 of the new Act and. Art. 144 of the old Act. But there is a difference in the starting point, for possession may not always be adverse from the date of the alienation. See *Abhiram Goswami's Case*: cf. also *Muthuswamier* v. *Sri Methanithi Swamier* [7] and it may accordingly turn out that in particular cases Art. 144 would have permitted a suit even after a date when it would have become barred if Art. 134 applied. It is by no means clear, whether this kind of difference is within the saving of S. 30.

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1. (1907) 17 M. L. J. 493.
2. (1911) I. L. R. 38 C. 526.
3. (1912) 23 M. L. J. 260.
4. (1909) I. L. R. 36 C. 1003.
5. (1911) I. L. R. 38 C. 526.
6. (1912) 23 M. L. J. 260.
7. (1913) I.L. R. 38 M. 356.

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VIJNANESHWARA.

नासीदस्ति भविष्यति क्षितितले कल्याण कल्पं पुरं
नोदृष्टः श्रुत एव वा क्षितिपतिः श्रीविक्रमार्कोपमः
विज्ञानेश्वर पण्डितो न भजते किंचान्यदन्योपम
श्चाकल्पं स्थिरमस्तु कल्पलतिका कल्पं तदेतत्त्रयम्.

(There neither was nor is nor will ever be a city like Kalyana, or a king like Vikrama or a Pandit like Vijnaneshwara. May these three live for ever.) Such is the proud boast made by Vijnaneshwara at the end of his work for his city, his sovereign and for himself. However much the two former might have bulked in contemporary Indian History (there is no doubt they did bulk very large), they are now little more than names. But that is not the case with Vijnaneshwara. He still occupies a pre-eminent position as a Doctor of Hindu Law and his position does not seem to be in danger of being assailed. We shall try to indicate some of the elements that have contributed to give him that position. His style which in point of brevity (few words and much sense, as he puts it) and preciseness has no equal in the legal literature of this country, must have had not a little share in giving him that position. To some extent, his position as the chief adviser of the ruler of a mighty and prosperous Empire might also have contributed to it. But in this, Madhava had great advantages over him. He was a scholar of greater reputation and whereas Vikrama's Empire soon came to nothing the Empire in which he was Prime-minister lasted in unabated glory for over two centuries after him. It may safely be inferred therefore that what was chiefly instrumental in giving him this pre-eminent position must have been not this or that adventitious circumstance but the substantial merit of the system that he propounds, its suitability to the needs of the times and its general agreement with the convictions of the people. Great master as he was in the art of balancing, explaining if need be, of distorting texts, he constantly raises the discussion above the dull level of wordy warfare by appealing to higher reason and morality.

His success with his contemporaries one has no doubt, was due not a little to this ethical appeal. Argument in favour of the right of succession of the widow not prepared to raise issue for the husband, like that in the words "अपिच संयताया: एवधनग्रहणंयुक्तं न नियुक्ताया: स्मृति लोकनिंदिताया:" "can it be that a chaste wife should not inherit but a woman reprobated by the world and the shastras for her act (niyoga) should?" must have been felt to be irresistible. Again, when discussing the texts about the relations between the master and his female slave, we find him asserting नचदासीभावात् स्वधर्माधिकार च्युति: पारतंत्र्यम् हि दास्यम् न स्वधर्मपरित्याग: (Slavery is loss of independence but it does not mean abandonment of one's Dharma). He had the boldness to declare in the face of numerous texts, relying on nothing better than the duty of the King to administer *justice*, that enjoyment however long, originating in wrong could not confer right on the wrong doer. The general humanity of his views must also have had much to do with his popularity. He is the greatest champion of women's rights that India had in the domain of law. Jimutavahana who came later was able to extend in some directions women's right of inheritance but on the whole, his views are more retrograde than Vijnaneshwara's. He provides for the maintenance not only of chaste women but also of the fallen. The husband is bound to maintain the unchaste wife, and the relations, the unchaste widow. It is their duty to improve them. While the earlier, for the matter of that many of the later writers, circumscribe woman's property within the narrow limits prescribed by Manu, he included all property however acquired within the definition. The liberty taken by him with the texts evoked protests; we find one writer saying that a particular rule was evolved by Vijnaneshwara out of his brains (स्वकपोलकल्पित) and deserved no consideration but in the long run Vijnaneshwara won. His bold generalisations gave his system a certain logical completeness which must have appealed strongly to the subtle mind of the Hindu Lawyer. For instance, taking his rules of inheritance and succession they are based on three fundamental principles (i) that property is secular (स्वत्वस्य लौकिकत्वं) (ii) that consanguinity and not religious efficacy is the basis of heirship *i.e.*, his doctrine of sapindata. (The term Sapinda being understood in the sense of a person connected by particles of body, to the nearest Sapinda inheritance belonged) and that (iii) absence of swastantrya (स्वातंत्र्य)

or right of independent dealing is not inconsistent with ownership (स्वाम्य). With the aid of these principles he was able to establish the doctrine of property by birth in the sons and the right of women to hold and inherit property and he was also able to evolve a simple and consistent scheme of inheritance. The progressive views of the Maharashtra School about womens' rights were made possible only by Vijnaneshwara's bold generalisations. In fact, adaptability to progressive interpretation is one of the strongest points about the Mitakshara and one is not certain if that is not the ground of its popularity throughout India in spite of differences in local conditions. Another merit of his system is its simplicity. In the case of women's property unlike many later lawyers who following the labyrinth of contradictory Smrithi texts prescribe a separate rule for each species of woman's property, even then leaving a large number of them unprovided for, Vijnaneshwara prescribes but one rule for all cases giving preference to the female issue and their descendants up to a point and then following the usual rule of "property to the nearest Sapinda." Again in the scheme of inheritance for males, his powerful advocacy must have settled the line of inheritance in the manner in which it is found now and in spite of the threefold distinction of Sapinda, Samanodaka, and Bandhu, it can certainly not be called complicate. Certain principles being recognised, the order follows without exception and without hitch. There is also reason to think that as regards many of the rules that Vijnaneshwara propounds he was doing no more than providing a theoretical basis for actual practice. So far as at least one of those rules is concerned, sons' right by birth, we have his own assurance that such a right was well-known (लोकप्रसिद्धं). The moral basis of this doctrine is stated by him to be the duty of man "पुत्रानुत्पादयित्वा संस्कृत्य वृत्तिंचैवाकल्पयेत्" to beget sons, to perform samskaras to them and to provide for their maintenance. Effect was given to this principle by avoiding gifts of entire property though self acquired. Such gifts could not apparently stand even against the rights of wives and parents to maintenance, स्वंकुटुंबाविरोधेनदेयम् (property only without detriment to family may be given.) There is a remarkable analogy between this rule and the rule of Code Napoleon which prohibits free gifts beyond a certain proportion of a man's wealth when there are children, parents or wife

of the donor. Vijnaneshwara had little difficulty in converting the moral duty above referred to into a legal one in the case of grandfather's property and giving equal rights to father and the son in such property. Adequate justice can be done to the Mitakshara scheme of inheritance only by taking it as a whole. If one looks at it partially, one is likely to run away with the impression that it does not recognise natural claims, that it ties up property unnecessarily and that it sets a premium on idleness. Along with the doctrines of male succession, of right by birth and survivorship (which is a corollary of the former,) must also be considered the rule as to self acquisitions the wide duty to maintain ladies of the family, and to give marriage portions to girls, the right of the mother to a share, the son's duty to pay the debts of the father and the doctrine of necessity. That the term necessity had different connotations as applied to different castes can admit of no doubt. For instance, it cannot be that when the debts of the wife incurred in the pursuit of hereditary occupation (as in the case of washer-men &c.,) was binding that the debts incurred by a brother under similar circumstances did not bind. The explanation of the term "Avyavaharika" in Jagannatha also seems to point to such a varying interpretation of terms. But for the timidity of lawyers and Judges that flexible term and the other term self-acquisition could very well have been made to cover all situations created by the needs of the present time and in fact we already find a tendency in that direction. Social practices change and what was not necessity at one time, might become an absolute necessity at another. Similarly by raise in the general level of culture, what was exceptional culture at one time might well become ordinary culture at another and property acquired with its aid might properly be regarded as the self-acquisition of the acquirer without any violence to the letter or the spirit of the law. In this connection it is worth remembering that the Mitakshara scheme of inheritance and joint family has not been found to be inconsistent with the prosperity of many great mercantile communities of India. It is hardly fair to Vijnaneshwara to hold him responsible for the extravagances of joint family system as at present obtains, when he nowhere recommends or even considers the probability of the descendants of a man continuing indefinitely, joint. Four periods are mentioned by him as proper for partition; during the father's lifetime (i) when he desires it (ii) when he is indifferent towards

pleasures and the mother is past child-bearing (iii) when he is old, diseased or perverse (iv) after the death of the father or of both father and mother. If the joint-family is continued longer, there is no doubt that it is done so because of the many advantages that the system possesses. It is a sort of mutual insurance for good behaviour and against bad days. It makes for economy and conservation of property. It appeals to the sentiment which is found even in individualistic England, in favour of family *prestige*. As for the claims of women under the Mitakshara system, even in the illiberal view taken by certain of the schools, they have certain preferences in the matter of inheritance to women's property (;) rights of inheritance are conceded to widows and daughters where by reason of division, the claim of the family is not strong and maintenance and marriage portions are provided for all who can in justice be said to have a claim thereto. While undue division as under the Mahomedan system is avoided, undue concentration of property in the hands of one with the consequent impecuniosity of the other members is equally prevented. Any violent disturbance in the status or condition of life of men can have as a rule only deleterious effects on society, though in a few cases, it may serve as an incentive to exertion. The English system is made tolerable only by the wide prevalence of the system of marriage settlements with life estates, estates over and restraints on anticipation and the existence of an altenative rule of inheritance as to movables which after all form the bulk of Englishman's property. The imperfect recognition of the duty to maintain relations under that system has been felt to be an evil and set right to some extent by remedial statutes. The rule of compulsory portions obtains both in France and Germany. A certain part of the property of a man existing at the time of his death should be left by him to his issue, parents and wife. The solicitude of Mahomedan law to the claims of legal heirs is well-known. In fact, the recognition of right by birth and right to maintenance of a wide circle of relations is the Indian solution of the same problem. It is curious that even the Indian rule as to incapacity to inherit owing to vice, crime &c., has its German counterpart giving power to disinherit the son or other compulsory heir in those circumstances. Whether the Mitakshara system is consistent with a highly industrial state of society or not, there is no doubt that it is found congenial to the present aptitudes of the bulk of Hindus.

SUMMARY OF ENGLISH CASES.

In re **Dunn Carter** *v.* **Barret**, (1916) 1 Ch. 97.

Will—Devise to a class—Joint tenancy or tenancy in common—Advancement clause—Class taking by substitution.

Where there was a residuary devise to the children of the testator and there was a limitation that on the death of them without issue the share of such child should go to the other children and the testatrix also declared that in case at any time "any person entitled to a benefit" under the will should be a minor or minors, it shall be lawful for the trustees at their discretion to apply the whole or any part of the income to which any such minor or minors might be entitled in possession or expectancy for their respective maintenance and education and also at the like discretion to apply the whole or part of the capital fund to which any such minor or minors should be entitled for his or their advancement in the world or for his or their benefit;

Held, the members of the class original or substitutionary took the estate as tenants-in-common, and not as joint tenants.

The advancement clause is a sufficient indication to show that the members of the class take as tenants-in-common, because if a sum of a considerable amount were advanced for one child, it would be debited against the share and that debit could not be worked out if the children were joint tenants.

L'Estrange v. *L'Estrange* [1], followed.

In re **White. White** *v.* **White.** (1915) 1 Ch. 172.

Will—Construction—Motor Car—Whether passes under a bequest of "carriages"—Furniture and all other articles of personal, domestic or household use.

Where a testator had at the date of the will carriages and horses which he subsequently sold and had only a motor car at his death, the bequest to his daughters by him of "all my horses, carriages, harness, saddlery and stable furniture, will not pass the Motor Car, because by the collection of words they only pass horse, carriages."

In re Hall [2], followed.

The Motor Car will pass under the words "furniture and all other articles of personal, domestic or household use or ornament" in the will.

1. (1902) I. L. R. 457. 2 (1912) 107 L. T. p. 196. s. c. W. N. 175.

Jones *v.* **Consolidated Anthracite Collieries, Ltd., and Dynevor,** (1916) 1 K. B. 123.

Mining lease—Construction—Lessee allowed to work mines according to customary way—Lessee if entitled to let down surface if that is necessary consequence of working mine in manner provided—Subsequent grant of building lease with reservation of mines—Injury caused by mining—Subsidence of surface—Liability of lessor and mining lessee—Damages—Measure of—Badness of building of building lessee if can be taken into account—Reservation—Exception—Distinction—Covenant for quiet enjoyment—Extent and Limits.

Under a mining lease allowing the lessee to win and work the mines regularly and properly according to the best and most approved mode of working mines in the locality, the lessee has the right to let down the surface if that result is the necessary consequence of his working the mine in the only way used in the locality. Subsequent lessees of the surface from the lessor have no right of action against the original lessee for damage done by subsidence to the buildings they have erected thereon by the original lessee working the mines in that way.

A *reservation* in its technical sense is the regrant out of the subject-mattar conveyed of something not previously existing, as a rent or an easement. But the retention by the grantor of something already existing in the subject-matter, as mines and the right to work them, is an *exception*, and provisions relating to what the grantor shall do with regard to the matter excepted usually operate in covenant.

Where A leased to B a plot of land (under which the mining rights had been granted to C) together with the two houses about to be erected thereon "excepting and reserving all mines and minerals in manner set forth in the Schedule hereto with the powers and authorities therein contained," and the Schedule excepted and reserved all mines under the demised premises, with liberty of access for the owners of the said mines, their agents, lessees and workmen to enter upon the demised premises and work the said mines and carry away the produce of the mines, "reasonable recompense and satisfaction being made for any injury done to the demised premises by reason of the exercise of any of the rights aforesaid whether by letting down the surface

or otherwise", and the lease concluded with an express covenant for quiet enjoyment, *held*, in an action for damages against A by B by reason of subsidence of plaintiff's houses caused by working of mines by C, that the lessor, A was liable on the ground (1) that the provision in the Schedule attached to the lease was a covenant by him that he would make or cause to be made recompense and satisfaction if injury was done either by himself or his lessees claiming under the leases granted prior and subsequent to the plaintiff's lease and (2) that the lessor could not derogate from his own grant.

Quaeré whether the plaintiff could also succeed for a breach of the covenant for quiet enjoyment:

True limits and extent of the covenant for quiet enjoyment examined.

Held, further that if plaintiff's house was so badly built that, if there was no mining, it would have fallen down in a year, that must be taken into account in fixing the damage caused by knocking it down.

It is open to a wrong-doer to prove if he can that the subject of the wrong-doing was at the time of the tort only of a particular value by reason of its own weakness, and to limit his damages to that value.

Palace Shipping Company, Ld. *v.* **Gans Steam Ship Line** (1916) 1 K. B. 138.

Ship—Charter party—Employment of ship between "Safeports"—"Safeport"—Meaning.

Whether a port is a *Safeport* within the meaning of a Charter party providing for the employment of a vessel between "Safeports" is a question of fact and a question of degree in each case. The word "Safe" when used with the word "port" implies that the port must be both physically and politically safe. Dangers likely to be incurred on a voyage to a port may be taken into account in considering the question whether such port is safe to go to or not.

Halsey *v.* **Lowenfeld**: (1916) 1 K. B. 143.

Alien Enemy—Suit against in King's Courts—Maintainability—Cause of action arising before war—Cause of action arising after war—Distinction—Defendant's right to counterclaim—His right to take third party proceedings.

As regards the liability of an alien enemy to be sued in the King's Courts, no distinction can be drawn between a case in which the alleged cause of action arose before and one in which it arose after the war began. He is, however, entitled to set up in answer to the claim any matter which can properly be treated as matter of defence. But he is not entitled to take third party proceedings which are not necessary for a presentment of his defence to the plaintiff's claim, though they are necessary for a proper presentment of the defendant's whole case relating to the liability alleged.

Ruff *v.* **Long and Co.** (1916) 1 K. B. 148.

Highway—Lawful User—Interviewing act of third party of full age and discretion—Damage—Liability of person using highway. Case in which there is an initial act of negligence and case in which there is no such act—Distinction.

A person who chooses to leave a dangerous thing in a highway is guilty of an unlawful act and is liable for damage resulting from the intervention of a third person, because he ought as a reasonable man, to have anticipated the same. But a machine, which cannot move by mere accident, but only after a series of operations so complicated as to be beyond the powers of a person unacquainted with the mechanism, cannot be regarded as a "dangerous" thing. The person who leaves such a machine (motor lorry) standing unattended in a road is not *prima facie* guilty of negligence. And if the machine is set in motion by two grown men and a third party sustains damage as the result of their intervention, the owner of the lorry is not liable for the same as he cannot, as a reasonable man, have anticipated such intervention.

Quaere whether, there being an initial act of negligence, the intervening act of third persons of full age and discretion which is the proximate cause of the subsequent mischief affords of itself an action to the action.

Heath's Garage, Ld. *v.* **Hodges** (1916) 1 K. B. 206.

Highway—Nuisance in—Allowing sheep to stray in highway through defective fencing—Damage to Vehicle—Liability of owner of sheep.

A person, who keeps sheep in his field, does not properly keep up his fence, and allows them to stay on the highway, may

or may not be guilty of negligence or of a nuisance. But he surely cannot be expected to anticipate that the sheep might stray and, by running into a car which could not avoid it at the speed at which it was travelling, cause damage to the car. In such a case the omission to keep the fence in order would be a cause *sine qua non* but it would not be the proximate cause of the accident and the owner of the sheep would not be liable to the owner of the car for damages.

In such a case a finding that it is the natural tendencey of sheep which are intended to run across, or otherwise endanger, vehicles on the road, and that it is a matter of common knowledge that sheep, finding themselves separated from the bulk of the flock, have almost a mania for rejoining it and are perfectly regardless of intervening traffic does not amount to a finding that they are vicious or of mischievous propensities within the meaning of the decided cases.

Per Lush, J.:—*Semble*, if sheep are allowed to stray through defective fencing and be on the road at night, driver of a cart or motor car, driving with due regard to all such possible risks, were to run against them in the dark, the negligent owner of the sheep would be liable.

JOTTINGS AND CUTTINGS.

The Journal of the Society of Comparative Legislation (N. S.) No. 35, January 1916 :—This number contains an appreciative sketch of Sir Robert Finlay by the Hon'ble Mr. Justice Rowlatt. An article on the Income Taxes of the Self-Governing Dominions affords instructive reading. There is of course the usual Review of Legislation, of practically the whole civilised world, during 1914, with an introduction by Sir Courtenay Ilbert. We take this opportunity of inviting the attention of our readers to the importance of the Society's work from the 'imperial' point of view. Founded in December 1894, the Society has now completed 21 years of useful and varied activity. Its main object is to keep all persons interested in legal economic and social questions, fully informed of legislation in different parts of the Empire and even in foreign countries, in relation to the many complex problems of modern life. It counts among its members most of the leading lawyers and statesmen of the day and it has the active support of the Home Government and the Governments of the

Colonies. The subscription for membership is one guinea. Any further information may be obtained from the Hon'ble Secretary (E. Manson, Esq.) of the Society, 3, (North King's Bench Walk, Temple.—*London E. C.*

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Ethics of Advocacy:—The Bar Council have been dealing with a request for advice from the Bar Committee at Shanghai on an old, old question as to the Ethics of Advocacy. The Council's decision was that if a confession of guilt was made to the advocate before proceedings were begun it was most undesirable that he should undertake the defence; but that if it was made during the proceedings or in such circumstances that the advocate retained for the defence could not retire from the case without seriously compromising the position of the accused person, the advocate's duty was to protect his client so far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he was charged. An eminently sound view. The stock illustration is the case of Lord William Russell, murdered in 1840 by his valet Courvoisier. On the second day of the trial Courvoisier, who knew that he had been recognised, sent for his counsel and told him that he had committed the murder. He said that he would not plead guilty, and that he expected Mr. Phillips to defend him. Counsel was for throwing up the case, but his junior told him that this would not be right, and ultimately they determined to consult Baron Parke, before whom and the Lord Chief Justice the trial was taking place. Baron Parke's first question was: "Does the prisoner require you to go on defending him?" and being satisfied of that, he said that Counsel must not throw the case up, and that it was Mr. Phillips's duty to go on with it, taking care, of course, as to what he said, and seeing that he did not incriminate any other persons, but to defend the man fairly and properly upon the evidence.—*February 1916; Law Notes.*

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Humour of the Law:—The technicalities of the law are often too finely drawn for the lay understanding. The following sounds like a burlesque, but it actually happened in an Ohio Court.

At a term of the circuit court there, a horse case was on trial, and a well-known "horseman" was called as a witness.

"You saw this horse?" asked the defendant's counsel.

"Yes, I"—

"What did you do?"

"I just opened his mouth to find out how old he was, and I said to him, 'Old top, I guess you're pretty good yet."

"Stop!" yelled the opposing counsel. "Your Honor, I object to any conversation carried on between the witness and the horse when the plaintiff was not present."

And the objection was sustained.—Case and Comment.—*28th January 1916*; *Central Law Journal.*

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Imprisonment without trial:—After the rejection of the appeal against the decision of the King's Bench Judges in *Rex* v. *Halliday* it must be taken that, so far as the Courtsare concerned, the suspension of the remedy by *Habeas Corpus* is complete, and that no writ will be issued to bring into question the internment of British subjects during the war on the simple order of the Secretary of State. We have it on the word of the Attorney-General that a considerable number of persons of British nationality have been interned, and are 'detained' at the present moment, and, as the Courts decline jurisdiction, they may be kept in prison indefinitely unless, under pressure of public opinion, Parliament intervenes. That has already occurred once in connection with the very same Defence of the Realm Act (5 Geo. V., cap. 8), under which the power is now claimed to suspend the subject's constitutional right of liberty without 'due course of law'. Then the energetic protests of men of such varied political outlook as Lord Halsbury and Lord Parmoor on the one side, and Lord Bryce and Lord Loreburn on the other, against the provision of the Act which changed the whole status of civilians by subjecting all persons charged with offences to the summary procedure of military law, brought about the prompt introduction of an amending Act (5 Geo. V., cap. 34) which restored to British subjects the right of trial with a jury. If the removal of alleged offences against the Act from the ordinary courts was then regarded as a 'monstrous thing' what is to be said of Regulations made by the Executive, without consultation with Parliament, which, without any allegation of an offence at all, give the Secretary of State power to imprison any of the lieges, in any place, and for any period? And this, too, without even

the semblance of a trial, or any right to be heard, or to appeal, or other means of redress! The alternative to all these rights which have hitherto been regarded as the common and natural rights of Englishmen is pretended to be the provision in the new Regulations for consideration by an Alien's Advisary Committee at the instance of the person ordered to be interned 'of any representations he may make against the order.' That, of course, is no equivalent to trial, even though a Judge presides over the committee deputed to consider the 'representations,' for all the elementary conditions of a trial are absent; there is no statement of the facts constituting the charge, no indication whatever of the evidence in support of it, no opportunity for the accused to examine witnesses or documents, no right even for him to appear before his accusers or the committee. The privilege of making 'representation' is in these circumstances no security; it is a mere mockery, for it imposes on the accused the impossible burden of proving a negative, and reserves entirely the regular course of justice. Parliament can never be intended to create such an unheard-of situation for any British subject, and it is the business of Parliament to redress so intolerable a grievance.—*12th February 1916. The Law Journal.*

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Solicitors and Costs:—Mr. Justice Shearman, in a case which came before him on Wednesday, pointed out that the rule that solicitors should inform the Senior Associate at the earliest possible opportunity of the probable length of impending cases in which they were acting had not been complied with. He added:

'The Court endeavours to save people costs by not burdening the lists with cases which are not likely to be disposed of during the day. It is really a shame that solicitors will not take the trouble to save their client's costs by complying with the orders of the Court. The officials are keeping a list of the solicitors who are negligent in this respect, and if the negligence is persevered in the matter will be dealt with when the question of costs is considered.'—*12th February 1916. The Law Journal.*

CONTEMPORARY LEGAL LITERATURE.

In the Journal of the Society for Comparative Legislation for January 1916, Mr. S.E. Minnis describes the special features of the

Income Tax Acts of the British Self-Governing Dominions. The principal feature seems to be the attempt made to tax at the source so as to prevent leakage as far as possible. With the end in view, there is a larger recognition of agency for taxation. The tenant of a land the owner of which resides outside is regarded as agent for the purpose of payment of the tax; similarly the employed, for the employer, the company for the debenture-holders and so forth. Another feature is *abatement* for special reasons. A special abatement is allowed for instance, where the income is the result of personal exertions; again, there are abatements with a view to relieve double taxation. A curious instance of abatement is that in respect of all donations over £ 20 to public charities. This issue of the Journal contains also the usual yearly review of the legislation of the world. As one would expect, war legislation forms the bulk of it, but as the legislation reviewed is of the year 1914, there is some peace legislation before the war which is dealt with. In the United Kingdom, the most important pieces of legislation were the Government of Ireland Act and the Welsh Church Act. Some amendments were also made in the Bankruptcy Act. One of these amendments gives sanction to "the Common Law of bankruptcy" which protects *bona fide* purchasers of the after-acquired property of a bankrupt before the official assignee intervenes. Another gives larger recognition to "deeds of arrangement which avoid the publicity and *quasi* criminal procedure incident to bankruptcy and as such commend themselves to business men. The growing solicitude for children is manifested in a number of Acts which give power to local Education authorities to feed children without formal application to the Board of Education. The important statute passed in India during the period is that which introduces the provisions of the Imperial Copy-right Act into India. The Hindu Transfer and Bequests Act passed by the Madras Council, is the one important piece of legislation by Provincial Councils. Among the South African Acts, those that interest the Indians most are those relating to the Indian immigrants which recognise the Indian marriages and abolish the necessity for license paying £ 3 to Indians who fail to re-indenture after the expiry of the period of indenture. A curious provision in the Cyprus Penal Code makes the employment of Dancing Girls at moslem feasts, an offence. An Act of Western Australasia vests the right in the water of water-courses, springs, lakes &c., subject

to certain restrictions, in the Crown. In British Columbia also, a somewhat similar Act is passed. The most important legislation in America is that directed against trusts. The State of New York has followed the lead of New Jersey by founding villages for the settlement of the feebleminded in the State. In the Law Quarterly Review for January, Professor Holdsworth deals with the original and early history of Bills of Exchange and Promissory notes. There he shows how the development of the Law as to Bills of Exchange re-acted upon the law as to promissory notes which were not considered assignable at first and were finally recognised as such only on the analogy of Bills of Exchange payable to the drawer's order.

The Harward Law Review for February contains on interesting article as to *property* in *chattels* under the common law, to what extent the doctrine of *seisin* was applicable to them and whether an action was maintainable under that law by the owner of a chattel against a person who meddles with it when it is not in his possession. Mr. Harold Laski points out that in spite of strict legal theory that personality can be conceded to associations only by the statute or the Crown, a large amount of it is as a matter of fact conceded to them indirectly under other names such as trust, partnership, contract, etc. It would be much better, the learned writer thinks, if personality is conceded to them directly by which an amount of confusion uncertainly could be avoided.

BOOK REVIEWS.

THE LAW OF GAMBLING AND WAGERING *by S. G. Velinker, Esq., B. A., LL. B.*

Though occasions for its use must necessarily be few, there can be no doubt there was necessity for a book like the present dealing with the entire statute law in this country as to gaming and wagering. The commentary is very carefully compiled. The Indian case law has been exhaustively dealt with. All appropriate references to English Case and Statute Law on analogous topics are also given.

MAJUMDAR ON HINDU WILLS—SECOND EDITION, *by Dwarka Nath Chakravarti, M. A., B. L., Vakil, Calcutta; Published by Messrs. R. Cambray & Co.*

More than ten years having elapsed since the publication of Mr. Majumdar's book, the second edition has appeared none too soon. We share the regret of the Editor that the author did not live to see this Edition through. The new volume is substantially on the same lines as the earlier one, indeed the older form is so far retained that in noting up recent decisions, the former statements of law have not been suitably modified. We may mention, as an instance, the discussion of the subject of gifts in favour of idols not in existence. On page 350, the law is stated as before the Full Bench decision in I. L. R. 37 Cal. 128, and there is only a note directing attention to another page where the later decision is referred to. So far as we have been able to see, there is not even a passing reference anywhere, to the legislation in Madras validating bequests in favour of unborn persons. Such shortcomings notwithstanding, we have no doubt that the book will be found very useful by the profession.

COURT FEES AND SUITS VALUATION ACTS: *Lawyer's Companion Series. 3rd Edition, 1916. Law Printing House, Madras.*

The Court Fees Act has undergone numerous alterations by way of amendment in its long course and it is essential for every practitioner to have a copy of the Act incorporating all the amendments up to date. The book under review answers to this description and gives under each section the decision of the various Courts till the end of 1915. The second portion of the book gives the Suits Valuation Act with the decisions under it, under appropriate headings. We have no doubt that practitioners will find the book very useful as a book of ready reference.

THE INDIAN DECISIONS. (*Old Series, Vols. 12 & 13, Published, by the Law Printing House, Madras.*

We are in receipt of the 12th and the 13th Vol. of this useful publication. The whole of Vol. 12 is occupied by a reprint of the 8th Vol. of the Bengal Sudder Dewani Adaulat Reports; and Vol. 13 comprises the next two Volumes. The legal profession knows the usefulness of this publication so much that we need not dwell on it at any length. These Volumes maintain the high standard of the get-up and printing for which the Law Printing House is so well known.

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SUBROGATION—A CRITICAL NOTE.

Har Shyam Chowdhuri *v.* **Shyam Lal Sahu**: I. L. R. 43 C. 69. **Surjiram** *v.* **Barhamdeo Prasad**: 2 C. L. J. 288. **Muhammad Sadiq** *v.* **Ghaus Muhammad**: I. L. R. 33 A. 101. **Har Narain** *v.* **Har Prasad**: 12 A. L. J. 470. **Govindasami** *v.* **Doraisami**: I. L. R. 34 M. 119.

It is an established rule that a mortgagor paying off a first charge on the property cannot set it up as against a puisne mortgagee from himself. This is based either on the doctrine of 'accession' enunciated in S. 70 of the Transfer of Property Act, (See *Badan* v. *Murari Lal* [1]) or on the principle that in paying off the first mortgage, the mortgagor is only performing his own covenant. It is equally established, since the decision in *Gokul Das's Case* [2], that a 'purchaser' of the equity of redemption stands on a different footing; if he pays off a first charge, he is not taken to have 'extinguished' it for the benefit of a mesne incumbrancer, but is presumed to keep it alive for his own benefit and may rely on it as against a puisne mortgagee. There is a third class of cases (of which the decisions noted at the top furnish instances) wherein the purchaser of the equity of redemption expressly stipulates by his sale deed that he would himself pay off the incumbrances on the property. If in such a case he pays off a prior charge, can he set that up as against a puisne mortgagee (whose debt also is included in his sale deed but whom he has failed to pay)?

In Surjiram v. *Barhamdeo* [3] it was held that the purchaser could not in the circumstances last stated rely on the first mortgage (by way of subrogation) as against a second mortgagee; and that view was affirmed in *Bissweswar Prasad* v. *Lala Sarnam Singh* [4], *Satnarain* v. *Sheobaran* [5], and *Harshyam Chowdhuri* v. *Shyam Lal Sahu* [6]. Much the same view was taken by the Madras High Court in *Govindasami* v. *Doraisami* [7] and by the Allahabad

1. (1915) I. L. R. 37 A. 309.
2. (1884) I. L. R. 10 C. 1035.
3. (1905) 2 C. L. J. 288.
4. (1907) 6 C. L. J. 134.
5. (1911) 14 C. L. J. 500.
6. (1915) I. L. R. 43 C. 69.
7. (1910) I. L. R. 34 M. 119.

High Court in *Muhammad Sadiq* v. *Ghaus Muhammad* [1] (see also *Baij Nath* v. *Murli Dhar* [2], *Dalip Rai* v. *Birnaik* [3].) The ground of decision is differently stated in the several cases and as the soundness of some of the cases seems to us open to question, it is desirable to analyse the reasons therein assigned and see how far they are merely steps towards conclusions of fact and how far they are reducible to definite principles, whose correctness may then be discussed.

In the earliest of them, *Surjiram* v. *Barhamdeo* [4] the question was first dealt with as one of intention and the learned Judges came to the conclusion (whether rightly or wrongly) that the payment relied on was intended to extinguish the prior mortgage. One of the learned judges (Mukherjee, J.) however also dealt with the case on a different footing and he laid down that the doctrine of subrogation could not be invoked by the purchasers, as they had 'retained in their hands money which they had agreed to pay in discharge of the security against which they now claim priority.' Another principle was also enunciated *viz.*, that as in paying the prior mortgage the purchaser only fulfilled his own obligation, that can give rise to no right by way of subrogation. It would be convenient to keep these two aspects of the rule separate, one relating to the character of the payment to the *prior* mortgagee, the other emphasising the violation of the obligation to pay the *subsequent* mortgagee. Both these aspects of the rule have been re-affirmed by the learned judge in later cases. In *Muhamed Sadiq's case*, the conclusion was arrived at as one of 'fact' *viz.*, against the intention to keep the prior charge alive, though reference is made in the course of the judgment, to the purchaser having 'kept in his pocket the portion of the consideration which should have been appropriated to the discharge' of the second mortgage, and, to the claim of priority being 'against the debt which he undertook to pay but which he did not discharge'. In *Baij Nath's case*, [2] as well as in *Dalip Rai's case*, [3] the decision is rested on the legal ground, while in the Madras case the legal principles stated in *Surjiram* v. *Barhamdeo* [4] are relied on not apparently as definite rules by themselves, but as reasons 'rebutting the presumption' of an intention to keep the prior charge alive. It is not clear what the result would have been in the Madras case,

1. (1910) I.L.R. 33 A. 101.
2. (1907) 27 A. W. N. 85.
3. (1909) 6 A L. J. 549.
4. (1905) 2 C. L. J. 288.

if there was actual evidence of an intention to keep the first mortgage alive, in spite of the payment ; but on the principles laid down by Mukherjee, J. even such expressed intention cannot avail to subrogate the purchaser to the rights under the first mortgage.

In so far as these authorities lay down or imply that, in the circumstances stated, the purchaser from the mortgagor has no *right* ('even if he proves the intention') to keep alive the mortgage discharged by him, so as to use it as a shield against the other mortgage, they would seem to rest substantially on the authority of American cases and text-books. With no desire to minimise the weight due to them, we nevertheless venture to doubt the propriety of applying such a rule in this country, in view of certain essential differences between the law in the United States and the law here as to the extent to which a mortgagee can have *direct* recourse against a purchaser of the equity of redemption [see an article on this point in 20 M. L. J., p 53.] The statement that the rule is founded on justice or is consonant with equity is too general to be convincing.

In the course of his speech in *Thorne* v. *Cann* [1] Lord Macnaughten observed broadly, that the option to keep alive exists in any case in which the owner of an estate ' pays charges on the estate which he is not personally liable to pay'. The reference to *personal* liability should be noted ; for, in a wider sense, every transferee of the equity of redemption is liable to pay off prior charges. That is only another way of stating the rule (referred to at the outset) that there can be no subrogation when a party merely performs his own obligation. What then is the position of a transferee of the equity of redemption, when there is an agreement between him and the mortgagor that the former should pay off the incumbrances ?

In some of the American States, there prevails a rule that such an undertaking amounts to an 'assumption' of the mortgage liability by the transferee, so as to give the mortgagee a direct *personal* remedy against the transferee. In this view, the purchaser of the equity of redemption (with such a covenant) would be exactly in the same position as the mortgagor *i.e.*, in discharging the prior encumbrances on the property he would only be paying off what he was

1. (1895) L. R. A. C. 11.

personally liable to pay and he could not therefore rely on that as against a second mortgagee. Even in States where the right of third parties to sue on a contract has not been recognised to such an extent, the American Courts allow the mortgagee to benefit to a limited extent out of the covenant between the morte gagor and his transferee; and to this extent, it would follow that the purchaser is liable *on his covenant* to the persons whose charges he has undertaken to pay. But neither of the abov- positions can be maintained in this country. It was laid down by the Privy Council in *Janna Das* v. *Ramautar Pande* [1] that the mortgagor does not, by reason of such undertaking, become 'personally bound to pay' the mortgage debt and that the mortgagee, not being a party to the sale, has 'no right to avail himself' of the covenant between the vendor and the vendee. It was further laid down by the same Board, in *Izzatunnissa Begam* v. *Partab Singh* [2] that even as between the mortgagor and his transferee, it makes no difference that in the deed of transfer there is an express stipulation for payment of incumbrances by the transferee: it creates 'nothing more than a contract of indemnity' which will be implied even in the absence of such an undertaking. Why then should there be any difference, as to the applicability of the rule of subrogation, between cases in which there is such an express undertaking and those in which there is none?

It does not carry the matter much further to say that the purchaser should not be allowed to claim priority *against* a person (*i. e.*, the second mortgagee) whose debt he had agreed to pay; for the undertaking is as unavailable to the second mortgagee as to the first mortgagee. The second mortgagee has not been in any way prejudiced by the existence of such an arrangement between the mortgagor and the purchaser. It was always open to him to pay off the first charge, if he chose, or, to sue to enforce his mortgage. Why then should he derive an 'unearned' advantage (so to say) from this agreement?

Much stress is sometimes laid on the argument (i) that in such a case the purchaser pays off the first mortgagee only with the funds of the mortgagor (or as his agent) or (ii) that he is retaining in his hands a portion of the consideration which he should have applied in discharge of the second mortgage. The

1. (1911) I. L. R. 34 A. 63. 2. (1909) I. L. R. 31 A. 583.

first of these arguments, if sound; would, by itself, exclude the right of subrogation even as against mesne incumbrances which the purchaser had not undertaken to pay; but there are several decisions laying down a different view. (See *Baldeo Prasad* v. *Uman Shankar* [1], *Man Raj* v. *Ramji Lal* [2] and *Har Narain* v. *Har Prasad* [3].) It is submitted that nothing can be made to turn on the circumstance that a portion of the consideration for the transfer is expressly left with the purchaser for the purpose of paying off prior charges. The vendor can in any case get only the value of his interest *viz.*, the equity of redemption, and he has no claim against the purchaser (except by way of indemnity) in respect of the amounts due under the prior mortgages, *Izzatunnissa Begam's Case* [4]. How then can it make any difference, whether or not the value of the incumbrances is included as part of the sale price?

The view herein submitted is supported by the following observations of the Judicial Committee, in *Gokuldas's Case*, with reference to *Toulmin* v. *Steere* [5], and *Watts* v. *Symes* [6].—

"In the case before their Lordships, the debt to the bank was not paid off out of the purchase-money. The appellant purchased the interest of the mortgagor only and did not bind himself to pay off that debt. When he paid the bank some six months afterwards, it was not because he was under an obligation to do so. This case might therefore be distinguished from *Toulmin* v. *Steere* [5], *but their Lordships do not think it necessary to do this* as they are not prepared to extend its doctrine to India" (the italics are ours). The words in italics in the above extract clearly show that, in the opinion of their Lordships, the circumstances stated by them in the preceding two or three sentences should not affect the *right* (or even the presumption as to the intention) of the purchaser to keep alive the prior charge paid off by him. Cases like *Parry* v. *Wright* [7], *Brown* v. *Stead* [8] and *Greswold* v. *Marsham* [9]—which are in some measure relied on by Mukherjee, J. in *Surjram's Case*—cannot be accepted as any guide, in the face of the above remark of their Lordships; and even *Toulmin* v. *Steere* and *Parry* v. *Wright* [7]

1. (1907) 6 A. L. J. 987.
2. (1909) 7 A L. J, 15.
3. (1914) 12 A. L. J. 470.
4. (1909) I. L. R. 31 A. 583.
5. (1817) 3 Mer 210.
6. (1851) 1 De G M. and G. 240.
7. (1828) 5 Russ. 142.
8. (1832) 5 Sim. 535.
9. (1685) 2 Chan. Cas. 170.

do not altogether deprive the purchaser of the right to keep alive the prior charge but permit him to do so by a conveyancing device or by a 'contemporaneous expression of intention.' (See also *Watts* v. *Symes* [1] where the first mortgage was paid off by the purchaser of the equity of redemption at the time of his purchase and out of the purchase money). The decision of the Madras High Court in *Narayanasami* v. *Narayana* [2] though referred to both in *Surjiram's Case* and in *Govindasami* v. *Doraisami* [3] has little bearing on the present topic, for no question of priority or subrogation arose there.

SUMMARY OF ENGLISH CASES.

United States Steel Products Company *v.* **Great Western Railway Company**: (1916) A. C. 189.

Sale of goods—Stoppage in transitu—Carriage of goods—Railway Company—Consignment note —Construction—General lien of carrier—Priority to right of stoppage in transitu.

A vendor of goods delivered them to a Railway Company for carriage to the buyers on a consignment note, one of the terms of which was "All goods delivered to the Company will be received and held by them subject to a lien for money due to them for the carriage of and other charges upon such goods and also to a general lien for any other moneys due to them from the owners of such goods upon any account." The bill of lading for the goods had already been indorsed in blank and sent to the buyers. While the goods were still in possession of the Railway Company, the buyers of the goods became insolvents; and the vendors exercised their right of stoppage in transitu. The buyers at that time owed a sum of £ 1,170 to the Railway Company on general account. The Railway Company exercised their right of lien for the amount due on general account under the above clause of the consignment note and claimed priority for the same.

Held, the carrier has in law a lien on the goods he carries for the charges of carrying them and this lien ranks in priority over the vendor's right of stoppage in transitu; he can by a contract in appropriate language provide for a general lien on the goods he carries, for all the debts of the owner of the goods, to rank in priority

1. (1851) 1 De. M. & G. 240. 5. (1893) I. L. R. 17 M. 62.
6. (1910) I. L. R. 34 M. 119.

over the vendor's right of stoppage in transitu. On a proper construction of the language of the clause in the consignment note, the general lien created does not rank in priority over the vendor's right of stoppage in transitu. *Held*, also, that the word "owners" in the clause means persons entitled to claim delivery and as such the vendor after exercising his right of stoppage in transitu.

Bradford Corporation *v.* **Myers**: (1916) A. C. 242.

Public Authorities' protection—Limitation of time for bringing action—Act done in pursuance of execution or intended execution of an Act of Parliament or of any public duty or authority —Corporation authorised to carry on business of a Gas Company and bound to supply gas—Corporation empowered to sell coke—Negligence of a servant in the delivery of coke—Private obligation and not public duty or authority—Public Authorities Protection Act, S. 1.

A Municipal Corporation was authorised by Statute to carry on the business of a Gas Company and was bound to supply gas to the inhabitants of the District; the Corporation was also empowered to sell and dispose of the coke produced in the manufacture of gas. One of the servants of the Corporation broke a plateglass window of a Customer's shop in delivering the coke. In an action by the latter against the Corporation for the negligence of its servant the Corporation pleaded that the action would not lie by virtue of the Public Authorities Protection Act, S. 1, as it was not commenced within six months from the date of occurrence which gave rise to the action; S. 1 provided that no action could lie or be instituted against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such act, duty or authority unless it was commenced within six months of the act, neglect or default.

Held, the act complained of was not one in the execution of the Statute or in the discharge of the public duty or in exercise of public authority and the action would lie even after six months.

As the Public Authorities Protection Act restricts the ordinary rights of subjects, the Statute ought to be construed strictly.

The Statute applies equally to all acts and omissions whether breaches of contract or torts.

Central Trust and Safe Deposit Company *v.* **Snider**: (1916) A. C. 266.

Trust—Covenant to settle land—Pecuniary legacy—Quantum of interest of the covenantee—Election.

Where certain properties were conveyed to the testator by his niece in consideration of the former agreeing to pay her during her life one-half of the net rental of the property and after her death to convey one moiety of the property to her heirs, these provisions to be embodied in the will by the testator, and the testator was paying half the rental for his life and by his will made this property fall into the residue and bequeathed to her out of the residue 20,000 dollars on the footing that she had relinquished or would relinquish her claim on the property under the original agreement.

Held, The testator was not by virtue of the conveyance a trustee of a half interest in the property for the niece; and she was put to her election between taking the pecuniary legacy and taking the half interest in the property. The equitable interest of a contractee under a contract to settle immoveable property is commensurate with the power of the Court of Equity to grant specific performance of the contract.

Steedman *v.* **Drinkle**: (1916) A. C. 275.

Specific Performance—Agreement to sell land—Time essence of the contract—Default of purchaser—Forfeiture of money paid—Penalty—Relief.

Where the defendant entered into a contract to sell land to the plaintiff, part of the consideration being paid at the time of the agreement and the balance being agreed to be paid by six annual instalments payable by the 1st of December of each year and it was agreed that in default of payment of any of the instalments, the defendant was to be at liberty to cancel the agreement and retain the amounts paid up to that time by way of liquidated damages and the plaintiff committed default in payment of one of the instalments and subsequently sued for specific performance of the agreement or in the alternative to be relieved from the ferfeiture;

Held, the parties having specifically agreed that time was to be of the essence of the contract, specific performance of the contract cannot be ordered; but that the forfeiture of the amounts paid being of the nature of penalty can be relieved against.

Courts of Equity which look at the substance as distinguished from the letter of the agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases, where justice requires it even though literal terms of stipulations as to time have not been observed. But they never exercise the jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is of the essence of their bargain. If however the parties having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach.

Stoodley, *In re*: **Hooson** *v.* **Locock.** (1916) 1 Ch. 242 (C. A.)

Will—Construction — Codicil — Revocation—Residuary disposition in will—Different—Bequest in codicil, effect of—Trust—Gift to a charity—Want of trustee—Duty of Court.

The testator, by his will, appointed certain persons as executors, and then, using the words "I bequeath," gave several specific and pecuniary legacies and using the words "I give and devise," he made certain specific devises of real estate. He then inserted a general bequest of his real and personal estate in these terms: "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees . . . . . that they shall hold the residue of the said monies and the income thereof in trust for the Society for Promoting Christian Knowledge etc. . . ." By a codicil to his will the testator, after referring to his will, gave and bequeathed "the residue of my estate, not bequeathed by the above will;" to M. A. L. absolutely and appointed her sole executrix of the codicil.

Held that the residuary gift in the will was revoked by the codicil and that under the codicil the whole of the testator's estate undisposed of by legacies or specific bequests passed to M. A. L.

The principle of law is, that if you find a residue given by will, and then there is a codicil, giving that residue to a different person or in a different mode, it is really a revocation of the gift of the residue by the will.

A gift to a charity never fails for want of a trustee, because the Court would see that a proper trustee was appointed and would take care, if necessary, that it should be done under the direction of the Attorney-General.

Drexel *v.* **Drexel**: (1916) 1 Ch. 251.

Jurisdiction—Writ—Service out of jurisdiction—Domicil—"Ordinarily resident within the jurisdiction"—Cause of action—Contract—Separation deed—Agreement to pay allowance—Breach—Supreme Court Rules, O. 11 R. 1 (c) & (e).

The plaintiff and her husband, Americans by origin, married in America in 1886. In 1897 they came with their children to England with the intention of residing in England permanently and acquired an English domicil. The husband was connected with a banking business in Paris and America. In January 1913, plaintiff and her husband entered into a deed of separation, prepared in America and executed by the husband in America and by the wife in England, by which the husband covenanted to pay his wife an annual sum of 50,000 dollars. No place for payment was stated in the deed. Both the parties lived in England till June 1915, when the husband closed his establishment in England and went to Paris with intent to acquire a French domicil and to institute divorce proceedings against the wife in the French Courts. The wife issued a writ in July 1915, against her husband, to enforce the terms of the separation deed, and obtained leave under O. 11 R. 1 (c) to serve the writ on him in Paris, on the ground that he was ordinarily resident in England. On a motion by the husband to discharge the service of writ.

Held, that under the circumstances the husband had abandoned his domicil of choice in England and that he was ordinarily resident in England at the date of the issue of the writ.

The covenant to pay the allowance was however a contract within O. 11 R. 1 (e) of the Supreme Court Rules, the breach of which entitled the wife to sue in England, which was the place of residence of the creditor.

Plyn *v.* **Weston Feature Film Company**: (1916) 1 Ch. 261.

Copyright—Infringement—Burlesque of literary production—Novel—Cinematograph film—Immoral and indecent scenes—Right of action—Copyright Act, 1911 (1 and 2 Geo. V. C. 46). Ss. 1 and 7.

This was an action by the plaintiff for the alleged infringement of the copyright in a novel, by the sale of burlesque cinematograph films, which were said to be substantial repro-

ductions of the novel. The plaintiff claimed an injunction and damages. It was found on the facts that there was no such infringement.

A genuine burlesque of a serious work may not constitute an infringement of copyright (though it may under certain conditions justify an action in the nature of slander of goods) either on the principle that a burlesque is usually the best possible advertisement of the original and has often made famous a work which would have otherwise remained in obscurity or on the principle that no infringement of the plaintiff's right takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result.

Copyright cannot exist in a work of grossly immoral tendency, though the Courts in this matter is now less strict than it was in the days of Lord Eldon.

Hall-Dare, *In re*: **Le Marchant** *v.* **Lee-Warner.** (1916) 1 Ch. 272.

Will—Construction, difficulty in, owing to the terms of the will—Summons by executor—costs—Supreme Court Rules, O. 45 R. 14-B.

Where an executor takes out an originating summons for the construction of a will and for the determination of the rights of the legatees and the amounts payable to them, and it is found that the necessity for the Summons is entirely attributable to the ambiguity of the language of the testatrix herself, *Held* that the costs of the Summons are costs of administration or testamentary expenses, and *prima facie* they ought to be borne by the residue. O. 45 R. 14-B. of the Supreme Court Rules, has no application to a case where the difficulty necessitating the application is directly attributable to the imperfect phraseology of the testatrix herself.

Timson, *In re*: **Smiles** *v.* **Timson.** (1916) 1 Ch. 293.

Will—Construction—Issue—Parent—Meaning of.

By her will the testatrix gave her residuary estate, subject to a life-interest to five named nephews and nieces, and provided that, if any of them should die in the life-time of the tenant-for-life leaving "issue," such issue should take the share which his, her

or their deceased "parent" would have taken if living; if any of them die in the life-time of the tenant-for-life without leaving issue, the share of the one so dying should go to the survivor or survivors and the "issue" of him, her or them so dying and leaving issue. *Held*, that the word "issue" throughout the will must be confined to children.

Rainbow *v.* **Kittoe:** (1916) 1 Ch. 313.

Practice—Costs, security for—Suit by administrator—Administrator acting as agent for person out of jurisdiction—Insolvency of administrator.

A plaintiff who sues as an administrator for recovery of the estate, will not be ordered to give security for the defendant's costs of the action. This is so even if the letters of administration are granted to the plaintiff as the attorney of a person who is abroad and until that person obtains letters of administration, and the plaintiff is shown to be an insolvent.

Staples, *In re*: **Owen** *v.* **Owen**: (1916) 1 Ch. 322.

Declaration —Future Rights —Practice —Supreme Court Rules, O. 25 R. 5.

Under O. 25 R. 5 of the Supreme Court Rules it is competent to the Court to make a declaration at the plaintiff's instance, though at the time he had no cause of action. Notwithstanding the jurisdiction of the Court to make a declaration as to future rights (even then, the matter is one of discretion rather than of jurisdiction), in practice such a declaration should not, as a rule, be made where all the parties interested are not ascertained; and the rule laid down by Jessel, M. R. in *Curtis* v. *Sheffield* [1], holds good even at the present time.

Carnell *v.* **Harrison**: (1916) 1 Ch. 328. (C. A.)

Infant—Marriage Settlement of reversion—Repudiation—Reasonable time—Ignorance of right, effect of—Ante Settlement rights of parties, immaterial.

An infant must repudiate within a reasonable time after attaining the age of majority, a settlement of reversionary property made by her on her marriage. In the case of a Settlement of reversionary property, the "reasonable time" has to be calculated not

1. (1882) 21 Ch. D. 1.

from the date when the reversionary property falls into possession and becomes payable to her or her trustees but from the date of her attaining the age of 21.

In construing a contract or considering a question of repudiation of a marriage settlement, the consideration of the ante-settlement rights of the parties with respect to the property settled, is immaterial. An infant cannot plead ignorance of her right to repudiate as an answer to her obligation to exercise that right within a reasonable time.

Dacre, *In re*: Whitaker *v.* Dacre. (1916) 1 Ch. 344 (C.A.)

Trust—Defaulting Trustee—Legacy to Trustee—Assignee of legacy—Right of—Set-off—Administration of Estate.

A defaulting trustee cannot claim a share in the estate until he has made good his default. Where a trustee who is also a beneficiary is found to have misapplied a portion of the trust funds, and therefore, to be a defaulter, yet if he is able to produce as much as is necessary to satisfy the other beneficiaries he is not really in default, but is to be treated as having paid himself by advance or in anticipation. That principle applies not merely to a trustee but to an assignee for value from a trustee; it also applies to a trustee although, in the first place, he was not a beneficiary, but has since acquired a beneficial interest by a derivative title. There again he is not allowed to aver that he has misappropriated the money; he is not supposed to have misappropriated the money if by any possibility he can be treated as having paid himself. Again, the assignee of a trustee taking under a derivative title will be in the same position. Possibly it is to be understood that the trustee has properly applied the money; therefore it is not open to anybody claiming under the trustee to say he has not properly applied the money to the extent he is in default; to that extent he is deemed to have been paid.

JOTTINGS AND CUTTINGS.

The Poor Man's Lawyer.—Eighteen months have passed since the new system of legal aid came into force, and notwithstanding the difficulties caused by the war, the 'Poor Persons' Rules as is shown by the official statement printed in another column, have worked successfully. Over 4,000 applications have been received during this period, of which considerably more than

one-fourth have been granted. It is in matrimonial matters that the system has proved most effectual, no fewer than 200 decrees *nisi* having been granted to persons, who, without the assistance afforded by the new rules, would have found it difficult, if not impossible, to obtain the relief they were entitled to. Both in the Chancery Division and King's Bench Division, as well as in the Divorce Court, substantial results have been obtained. Not the least merit of the new system is that it tends to destroy the private organisations, which, under the misleading name of 'Poor Man's Lawyers' batter upon necessitous persons with legitimate grievances. How mischievous and dishonest these spurious organisations may be is shown by the case at the Central Criminal Court, in which two fraudulent 'poor man's lawyers' were sentenced by the Common Serjeant on Tuesday to rather lenient terms of imprisonment. It would be well now that the official system of legal assistance is in good working order, if all these so-called 'Poor Man's Lawyers' instituted and conducted for private gain, were suppressed.—*The Law Journal, 18th March 1916.*

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Bar Council and *Ethics of Advocacy.*—The Bar Council have been dealing with a request for advice from the Bar Committee at Shanghai on an old, old question as to the ethics of advocacy. The Council's decision was that if a confession of guilt was made to the Advocate before the proceedings were begun it was most undesirable that he should undertake the defence; but that if it was made during the proceedings or in such circumstances that the Advocate retained for the defence could not retire from the case without seriously compromising the position of the accused person, the advocate's duty was to protect his client so far as possible from being convicted except by a competent tribunal and upon legal evidence, sufficient to support a conviction for the offence with which he was charged. An eminently sound view. The stock illustration is the case of Lord William Russell, murdered in 1840 by his valet Courvoisier. On the second day of the trial of Courvoisier, who knew that he had been recognised, sent for his counsel and told him that he had committed the murder. He said that he was not guilty, and that he expected Mr. Phillips to defend him. Counsel was for throwing up the case, but his junior told him that this would not be right, and ultimately they decided to consult Baron Parke, be-

fore whom and the Lord Chief Justice the trial was taking place. Baron Parke's first question was: "Does the prisoner require you to go on defending him?" And being satisfied of that, he said, that counsel must not throw the case up and that it was Mr. Phillip's duty to go on with it, taking care, of course as to what he said, and seeing that he did not incriminate any other persons, but to defend the man fairly and properly upon the evidence.—*The Law Notes, Feb. 1916.*

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Lord Chief Justice's Quasi Political duties.—The decision of the Divisional Court, since confirmed by the Court Appeal, in *Rex* v. *Halliday* is an apt illustration of the undesirability of using our judges for any purposes other than purely judicial duties. The decision is probably absolutely correct in law, but a quasi political judge—a judge who has been sent by the Government on a quasi political international mission—should not have formed one of the court.

By its decision the Divisional Court and now the Court of Appeal, has given the Government vast powers. That a British subject may be interned during the war may be necessary, but Parliament went far when it extended the internment provisions of the Defence of the Realm Act, 1914, to British subjects. It will be noted, however, that the power only arises as to British subjects of hostile origin or associations.

Theoretically, the liberty of the subject, the provisions of Magna Charta and the power of Habeas Corpus are gone. In these days we are only too ready to the curtailment of our liberties to give the Government, in short, all they ask for, but the Lord Chief Justice, who is a quasi-politician should not have presided over the Court which gave this decision.—

The present Lord Chief Justice possesses probably the power of the Lord High Executioner. One moment he is the Lord High Financial Government Agent, the next the Lord High Government Enquirer, and the next the Lord Chief Justice of England.

The welfere of the nation demands that the executive and the judicial authorities should not be too friendly.—*The Law Notes, March 1916.*

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Shortest Judicial Summing up.—A Law Journal asked by a lay newspaper what is the shortest judicial summing up on record thinks that the palm should be awarded to Judge Rentoul, one of the present Judges of the London Criminal Court. "Gentlemen of the Jury," said he, "you have heard Mr. X say everything that there is to be said for the prisoner—which amounts to exactly nothing. Consider your verdict". The second prize it thinks should be given to a certain Judge in a case concerning loss of property on a rail road. "Gentlemen, in this case the plaintiff claims a hundred pounds for goods lost on the defendants' line. Railways are always losing peoples' things. They lost a bag of mine last week. Consider your verdict'. Very good for England. But the first prize, as the Docket several years ago pointed belongs to this side of the water and to a contributor to this very number of the Review, and an old friend of the The Docket, Mr. Justice Riddel, of the High Court of Ontario. The lawyers on both sides had finished their lengthy arguments, when the Judge seeing that the only question in the case was the measure of damages charged the Jury in but three words: "Gentlemen, How much?"—*American Law Review, 1916.*

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The Jolly Testator who makes his own will.

Ye lawyers who live upon litigants' fees,
And who need a good many to live at your ease,
Grave or gay, wise or witty, whate'er your degree,
Plain stuff or Queen's Counsel, take counsel of me.
When a festive occasion your spirit unbends,
You should never forget the Profession's best friends;
So we'll send round the wine and a bright bumper fill,
To the jolly testator who makes his own will.

He premises his wish and his purpose to save
All disputes among friends, when he is laid in the grave;
Then he straightway proceeds more disputes to create
Than a long summer's day would give time to relate.
He writes and erases, he blunders and blots,
He produces such puzzles and Gordian knots,
That a lawyer intending to frame a deed ill
Could not match the testator who makes his own will.

Testators are good; but a feeling more tender
Springs up when I think of the feminine gender;
The testatrix for me, who, like Telemarque's mother
Unweaves at one time what she wove at another.
She bequeaths, she repeats, she recalls a donation,
And she ends by revoking her own revocation,
Still scribbling or scratching some new Codicil,
Ah! success to the woman who makes her own will.
'Tisn't easy to say 'mid her varying vapours
What scraps should be deemed testamentary papers;
'Tisn't easy from these her intentions to find,
When perhaps she herself knew her own mind.
Every step that we take there arises fresh trouble—
Is the legacy lapsed? is it single or double?
No customer brings so much grist to the mill
As the wealthy old woman who makes her own will.
The law decides questions of *meum* and *tuum*
By kindly consenting to make the thing *suum*;
The Aesopean fable instructively tells
What becomes of the oyster and who gets the shells
The legatees starve but the lawyers are fed,
The seniors have riches, the juniors have bread;
The available surplus of course will be nill.
For the worthy testators who make their own will.
You had better pay toll when you take to the road
Than attempt by a bye-way to reach your abode;
You had better employ a conveyancer's hand
Than encounter the risk that your will shouldn't stand
From the broad beaten track where the traveller strays,
He may land in a bog or be lost in a maze:
And the law, when defied, will revenge itself still
On the man and the woman who make their own will.

Juridical Review.

CONTEMPORARY LEGAL LITERATURE.

In the American Law Review for January—February, Chief Justice Walter Clark makes a vigorous attack against the theory of the Court's jurisdiction to declare acts of Sovereign legislatures *ultra vires*. In this controversy, which has been raging for a very

considerable time, he sides Thomas Jefferson as against Chief Justice Marshall. Another writer in the same Journal deplores the alarming growth of extremes of wealth and poverty in the United States which invariably breed social inequality and therefore generate rancorous class antagonisms. Unless the law is made to weld this incoherent mass together, by substituting common property interests for those hostile interests which now prevail, the sporadic social warfare waged between capital and labour may lapse into chaos. He illustrates the point by reference to English History.

An important subject of which Tolstoy very often treats in his social writings is law. His doctrine as to law differs largely from the teaching of Plato, Aristotle and others. He recognises only divine or eternal laws but not the human. "The human or the written laws are not just. They are capricious and artificial; Jesus Christ nullifies them and confirms only the eternal law". In place of the written law Tolstoy would substitute the supreme law of love, fraternity and equal opportunity. This violent prejudice against law is due to the autocratic system under which he lived.

Professor Lee's lecture on *Legal Education, Old and New* appears in two consecutive issues of the 'Canadian Law Times.' In the best days of Roman Law, instead of lawyers taking their law from the Courts it was the Court that took its law from the lawyers. Unenslaved by the accident of forensic necessity they were free to consider each problem, as it arose, in its proper relation to morals and legal principle. The revival of Roman Law in the twelfth century was the beginning of what Professor Vinogradoff not inaptly calls a ghost story. The Roman law was then taught for its scientific value for the law which is practised in Courts is entirely different. But soon, this law came to affect the law in Courts and thus to be of interest to practising lawyers. The age of codification has thrown the Roman Law again into the background but its scientific value is still recognised and its study is made a compulsory preliminary to practice in the Continent. In England, Roman Law is taught in the Universities; in the Inns only English Law is taught. In the United States of America, once the astounding notion prevailed that any adult citizen who could walk and talk had a natural right to practise law. In Indiana good moral

character is still all that is wanted. In England, the practice of reading in Chambers is coming more and more into vogue. In Canada, the system of apprenticeship to a law office is universal. In Manitoba, attendance at law school is made compulsory. In all the provinces of Canada there is a reduction of the period of apprenticeship in favour of Graduates in Arts or Law. The Professor suggests that a mere study of the practice of Law or even the knowledge of the law is not sufficient to make a thorough and scientific lawyer and therefore recommends a study of Roman Law, Jurisprudence and International law as a University Course.

BOOK REVIEWS.

THE LAW OF PARTITION AS ADMINISTERED IN INDIA, *by S. C. Mitter, Esq., B.A., Barrister at Law First Edition, Butterworth & Co. (India) Ltd., Calcutta. Price Rs. 3.*

In this book, the writer attempts to give a comprehensive account of the Law of Partition in India. We have no doubt the book will be found useful by the profession. Its usefulness would have been considerably enhanced if the writer instead of merely recording the effect of case-law had undertaken to consider and suggest solutions for the numerous difficulties that arise in the working of this branch of the law, if need be, by reference to English precedents.

THE LAW OF TRANSFER IN BRITISH INDIA, VOL. III, 4TH ED., 1916, *by Dr. H. S. Gour. Thacker Spink and Co., Calcutta, Rs. 10.*

The volume completes the well-known treatise on the Transfer of Property in British India which is mainly a commentary on the Transfer of Property Act by Dr. Gour. The volume under review comprises the Law of Landlord and Tenant, Gifts, Exchanges and Choses-in-action. The reader will find the case law on the subjects brought down to the end of January 1916; and the addenda at the end of the volume note the cases on the branches of law dealt with in Vol. I and II up to date. We have no doubt that Dr. Gour's book will continue to enjoy a very high place among the commentaries on the Transfer of Property Act for its exhaustiveness and usefulness to practitioners.

THE INDIAN DECISIONS (OLD SERIES) VOL. 14, *by The Law Printing House, Madras.*

It was only last month that we announced the publication of Vols. 12 and 13 of the series; and now we are in receipt of Vol. 14 which contains the reports of cases in Vol. 11 and part 1 of Vol. 12 of the Bengal Sudder Dewani Adaulut Reports. This volume it need hardly be mentioned maintains the high level of its predecessors.

THE PROVINCIAL INSOLVENCY ACT, (*Lawyer's Companion Series*) *1916.*

The Lawyer's Companion Office has brought out this edition of the Provincial Insolvency Act as a companion volume to their publications of the other important works. The book will be particularly useful to the practitioner by reason of its introduction and the frequent references to English law in the body of the book.

A DIGEST OF ENGLISH CIVIL LAW *by Edward Jenks, M. A., B. C. L. Books IV and V, 1916. Butterworth Co., London.*

In the present circumstances, the wonder is not that there has been so much delay in the appearance of this part of the Digest but that it has appeared at all. The Law of Property having been completed with the last volume, the present one deals with (*A*) Family Law and (*B*) a portion of the Law of Succession, *viz.*, Testamentary Succession. The former covers 9 titles dealing respectively with S. I. Marriage Title I.—Celebration of Marriage. II.—Invalid and Voidable Marriage. III.—Jactitation of Marriage. IV.—Rights and Duties Arising out of Marriage. V.—Nullity, Divorce and Judicial Separation. S. II.—Relations of Children, Parents, and Guardians. Title I.—Legitimacy. II.—Duties of Maintenance and Education. III.—Custody and Guardian of Minors. IV.—Powers of Parents and Guardians in relation to the property of Minors. In the Law of Succession (Book V) S.I. begnis with Testamentary Succession. Title I.—The making of Testaments and Codicils. II.—The Revocation, Alteration, and Republication of Testaments and Codicils. III.—Capacity to make or attest a Testament or Codicil. IV.—Devises, Legacies, and Donations, Mortis Causa. In the next part it is hoped to finish the rest of the Law of Succession (*i. e.*, Intestate Succession and the distribution of Assets); and that will make the completion of

a work which in its treatment of the English Civil Law as a whole, may well be said to be unique. To us in India, the topics of Family Law in England and portions of the law relating to wills are more of theoretical interest than of direct practical application, most people here being governed by their own personal laws in such matters. To those familiar with the Indian Succession Act, the titles of the present book relating to the making of wills and their revocation, Devices, Legacies, &c., must be more or less familiar reading. But these considerations need not prevent our appreciation of the clearness and accuracy characteristic of the book.

THE HINDU LAW OF ADOPTION (TAGORE LAW LECTURES, 1883) *by Golap Chandra Sircar Shastri, M. A., B. L., Edited by Rishinda Nath Sircar, M.A.B.L., Vakil, High Court, Calcutta (2nd Edition, 1916; R. Cambray & Co.*

A melancholy interest attaches to this edition in that the author did not live to see its publication though he seems to have prepared the book for the press. Neither Sircar Shastri nor his work on Adoption requires any introduction from us. Both are well-known to the profession. The lectures are among the most valuable in the series and have largely helped to settle the law and there is no doubt their value will be felt whenever a new point arises for decision. By his learning and habit of vigorous thinking, Sircar Shastri has been able to give an interesting turn to many a discussion and though his views have not always found favour with the courts, they have contributed remarkably to the elucidation of the law. Need has not been felt for much alteration of the text, but all changes in the law have been carefully noted with comments where necessary. The case-law has been brought up-to-date.

SANJIVA RAU'S *All India Digest Criminal, 1836-1915. Vol. II, 2nd Edition.*

We have great pleasure in announcing the publication of the 2nd volume of this useful digest. Sanjiva Rau's is the only digest, so far as we are aware, of criminal rulings exclusively; and it will be particularly useful to practitioners devoting their attention to Criminal work.

DESAI'S *Point-noted Index of Cases judicially noticed. 1811—1915, Fifth Edition, 1916.*

The main features of the work are so well known to the legal profession in this country that it is needless to draw attention to them. So far as we are aware, the late Mr. S. Srinivasa Iyer originated the idea in this country of publishing an index of cases setting out the particular points on which the cases have been followed or otherwise judicially noticed. He, however, did not live to complete the work. Shortly after Mr. Srinivasa Iyer started the idea, Mr. Desai published the Fourth Edition of his "Index of Cases" in which he partially introduced the system of point noting. The present Edition carries out the system fully to all the Indian Cases.

The present Edition marks a further progress in the indexing of cases, in that it makes an attempt at bringing together cases which have a bearing on the case in hand, though not specifically noticing the case. With the increased facilities offered, the book is sure to be of invaluable assistance to all practitioners.

[*End of Vol. XXX.*]

NOTES OF RECENT CASES.

Abdur Rahim, J.
Srinivasa Aiyangar, J.
1916 January, 3.
A. S. Nos. 165 and 409 of 1914.

Companies Act—Secretary—Personal liability to members—Agreement as to—Validity—Liability imposed in return for payment by members—Effect.

There is nothing in the Companies Act to prevent the Secretary of a limited company from making himself presonally liable to members for amounts due to them from the company where the members agree to pay the Secretary a specified monthly salary out of monthly contributions made by the members.

C. V. Ananthakrishna Aiyar for Appellant.

T. R. Ramachandra Aiyar and *S. Viswanatha Aiyar* for Respondent.

Coutts-Trotter, J.
Seshagiri Aiyar, J.
1916 January, 4.
S. A. No. 2442 of 1914.

Hindu Law—Widow succeeding to husband's estate—Deed dividing estate between two daughters—Effect—Death of widow and one of daughters—Right of surviving daughter to succeed to whole estate.

A document under which a Hindu widow, who had inherited the estate of her husband, divided the same between her two daughters giving each authority to alienate, should be construed to deal only with her widow's estate. On the death of the widow and one of the daughters, the other daughter is entitled to possession of the whole estate.

C. V. Anantakrishna Aiyar for Appellant.

V. Ramdoss for Respondent.

Ayling, J.
Napier, J.
1916 January, 5.
S. A. No. 30 of 1915.

Mortgage—Redemption—Right of—Extinguishment—Simple money decree obtained by mortgagee against mortgagor—Purchase of mortgaged property by mortgagee himself in execution—Failure of mortgagor to object to validity of sale—Effect—Subsequent suit for redemption—Maintainability.

Where, in a suit for redemption, it appeared that the defendant, the mortgagee, had previously obtained a simple money decree against the plaintiff and purchased the mortgaged property himself in execution thereof, *held* that, the plaintiff having been a party to the prior proceedings and not having contested the validity of the sale in the execution proceedings therein, his right of redemption was lost.

V. S. Govindachariar and *Kallabiran Aiyangar* for Appellants

K. S. Ganapathi Aiyar for Respondent.

Ayling, J.
Napier, J.
1916 January, 5.

S. A. No. 400 of 1915.

Transfer of Property Act. S. 54—Sale of property of less than Rs. 100 in value—Property previously in possession of vendee—Registered instrument—Necessity—Unregistered sale-deed with recital as to delivery of possession—Effect.

A sale of immovable property of less than Rs. 100 in value and already in the possession of the vendee can only be effected by a registered instrument. In such a case, an unregistered sale-deed containing a recital that the vendor thereby gave possession of the property to the vendee is not sufficient to convey title.

V. Ramesam for Appellant.

V. Ramdoss for Respondent.

Sadasiva Aiyar, J.
Moore, J.
1916 January, 7.

C. R. P. No. 188 of 1914.

Civil Procedure Code of 1908 O. 21, R. 89—Execution sale—Application for setting aside—What amounts to—Deposit of money into treasury after filing lodgment schedule—Effect.

The deposit of money into the treasury after filing a lodgment schedule into court does not amount to an application to set aside the sale within the meaning of O. 21, R. 89 of the Code.

C. R. P. No. 415 of 1904 and 359 of 1902 followed.

P. Somasundaram for Petitioners.

P. R. Srinivasa Aiyangar and *H. Suryanarayana* for Respondent.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Moore, JJ.
1916 January, 12.

L. P. A. No. 360 of 1914.

Madras Estates Land Act S. 6—Applicability—Ijara for actual cultivation—Ijaradar if "ryot." within meaning of Act—Right to occupancy right by reason of Act—High Courts Act of 1861 S. 15. Applicability—Godavery Agency Courts if subject to jurisdiction of High Court.

An ijaradar who obtains an ijara muchilika for purposes of actual cultivation is a "ryot" within the meaning of the Madras Estates Land Act and obtains occupancy rights under S. 6 thereof.

Quaere whether the Godavery Agency Courts governed by the Godavery Agency Rules framed under Act XIV of 1874 (Schedule District's Act) are subject to the appellate jurisdiction of the High Court under S. 15 of the Indian High Court's Act of 1861.

23 M. 329 referred to.

D. Appa Rao and *P. Narayanamurti* for Appellant.

P. Somasundaram for *Hon. B. N. Sarma* for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 January, 24.

C. M. A. No. 352 of 1914.

Limitation Act, Art. 182—Execution—Step-in-aid—Application for adjournment, for getting encumbrance certificate.

An application by the decree-holder for an adjournment, in order to enable him to get an encumbrance certificate for the purpose of preparing the sale-proclamation, is a step-in-aid of execution.

P. Chenchiah for Appellant.

L. A. Govindaraghava Iyer for Respondent.

Sadasiva Aiyar and Napier, JJ.
1916 January, 25.

S. A. No. 431 of 1914.

Church—Roman Catholics—Right of worshippers—Claim by one section to exclude another, from a part of the Church—Concessions by one Bishop, if binding on successors.

Where a section of Roman Catholic Christians claimed to exclude another section of the same community belonging to the

same Church, from occupying a wing of the Church, on the ground of an alleged inferiority of caste on the part of the latter, *held* that the claim was opposed to the rules and tenets of the Catholic Church and could not be allowed. A concession of such a claim by one Bishop is not binding on his successors-in-office.

T. Rangachariar and *V. S. Govindachariar* for Appellants.

W. Barton for Respondent.

Ayling, and Napier, JJ. — *1916 January, 27.* — S. A. No. 80 of 1915.

Civil Procedure Code S. 66—Scope of—Person claiming title under purchase certified by Court—Meaning of—Release, not effective to pass title.

In execution of a decree against the plaintiff, his properties were sold in Court auction and purchased by A. Subsequently A, alleging that he purchased the property *benami* for the defendant executed a deed of release in favour of the latter. The plaintiff, claiming that the purchase by A and the subsequent release in favour of the defendant were *benami* for himself sued for a declaration that he was in possession as owner and for an injunction restraining the defendant from interfering with his possession. *Held* that the release by A in favour of the defendant was not effective to pass a title to the properties, that the defendant could not be said to be a person claiming title under a purchase certified by the Court and that S. 66 of the Civil Procedure Code was no bar to the maintainability of the suit.

Jadu Nath Poddar v. *Rup Lal Poddar* [1], followed.

T. M. Krishnaswami Iyer and *A. V. Visvanatha Sastri* for Appellant.

K. Bhashyam Iyengar for Respondents.

Ayling and Napier, JJ. — *1916 January, 28.* — S. A. No. 2360 of 1913.

Co-heirs—Mahomedan Law—Adverse possession—Mortgage of property by one co-heir—Rights of mortgagee against other heirs, without notice of mortgage.

Where one of several co-heirs under the Mahomedan Law, is in possession of the whole property forming part of the inheritance

1. (1906) I. L. R. 36 C. 967, 984.

and gives a kanom mortgage of the same describing it to be exclusively his own and the mortgagee is in possession for more than 12 years, such possession of the mortgagee is not adverse to the other co-heirs so as to give him a valid mortgage right as against the shares of the other co-heirs unless the other co-heirs had notice of the mortgage.

1914 M. W. N. 708, 38 M. 903, followed.

23 B. 137, distinguished.

T. K. Govinda Aiyar for Appellant.

P. V. Parameswara Aiyar for *C. V. Anantakrishna Aiyar* for Respondent.

Ayling and Napier, JJ. *1916 January, 31.* S. A. No. 487 of 1915.

Madras Estates Land Act—Ss. 4, 27 28—Applicability—Suit for rent—Plea of custom to pay rent on cultivated lands only—Sustainability—Provisions of Rent Recovery Act compared.

S. 4 of the Madras Estates Land Act must be read subject to the provisions of S. 27 thereof and it is open to a tenant to plead a custom that only cultivated lands in a village can be charged with rent.

26 M. L. J. 575, (1915) M. W. N. 192, followed.

Per Napier, J:—Ss. 27 and 28 give the widest possible powers to a Revenue Officer. A claim to pay a reduced amount of rent or reduced rent on the whole holding in a particular year by reason of the fact that a portion of the holding remained uncultivated in the preceding year can be considered under Ss. 27 and 28. Old and New Acts compared.

M. D. Devadoss for Appellants.

T. S. Ramaswami Aiyar for Respondents.

Ayling and Napier, JJ. *1916 February, 1.* S. A. No. 2654 of 1913.

Limitation Act of 1908—S. 23; Art. 120, 124, 131, 144—Applicability—Temple Committee—Suit for declaration that suit temple is subject to their jurisdiction and for decree directing

defendants to plaintiffs' supervision—Limitation—Denial of right of Committee more than 6 years before suit—Effect.

Where in a suit by a Temple Committee appointed under Act XX of 1863 for a declaration that the suit temple was subject to the jurisdiction of the plaintiffs and for a decree directing the defendants, who were not appointed by the Committee, to submit the account-books and properties of the temple to the supervision of the plaintiffs, it appeared that the defendants had denied the right of the plaintiffs more than 6 years before suit, *held*, that

1. Neither Art. 124 nor Art. 144 of the Limitation Act applied to the case.

2. The suit was not governed by Art. 131, as the right of the Committee was not a recurring right within the meaning of that Art;

3. The suit did not fall within S. 23 of the Act as the denial by the defendants of the right of the plaintiffs and the refusal to submit to their supervision was not a continuing wrong within the meaning of that section.

4. The suit, being one for declaration, was governed by Art. 120 and inasmuch as the plaintiff's right to the declaration of their right was barred, their right to supervision was also barred.

H. Balakrishna Rao for *K. Narayana Row* for Appellants.

A. S. Viswanatha Aiyar for Respondents.

Sadasiva Aiyar and Moore, JJ.
1916 February, 1.

L. P. A. No. 131 of 1915.

Civil Procedure Code O. 23, R. 1—Partition suit—Withdrawal of suit by plaintiff—Defendant applying to continue suit as plaintiff—Duty of Court.

Where the plaintiff in a partition suit withdraws his suit under O. 23, R. 1 C. P. Code, and one of the defendants claiming a share in the property applies to continue the suit as plaintiff, *held*, that the Court is not bound to allow the defendant to so continue the suit.

T. Prakasam for Appellant.

M. Patanjali Sastri for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 February, 1.

C. M. A. No. 197 of 1914.

Provincial Insolvency Act Ss. 4 (a), 6 (3), 36 and 38—Transfer to trustee, on behalf of creditors—Transfer, if voidable at the instance of Official Receiver — Adjudication — Property of Insolvent if vests in Receiver—Transfer by debtor to trustee for benefit of creditors—Creditor privy to act of bankruptcy of debtor, if can apply for adjudication.

S. 4 (*a*) of the Provincial Insolvency Act does not exclude a conveyance to some of the creditors as trustees for the general body of creditors. A transfer made *bona fide* by a debtor to trustees for the benefit of creditors cannot be annulled under S. 36 of the Act. As soon as an adjudication order is made, the properties of the Insolvent cannot be treated as having vested in the Official Receiver. To have that effect, an order under S. 18 of the Act, appointing a Receiver is necessary.

A debtor cannot avail himself of a transfer of property to a third person for the benefit of his general body of creditors, as an Act of insolvency under S. 6 Cl. 3, though a creditor can do so under S. 4 Cl. (a) of the Act.

It is not open to a creditor to present a petition for adjudication if he has been privy to the Act of bankruptcy on which he relies.

S. T. Srinivasagopala Chariar for Appellant.

C. V. Ananthakrishna Iyer for Respondent.

Coutts Trotter, J.
1916 February, 1.

C. R. P. No. 294 of 1915.

Broker—Commission of—Agent for purchase and agent for sale, difference between—Broker for purchase, duty of—Defect in title—Executory contract by vendor to third person—Effect of—Completion of sale-deed—Broker, if entitled to commission.

There is a difference between the rights and liabilities of a broker who acts as an agent for the sale of lands and one who acts as an agent for the purchase of lands. A broker for sale has earned his commission as soon as he finds a willing purchaser and brings him into contact with his principal, though the actual

sale is brought about by the intervention of some body else. A broker for the purchase of lands must secure for the vendee a free and clear title and is bound to communicate to his principal any defects in the title of which he is aware. The mere fact that the vendor had entered into a contract for the sale of a portion of the lands to a third person some $2\frac{1}{2}$ years before the date of sale to the vendee, is not a defect in the title of vendor and a broker who buys such lands for his principal is entitled to his commission.

S. T. Srinivasagopala Chari for Petitioner.

A. V. Visvanatha Sastri for *G. S. Ramachandra Iyer* for Respondent.

Coutts Trotter and Seshagiri Iyer, JJ.
1916 February, 1.

S. A. No. 2386 of 1913.

Hindu Law—Inheritance—Gotrajas beyond the 14th degree —No right to inherit in Southern India—Jus Tertii, onus *of proof.*

The Hindu Law as prevalent in Southern India does not recognise the right of Gotrajas beyond the fourteenth degree to inherit. In a suit by a Bandhu to recover the inheritance, the *onus* of proving the existence of nearer heirs is on those who set it up.

C. V. Ananthakrishna Iyer and *K. R. Rangaswami Iyengar* for Appellants.

T. R. Ramachandra Iyer and *N. Rajagopalachariar* for Respondents.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Moore, JJ.
1916 February, 1.

C. M. A. No. 19 of 1915.

Civil Procedure Code Sch. ii para. 21—Private reference—Award—Application to file in Court—Satisfaction of the award, if a ground for refusal to file, the award and pass a decree.

Where an application is made to the Court to file an award made by the arbitrators on a reference out of Court, the mere fact that the terms of the award have been satisfied prior to the application is no ground for refusing to file the award and pass a decree thereon as required by Sch. ii para. 21 of the Civil Procedure Code.

C. S. Venkatachariar for Appellant.

C. V. Ananthakrishna Aiyar for Respondent.

Ayling and Napier, JJ.
1916 February, 2.

Crl. Revn. Case. No. 653 of 1915.

Criminal Procedure Code S. 145—Preliminary order—Statements filed—Magistrate if bound to continue inquiry, if no likelihood of breach of the peace, thereafter.

Where after the passing of a preliminary order under S. 145 (1) of the Criminal Procedure Code in pursuance of which written statements were filed by the parties, the Magistrate is satisfied that there is no apprehension of a breach of the peace, it is open to him to drop the proceedings at that stage.

T. Rangachariar and *K. V. Krishnaswami Aiyar* for Appellants.

E. R. Osborne for Respondent.

Sadasiva Aiyar and Moore, JJ. } C. M. A. No. 86 of 1915.
1916 February, 2.

Impartible Estate—Liability of holder for debts of predecessor —Mortgage—Acquisition of equity of redemption by mortgagee— Merger—Income of the estate—Extent of liability for debts.

The Mohunt of Tirupathi obtained a decree under O. 34 R. 6 of the Civil Procedure Code, against the late Rajah of Kalahasti, the holder of an impartible estate. The present Rajah had, before his accession, taken a mortgage of the estate from the late Rajah, who however did not discharge the mortgage. The present Rajah after his accession, had received the income of the estate for a number of years. The Mohunt of Tirupathi in execution of his decree, sought to attach a portion of the estate in the hands of the present Rajah, free of the mortgage in his favour. *Held*, that the mortgage in favour of the present Rajah created by the late Rajah, had been extinguished on the former's accession to the estate.

40 C. 89 (P. C.) and 29 M. L. J. 583, referred to.

Held further, that the income of the estate was assets in the hands of the present Rajah and in the absence of evidence that he had applied the income for purposes binding on the estate, he was liable to the creditors to the extent of the income received by him after his accession.

L. A. Govindaraghava Aiyar and *A. Ramachandra Aiyar* for Appellants.

The Hon'ble The Advocate General and *K. Rajah Aiyar* for Respondent.

Coutts-Trotter and Seshagiri Iyer, JJ. } S. A. No. 37 of 1914.
1916 February, 3.

Hindu Law—Widow—Alienation of portion of estate—Consent of reversioner, effect of.

Where a Hindu-widow alienates a portion of her estate with the consent of the then presumptive reversioner, the alienation is

not binding on the actual reversioner unless it was made for proper purposes, the consent of the presumptive reversioner being evidence of its propriety.

A Srirangachariar for *T. Rangachariar* for Appellants.

V. Ramesam for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 February, 8.

C. M. A. No. 107 of 1915.

Limitation Act Arts. 65 and 120—Minor—Receipt of money by next friend on behalf of minor—Surety for next friend—Failure of next friend to account to minor—Suit by minor on attaining majority against next friend and his surety—Limitation.

The next friend of a minor plaintiff received certain moneys on behalf of the minor and a surety for the next friend undertook to be liable in case the next friend did not account to the minor on his attaining majority. A breach of the obligation having occurred, the minor on attaining majority sued both the surety and the next friend for an account of the sums due to him. *Held*, that the suit as against the surety, being governed by Art. 65 of the Limitation Act, was barred having been instituted more than 3 years after majority; but, that the suit as against the guardian, being governed by Art. 120, was in time.

A. Krishnaswami Iyer for Appellant.

N. S. Rangaswami Iyengar for *T. Narasimha Iyengar* for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 February, 8.

C. M. A. No. 385 of 1914.

Civil Procedure Code S. 47 and O. 21, R. 90—Execution sale in contravention of provisions of decree—Sale in wrong order—Application to set aside.

Where an application is made by the judgment-debtor to set aside an execution sale on the ground that the properties were

not sold in the order directed by the decree, *held* that the application was one under S. 47 and not under O. 21 R. 90 of the C. P. Code.

T. Rangachariar for Appelllant.

C. V. Ananthakrisna Iyer for Respondent.

Sadasiva Aiyar and Moore, JJ. / *1916 February, 9.* — C. M. S. A. No. 90 of 1914.

Civil Procedure Code S. 60 (n) Right to future maintenance—Attachment in execution of decree—Appointment of receiver.

A right to future maintenance is not liable to attachment in execution of a decree against the maintenance-holder and the appointment of a receiver for realising such maintenance and applying it in satisfaction of the decree, is bad.

K. R. Subramania Sastri for Appellant.

T. S. Narayana Iyer for Respondent.

Chief Justice and Srinivasa Aiyangar, J. / *1916 February, 9.* — A. S. No. 376 of 1914.

Lunacy—Adjudication not superseded—Adoption by lunatic at sane intervals—Validity—Hindu Law—Adoption—Nature of—Act of.

An adjudication of lunacy not superseded does not prevent the lunatic from making a valid adoption if at the time of his making the adoption he is sane and is in a position to understand the nature of the act he is doing.

(1905) 1 Ch. 160 Distinguished.

An adoption is a religious act and not an alienation of property.

T. V. Venkataramier and *A. Venkatarayaliah* for Appellants.

B. Somayya for Respondent.

Coutts-Trotter, J.
1916 February, 10.

C. R. P. 663 of 1915.

Court Fees Act, S, 7 Sub-S. V. Cls. (b) and (d)—Scope and applicability—Suit for specific plot covered by a survey No. comprising large area—Valuation for purposes of Court-Fee and jurisdiction—"Separately assessed"—"Definite Share"—Meaning.

A suit for a specific plot of land comprising 3 acres and odd and covered by a particular survey number comprising an area of 4 acres and odd falls under S. 7 V. (*d*) and not under S. 7 V. (*b*) of the Court-Fees Act. The valuation of such a suit for purposes of Court-fee and jurisdiction is the market value of the land sued for.

16 A. 493 Referred to.

A. Krishnaswami Aiyar for Petitioner.

P. Narayanamurti for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 February, 15.

C. M. S. A. Nos. 95 & 96 of 1914.

Decree—Execution—Reference to pleadings and judgment—Power of executing court.

Where a decree is ambiguous. it is open to the court executing the decree to look into the pleadings and the judgment to ascertain its precise meaning. But where the provisions of a decree are reasonably clear, the executing court is not competent to add to, or vary its terms.

T. Rangachariar for Appellant.

T. R. Ramachandra Iyer and *G. S. Ramachandra Iyer* for Respondents.

Coutts-Trotter and Seshagiri Iyer, JJ. 1916 February 17. — S. A. No. 852 of 1914.

Burden of proof—Discharge—Suit on mortgage—Original deed in the possession of mortgagee with indorsement of discharge —Mortgagee only a markswoman—Presumption.

The presumption of discharge arising from the production by the mortgagor, of the original mortgage deed with an indorsement of discharge signed by the mortgagee, does not arise in a case where the mortgagee is a marksman and the indorsement is impeached as a forgery.

A. V. Visvanatha Sastri for Appellant.

T. Rangaramanujachari for Respondent.

Coutts-Trotter J. 1916 February 18. — Crl. Revn. Case No. 693 of 1915.

Evidence Act S. 24—Confession—Invalidiaing circimstance —Onus of proof.

Under S. 24 of the Indian Evidence Act, a confession is admissible *prima-facie*, and the *onus* is on the person objecting to its admissibility to prove that it was obtained by threat or coercion etc.

Under the English law, the *onus* in such a case would seem to be on the prosecution.

T. Rangachariar for Petitioner.

The Public Prosecuter for Government.

Coutts-Trotter and Srinivasa Iyengar, JJ. 1916 February, 18, — A. S. No. 90 of 1912.

Lessor and Lessee—Covenant for quite enjoyment—Breach— Cause of action when arises—Suit for declaration—Limitation.

The failure of the lessor to put the lessee into possession of the demised land goes to the root of the contract of lease and is

a complete and final breach which gives rise to a cause of action to the lessee at the inception of the term. The period of limitation commences from the date of the breach and there is no continuing cause of action throughout the period of the lease, for a suit by the lessee in respect of the breach.

Per Srinivasa Aiyangar, J. Though a covenant for title is a covenant for the whole of the term and is in that sense a continuing covenant, yet a breach of it is not a continuing breach.

The Government Pleader for Appellants.

T. Prakasam for Respondents.

Coutts-Trotter and Seshagiri Iyer, JJ. | S. A. Nos. 1509 to 1511 of 1914.
1916 February, 18. |

Compromise—Validity of—Consideration—Transfer of Property Act S. 6—Executory Contract for conveyance—Assignment, if bad—Specific Relief Act S. 23—Executory contract by a member of a Hindu family—Liability of others.

A compromise is valid, if at the time it was entered into, there was consideration to support it. An executory contract for the conveyance of land is not property within the Transfer of Property Act, nor is it an actionable claim. At the same time it is not a mere right to sue and its assignment is not forbidden by S. 6 of the Transfer of Property Act. It is not the law that assignments cannot be supported unless they come within the Transfer of Property Act. Under S. 23 of the Specific Relief Act an assignee of an executory contract for the conveyance of land, can enforce the same.

Per Seshagiri Iyer J. The liability of a Hindu co-parcener as regards executory contracts is not different from his liability under executed contracts. In either case, the same considerations as to benefit and necessity, apply. An executory contract by the deceased manager of a Hindu family, is binding on the survivors if necessity is shown for the contract.

K. R. Subramania Sastri for Appellant.

K. Govinda Marar for Respondent.

Sir John Wallis, C. J.
Abdur Rahim, J.
Srinivasa Aiyangar, J.
1916, February 22.

Full Bench.
S. A. No. 1376 of 1914.

Civil Procedure Code O. 23, R. 1 (3)—Suit against alienee from a Hindu widow for declaration that alienation is not binding on the reversioners—Withdrawal—Subsequent suit for possession—Whether barred—"Subject-matter," "Matter"—Meaning of.

Where a reversioner brings a suit against the widow and the alienee for declaration that an alienation by a Hindu widow is not binding on the reversion, and during the pendency of the suit the widow dies and the suit is consequently withdrawn without liberty to bring a fresh suit, and subsequently he sues to recover possession from the alienee on the ground that the alienation is not binding on him, the subsequent suit is not barred by reason of the provisions of O. 23, R. 1 (3) of the Civil Procedure Code.

The cause of action and the reliefs asked for in the subsequent suit are different from the cause of action and reliefs in the former suit.

The provision in O. 23, R. 1 (3) being a penal provision, the terms "subject-matter" and "matter" ought to be construed strictly.

4 C. W. N. p. 110 followed.

21 M. p. 35 ; 1910 M. W. N. p. 782 ; 2 L. W. p. 177 overruled.

T. V. Venkatarama Aiyar for the Appellant.

S. Varadachariar for the Respondent.

NOTES OF RECENT CASES.

Coutts Trotter and Srinivasa Aiyangar, JJ.
1916 February, 18.

S. A. Nos. 2037 and 2038 of 1914.

Madras Estates Land Act, S. 3 Cl. (2) (c) and (d)—Grant by Nawab for subsistence of a relation—Jaghir—Inam—Jurisdiction of Civil Court.

Where certain lands were granted to a lady of the family of the Nawab of the Carnatic as a provision for her maintenance, the grant though styled as a Jaghir, is really an Inam and not a Jaghir within S. 3 (2) (c) of the Estates Land Act. Where the grantee of such lands holds both the Melvaram and the Kudivaram, the lands do not form an estate within S. 3 (3) of the Act and the jurisdiction of the Civil Courts is not ousted.

S. Subramanya Iyer for Appellant.

T. R. Venkatarama Sastri for Respondent.

Sir John Wallis, C. J.
Abdur Rahim and
Srinivasa Aiyangar, JJ.
1916 February, 22.

L. P. A. No 185 of 1915.

Criminal Procedure Code S. 147—Jurisdiction of Magistrate, under—Order prohibiting the public from passing through a public street, if legal.

It is not open to a Magistrate acting under S. 147 of the Criminal Procedure Code, to pass orders prohibiting the public from passing through a public street.

S. Krishnamachariar for Appellant.

Marthandam Pillai for Respondent.

Sadasiva Aiyar and
Moore, JJ.
1916 February, 22.

C. M. A. No. 280 of 1914.

Civil Procedure Code, O. 21 R. 16 proviso (2)—Decree against assets of deceased in the hands of a defendant—Assign-

ment of decree to that defendant—Decree, if executable against other defendants, judgment-debtors.

Where a decree is passed against the assets of a deceased person in the hands of A, one of the defendants in a suit and against the rest of the defendants unconditionally, and A takes an assignment of the decree on payment of the decree amount from his private funds, *held* that O. 21, R. 16, proviso (2), applied and that the decree was not executable against the other judgment-debtors (defendants).

T. Rangachariar and *C. S. Venkatachariar* for Appellants.

T. R. Ramachandra Iyer and *K. S. Jayarama Iyer* for Respondents.

Sadasiva Aiyar and Moore, JJ. 1916 February, 25. } L. P. A. No. 318 of 1914.

Civil Procedure Code Ss. 2 (2) and 115—Abatement of suit—Dismissal—Order, if a decree—Appeal—Revision.

Where a suit is dismissed as having abated in consequence of the failure of the plaintiff to bring on record the legal representatives of the deceased defendant, the order amounts to a decree within S. 2 (2) of the Civil Procedure Code and is appealable. Where a remedy by way of appeal is open to a party, the High Court will not interfere in revision.

K. S. Jayarama Iyer for Appellants.

T. V. Muthukrishna Iyer for Respondents.

Abdur Rahim and Phillips, JJ. 1916 February, 29. } S. A. No. 221 of 1919.

Religious Endowment—Mutt—Succession—Dwandwa rule—Usage—Proof—Evidence Act S. 32 (4)—Fact in issue, proof of—Public right, what is.

Succession to the headship of a mutt is governed by the usage of the institution. *Dwandwa* mutts are interdependent mutts in this sense, that when there is a vacancy in the office of matadhipathi owing to the failure of the last occupant to nomi-

nate his successor in one mutt, the head of the other mutt can fill up the vacancy by ordaining a proper person and appointing him to the office. In other respects, the mutts are independent of each other. The *Dwandwa* rule is not a general law governing religious institutions but requires proof in each case before it can be held to apply to particular institutions. At the same time, the usage is not antagonistic to, or at variance with Hindu Law and courts will not require such strict proof of the usage, as in the case of a custom in derogation of the Hindu Law. Though there was only one instance of a head of the mutt having been appointed under the *Dwandwa* rule, yet having regard to the fact that the occasions for the application of the rule were rare and that there was no evidence of any other usage and the tradition the court upheld the custom. It is impossible to lay down as a general rule what amount of evidence is necessary to prove a custom in every case.

Where the usage of the mutt was to appoint a Balabrahmachari and ordain him a Sanyasi *Held*, that a Balabrahmachary who had already been ordained a Sanyasi could not be validly appointed to the mutt.

S. 32 Cl. (4) of the Evidence Act applies not only to a case where the public at large claim the disputed right but also where a section of the public *viz.*, the Madhwas are interested in a particular right. A statement falling within S. 32 of the Evidence Act can be admitted in evidence not only to prove a relevant fact but also a fact in issue.

T. Rangachariar and *K. Y. Adiga* for Appellants.

The Hon'ble the Advocate-General and *B. Sitarama Row* for Respondents.

Sadasiva Aiyar and Moore, JJ.
1916 February, 29.

C. M. A. No. 363 of 1914.

Hindu Law—Guardianship—Power of father to appoint testamentary guardian for the person and property of minor son.

A Hindu father is entitled to appoint a guardian for the person of his minor son, by will. But he has no right to appoint a testamentary guardian for his minor son in respect of joint

family property in which his son takes an interest by birth. 22 M. L. J. 247 ; 21 I. C. 848 ; 29 I. C. 475 referred to.

T. Rangachariar for Appellant.

The Hon'ble the Advocate General and *N. S. Rangaswami Iyengar* for Respondent.

Abdur Rahim and Phillips, JJ.
1916 February, 29.

A. S. No. 362 of 1914.

Hindu Law — Widow—Alienation— Necessity—Proof—Old alienation—Quantum *of proof—Barred debt.*

In order to justify an alienation by a widow, actual pressure in the shape of institution of suits by creditors, need not be proved. The widow is in possession of the estate in her own right and not as a trustee for the reversioners. In the case of alienations which are very old, courts would not require such strict proof of necessity as in the case of a recent alienation. A *bona fide* sale by a Hindu widow, of her husband's property in order to pay off a barred debt of her husband is binding on the reversioner.

9 M. L. J. 363 referred to.

T. Rangachariar for Appellant.

The Hon'ble the Advocate General for Respondent.

Sadasiva Aiyar and Moore, JJ.
1916 February, 29.

L. P. A. No. 217 of 1914.

Contract Act S. 178—Goods entrusted to commission agent for sale—Pledge by Agent—Rights of owner.

Whether the plaintiff handed over a jewel to a commission agent for sale on condition that he should pay over the proceeds to him after deducting his commission and the agent pledged the jewel to the defendant who acted in good faith, *held* that the plaintiff had transferred possession of the jewel to the pledgor and that he could redeem the jewel only on payment of the principal and interest of the pledge money.

K. S. Jayaram Iyer for Appellant.

T. V. Gopalaswamy Mudaliar for Respondent.

NOTES OF RECENT CASES.

Abdur Rahim, J.
Srinivasa Aiyangar, J.
1916 March, 7.

A. S. No. 324 of 1914.

Hindu Law—Will—Construction—Bequest to widow for life and to B, daughter's son then alive and other sons subsequently to be born—Death of B after testator but during lifetime of his widow—Effect—Right of B's widow—Rights of daughters' son subsequently born—Madras Act I of 1914—Scope and applicability.

A, a Hindu, executed a will in 1905 and died in 1906. By his will, he bequeathed all his properties to his wife for her life and after her death to B, his daughter's son who was then alive, and to the other sons that might be born to his daughter thereafter. B survived the testator but died in 1908 leaving a widow. In 1914 a son was born to the daughter of the testator. The testator's widow was alive at the date of suit and even subsequently. In a suit brought by B's widow, *held*

(1) The bequest to B and to the other daughter's sons was a gift to a class;

(2) The daughter's sons born during the lifetime of the widow of the testator, though subsequent to his death, were intended to take along with B;

(3) Madras Act I of 1914 applied to the case as the disposition in favour of the daughter's sons had not come into operation before the date of the Act.

(4) Each daughter's son as soon as he was born took a vested and transmissible interest.

(5) Though B died, his widow and the other daughter's sons of A born before the death of his widow took vested interests.

V. Ramesam and *P. Narayanamurti* for Appellant.

The Ag. Advocate-General and *B. Somayya* for Respondent.

Ayling, J.
Napier, J.
1916 March, 9.

S. A. No. 1460 of 1914.

Civil Procedure Code, O. 8, R. 6—Scope of—Transfer of Property Act, S. 132—Applicability—Mortgage—Assignment—Suit for sale by assignee—Mortgagor's plea of set-off in respect of decree obtained after assignment against original mortgagee for debt due prior thereto—Maintainability.

The claim to set-off allowed by O. 8, R. 6 of the Code is not available as against an assignee.

In a suit for sale upon a mortgage instituted by an assignee of the mortgage, *held* the defendant (mortgagor) cannot plead a set-off in respect of a decree obtained by him against the original mortgagee subsequent to the assignment, though the debt for which the decree was obtained was due to him before the assignment. *Held* further that neither S. 132 of the Transfer of Property Act nor any analogous principle of law could be invoked as against assignees of mortgage securities. (1901) 1 Ch. 213 explained; 17 M. L. J. 485 distinguished; 15 M. L. T. 293 Referred to.

C. V. Ananthakrishna Aiyar for Appellant.

A. S. Venku Aiyar for Respondent.

Abdur Rahim, J.
Srinivasa Aiyangar, J.
1916 March, 10.

A. S. No. 416 of 1914.

Contract Act S. 74—Penalty—Stipulation by way of—What is—Amendment of section—Effect—Loan with undertaking by borrower to sell certain property to lender in event of failure to repay on specified date—Provision for sale if can be held to be "penalty" within meaning of section.

Under S. 74 of the Contract Act of 1872 as amended by the Act of 1899 the penalty may be either a specified sum of money or any other stipulation intended by the parties to be a penalty for breach of a contract The penalty contemplated by the section is not limited to money.

Where A borrowed a sum of money from B, executed a promissory note therefor and undertook, by a Varthamanam executed in favour of B as part of the transaction of loan, to convey certain property to B in the event of his failure to pay the amount of the promissory note on a specified date, *held*, in a suit by B for specific performance of the contract to sell on the ground of A's default to pay on the specified date, or, in the alternative, for the amount due under the promissory note that S. 74 of the Contract Act could be applied to the case if the Court found that the stipulation for sale of the property in the event of

default to pay on the specified date was in the nature of a penalty within the meaning of that section.

The Advocate-General and *R. Krishnan-achariar* for Appellants.

A. Krishnaswami Aiyar and *C. Rajagopala Aiyangar* for Respondents.

Sadasiva Aiyar, J.
Moore, J.
1916, March 11.

C. M. A. No. 296 of 1914.

Guardians and Wards Act—Guardian—Order confirming appointment after acceptance of security—Appeal—S. 47 (1)—Effect—Civil Rules of Practice Rules 240, 241—Validity.

The final order confirming the appointment of a guardian of the properties of a minor after the acceptance of the security tendered by such guardian is not open to appeal under S. 47 cl. (1) of the Guardians and Wards Act.

Per Sadasivaiyar, J. (*Moore, J.* dissenting)—Rules 240, 241 of the Civil Rules of Practice, which indicate that the appointment of a guardian is made after the acceptance of the security, are *ultra vires*.

J. L. Rosario and *A. Swaminatha Aiya-* for Appellants.

C. S. Venkatachariar and *P. S. Vaidyanadha Aiyar* for Respondents.

Sadasiva Aiyar, J.
Moore, J.
1916, March 13.

C. M. S. A. No. 85 of 1915.

Foreign Court—Jurisdiction—Submission—What amounts to—Pudukota Court—Ex parte decree against non-resident foreigner—Application by defendant to set aside ex parte decree—Effect.

The filing of an application to set aside a decree passed ex-parte by a foreign Court (Pudukota Court) against a non-resident foreigner amounts to a submission to the jurisdiction of that Court and the defendant in such a case cannot resist the enforcement of the decree in a British Indian Court on the ground that the foreign Court had no jurisdiction to pass such a decree against him.

S. T. Srinivasagopalachariar for Appellant.

T. V. Muthukrishna Aiyar for Respondent.

Chief Justice and Phillips, J. 1916, March 14. } O. S. A. No. 19 of 1914.

Power of Attorney—Transaction—Authority to institute suit on behalf of firm—What constitutes—Plaint filed by agent alleged to be authorised by Power of Attorney—Power not containing authority—Agent in fact authorised to institute suit in question—Irregularity—Reversal of decree on ground of—C. P. C. of 1908 S. 99—Limitation Act, S. 19—Agent—Authority to acknowledge—Express authority not necessary.

Where objection was taken to the decree of the Court below on the ground that the plaint, which was presented by an agent purporting to act under a power of attorney executed by the plaintiffs in his favour, was not validly presented as the power did not authorise the agent to institute the suit, but there was uncontradicted evidence that the agent was authorised and directed to file the suit in question, *held*, that even if the power of attorney did not cover the case, there was merely an irregularity of procedure in respect of which the decree appealed against could not be altered or reversed under S. 99 of the Code.

It is not necessary to satisfy S. 19 of the Limitation Act that there should be an express authority in favour of the agent. The authority may be gathered from the circumstances of the case.

J. L. Rosario and *H. Balakrishna Rao* for Appellants.

T. R. Venkatarama Sastri and *L. S. Veeraraghava Aiyar* for Respondents.

Sadasiva Aiyar, J. and Moore, J. 1916, March 14. } C. M. A. Nos. 11, 12 to 14 of 1915.

Executing Court—Jurisdiction—Costs—Provision as to—Decree in accordance with judgment—Amendment of decree in execution—Legality—Remedy of aggrieved party—Amendment—Petition for—Conversion of, into one for review—Practice—Arbitration—Reference—Provision for costs of parties—Court if can pass inconsistent order.

When the decree is in accordance with the judgment with regard to the provision about costs, the executing court has no jurisdiction to amend the decree on the ground that the provision as to costs in the judgment was due to a mistake. Neither S. 151

nor S. 153 of the Code confers any such jurisdiction. The proper remedy in such a case is to apply for review.

When both parties provided by the agreement to refer to arbitration that costs of both sides should come out of their joint family funds, the court has no jurisdiction to direct costs to be paid by one party to the other. A petition for amendment of a decree may be converted into one for review of the judgment in the case.

V. Ramdoss for Appellant.

V. Ramesam and *T. Ramachandra Rao* for Respondents.

Chief Justice, Abdur Rahim and Srinivasa Aiyangar, JJ. 1916, March 15. — L. P. A. No. 20 of 1915.

Madras Estates Land Act, S. 3 Sub-S. 7 cl. (1)—"Old waste"—What is—Waste land let to one person for 5 years in 1901 and re-let to another in 1905, "at time of letting"—Meaning.

Waste land, which is let for the first time in 1901 for 5 years to one person and re-let to another in 1906 is not "old waste" within the meaning of S. 3 Sub-S. 7 cl. (1) of the Estates Land Act. The character of the land is to be determined with reference to the letting in question. The words "at the time of letting" in S. 3 Sub-S. 7 cl. (1) mean immediately prior to the letting in question.

V. Ramdoss for Appellant.

P. Nagabhushanam for Respondent.

Sadasiva Aiyar and Moore, JJ. 1916, March 16. — C. M. S. A. No. 69 of 1915.

Limitation Act of 1908, Art. 182 cl. (2)—Execution of decree—Limitation—Appeal against one defendant only—Limitation if saved as against other defendant, not even made party to appeal—Civil Procedure Code of 1908, O. 21, R. 16—Execution of decree—Right of decree-holder on record—Third parties becoming entitled to decree along with him subsequent to decree—Application by recorded decree-holder only—Maintainability.

Under Art. 182 cl. (2) of the Limitation Act of 1908, the time allowed for execution of a decree runs, in a cases in which there

has been an appeal from it, only from the date of the appellate decree, even as against a defendant who was not made a party to the appeal and against whom the decree appealed against was allowed to become final. 26 M. 91 F. B. foll. 20 C. W. N. 178 rel. 22 I. C. 685 cons.

The executing court is bound to allow execution at the instance of the person whose name appears on the record as decree-holder, notwithstanding that other persons may, subsequent to the decree, have become jointly interested in the decree with him. 29 M. L. J. 693 foll.

A. Krishnaswami Aiyar for Appellant.

A. S. Visvanatha Aiyar for Respondent.

Abdur Rahim and Srinivasa Aiyangar, JJ. } A. S. No. 118 of 1915.
1916, March 22.

Partnership—Partner authorised to borrow on behalf of firm—Loan contracted by partner and execution of pro-note for it—Execution not as partner—Liability of other partners for debt covered by note—Negotiable Instrument—Suit on original cause of action—Maintainability—Loan and execution of note simultaneous—Effect.

If a member of a firm, who is authorised to borrow money on its behalf borrows it and executes a pro-note for it, the firm is liable for the debt covered by the note, even though the member does not execute the note as partner. 39 B. 261 P. C. foll. 17 M. L. J. 126 cons. 26 M. L. J. 19 dist.

Except in cases in which a debt becomes merged in a negotiable instrument, a suit for the recovery of a debt for which a pro-note has been executed is maintainable as well in cases in which the note and the advance were simultaneous as in cases in which the note was executed for securing an antecedent debt.

A. Krishnaswami Aiyar and *M. Subbaraya Aiyar* for Appellants.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for Respondents.

NOTES OF RECENT CASES.

The Chief Justice Phillips, J. / *1916 March, 9.* — O. S. A. No. 59 of 1915.

Trusts Act—S. 23 (f)—Trustee—Breach of Trust—Employment of trust property in trade or business—Interest—Liability for—Rate allowable.

A trustee who has committed a breach of trust by employing trust property in trade or business is liable, under S. 23 cl (f) of the Trusts Act, to pay interest only at 6 % compound interest with half-yearly rests. An order directing him to pay interest at 12 % compound interest is wrong.

The Advocate-General, V. V. Srinivasaiyangar and *T. G. Raghavachariar* for Appellant.

R. Subramania Aiyar for Respondent.

Abdur Rahim J. Srinivasa Aiyangar, J. — A. S. No. 320 of 1914.

Practice—Events subsequent to suit—Court if and when will take note of—Mortgage—Properties situated in Agency and in plain tracts—Suit in civil courts—No objection raised—Objection in appeal for first time—Maintainability—Decree if will be reversed on ground of objection—C. P. C. of 1908, S. 21—Effect.

In a suit for the recovery of the principal amount and interest due under a mortgage bond by sale of the mortgaged properties, their Lordships passed a decree as prayed for, although the principal amount had not, by reason of the stipulations in the bond, become payable at the date of suit and became payable only during the pendency of the appeal in the High Court.

Where a suit for sale on a mortgage was instituted in the civil courts although part of the properties comprised in the mortgage and forming the subject-matter of the suit lay in the Agency tracts and a decree was allowed to be passed by the first court without objection, *held* that the objection could not be taken in appeal under S. 21, C. P. C.

V. Ramesam for Appellant.

Hon. B. N. Sarma and *K. S. Aravamudu Aiyangar* for Respondents.

Sadasiva Aiyar and Moore, JJ. / *1916 March, 22.* — S. A. Nos. 898, 900 of 1913.

Minor-Appellant—Representation—Death of guardian ad-litem *appointed by court below—Failure to appoint fresh guardian—Appeal heard and decided without guardian* ad litem.

Validity of decree—Execution Sale—Validity—Rights of bona fide *purchaser.*

Where the guardian *ad litem* of a minor defendant—appellant died pending the appeal and the appeal was heard and decided against him without a fresh guardian being appointed, *held* that the decree in the appeal was void as the minor was not properly represented and that a sale of the property of the minor in execution of such decree was also void and conveyed no title even to a *bona fide* purchaser.

G. Venkataramiah (*B. Narasimha Rao* and *N. Rama Rao* with him) for Appellants.

V. Ramesam, P. Narayanamurthi and *P. Somasundaram* for Respondents.

Wallis, C. J.
Phillips, J.
1916 April, 4.
} C. M. P. Nos. 2697 to 2700 of 1915.

Companies Act S. 68—Mortgage—Advance of money by officer of a limited Company out of funds of a joint family of which he is manager.—Omission to register—Effect of.

Where the manager of a joint Hindu family who is an officer of a Limited Company advances in his individual capacity, money on a mortgage to the Limited Company, the mortgage is invalid for want of registration under S. 68 of the Companies Act, in spite of the fact that the consideration for the mortgage was paid out of the joint family funds.

T. Narasimha Iyengar and *C. Padmanabha Iyengar* for Petitioners.

A. Krishnaswami Iyer and *K. Balasubramania Iyer* for Respondents.

Sir John Wallis, C. J.
Abdur Rahim J.
Srinivasa Aiyangar, J.
1916 April, 5.
} S. A. 1366 of 1914.

Minor—Mortgage or sale in favour of—Validity—Indian Contract Act Ss. 2, 10—Transfer of Property Act S. 7.

A mortgage or sale in favour of a minor for executed consideration is valid; and there is nothing in the Contract Act or Transfer of Property Act against its validity.

33 Mad. 312 overruled.

P. R. Ganapati Aiyar for the appellant.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for the respondent.

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