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THE RECEIVING MOTHER.

Annapurni Nachiar v. *Collector of Tinnevelly*, *I. L. R.*, 18 *M.*, 277.

The question is whether the mother receiving in adoption only, or both she and the co-wife of the father have the status of mother to the deceased adopted son, the propositus. Even if the property had been a partible estate, the receiving wife alone as the mother would have been entitled to succeed to the exclusion of the father's co-wife who is only a step-mother. At the outset such a conclusion must commend itself to every jurist, for, a fiction in law—and adoption is but a fiction in law,—should as nearly as possible imitate nature and not violate it. This is peculiarly so with the question at issue, for, it would be the very reverse of reality in nature to recognise by fiction that a man has two or more mothers. The fiction of adoption in Hindu Law is one which is essentially assimilated to nature, so much so that by fiction he not only becomes the son born in the adoptive family but also ceases to be the son of his natural parents. In the family of adoption he acquires all the rights of a son by birth, entitling him to inherit not only to his adoptive parents but to all their relations to whom a natural born son would inherit; and his heritable right to his natural parents and to all their relations to whom he would have inherited, had he not been adopted, is cut off. Is it consistent with the genius of such a law that the fiction of adoption should outrage nature by predicating more than one mother to an adopted son?

Under the Roman law of adoption the reason assigned (1) why a man cannot adopt a person older than himself is, adoption imitates

(1) The Institutes of Justinian translated by J. B. Moyle, 2nd edition of 1889, bottom of p. 16.

nature and that it would be unnatural for a son to be older than his father. This should be equally true under the Hindu Law, for, under that Law,(1) almost the whole Law of adoption has been evolved from the canon that he must be "the reflection of a son."

There is no topic of Hindu Law on which the original text is so meagre as that on adoption. The law of adoption has been developed principally by commentators and by the Judiciary. Unless some clear authority in Hindu Law or some authoritative judicial decision is cited in support of the position that the father's co-wife who did not join in the adoption is entitled to the status of mother, it would be quite unreasonable to suppose that any court will hold that the Hindu system of Jurisprudence is so absurd as to create by fiction two or more mothers to one and the same person. There is no express authority bearing on this question either in the original texts of Hindu Law or in the works of any Hindu commentator which have been translated and published. There are however certain principles and analogies recognised or indicated by such texts and commentaries, from which it is apparent that the wife, in conjunction with whom alone the adoption is made by the husband, is the mother and the other wives are only mothers in a secondary sense, *i.e.*, they are only step-mothers. The modern authors on Hindu Law, both English and Indian, maintain the same view. Among judicial decisions, there are but three bearing on the question, all of which are in favor of the contention that the receiving mother alone is the mother; and one of which is exactly in point.

The only authorities which may seem to support the opposite view are two. One of them, *viz.*, the opinion of Mr. W. H. MacNaughten (2) expressed in the preface to his work on Hindu Law is really, when analysed, in support of our contention.

The other authority is Jagannatha's commentary as translated by Mr. Colebrooke.(3) He does not deal with the case of an adoption made by a person having several wives, in conjunction with only one of them. But he refers generally to an adoption by

(1) Mayne's Hindu Law and Usage, para. 94, *i.e.*, bottom of p. 104.

(2) W. H. MacNaughten's Hindu Law, 3rd edition, p. 13 of the preliminary remarks.

(3) Colebrooke's Hindu Law, 4th edition, Vol. II., p. 394.

a person having two wives without saying whether either of them joined in the act of adoption; and mentioning the difficulty of such adopted son claiming maternal ancestry on the side of both the wives, he meets the difficulty by observing that some reconcile it by suggesting that the two sets of maternal ancestors should be jointly considered as the manes of ancestors.

This explanation forcibly brings out the consciousness of the commentator that it would be absurd to regard an adopted son as having two lines of maternal ancestry because his father has two wives. He tries to explain away this absurdity by suggesting another fiction that both the lines should be conjointly considered as the manes of ancestors. He evidently was contemplating a case where the adoption was made by the husband without either of his wives joining him. Though, as a general rule, the husband associates one of his wives with him in the act of adoption, yet the adoption would be legal even though he does not so associate with him any of his wives. Evidently it was such a case that Jagannatha was referring to in his commentary and he was unable to suggest a better solution of the supposed difficulty of the adopted son having two lines of maternal ancestry. If the adoption has been made in conjunction with one of the wives, no difficulty would have suggested itself at all; for, in such a case, the wife who joined in the adoption and received the adopted boy would certainly be regarded as the mother and the line of her ancestry as the only maternal ancestry of the adopted son, while the line of ancestry of the other wife would not at all be regarded as the maternal ancestry of such adopted son. The case which was evidently in the contemplation of Jagannatha is, no doubt, one which presents some difficulty; for, neither wife joined in the adoption. If he had an only wife and she did not join in the adoption, she, no doubt, would, notwithstanding that she did not join in the act of adoption, become the mother of the adopted son and entitled to succeed as such (*vide* Dattaka Mimamsa, section I, verse 22).

There is no text referring to a case in which a person so adopting had more wives than one. The explanation suggested by Jagannatha to solve this anomaly is really no explanation at all. If it were necessary to suggest a solution in such a case, to avoid the anomaly

of the same person having two mothers and two lines of maternal ancestors, it will by no means be difficult to deduce a solution from admitted principles of Hindu Law. Though an adoption made by a Hindu without his wife joining him in the act of adoption is perfectly legal, yet from a religious point of view, he ought to associate with him his wife, and in case he has more wives than one, his senior or first married wife. This rule of preference in favor of the senior wife is merely a moral injunction, and is often violated out of partiality to a favorite wife, and in a legal point of view he may associate with him any one of his wives, even though she be the most junior. If he does not associate with him any of his wives, then, according to the moral precept that the first married wife should be associated with the husband in performing acts of religion, she should be regarded as having been associated in the act of adoption and, therefore, as the mother of the adopted son, the other wives of the husband being regarded as step-mothers. There is also another solution that may be suggested, having regard to the principle of Hindu Law, in a religious point of view, that marriage is for begetting male issue and that a man may marry wife after wife if the previously married wife does not present him with a son. If a man having several wives adopts a son without associating with him any of the wives in the act of adoption, the adoption takes place because even the wife last married has not given birth to a son; and in this view it may be suggested that the last wife should be regarded as having been associated with the husband in the act of adoption, and as such, the mother. When the husband selects any one of his wives to associate with him in the act of adoption as he is perfectly competent to do, in the same way in which he may select any of his wives for the purpose of begetting issue, no difficulty could at all arise. She is the receiving mother by the choice of the husband and is as such the only mother, the other wives of the father being only step-mothers. The difficulty arises only in the solitary case in which a man having more than one wife makes an adoption without associating with him any of his wives in the act of adoption. Nobody suggests that a man having several wives could associate with him more than one wife either in the act of adoption or in any other religious act. Such a thing cannot and does not occur, because, according to

ceremonial law, only one of the wives and that generally the eldest wife is associated with him in all religious acts. But if it should be asked how the question of maternity is to be determined, if a person chooses to associate with him two or more of his wives in the act of adoption, the answer is that the senior of them alone would be regarded as the receiving mother and as such the only mother of the adopted son, the joining of the other wives in the act of adoption being viewed as superfluous. The theory that an adopted son may have two or more mothers would lead to many anomalous, if not absurd, results, and, in fact, place him in a more advantageous position than an *aurasa* or a natural born son. He would be entitled to succeed to two maternal grandfathers while a natural born son could only succeed to one maternal grandfather. It has now been definitely settled that a daughter's son by adoption has the same right of inheritance to the father of the adoptive mother as the natural born son of a daughter. Suppose a person makes an adoption, after the death of his 1st wife, in conjunction with his 2nd wife, married either during the life-time of the 1st wife, or subsequent to her death, and the father of the 1st wife dies after such adoption leaving no widow nor daughter, could such adopted son claim to inherit the estate of the deceased father of the 1st wife as his daughter's son by adoption? If the opposite view were sound, the 1st wife also would be one of his mothers and he should be entitled so to succeed. Take an equally anomalous case of a man having only one wife who makes an adoption in conjunction with her and then marries a 2nd wife. Is the 2nd wife also to become the mother of the son adopted previous to her marriage and is he to succeed to the estate of the father of such 2nd wife as his maternal grandfather? Such anomalies may be multiplied. The only rational principle is that though a son may be adopted to a deceased male even long after his death by his widow under proper authority, yet there is no such thing as an adoption to a female either during her life-time or after death. She may become mother by fiction at the time of the adoption to her husband, but no female could become the mother of a son adopted by or to her husband after her death nor could a female become the mother of a son adopted by her husband before her marriage. No wife could become the mother of a son adopted by or to her husband either subsequent to her death or prior to her marriage, and

adoptive father by joining in the act of adoption and receiving the boy adopted becomes the mother of such adopted son and her ancestors become his maternal ancestors. It may be that in the two texts the word "only" is used to exclude the natural mother and her ancestors, but that does not detract from the force of the inference which is deducible from the two texts that the receiving wife is the adoptive mother. This is really strengthened and not weakened by the text first referred to, *viz.*, Dattaka Mimamsa, section I, placitum 22. In the above text, the author of the Dattaka Mimamsa refutes the position that the assent of the wife is necessary for the validity of an adoption by the husband, and maintains that owing to the superiority of the husband by the mere fact of adoption the filiation of the adopted as son of the wife is complete in the same manner as her property in any other thing accepted by the husband. This shows that the filiation as the son of the wife, of a boy adopted by the husband alone without the assent and association of the wife is on the same footing as her right in any property accepted by the husband alone. Even in the case of a Hindu having a son by one of his several wives,* such a son is, in a sense, the son of all the wives; the sense being that he is the step-son of each of the other wives and each of them his step-mother; and not that he will be entitled to succeed to each of them as son or that each of them will be entitled to succeed to him as mother. By analogy, therefore, if a Hindu adopts a son by associating with him one of his wives, she alone becomes the mother and the other wives become only step-mothers. This is exactly the view propounded by one of the Court Pandits (Hindu Law officer) of the Supreme Court at Calcutta in answer to certain questions referred to him in a certain case in 1823.

Q. Can three widows adopt, one of them being related to the child?

A. Only one can adopt. The three may agree upon the child to be adopted, but only one of the widows can adopt.

Q. Does the child so adopted become the child of the widow so adopting or the child of three?

A. The child becomes the child of all three.

* Sacred Books of the East, Vol. XXV., p. 365, para. 183, Manu,

Q. Suppose the child to die after adoption, which of the widows inherits the property?

A. The widow adopting him, if he should die under age. She will be called the mother and the others the step-mothers.

These questions and answers will be found at p. 11 of the appendix of Sir F. MacNaughten's Hindu Law * and also referred to by Mr. Mayne in his Hindu Law and Usage, 5th edition, Note *x* to para. 125, p. 146.

The three answers above set forth clearly bring out the three essential propositions bearing on the question at issue.

1*st*,—That though one may have several wives only one of them can receive the boy in adoption.

2*ndly*,—That all the wives are the mothers of an adopted son in the sense in which all the wives are the mothers of a son born to any one of them.

3*rdly*,—That, on the death of the adopted son, unmarried and issueless, that wife alone, who received him in adoption would succeed as mother, the other wives being only his step-mothers.

This has not only the merit of avoiding the absurdity of a person being supposed by fiction to have two mothers, but has also the merit of assimilating it to the case of an *aurasa* or natural born son of a person having two or more wives. Apparently the Dattaka Mimamsa and Dattaka Chandrika take the same view (*vide* Dattaka Mimamsa, sec. II, verse 69, and Dattaka Chandrika, sec. I, verse 23, and Mayne's Hindu Law and Usage, para. 125).

The practical result both in the case of an *aurasa* or natural born son and an adopted son of a man having several wives is, under the Mitakshara law, that the natural or the receiving mother alone, as the case may be, will succeed to him as mother; while the other wives of the father, as step-mothers, are not recognised as heirs at all. In the event of his natural or receiving mother having no daughter or daughter's issue then he would succeed to her stridhanam, but in regard to stridhanam property of

* Sir F. MacNaughten's considerations of Hindu Law, Appendix, p. 11.

his father's other wives or step-mothers his place in the line of inheritance is only as the sapinda of her husband, his father, and that only, if the father's marriage with the step-mother was in one of the approved forms. As regards the ceremonial law, the natural born son or the adopted son, as the case may be, stands in the position of a son to all the wives and as such has to perform the obsequies of all the wives of his father; but so far as the maternal ancestry is concerned, he has to offer oblations only to the ancestors of the natural receiving mother while no oblations are offered to the ancestors of the step-mother.

Turning now to modern authorities reference may be made to Sir F. MacNaughten, W. H. MacNaughten, West and Bühler and Mr. Mayne among English authors, and to Justice Gurudas Banerjee's 'Hindu Law of Marriage and Stridhanam', Battacharya's Commentaries on Hindu Law, Vyavastha Chandrika and Golap Chander Sircar 'on Adoption among Indian authors'.

In Sir Francis MacNaughten's Hindu Law, p. 171, the author in commenting upon the case in which as already mentioned certain questions were referred to one of the Hindu Law officers of the Supreme Court of Calcutta, stated as follows:—

"The law is clear and was undisputed. The boy could not be received by the three widows jointly. He must be received by one of them—and would then be considered as the son of Lakhinarain and the widow by whom he had been received—about this there was not, because there could not be, any dispute."

The same principle will *a fortiori* be applicable to an adoption made by the husband in his life-time in conjunction with one of his wives.

Mr. W. H. MacNaughten in his preliminary remarks or preface to his 'Principles and Precedents of Hindu Law', 3rd edition, 1874, at pp. 12 and 13, after observing that cases of omission in codes of law can only be supplied by analogy gives as an illustration of such omission in Hindu Law, the instance of a man dying childless and leaving three widows him surviving, with authority to one of them to adopt after his death, which is done accordingly. He then considers the question as to who would succeed to such adopted son on his death issueless, leaving the three widows him surviving, and assumes

that those who maintain that the estate would devolve "of right to the widow who received him in adoption to the exclusion of the other two, who can be considered in the light of step-mothers only" concede, however, that, had the childless husband adopted the boy during his life-time, he could not have selected for him, as adoptive mother, one of three wives, and excluded the other two from all maternal relations. Mr. W. H. MacNaughten then expresses his dissent from the view that the adopting widow only succeeds, and says that, though the reasoning in support of such view seems plausible enough, yet it is not the law. According to him, the three widows should, in a legal point of view, be held to be one and the same individual and the adopted son should be regarded as holding the same relation to all three widows of the adoptive father. The author then guards himself by limiting his opinion to a case in which the exclusive privilege in favor of the widow making the adoption is claimed from the simple fact that she alone made the adoption, and concedes that she would have the exclusive privilege of succeeding as the only mother of the adopted son, on his death, if it could be shown that the intention expressed or implied of the deceased husband was that such widow alone should be considered as the mother of the adopted child; but that the mere fact of his having commissioned only one of the widows to select and adopt the boy is not a sufficient indication that she alone is to have the status of mother to the boy. Mr. W. H. MacNaughten, therefore, recognises the principle that a person having two or more wives can constitute one of them as the mother of the adopted boy. Whether he is right or not in supposing that, when a husband authorises one of his three widows to adopt a boy after his death, it is reasonable to imply that his intention was to constitute her alone the mother of the son to be adopted, is a question which it is unnecessary to decide. It may be added that, in the view of one acquainted with Hindu usages and sentiments that nothing could be a stronger indication of the husband's intention that all his surviving widows are not to occupy the position of mother to the boy to be adopted after his death, but that only one of them should occupy such position than the circumstance of his authorising only one of the widows to select and adopt a boy. Mr. W. H. MacNaughten's statement that, in the illustration given by him, those who maintain that the widow who received the boy

in adoption would alone succeed as mother, conceded that, if the adoption had been made by the husband himself in his life-time, he could not have selected one of his wives alone as the mother, can carry but little weight. It does not appear who the person or persons were who made that concession which, on the face of it, to say the least, is inconsistent with the position they took, *viz.*, that by a husband's authorising one of his wives alone to adopt after his death, he constituted her alone as the mother. Mr. W. H. MacNaughten himself admits that the receiving widow alone would occupy the position of the mother, if that was the intention of the deceased, expressed or implied. If Mr. W. H. MacNaughten be right in this view, as undoubtedly he is, it necessarily follows that such intention on his part must have equal efficacy in the case of an adoption made by himself in his life-time which adoption he makes in conjunction with one of his wives to the exclusion of the other. The solitary authority of Mr. W. H. MacNaughten far from supporting the opposite view recognises the important principle that the husband could constitute any of his wives as the mother of the adopted boy.

The learned authors of West and Bühler's Digest deal with this question at pp. 1181 and 1182 of their Digest and they adopt the view of Sir F. MacNaughten and cite with approval the two judicial decisions which will hereafter be referred to. They first refer to the relations that exist between adoptive step-mother and son. The very expression "adoptive step-mother" negatives the appellant's theory that in the case of an adopted son all the wives of the adoptive father stand in the position of mother and the receiving mother alone is not the mother. At p. 1182 the learned authors say that "the importance of the right to adopt as between two or more widows becomes evident when it is borne in mind that the one taking the place of mother succeeds first to her son on his death without a child or widow. The step-mother is comparatively a remote successor." The learned authors then allude to the criticism by Mr. H. H. Wilson of the three widows' case quoted and considered by Sir F. MacNaughten at p. 171 of his considerations on Hindu Law. The criticism does not bear upon the question now at issue, but is directed to show that the property being ancestral, the testator who died leaving a natural born infant son

him surviving, could not by his testamentary authority to adopt, which was exercised, on the death of the natural born infant son, by one of his three widows, not being his mother, divest the mother, of the estate which, by the operation of the law, devolved upon her as the heir of her deceased infant son, and transfer the same to the adopted son and on his death to the receiving widow as his mother. Mr. Wilson, therefore, evidently acquiesces in the view that the boy could be adopted only by one widow and that she alone could occupy the position of mother; the other widows occupying the position of step-mothers; and Mr. Wilson would not have criticised the case adversely, if the testator had not left, him surviving, a natural born son by one of his surviving wives.

Mr. Mayne in his Hindu Law and Usage does not discuss this question directly. In paras. 125 and 154 he compares the rights of an adopted son with those of a natural born son and in maintaining they are identical, he places him in relation to the wives of the adoptive father, in the same position as the natural born son by one of the wives. In para. 125 after holding that the real fiction is only that the adoptive father had begotten the child upon its natural mother and not that the natural father had also begotten the child upon the adoptive mother, he states as follows:—

"The natural son becomes the son, not merely of the particular wife from whom he is born, but of all the wives; and the authors of the Dattaka Mimamsa and Dattaka Chandrika seem to think that the same result follows in the case of several wives from an adoption. The fiction can hardly extend to the length of his being conceived by all." It is in connection with this that he cites in his footnote *x* in para. 125, the opinion of the Hindu Law officer already referred to and placitum 183, Chap. IX of Manu. Under Manu's text, as already stated, all the wives are not mothers in the sense either that he succeeds to them all as son or that they succeed to him as mother. Mr. Mayne says that an adopted son in the case of a man having several wives, occupies the same position as a natural born son. That position, therefore, can only be, that one alone can be his mother, entitled to inherit to him, while the others would be only his stepmothers: who that one is to be, is shown by the Hindu Law officer's opinion referred to in the footnote *x* to para. 125 of Mr. Mayne's book. Para. 154 is devoted principally to

the consideration of the right of an adopted son to succeed to the family of his adoptive father's wife or wives. Mr. Mayne states :—

"*Prima facie* one would imagine that he must necessarily do so. The theory of adoption is that it makes the son adopted, to all intents and purposes, the son of his father, as completely as if he had begotten him in lawful wedlock. The lawful son of a father is the son of all his wives and would, therefore, I presume be the heir of all or any of them. And so it has been laid down that a son adopted by one wife becomes the son of all and succeeds to the property of all. The same result must follow where the son is adopted not by the wife but by the man himself."

The authority which Mr. Mayne cites in his footnote *m* to para. 154 in support of his position that a son adopted by one wife becomes the son of all and succeeds to the property of all is *Teencowrie* v. *Dinonath* 3 W. R., 49, the dictum in which is decidedly in support of our view. According to that decision he would succeed to the *stridhanam* property of the co-wife of his adoptive mother, as her stepson and not as her son.

Turning now to modern treatises on Hindu Law by Indians, Mr. Justice Banerjee's 'Hindu Law of Marriage and Stridhanam' invites prominent attention. He deals specially with this question. With reference to the husband associating with him one of his several wives in performing acts of religion, he says, at p. 129 (2nd Edition Revised 1896) :—

"One of the most important of these acts" (of religion) "which has also a legal aspect is the taking of a child in adoption. The wife who is associated with the adoptor in this act becomes the mother of the boy adopted, and her maternal ancestors become the maternal ancestors of the adopted son."

At p. 356 (same edition) he says :—

"An adopted son may become affiliated to a woman either by being taken in adoption by her husband in association with her or by being taken by the husband alone * * * * * or by being taken by the husband in association with another wife. * * * * * In the 1st two cases the adopted

son would, of course be regarded as son of the woman, but in the last case the question arises whether he is the son of the woman herself or the son of the co-wife".

In answer to this question, he refers to the observations of the High Court of Bengal in its judgment in the case of *Teencowree Chatterjee* v. *Dinonath Banerjee*, 3. W. R., 49, as showing that the son adopted by the husband of a woman in association with another wife should be regarded not as her son but only as the son of a rival wife for purposes of succession to *stridhana*.

Bhattacharya in his Commentaries on Hindu Law says as follows, at p. 151 :—

"But in the case of an adoption by the husband, the child taken becomes, by his act, the son of his wife also, except when the ceremony was performed in conjunction with another wife. Nanda Pandita says 'the forefathers of the mother that accepts in adoption, are also the only maternal grandsires of sons given and the rest.' Dattaka Mimamsa VI, S. 50. In this passage the word '*Eva*' (only) is meant to exclude the paternal ancestors of the natural mother. But it can be taken also to exclude the paternal ancestors of the adoptive mother's co-wives".

The following placitum in Vol. II, Vyavastha Chandrika of Shyamacharan Sirkar, has a material bearing on the question.

"348. Should the adoptor have many wives, then the adopted is to perform the Parvanasraddha in honor of the father and two other ancestors of that wife alone by whom he was received in adoption" (1).

In the next placitum he lays down :—

"349. If, however, he was received by none of them, either in conjunction with or under the authority of her husband, but by the husband alone, then the adopted is to perform the Parvanasraddha in honor of the ancestors of all such wives of the adoptor".

In the notes under this placitum, reference is made to the passage in Jagannatha's digest already referred to. This clearly shows that the author of Vyavastha Chandrika understood Jagannatha as

(1) Vyavasta Chandrika, Vol. II., p. 161.

referring only to a case in which the adoption was not made in association with any one of several wives (1).

The last authority under this head, though not the least in importance, is Golap Chander Sircar's Law of Adoption, published in 1891. The Judicial Committee of the Privy Council quote him with approval more than once in their recent judgment on the question of the validity of the adoption of an only son. He takes the strongest view in favor of our contention. He maintains that, unless the wife joins the husband in the act of adoption, she cannot acquire the status of a mother even in a case in which the husband making the adoption has only one wife. He explains that the affiliation referred to, in placitum 22 of section I of Nanda Pandita's Dattaka Mimamsa, is merely nominal, just as nominal as the wife's co-ownership in any property belonging to the husband (2). He also refers to a son adopted by a husband against the wife's will or without permitting her to associate with him in the ceremony of adoption as the son of the wife in a tertiary sense and that he does not stand to such wife or wives even in the position in which a natural born son by one wife stands with reference to her co-wife or co-wives. This may be overstating the case, for the relationship in which such a natural born son stands to the co-wives of his mother is simply by reason of such co-wives being the wives of his father. Similarly, if he were adopted in conjunction with no wife or in conjunction with one of the wives he must stand in the same position to all the wives of his father or to all the wives except the receiving mother as the case may be. The author unequivocally lays down that "if the husband alone or with one wife, adopts a son, then his wife or another wife respectively not joining the husband in the act of adoption cannot be called the mother that accepts in adoption."

Thus it will be seen on a review of all the foregoing authorities that there is a remarkable consensus of opinion that when a man makes an adopiton in conjunction with one of his wives only, she and she alone is the mother, while the co-wives are only step-mothers. The only case in which there is any difficulty or

(1) Colebrooke's Digest, 4th edition, Vol. II., p. 394.
(2) Sircar on Adoption, p. 227.
Sircar on Adoption, p. 215.

divergence of opinion is the one in which a man having one or more wives makes an adoption without associating with him any of them in the act of adoption.

All that now remain to be noticed are the two reported cases one of which is a precedent quite in point. It is the case of *Kasheeshuree Debia* v. *Greesh Chander Lahoree* decided in February, 1864, by a division Bench of the Calcutta High Court consisting of *Bayley* and *Jackson*, JJ. (1). In that case according to the facts found, one Kalikant having two wives adopted in his life-time one Sarodapershad in conjunction with his second wife only. After the death of Kalikant and of his junior wife, the adopted son died unmarried and issueless. The plaintiff, the senior wife of Kalikant claiming as the mother and heir of the adopted son, Sarodapershad, sued the defendant in possession who was the nephew of Kalikant. The contention on behalf of the plaintiff appellant was that both she and the deceased junior wife must be regarded as mothers by adoption of Sarodapershad, and as the junior wife predeceased the adopted son, that she as the only surviving mother, was entitled to succeed. The decision of the original court as well as that of the Court of Appeal was that she was only in the position of a step-mother to the propositus, the adopted son, and, therefore, she was not the heir entitled to succeed to Sarodapershad's properties.

The next and only other reported case in which there is only a dictum, though a clear one, is the case of *Teencowrie Chatterjee* v. *Dinonath Banerjee* decided in May, 1865, by another Division Bench of the Calcutta High Court. In this case, it was contended that an adopted son cannot inherit to the *stridhanam* property of his adoptive mother (2). It was held that the adopted son was entitled to succeed to the adoptive mother in the same way as he is entitled to succeed to the adoptive father. Apparently the adoptive father had only one wife and her status as mother was admitted. But the contention was that, in the adoptive family, the adopted son could only succeed to the property of his adoptive-father and not to the *stridhanam* property of the adoptive mother. Counsel

(1) Sup. Vol. W. R. Jan. to July 1864, p. 71.
(2) 3 W. R., p. 49.

who advanced this contention, urged in support of such contention by suggesting that a contrary contention would give rise to a difficulty in the case of the adoptive father having more than one wife. The Judges, in noticing this argument, meet it by stating that the Hindu Law of Inheritance provides even for this case, by providing that the son of a contemporary wife is among the heirs of a woman entitled to succeed to her *stridhanam*, thereby implying, that by analogy the adopted son would succeed to the *stridhanam* of the co-wives of his receiving mother. This decision is cited and approved by the High Court of Bombay in the case of *Gogobai* v. *Srimant Shashaji Maloji Row Raoje Bhosle*.(1)

JURISPRUDENCE.

APOLOGY.

In a recent case which excited considerable local interest, the question arose as to the legal effect of an apology in proceedings for libel. There is no statutory provision in India regarding it. We have, therefore, to look for the law in England to determine whether any legal weight is to be attached to an apology in civil or criminal proceedings. In the absence of any provision of the Penal Code, we may take it as clear that it is no defence in criminal proceedings. The only question that can possibly arise is, whether it can act in mitigation of punishment? It is impossible to say that an apology ought to have no effect upon the mind of the Judge. The fact of a prisoner confessing or expressing remorse for his criminal conduct cannot but weigh with the Judge in determining the *quantum* of punishment. Whatever be the true theory of punishment, whether it is the vengeance of the State, or the revenge of the party wronged, or the improvement of the criminal or an educative warning to the rest of society, there can be no doubt that the measure of punishment will be somewhat regulated by the state of mind of the prisoner towards acts of the kind for which he is arraigned. It is further impossible for the presiding Judge altogether to keep out of his mind the consideration that the prisoner condemns the act for which he is arraigned and feels sincerely sorry for it. It is, however, no defence to the proceeding, and can at no time be listened

(1) I.L.R., 17 B., 120.

to as such. It has, however, been said that a writ of criminal information, which is a prerogative writ, may be refused to the relator if upon *rule nisi* being issued, it is proved that the defamation was published inadvertently and an apology promptly published. A writ of criminal information would be refused for several other reasons also which would have no place in proceedings by criminal indictment. In *Regina* v. *Labouchere*, 12 Q. B., 320, the writ was refused on the ground that the complainant was resident abroad. In *Regina* v. *Aunger*, 12 Cox's Criminal Cases, 407, where the relator did not specifically deny the truth of the imputation that he rejected the vote of a woman, the rule *nisi* was discharged. The fact, therefore, of a writ of criminal information not being easily obtainable where the accused has purged his criminality by the publication of a prompt apology, only shows that a high prerogative writ would not be available to the relator, but not that an apology is an answer to criminal proceedings. On the other hand, where a criminal information is applied for the purpose of extorting an apology, the Court will not allow the writ to issue; and it was ruled by Chief Justice *Cockburn* in *Regina* v. *The World*, 13 Cox's Criminal Cases, 305, that it would be incumbent upon the Court, in order that its process might not be used simply for private purposes, to require before allowing the proceedings to be instituted an undertaking by counsel on the part of the relator to proceed with the prosecution in order to ensure its being carried to its legitimate conclusion. See Folkard, p. 371. It is needless to add that in proceedings by indictment, which is the ordinary procedure in a prosecution for libel, any apology by the accused cannot be taken into account.

As already observed, there is no statutory provision regarding the effect of an apology in civil actions in this country. Here, again, the state of the law in England has no real bearing, unless there is any rule of the common law relating to the place and effect of an apology. An apology, provided it is fair and full, cannot but produce a reasonable effect upon the mind of the Judge in determining the *quantum* of damages. An apology is a mode of making amends, and must operate in mitigation of damages, even though it is not made at the earliest opportunity after the commencement of the action. *Smith* v. *Harrison*, 1 F. & F. 565. It is no defence to the action under the common law. By Lord Campbell's Act, however, 6 & 7 Vict., ch. 96, it is provided (*vide* S. 1 of

the Act) that the defendant in any action for defamation may give in evidence in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so in the action, where the action shall have been commenced before there was an opportunity of making or offering such apology.

Apology has been made a defence in a civil action in a limited class of cases. S. 2 provides that where the libel was inserted in a public newspaper or other periodical publication *without actual malice and without gross negligence,* the defendant may plead in defence that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel. A further limitation has been imposed by S. 9 of 8 & 9 Vict., ch. 75 that the defendant should pay some money into Court in addition to the apology. Where there has been malice or gross negligence, or the publication is not contained in a newspaper or other periodical publication, or the apology is not prompt, or there is no payment into Court, the apology is no defence. It is needless to add that these statutory provisions have no force in India. The common law rule that an apology operates in mitigation of damages would of course apply.

NOTES OF INDIAN CASES.

Alamai *v.* **Positive Government Security Life Assurance Company,** I. L. R., 23 B., 191. The question in this case is a novel one and must be of considerable interest to Insurance Companies and to the large and increasing number of people with whom insurance is a craze. Unless a person has, what is called an insurable interest in the life of the person whose life is insured, the contract is void under the provisions of the Contract Act. The law is the same in England as to the necessity of an insurable interest. A contract of this description is of the nature of a wagering contract, but some wagering contracts like contracts of life or fire insurance are excepted from the rule which renders them void. In the absence of an insurable interest, the case does not fall within that exception. Without attempting an exhaustive definition of what an insurable interest is, it is sufficient to point out that some relationship as that of husband and wife, or that of father and

son, would be an instance of such interest. The same view was taken by the Madras High Court in a recent case.

Empress *v.* **Durand**, I. L. R., 23 B., 213. There seems to be no doubt of the correctness of Mr. Justice *Candy's* ruling in this case. The rule that the accused should not be examined upon oath or called as a witness does not apply when he is brought to be examined as a witness in the trial of another accused, whether charged with the same offence or not, if that other is separately tried. It may be inconvenient that the accused should be subjected to cross-examination as a witness in respect of matters as regards which he is awaiting his trial.

Queen-Empress *v.* **Raghu**, I. L. R., 23 B., 221. The High Courts in India have been divided as regards the admissibility of a confession not taken in accordance with the provisions of S. 164 or 364, the Calcutta Court holding evidence inadmissible and the Bombay Court holding such evidence to be receivable. In *Queen-Empress* v. *Viran*, I. L. R., 9 M. 224, the Madras High Court seems to have taken the same view as the Calcutta High Court. But S. 533 of the present Code has been so amended as to render evidence of the statement receivable, whether the informality was an omission to comply with the provisions of S. 164 or 364, or an infraction thereof. It seems, therefore, unnecessary to consider hereafter which of the conflicting views is correct.

Murigeya *v.* **Hayat Saheb**, I. L. R., 23 B. 237. The question in this case relates to the applicability of S. 244 to cases where a claim is made by the representative of the judgment-debtor as trustee for another. It seems to us that the language of Ss. 278 to 280 makes it clear that such a claim is not to be adjudicated upon under S. 244. A distinction may, however, be drawn between cases where the representative of the judgment-debtor is pursued in execution and those where the decree itself is obtained against the representative of the debtor. In the latter case where the judgment-debtor pleads that the property is held by him as trustee and that it is not liable for the decree-debt, it may seem more doubtful whether the question is to be treated as one for investigation under the claim sections merely. We think, however, that the view of *Ranade*, J., and not that of *Parsons*, J., is the sounder view. If the claim is made as trustee, the matter cannot be dealt with under S. 244.

Raghunath Mukund *v.* **Sarosh K. R. Kama**, I. L. R., 23 B., 266. Article 20 of the 2nd Schedule to the Provincial Small Cause Act, speaks of suits under S. 283 of the Code, and Article 19 of other suits for declaratory decrees. Article 21 refers to a suit to set aside an attachment by

a Court. It seems that all those provisions are intended to be reproduced by Cl. 5 of S. 19 of the Presidency Small Cause Act, which speaks generally of suits for declaratory decrees. In the case under notice, a claim had been preferred to movable property attached under several decrees; and after the claim was disallowed, a suit was filed to establish the claimant's right to the property. In regard to the attachments to which exception was not taken by a claim, the suit cannot be deemed to fall under S. 283, but may be regarded as one for a declaration. But the case as stated by the Chief Judge shows that the relief asked for was damages in respect of the attachment or the value of the goods. Having regard to the form of the prayer, there can be no doubt that it is a suit within the cognizance of the Small Cause Court.

Shivrudrappa *v.* **Balappa,** I. L. R., 23 B., 283. There can be no adverse possession during the continuance of the lease. Where the occupation is permissive and for a defined period, the possession of the occupant cannot become adverse. The right of the owner to possession arises upon the termination of the period of permissive occupation; and time runs from that date under Article 144. The principal must be the same, whether it is tenancy or permissive occupation for a term. Compare *Moideen Saiba* v. *Nagappen*, I. L. R., 7 B., 96.

Dattaram *v.* **Gangaram,** I. L. R., 23 B., 287. A mortgage by a guardian appointed under the Guardians Act, XX of 1864, and made subsequent to Act VIII of 1890 without the sanction of the Court appointing the guardian, is voidable at the instance of the party affected by it. The same view was taken by the Madras High Court in *Chinia Pillai* v. *Munisami Aiyar*, I. L. R., 22 M., 289. But the question remains whether the word "voidable" suggests that it would be avoided only on any of the grounds on which a contract could be avoided, or that it could be absolutely avoided by certain persons at their will and pleasure. We think the latter view is the correct one; and that is the interpretation which has been placed upon the same word occurring in S. 462 of the Civil Procedure Code, though the former interpretation has found favor with the Allahabad High Court in *Aman Singh* v. *Narain Singh*, I. L. R., 20 A., 98. See, however, *Arunachellam Chetty* v. *Meyyappa Chetty*, I. L. R., 21 M., 91.

Bai Mangal *v.* **Bai Rukhmini,** I. L. R., 23 B., 291. This is a case of some interest, and Mr. Justice *Ranade's* review of the authorities establishes the position that a widowed daughter is not entitled to be maintained in her father's family. There seems to be very little doubt that the sense of the community, though in favor of recognizing the

moral obligation, is not at variance with the law of the text books that there is no legal obligation.

Rango *v.* **Mudiyeppa,** I. L. R., 23 B., 296. This is an interesting case. It has been long ago held by the Allahabad High Court (see *Dharup Nath* v. *Gobind Saran*, I. L. R., 8 A., 614) that though there is a presumption of death in the case of a person who has not been heard of for seven years, there is no presumption as to the time of his death. In the case under notice, the plaintiff was adopted a year after the son of the adopting parent had ceased to be heard of, and the adopting parent's estate given to the plaintiff as filling the character of adopted son. If the natural son returned, the adopted boy was to have half the estate. In a suit brought more than seven years afterwards, it was held that the adoption had not been shown to be valid, because there was no presumption that the natural son had died before the adoption. But the Court turned round upon the defendant and said that he was bound to establish that the plaintiff did not fill the character of adopted son in virtue of which the estate was given to him. If the burden was rightly thrown upon the defendant to prove this, the decree was undoubtedly right. Chief Justice *Farran's* reasons for casting the *onus* on the defendant appear to us to be right.

Fakirgauda *v.* **Gangi,** I. L. R., 23 B., 307. A suit against the wife for joining her husband is a suit for restitution of conjugal rights. A suit against another who has the wife under his control or in his custody, is a suit for the recovery of the wife. In the case under notice, the suit was against the wife. It seems to us that in *Binda* v. *Kaunsilia*, I. L. R., 13 A., 126, Mr. Justice *Mahmood* effectively disposed of the contention that demand and refusal are an essential part of the cause of action. The provision of a period in the Limitation Act from demand and refusal cannot affect the substantive law of the Hindus or Mahomedans which does not require demand and refusal to give a right of action. Chief Justice *Farran* and *Candy*, J., observe that a minor wife cannot refuse. We know that a minor is incapable of contracting, and as her husband is her guardian, it cannot be said that the guardian's refusal is tantamount to the wife's. It appears to us that the wife may refuse even during minority. If so, time runs from that refusal.

There is a more important question, however, as to whether the cause of action is a continuing one. We are inclined to think it is. If so, it is difficult to reconcile it with Article 35 of the Limitation Act.

Bai Jasoda *v.* **Bamansha,** I. L. R., 23 B., 334. We are glad that the Bombay High Court has refused to follow the decision of the Allaha-

bad Court limiting the scope of S. 25 of the Small Cause Act to cases covered by S. 622, *Muhammad Bakar* v. *Bahal Singh*, I. L. R., 13 A., 277. We are also glad to note that when the High Court is rightly seized of the case under S. 25, the Court imposed no restrictions upon the nature of the order to be passed by the Court, but reversing the decree of the Small Cause Court, and passed a decree in favor of the plaintiff.

Ram Nath Rai *v.* **Lachman Rai,** I. L. R., 21 A., 193. The decision of the Allahabad High Court in *Bhawani Parsad* v. *Kallu*, I. L. R., 17 A., 537, that a decree against a Hindu father upon his mortgage in a suit to which the sons were not parties, cannot affect the sons' shares, is not, it appears to us, in accordance with the decisions of the Privy Council. Mr. Justice *Shephard* dissented from that decision in *Ramasamayyan* v. *Virasami Aiyar*, I. L. R., 21 M., 222, and another Division Bench of the Madras High Court has expressed its concurrence in the dissenting judgment of Mr. Justice *Bannerjee* in the Allahabad case. We have no doubt that the view of the Allahabad Court is erroneous, and we are glad to find the error somewhat minimised by the decision under notice that the sons are bound even though they are not made parties if they cannot show that the mortgage decree-holder was aware of their existence.

Sibta Kunwar *v.* **Bhagoli,** I. L. R., 21 A., 196. The decision in this case, upholding the maintainability of a suit against the assignee or heir of a certified purchaser, has the support of *Davies* and *Boddam*, JJ., in *Theyyavelan* v. *Kochan*, I. L. R., 21 M., 7. But we are unable to alter the opinion that we expressed in respect of that decision in 8 M. L. J., 135.

We cannot suppose that the Legislature intended any distinction between a suit against a certified purchaser and a suit against his heir.

Kishan Lal *v.* **Garuda Dhwaja Prasad Singh,** I. L. R., 21 A., 238. The suit in this case was by a mortgagee to enforce his mortgage. Part of the property included in the mortgage had been purchased in execution of a decree in the name of another person. The mortgagee contended that the mortgage was *benami* for the mortgagor. The question is raised whether S. 317 bars the suit. The plain answer appears to us to be that the mortgagee is claiming through the real purchaser against the certified purchaser. The mortgagee cannot get his decree upon the property unless it is first established that the mortgagor was the real owner; and such a case obviously falls within the language of S. 317. The learned Judges in the course of the judgment speak with approval of the decision in *Rama Kurup* v. *Sri Devi*, I. L. R.,

16 M., p. 290, by the *Chief Justice* and *Handley*, J. Those observations have not been accepted in later Madras cases, nor are they in accord with the remarks of the Privy Council in 14 M. I. A. 496.

SUMMARY OF RECENT CASES.

Res judicata—Civil Procedure Code, S. 13, expl. III—Suit for possession of land and mesne profits, past and future—Future mesne profits not granted—Subsequent suit not barred.

Ram Dayal *v.* Madan Mohan Lal.

Held that, where a suit has been brought for possession of immovable property and for mense profits both before and after suit, the mere omission of the Court to adjudicate upon the claim for future mesne profits will not, by reason of S. 13, explanation III, of the Code of Civil Procedure, operate as a bar to a subsequent suit for mesne profits accruing due after the institution of the former suit. *Mon Mohun Sirkar* v. *The Secretary of State for India in Council* (I. L. R., 17 C., 968), followed. *Jiban Das Oswal* v. *Durga Pershad Adhikari* (I. L. R., 21 C., 252); *Pratap Chandra Burna* v. *Rani Swarnamayi* (4 B. L. R., 113); *Julius* v. *The Bishop of Oxford* (L. R., 5 App., Cas., 214); *In re Baker* (L. R., 44 Ch., D. 262); *Bhivrav* v. *Sitaram* (I. L. R., 19 B., 532); and *Thyila Kandi Ummatha* v. *Thyila Kandi Kunhamed* (I. L. R., 4 M., 308) referred to. *Ramabhadra* v. *Jagannatha* (I. L. R., 14 M., 328) discussed. *Narain Das* v. *Khan Singh* (Weekly Notes, 1884, p. 158) overruled.

Hindu law—Reversioners—Suit to set aside alienation by Hindu widow—Similar suit barred by limitation as against a prior reversioner—Suit by subsequent reversioner not thereby barred—Limitation—Act No. XV of 1877 *(Indian Limitation Act), Sch. II, Art.* 120.

Bhagwanta *v.* Sukhi.

Held that, where there are several reversioners entitled successively under the Hindu law to an estate held by an owner whose interest is limited, no one such reversioner can be held to claim through or derive his title from another, even if that other happens to be his father, but he derives his title from the last full owner. If, therefore, the right of the nearest reversioner for the time being to contest an alienation or an adoption by the limited owner is allowed to become barred by limitation as against him, this will not bar the similar rights of the subsequent

reversioners. *Beni Prasad* v. *Hardai Bibi* (F. A. No. 35 of 1888, decided February 4th, 1892); *Ramphal Rai* v. *Tula Kuari* (I. L. R., 6 All., 116); *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani* (L. R., 3 I. A., 72) and *Isri Dut Koer* v. *Mussumat Hansbutti Koerani* (L. R., 10 I. A., 150) referred to. *Chhaganram Astikram* v. *Bai Motigavri* (I. L. R., 14 B., 512), and *Pershad Singh* v. *Chedee Lal* (15 W. R., C. R., 1) dissented from.

Held also that it is not essential to the applicability of S. 7 of the Indian Limitation Act, 1877, that the plaintiff claiming the benefit of that section must have been in existence and under disability at the time from which the period of limitation commences. *Siddhessur Dutt* v. *Sham Chand Nundan* (23 W. R., 285); *Morino Moyee Debia* v. *Bhoobun Moyee Debia* (23 W. R., 43); *Gobind Coomar Chowdhry* v. *Huro Chunder Chowdhry* (7 W. R., 134), and *Gobind Chandra Sarma Mozoomdar* v. *Mohan Sarma Mozoomdar* (2 B. L. R., 313) referred to.

Practice—Appeal under the Workman's Compensation Act—Security for costs.

Hall *v.* **Snowdon, Hubbard & Co.** [1899] 1 Q. B., 593, C. A.

Appeals under the Workman's Compensation Act are not exempt from the application of the general rule of practice as to requiring security for the costs of appeal.

Insurance—"Burglary and Housebreaking"—Theft—Entry by turning the door handle—Breaking open show-case—"Actual forcible and violent entry."

In re **George and Goldsmiths and General Burglary Insurance Company, Limited** [1899] 1 Q. B., 595, C. A.

Where a policy of insurance on stock-in-trade was expressed to be "against loss or damage by burglary and housebreaking *as hereinafter defined*," and by a subsequent clause the insurers undertook to make good to the assured any loss "by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate," it was *held* by the Court of Appeal in reversal of the judgment of the Division Court, that the loss of a quantity of jewellery which was got at by the thief by merely turning the handle of the unlocked outer door during a temporary absence of the servant was not covered by the policy as the entry could not be said to be *actually* "violent" or "forcible"

within the terms of the policy and that the breaking open of the showcase in which were the jewels could not be said to satisfy that clause of the policy, because it was only where the *entry* into the shop was "violent" or "forcible" that the assured was entitled to be indemnified under the terms of the policy.

Practice—Action against firm—Death of partner after appearance—Defence of surviving partner, form of.

Ellis *v.* **Wadeson** [1899] 1 Q. B., 714, C. A.

Where an action was brought against a firm consisting of two partners in the firm name and one partner died after writ and appearance, it was *held* that the right course for the surviving partner to take was not to put in a personal defence but to put in one for, and in the name of, the firm.

Insurance—Concealment of material facts—"Uberrima gides."

Seaton *v.* **Heath**; **Seaton** *v.* **Burnand** [1899] 1 Q. B., 782, C. A.

Where the defendants executed an instrument in the form of a policy of insurance whereby they agreed in consideration of a premium to guarantee the solvency of a surety for the repayment of a debt due to the plaintiff, it was *held* by the Court of Appeal that the duty to disclose to the under-writers material facts relating to the risk was not one peculiar to the contracts of marine, fire or life insurance but applied to all contracts of insurance and that the concealment of material facts by the plaintiff would afford a good defence to an action on the policy.

As there was no proof that there was a concealment of material facts, the case was sent down for retrial before a jury.

(See the observations of *Romer*, L. J., as to the difference between contracts of insurance and contracts of guarantee).

Stock exchange—Payment of "differences"—Option to demand delivery or acceptance of stocks or shares—Wagering contract—Gaming Act 8 and 9 Victoria, Chapter 109, S. 18.

In re **Gieve** [1899] 1 Q. B., 794, C. A.

Two stock and shareholders were dealing in stock on what is called the "cover" system. The sold note between them ran as follows:—"I beg to advise having sold to you 20 Canadas . . . . plus $\frac{1}{8}$ if stock is

taken up . . . . subject to conditions at back." The fifth condition was "It is to be distinctly understood that I am prepared to deliver the stock or shares to which this contract refers, if demanded, but require cash on the first day of the account for securities I have to deliver to customers." The question was whether the contract was one for payment of 'differences' and whether it was void as a contract "by way of gaming or wagering" under S. 18 of the Gaming Act of 1845. It was contended that the contract was not one for payment of differences, and that even if it was, the buyer had the right to turn it into a lawful agreement for sale.

It was held by the Court of Appeal (*Lindley*, M. R., and *Rigby*, and *Vaughan Williams*, L. JJ.,) in reversal of the decision of *Wright*, J., that the contract was really for payment of differences and not for sale of stock, that thus the transaction being really by way of wagering or gaming was void under S. 18 of the Act and that the option given to the buyer to call for delivery and turn it into what may seem an ordinary sale of stock did not make matters any better.

Administration—Purchase of shares from testator—Misrepresention—Claim for damages for deceit—Unliquidated damages—'Actio personalis moritur cum persona.'

In re **Duncan—Terry** *v.* **Sweeting** [1899] 1 Ch. 387.

Where the purchaser of certain worthless shares from a testator, without repudiating the sale and throwing up the shares, claimed to prove in an administration action against his estate for damages which he assessed at £250, the price he paid for the purchase of the shares, it was held by *Romer*, J., that the claim was not to pursue the claimant's money in the hands of the executors, but was legally one for unliquidated damages, notwithstanding that the claimant may eventually be able to prove that the measure of damages was exactly the price paid for the shares, and that since *actio personalis moritur cum persona*, the claim against the executors could not be sustained.

Company—Unauthorised borrowing—Application of the money in payment of debts of the Company—Subrogation.

In re **Wrexham, Mold and Connah's Quay Railway Company** [1899] 1 Ch. 440, C. A.

Where a Railway Company, which had only limited borrowing powers had exhausted its powers, and afterwards borrowed money and applied the same in reduction of debts due by it, it was held by

the Court, consisting of the Master of the Rolls and *Rigby* and *Vaughan Williams*, L. JJ., that the loan being *ultra vires*, the lender could not be subrogated to the securities of the creditor paid with his money so as to have priority over the other secured creditors of the Company; but that in so far as the money was applied in payment of the debts of the Company since the borrowing powers could not be really said to have been exceeded, the lender would in equity be entitled to stand in the same position as if his advance had been a valid one.

Practice—Parties—Representative action—Action on behalf of the class of the public—Rules Order XVI, r. 9, Order XXV, v. 5.

Ellis *v.* **Duke of Bedford** [1899] 1 Ch. 494, C. A.

The first question that arose in this case was, whether the six plaintiffs could sue on behalf of themselves and all other growers of fruit, flowers, vegetables, roots or herbs within the meaning of 4 Geo. IV, Ch. 113? *Wright*, J., held that the growers as a class had no common beneficial proprietary right under the Act; that therefore the plaintiff could not bring an action as representing a class, and that such right as the growers as a class possessed under the Act being in the nature of a public right, the action should, in order to be properly constituted, have been brought in the name of the Attorney-General. As to the further question whether, as far as the action related to the claims of the plaintiffs as individuals, they were rightly joined in one suit, he said that the claim of each was distinct and constituted a separate cause of action, and that since they did not arise in respect of the same transaction or series of transactions, they could not be joined in one suit. He, therefore, gave the plaintiffs liberty to continue the action on behalf of any one plaintiff so far as he sought any relief as an individual.

The plaintiffs appealed. The Court of Appeal (*Lindley*, M. R., and *Rigby*, L. J., *Vaughan Williams*, L. J., diss.) held that a *bonâ fide* question in which the class of growers was interested having been raised by the plaintiffs, there could be no objection to the plaintiffs maintaining the action on behalf of themselves and the other growers, but that the Attorney-General must be joined as a party to the case, in order to represent the interest of the public which might be interested in disputing the rights claimed by the plaintiffs.

On the other hand, *Vaughan Williams*, L. J., concurred with *Romer*, J., in holding that the growers having no community of interest the subject-matter of the action, the plaintiffs could not bring a

representative action, but held that, if they could bring such an action, the Attorney-General was a necessary party to the suit.

Riparian owner—Interruption of the stream—Local authority—Injuriously affecting—Consent of riparian owner—38 and 39 Vict., Ch. 55, S. 332.

Roberts *v.* **Gwyrfai District Council** [1899] 1 Ch. 583.

Where a local authority constructed a dam across a lake and increased the storage of water, in order to supply water to a neighbouring district under the Public Health Act, and a riparian owner brought an action for injunction restraining the local authority from taking water from the lake or from doing any other act whereby the flow of water by the plaintiff's lands might in anywise be diminished, it was held by *Kekewich*, J., that the defendants were "injuriously affecting" the stream within the meaning the words in S. 332 of the Act; and that since they had neither the permission of the plaintiff which S. 332 required, nor any compulsory powers under the Act to interfere with the free flow of the stream, an action could be maintained against them, even though no perceptible damage was proved.

Administration, decree for—Right of retainer—Form of the Administration Bond.

Davies *v.* **Parry** [1899] 1 Ch. 602.

The question raised in this case was, whether after a decree for administration had been made at the instance of other creditors, and the *administrator de bonis non* had executed a bond undertaking to "well and truly administer according to law (that is to say) pay all and singular the debts which he did owe at his decease in the due course of administration rateably and proportionably" and "according to the priority required by law and not unduly preferring his own debt or any other of the debtors of the said deceased by reason of his being an administrator as aforesaid", the administrator could still exercise his right of retainer. *Romer*, J., held that, according to *Nunn* v. *Barlow*, (1824) 1 S. and S. 588 and a long series of authorities following it, it was well established that the administrator had the right of retainer, even though a decree for administration had already been passed at the instance of other creditors; and that the bond being in common form could not be said to have taken away from the administrator the usual right of retainer, that even taking the words of the bond itself, it only restrained the administrator from giving an illegal or undue preference to his own or any other debt;

and where a long series of decisions had pronounced in favour of the legality of the right of retainer, it could not be said to be either an illegal or undue preference, and that the administrator was within his rights in retaining the debt due to himself.

Company—Prospectus—Statement that Directors will take shares not taken by vendor—Estoppel.

In re **Moore Brothers and Company, Ld.** [1899] 1 Ch. 627, C. A.

In the prospectus approved and issued by the Directors of the Company a statement was made to the effect that the Directors would take all the shares not taken by the vendors. The vendors took all, except 367 shares. These shares were never afterwards allotted to any of the Directors; nor were their names registered as the holders of such shares. In the course of the winding-up, the liquidator applied to the Court and got an order that the Directors (except this defendant) were liable to calls in respect of the 367 shares not allotted to anybody. Subsequently the liquidator also obtained another order from the Court affirming this defendant's liability in respect of those shares. On his application to *Wright*, J., to discharge the order, he held that if the question arose between the Director and one who had taken shares on the strength of the representations contained in the prospectus, the Director would be estopped from denying his liability, that the question arising merely between the Director and the Company, his representations to the public made in the prospectus could not be said to operate as estoppel; but that since the Director had accepted office on the terms of the prospectus and had, so to speak, acted upon them, it must be held that he impliedly agreed to take the shares. He therefore refused to discharge the order.

On appeal the Court (*Lindley*, M. R., *Rigby* and *Vaughan Williams*, L. JJ., held that the language of the prospectus did not amount to an undertaking on the part of the Directors to jointly take the unallotted shares, that at best it could amount only to an expression of intention that the Directors would, if no one took the shares, arrange in some way to distribute them among themselves, that as rightly held by *Wright*, J., there was no estoppel between the Directors and the Company, and that no contract between them could be implied from the terms of the prospectus as it was clear from the fact the Company would not be bound to allot the shares to them even if they had insisted upon it.

Practice—Decree against Company—Secretary ordered to file accounts—No service upon the Secretary—Attachment of Director.

McKeown *v.* **Joint Stock Institute** [1899] 1 Ch. 671.

Where an order of the Court directing a Company to render accounts to the plaintiff was not complied with and an application was made asking the Court to send the Director to prison for wilful disobedience to the order of the Court, it was held by *North*, J., that no writ of attachment could be issued against him, unless and until he had been personally served with the order which had been disobeyed.

Trade-mark—Unregistered mark—Imitation of get-up—Application for interlocutory injunction—Misrepresentation by the use of the word "trade-mark"—46 and 47 Vict., Ch. 57, S. 105.

Sen Sen Company *v.* **Britten** [1899] I Ch. 692.

The plaintiffs, an American Company, dealing in cachous for the voice, marked their packages with the words "Sen Sen" above and the words "Trade Mark" just below them. The mark was not registered in England. An English Company imitated their get-up and used the same words, except that they marked their packages with the addition '5 C'. In an action under the Common Law to restrain the English Company from imitating their get-up and passing off their article as that of the plaintiffs, an application was made for the issue of an interlocutory injunction against them. It was contended for them that the plaintiffs, having by the words 'trade-mark' upon the packages misrepresented to the public that their trade-mark was registered, had committed a crime under S. 105 of the Act and were not entitled to any relief. It was held by *Stirling*, J., that the use of the words trade-mark did not necessarily imply that it was registered so as to come within the clutch of S. 105 of the Act, and that, apart from that section, they were not guilty of such misrepresentation as would deprive them of their right to an injunction.

Prescription—Ancient lights—Greenhouse—Building—Prescription Act 2 and 3 Will. 4, Ch. 71, S. 3.

Clifford *v.* **Holt** [1899] 1 Ch. 698.

In this case a question was raised as to whether a greenhouse was a building within the terms of S. 3 of the Prescription Act so as to have a right to light by Prescription. It was held by *Kekewich*, J., that it was

a building within the Act, and that the interference with its ancient lights could be restrained by injunction. *Harris* v. *DePinna* (1886) 33 Ch. D. 238 considered.

Will—Issue—Children—Context to show that issue means children in many clauses—No such context in another clause—Construction.

In re **Birks—Kenyon** *v.* **Birks** [1899] 1 Ch. 703.

A testator made gifts to legatees and to their *issue* in case they should die in his lifetime. In a number of these clauses the testator had used such words as 'parent' or 'child' or 'children' to show that the gift over was confined to the children of the legatees only. In the 11th clause, with reference to which the question arose, no such words were used, and the clause ran as follows:—"I bequeath to my cousin, John Birks Pigott, the legacy or sum of £5,000; but in the event of his death in my lifetime leaving lawful *issue*, I direct that the said legacy shall not lapse, but such *issue* shall have and be entitled thereto in equal shares and proportions." The question was, whether the gift over was confined as in other clauses to the children merely or extended to children's children, &c., also? It was held by *Kekewich*, J., that there was no ground to suppose that the testator intended to use the word "issue" in this clause in the same sense in which he used it in the other clauses, and that in the absence of anything in the will to show that wherever he used the word 'issue' he meant only children, the express words of the legacy could not be controlled by any supposed intention to use the word to denote children merely.

The canon of construction in *Ridgeway* v. *Munkitbrick* (1841) 1 D. and War. 84, 93, and *Rhodes* v. *Rhodes* (1859) 27 Beav. 413, 417 dissented from. *In re Warren's trusts* (1884) 26 Ch. D. 208, 216 followed.

Guardian and minors—"Maintain, educate and bring up"—Immoral home—Power of Court to interfere.

In re **G. (Infants)** [1899] 1 Ch. 719.

A testator settled certain trust estates "upon trust to pay the annual income . . . . to my said wife during her life if she shall so long continue my widow, she maintaining, educating and bringing up such of my children as shall be under 21 . . . . and of maintaining such of my daughters as being of the age of 21 years shall not be or have been married". The mother who was bringing up the children

was living in adultery with a married man in the very house in which they were being brought up. The question was, whether she was not guilty of breach of trust and whether the Court could make any order as to the funds? *Kekewich*, J., held that the mother was guilty of breach of trust in bringing up the children in the house in which she was herself living in adultery with a married man, and that since it was clear from the will that the testator intended to provide for the children's maintenance out of the income granted to the widow for life, the Court could administer the estate and distribute the income in some equitable proportion between the mother and her minor children.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications:—

Sind Sadar Court Reports, Vol. I., No. 1. Edited and published by Nihalchand Gidumal, B.A., LL.B., Karachi. Subscription, Rs. 10.

Index of Cases reported in the Indian Law Reports, Madras Series, 1876—1898, by Dharm Das. Suri Printed at the *Caxton Press, Lahore.*

A Guide to Best on Evidence. Printed by Ramasami Chetty and Co. Madras:—*Price*, Rs. 2-8-0.

The Bombay Law Reporter for July (*in exchange*).
The Albany Law Journal for July (*in exchange*).
The Calcutta Weekly Notes for July (*in exchange*).
The Allahabad Weekly Notes for July (*in exchange*).
The Green Bag for July (*in exchange*).
The Canadian Law Times for July (*in exchange*).
The Canada Law Journal for July (*in exchange*).
The Ceylon Law Review, Vol. I, No. 3 (*in exchange*).

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Pleaders as Directors.—It appears that the High Court, or to speak more correctly, the Vacation Judge, Mr. Justice *O'Farrel*, has ruled that if a pleader is a director of a Fund, he will be deemed to be carrying on business within the meaning of the rule framed by the High Court prohibiting a pleader from carrying on a trade or business except with the leave of the High Court. If the rule in question is to have this wide interpretation, we think it is open to serious objections. In the present state of the country if the Joint Stock Companies, commonly called Funds, are not to some extent under the control of men versed in the law,

it is impossible that these Companies should be efficiently managed. Even in the Presidency Town, we have seen how very difficult it is to manage the business of a Fund without competent legal assistance on the direction. Nor can it be correctly styled in common parlance that a lawyer director of a Fund who assists in the deliberations of the Committee carries on a business. We hope that a proper representation will be made on the subject to the Honorable Judges on the hardship and inconvenience likely to be caused by the rule in question if interpreted as it has been by the Vacation Judge.

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A Novel Procedure.—In a recent prosecution of the Editor of the *Madras Standard* by the Hon. Mr. V. Bhashyam Aiyangar for defamation, a question of practice of considerable importance arose. When summons was applied for, the Chief Presidency Magistrate issued notice to the accused to show cause why summons should not be issued. We think there is no warrant for this procedure under the present Criminal Procedure Code. There are two alternative courses open to the Magistrate upon the complaint being preferred. Under S. 202 if the Magistrate is not satisfied as to the truth of a complaint, he may postpone the issue of process and make an enquiry himself or direct a local investigation for the purpose of ascertaining the truth or falsehood of the complaint. Upon the result of such inquiry or investigation he may dismiss the complaint unless there is sufficient ground for proceeding. The other alternative is under S. 204 where the Magistrate instead of not being satisfied as to the truth of the complaint sees sufficient ground for proceeding. In that case, he *shall* issue a summons for the attendance of the accused. The rest of the procedure after summons was issued is a trial which may end in an acquittal or a conviction. There is no third alternative provided by the Code. Where the Magistrate cannot say he is not satisfied as to the truth of the complaint, it is not competent to him to issue a notice to the accused to show cause why summons should not be issued. The practice, however, of issuing such notices seems to obtain in the Presidency Magistrates' Court; and it is a question, as observed by Mr. Clarke, the Chief Presidency Magistrate, whether such a practice ought not to be discontinued.

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Indian Judges.—The Lord Chief Justice has declared on several occasions that the salary of a Judge of the High Court is inadequate. The increase in the salaries of the Puisne Judges of the High Courts of

India may induce him when occasion offers to emphasise his belief that the remuneration of English Judges ought to be increased. The addition to the salary of the Indian Judge is, however, very slight; he is to receive Rs. 48,000 instead of Rs. 45,000 per annum. Whether this increase is large enough to effect any improvement in the calibre of the Indian Bench is doubtful in the extreme. What is more likely to prove attractive is the reduction of the period of service that qualifies a Judge for a pension from fourteen years and-a-half to eleven years and-a-half :—*The London Law Journal.*

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The question of improving the position of the Judges of the several High Courts in India has recently been engaging the attention of the Secretary of State for India in Council, and on April 27th last he addressed a despatch to the Government of India informing them that the following changes had been decided upon. In future the salary of a Puisne Judge of a High Court in India will be Rs. 48,000 instead of Rs. 45,000 per annum. The salaries of the Chief Justices, however, remain unchanged, *viz.*, Rs. 72,000 per annum for the Chief Justice of Bengal and Rs. 60,000 per annum for the Chief Justice of Madras, Bombay and North-West Provinces. Every Chief Justice or Judge appointed to a High Court in India will be called upon to resign his office on attaining the age of sixty years. The pensions will remain as at present, *viz.*, £ 1,800 per annum for the Chief Justice of Bengal, £ 1,500 per anuum for the Chief Justices of the other three High Courts, and £ 1,200 per annum for Puisne Judges. But the period of actual service required by a Chief Justice or a Puisne Judge for earning his pension has been reduced from fourteen and-a-half to eleven and-a-half years. If at any time after six and three-quarter years' service, but before he has served for eleven and-a-half years, a Judge is compelled to retire through ill-health, he will receive half the pension which he would have received if he had completed his full term of office :—*The London Law Journal.*

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Women as Lawyers.—The interesting comment upon the decision of the French Chamber to allow a woman to practise as an advocate in the French Courts is to be found in a complaint made by an American lady at the Women's Congress, that women, though allowed to practise as lawyers in the United States, are not permitted to act as Judges. The complaint is sufficiently logical to render it desirable that the thin end of the wedge should not be admitted :—*The London Law Journal.*

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Insurance—Health of insured.—In *Barnes* v. *Fidelity Mut. Life Ass'n.*, decided in the Spreme Court of Pennsylvania in May 1899 (43 Atl. R., 341), it was held that whether an insured, who, at the time of the payment of his premium and delivery of the policy, was in bed with a cold which developed into pneumonia, causing his death two days later, was in "good health," within the meaning of the policy, was a question for the jury.

The Court said in part:

As stated by a learned text writer, the term "good health" does not mean absolute perfection, but is comparative. The insured need not be entirely free from infirmity or from all the ills to which flesh is heir. If he enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and to ordinary observation and outward appearance his health is reasonably such that he may with ordinary safety be insured, and upon ordinary terms the requirement of "good health" is satisfied. Slight troubles, temporary and light illness, infrequent and light attacks of sickness, not of such a character as to produce bodily infirmity or serious impairment or derangement of vital organs, do not disprove the warranty of good health. In other words, the term "good health," when used in a policy of life insurance, means that the applicant has no grave, important or serious disease, and is free from any ailment that seriously affects the general soundness and healthfulness of the system. A mere temporary indisposition, which does not tend to weaken or undermine the constitution at the time of taking membership, does not render the policy void (3 Joyce, Ins., §. 2004). "Colds are generally accompanied with more or less congestion of the lungs, and yet in such a case there is no disease of the lungs which an applicant for insurance would be bound to state." (*Cushman* v. *Insurance Co.*, 70 N. Y. 77). It is unnecessary to refer in detail to the evidence. It was clearly sufficient to warrant the submission of the case to the jury on the question of the "good health" of the insured at the time the premium was paid, and the policy delivered to plaintiff, and other subordinate questions of fact in dispute. This is especially so in view of the fact that the evidence was more or less conflicting on all material questions of fact. The case was clearly for the jury (*Smith* v. *Insurance Co.*, 183 Pa. St. 504, 38 Atl. 1038; *Keatley* v. *Insurance Co.*, 187 Pa. St. 197, 40 Atl. 808):—*The Albany Law Journal.*

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A physician was acquitted recently in England for riding a bicycle on a sidewalk, because of an old law that gives a doctor the right to take the shortest cut when on his way to an urgent case. :—*The Albany Law Journal.*

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The following extracts are taken from an article in the American Law Review :—

Trial by Judge and Jury.—Lord Hobhouse in an address showing the necessity for jury trials said : " It seems to me that juries have kept our laws sweet; they have kept them practical ; they still do so; they are like the constant, unseen, unfelt force of gravitation which enables us to walk on the face of the earth instead of flying off into space. Certainly nothing can be more important to the welfare and coherence and strength of the nation, than that its laws should be in general harmony with its convictions and feelings. * * * Juries are passing every day innumerable decisions, each of them very small, but constant, ubiquitous, and tending to carry superfine laws down into practical life so as to make them fit for human nature's daily food."

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It is said jury trials protract litigation, but the errors that lead to new trials, and appeals and writs of error and the reversals of judgments and protraction of litigation are the errors of the Judges. Look into the reports and you will find that in the trial of commonplace cases the trial court is charged with the commission of from five to fifty errors of law, and frequently convicted on some of the charges. And the errors of Judges are not limited to the courts of original jurisdiction. The appellate courts themselves are constantly falling into error. If one is curious to know the extent of these errors, let him consult Bigelow's Overruled Cases, where he will find that appellate courts, as far back as 1873, had overruled nearly ten thousand of their own decisions. How many they have overruled since that time is not known. These are their confessed errors only, there still remain, we know not how many errors not yet confessed, for Judges are like all great sinners,—never confess their errors until *in extremis*,—and not then with that openness, fulness, and frankness supposed to be essential to insure spiritual salvation to a sinner.

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The juries, equally with the Judge on the Bench, are Judges, and as supreme and independent in the exercise of their jurisdiction as he is in his. The errors of both may be corrected in the orderly mode provided by law, and both may be impeached and removed from office for

corruption, but neither has a right to summarily impeach or remove the other from his office for a supposed error in discharging his or their duty. Let the case be reversed: Suppose whenever the Judge errs in deciding the law, he was summarily ordered to step down off the Bench. What would be the result? Not one single Judge's Bench would be occupied next Monday; it is certain that this (the lower court's) bench would be vacant, for the Judges who sit here have been convicted of repeated errors by the Supreme Court. Judges make hundreds of mistakes in deciding the law where the jury makes one in deciding the facts; and when juries do err, it is commonly owing to the mistake of the Judge instructing them erroneously or inconsistenly on the law. A jury after receiving a two-sided charge from the Judge were unable to agree, and when they were discharged, the Judge asked them how they stood, to which their foreman replied: "Just like your Honor's charge, six to six." When the Judges learn to decide the law with as much accuracy and fidelity as juries do the facts, it will be time enough for them to indulge in censorious criticism of the jury for their supposed mistakes. Such action is not only a gross invasion of the rights of the jury, but it is an invasion of the constitutional rights of the suitor who is entitled to have a jury in the box who will not be influenced in any degree in the honest and independent exercise of their own opinion by fear of censure, or the hope of applause from the Judge. The free, independent mind has one opinion, and the trammelled, dependent mind another opinion; and the free, independent mind is what every suitor is entitled to have in the jury box.

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Lord Lytton's Description of Daniel O'Connell addressing an out-door Meeting.—The following poem, often lost, often sought for, generally misquoted, has been recently rediscovered and brought to light by J. W. Clark, Esq., in an article entitled "Law and Lawyers," published in the *American Lawyer* for January. Allowing for variations made by the copyist and possible changes made by the author in different editions of his work, it is the real thing:—

Once to my sight the giant thus was given,
Walled by wide air and roofed by boundless heaven.
Beneath his feet the human ocean lay,
And wave on wave flowed into space away.
Methought no clarion could have spent its sound,
Even to the center of the hosts around;
And, as I thought, rose the sonorous swell,
As from the church tower swings the silvery bell.

Aloft and clear, from airy tide to tide
It glided easy as a bird may glide;
To the last verge of that vast audience sent
It played with each wild passion as it went.
Now stilled the uproar, now the murmur stilled,
And sobs or laughter answered as it willed.
Then did I know what spells of infinite choice
To rouse or lull has the sweet human voice;
Then did I seem to see the sudden clue
To the great troublous Life Antique, to view,
Under the rock stand of Demosthenes,
Mutable Athens heave her noisy seas.

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Sentence of Death pronounced by Judge Kirby Benedict on Jose Maria Martin, convicted of Murder in Toas Co., N. M. in 1858.—Judge Benedict said: "Jose Maria Martin, stand up. You have been indicted, tried, and convicted by a jury of your countrymen of the crime of murder, and the court is now about to pass upon you the dread sentence of the law. As a usual thing, Jose Maria Martin, it is a painful duty of the Judge of the court of justice to pronounce upon a human being the sentence of death. There is something horrible about it, and the mind naturally revolts from the performance of such a duty. Happily, however, your case is relieved of all such unpleasant features. The court takes a positive delight in sentencing you to death. You are a young man, Jose Martin, apparently of good constitution and robust health. Ordinarily, you might have looked forward to many years of life, and the court has no doubt you have, and expected to die in green old age, but you are about to be cut off in consequence of your own act. Jose Maria Martin, it is now the spring time. In a little while the grass will be springing up green in these beautiful valleys and these broad mesas, and on the mountain sides. Flowers will be blooming, birds will be singing their sweet carols, and nature will be putting on her most attractive robes, and life will be pleasant, and men will want to stay. But none of this for you, Jose Maria Martin. The flowers will not bloom for you, Jose Maria Martin. The birds will not sing their sweet carlos for you, Jose Maria Martin. When these things come to gladden the sense of men, you will occupy a space six by two beneath the sod, and the grass and these beautiful things will be green, growing above your lowly head. The sentence of the court is that you be taken from this place to the county jail. That you be safely kept and securely confined in the custody of the sheriff until the day appointed for your execution. Be

very careful, Mr. Sheriff, that he have no opportunity to escape, and that you have him at the appointed place, at the appointed time. That you be so kept, Jose Maria Martin, until—'Mr. Clerk, upon what day of the month does Friday, about two weeks from this time, come?' 'March 22nd, your Honor.' 'Very well, until Friday, the 22nd day of March, when you will be taken by the Sheriff from your place of confinement to some safe and convenient spot within the county, and that you be there hanged by the neck until dead.' And the court was about to add, Jose Maria Martin, 'May God have mercy on your soul;' but we will not assume the responsibility of asking an All-Wise Providence to do that which a jury of your peers have refused to do. The Lord could not have mercy on your soul. However, if you affect any religious belief, or if you are connected with any religions organization, it might be well for you to send for your priest or your minister and get from him, well, such consolation as you can; but the court advises you to place no reliance on anything of that kind. Mr. Sheriff, remove the prisoner."

The sequel of the above remarkable sentence is interesting, in that Jose Maria Martin "escaped from the county jail" and several years afterwards peacefully met his death in Lincoln County, by falling backward out of a wagon and breaking his neck.—E. L. B.:—*The American Law Review.*

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The Generosity of Lawyers.—Judge Richardson of the Superior Court of Massachusetts, in response to the Bar of Essex County upon the presentation of a memorial of Thomas M. Stimpson, of Peabody, at a recent meeting of that Bar said:—

Forty-five years in the practice of law! What a fund of interesting knowledge of all kinds he must have acquired! What a store of family confidences! What a treasure of interesting personal reminiscences of the great men whom he met and knew at this Bar he must have had. And then during that period what feuds and contentions he has allayed, what suits averted, what reconciliations brought about, how much useless litigation saved! I cannot conceive a place or field where a man of the proper qualifications and of the right spirit and temper, and having the confidence of the community, can render more or better service to his fellow-men than in such a field and practice as that. Some other professions and callings occasionally bring men into close relations; the physician has many family secrets, the minister has parish confidences, but no other calling or profession brings men into so close a touch, or so intimate and sympathetic relations as the profession of law. When his

client's honor, or his life, or liberty or rights to property, or anything which he values in life, is assailed or threatened, to whom does he go? To whom so unreservedly lay open his heart, and so fully expose his troubles and burdens, whatever they may be, as to his lawyers?

It is the fashion in some places to charge the profession with selfishness, and it may be, probably is, true that few lawyers make, or can make, an exhibition of charity in the shape of testamentary bequests. Few of them leave large estates, and they may not care with money laboriously earned to leave it to the chance of its being perverted and used.

"To endow a college, or a cat."

But there is much genuine charity besides bequests of gifts of money. What good lawyer of ten years' practice has not often given his time, his advice, and services, to the extent of trials in court, to poor persons from whom he had no expectation of compensation? And when the welfare of his neighborhood or town is in any way in jeopardy, or when a proposed public improvement is to be promoted, who, as much as the lawyer of the neighborhood or town, is expected to gratuitously contribute his time and talents to it? Lawyers more than any other men give direction to public affairs; they are an essential and conspicuous part of the machinery of administering the law, and the respect in which the law itself is held depends much upon the character of the Bar:—*The American Law Review.*

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Trials: Actions for Damages for Physical Injuries—Right of Examination of the Body of the Person injured.—In the case of *Chicago &c. R. Co.* v. *Langston*, 48 (S. W. Rep. 610), the Civil Court of Appeals of Texas hold that where the plaintiff, in an action for damages for personal injuries, has exhibited her legs in the presence of the court, and physicians who have examined them have testified for her that she would not be able to wear artificial legs, defendant is entitled to have an examination by experts of its own selection, for the purpose of testifying on the same point, though they are in its regular employment as surgeons:—*The American Law Review.*

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Trial by Jury: Propriety of an Instruction urging the Jury to agree.—In the case of *People* v. *Engle* (76 N. W. Rep. 502), recently decided by the Supreme Court of Michigan, the defendant was prosecuted for

selling a bottle of beer contrary to the statute law restricting the sale of intoxicants. After the jury had been out all night deliberating upon the case, they came into court and announced that they were unable to agree upon a verdict. The court then asked "Do you think you have exhausted every reasonable effort to agree? The foreman; Yes, sir; we have been over the testimony several times. The court: I was very sorry, gentlemen, that you were obliged to remain out all night with this case. The work of a jury is hard enough if it only works when court is in session, without having to be out all night; but the interests of both the people and the respondent are important in this case, and it is very important that you should, if possible under the testimony, agree upon a verdict. Now, I have no doubt that you have done just as your foreman says—gone over the testimony very carefully and concientiously, and endeavoured to agree upon a verdict, so far as you have been able to: but, perhaps on further reflection, you may be able to do so. I certainly hope so. Now, I make this suggestion: I have no doubt that each side has used all the powers of persuasion, that of the individual jurors, to convince his fellow-jurors of the case as it looks to him. Now, suppose you go out and try the reverse, and let each of you try as hard as you can to be persuaded instead of trying to persuade the others. Try and persuade yourselves, those who do not agree with their fellow-jurors, and see if, looking over the testimony carefully and listening to all the arguments that those who do not agree with you may use, you cannot come to the same verdict. In view, as I have said, of the importance of the verdict in this case, I do not feel like discharging you at this time. It is now early in the morning. You have had your breakfast. Make yourselves as easy and comfortable as you can, and think the matter over carefully. Divest yourselves of all sorts of preconceived opinions about the case on either side up to this time. Start right in now just as if you had first gone out, and see what you can do. You may again retire, gentlemen." Within an hour after this charge, the jury returned a verdict of guilty, but with the recommendation that the court fix the punishment or fine as light as the law would allow in such cases. The Supreme Court held that the giving of this instruction was error, on the ground that it had a tendency to make the jurors, who were holding out for the defendant, fear that they must give way to their honest convictions upon the merits and agree with the others, although they might have a reasonable doubt as to the guilt of the defendant. The court distinguished a leading Massachusetts case (*Com* v. *Tuly*, 8 cush, Mass) on this question, on the ground that although in that case somewhat similar advice was given to the jury, yet they had been

previously instructed that the verdict to which a juror agrees must be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows; whereas in the case at Bar there was no such instruction :—*The American Law Review.*

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Attorney at Law : Touting—Barratry—Soliciting cases "on shares"—No recovery of fee in such cases.—Just how far an attorney can go in soliciting employment on a contingent fee was discussed by the Supreme Court of Minnesota in *Gammons* v. *Johnson*, decided April 26th. The plaintiff in that case sent agents through certain counties in the northern and western part of Minnesota to seek claims and institute suits against the Great Northern Railroad Company for damages resulting to different persons from the failure of the Railroad Company to fence its track across the land of such persons, and to procure the bringing of suit by such persons against the Railroad Company. Blank contracts were furnished under which the attorney was to be employed, and seventy-one persons were induced to make such contracts. Suits were brought in the seventy-one cases for from $400 to $1,500, but all except one or two were settled before trial by the Railroad Company with the landowners for from one to five dollars each. It was alleged that the persons would not have brought these suits but for the labors of the attorney. Action by the attorney on some of these written contracts was begun, and the latest case is the third which has been before the Minnesota Supreme Court. The court holds that the attorney cannot recover under the circumstances disclosed by the answer. The opinion of one of the concurring Judges says: "It is somewhat unprofessional for an attorney to solicit employment at all, more especially so when he expects to take the case 'on the shares;' and it is still more unprofessional for him to solicit employment in a case when he expects to take 'on the shares,' and which he has good reason to believe would never be brought at all, were it not for his solicitation." But an isolated or casual solicitation of employment in a case of this kind is not so highly unprofessional that the court would refuse to aid the attorney in recovering remuneration for his services in the case. The great and crying evil which the courts should condemn most strongly is making a practice of soliciting such cases. An attorney who does this should, in my opinion, be disbarred; and surely he should not be rewarded by aiding him to recover remuneration for doing the very act, or one of the series of acts, for which he should be disbarred. On the plainest principles of public policy, the courts should condemn the practice of the 'ambulance chasers' and 'prowling assignees' who thus stir up

litigation, and should refuse to aid them in recovering fees in such cases";—*The American Law Review.*

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Custody of children : Right of parents to reclaim their children from a Charitable Institution after becoming fit to have their custody.—The New York Supreme Court has, within a few weeks, carried out the common-sense opinion, delivered April 18th, by the Court of Appeals in the matter of Knowack (158 N. Y. Rep. 482.) The petitioners in that case, Charles Knowack and Johanna his wife, sought to obtain the custody of their four children who were held by the Children's Aid Society of Rochester. The children, who were under thirteen years of age, had been for over two years in the custody of the society as a result of proceedings begun on the ground of the intemperance and neglect of their parents. When the commitment was made it was shown that the parents were not qualified to take care of the children. But in the later proceedings they declared, and the allegation was not controverted, that they had been for more than two years sober and industrious, were earning good weekly wages, had a substantial bank account, were free from debts, and in comparatively independent circumstances for persons in their station of life. Affidavits corroborating these statements were submitted; but the Children's Aid Society declared that when a child was finally committed to a charitable institution under the Penal Code, there was no way by which the institution could be deprived of its custody except by the consent or in consequence of the misconduct of the institution itself, unless the commitment were successfully attacked by appeal or by *habeas corpus* proceedings. The court held, however, that the Supreme Court of the State of New York having the chancery jurisdiction of the old Court of Chancery in England, had power to intervene and restore the children to the custody and care of their parents. "It certainly is," says Judge Bartlett: "A most startling doctrine that a child who is a public charge and has been committed for such reasons as are disclosed in this case, cannot be restored to parental care and control, where conditions have changed and are such that neither in law nor morals the separation of parent and child should be continued. * * * Stripped of all form and technicality, we have this situation: Intemperate parents are deemed to be unfit custodians of their children, and the State steps in and cares for and supports them for the time being. It now appears that the parents have reformed, are living honorable lives, and are abundantly able to care for their children. It seems evident that public policy and every consideration of humanity demand the restoration of these children to parental control. If the Court of Chancery can

interfere and take the child from the custody of its parents, it can also intervene and restore it to their care in the exercise of the same discretionary power." :—*The American Law Review.*

REVIEWS.

The Indian Stamp Act with Notes, by C. V. Visvanatha Sastri, B.A., B.L., printed by *The Vijayanti Press*, Madras.

Mr. Visvanatha Sastri's new book on the Stamp Act is neatly printed. We must congratulate the *Vijayanti Press*, on the excellence of its work. Throughout the book wherever reference is made to the General Clauses Act, the Acts of 68 and 87 are referred to and the author does not seem to have been aware of the General Clauses Act, X of 1897. The author has, no doubt, collected cases, but he has not even told us how far decisions under the old Act are still law under the amended wording of some of the sections. Cases are cited such as the decision in I. L. R., 4 C., 829, which have no longer the force of law. The note on p. 78 is out of place, S. 56, cl. 1, giving a right of appeal to the Board and partly overruling the note. Under Art. 3, where the definition of adoption deed includes an instrument recording an adoption, the cases in I. L. R., 13 B., 280, 281, are quoted without a note of warning that they may not be good law now. There are numerous other blunders which show that the book must have been got up in a great hurry without a careful study of the Act. Compilations which evidence the work of scissors and paste are, no doubt, good in their own way, but we expected better work than a mere collection of cases from Mr. Visvanatha Sastri.

Index of Cases reported in *The Indian Law Reports, Madras Series*, 1876—1898, by Dharam Das Suri, printed at The *Caxton Press*, Lahore.

We have already noticed Mr. Dharam Das Suri's Index of the Allahabad Reports. All aids to the profession in hunting up references to decided cases are useful; and in that view we commend this publication.

Guide to Best's Principles of the Law of Evidence, printed by G. Ramasami Chetty, Madras. Price, Rs. 2-8-0.

We are not in favor of books of this description. Questions and answers are calculated to test a student's knowledge derived from other sources; and where the study of law is very much a study without extraneous assistance, there may be some advantage in the student being able to measure his progress. It is not impossible that there may be some students who can derive some benefit from a *Guide*. The author of the book must have taken some trouble, and we hope it may be rewarded.