THE PUNJAB CIVIL CODE,
[ PART I. ]

AND

SELECTED ACTS,

WITH A COMMENTARY,

COMPILED

BY

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OF LAW THERE CAN BE NO LESS ACKNOWLEDGED THAN THAT HER SEAT IS THE
BOSOM OF GOD, HER VOICE IS THE HARMONY OF THE WORLD: ALL THINGS
IN HEAVEN AND EARTH DO HER HOMAGE, THE VERY LEAST AS FEELING
HER CARE, AND THE GREATEST AS NOT EXEMPTED FROM HER POWER:
BOTH ANGELS AND MEN AND CREATURES OF WHAT CONDITION
EVER, THOUGH EACH IN DIFFERENT SORT AND MANNER,
YET ALL WITH UNIFORM CONSENT, ADMIRING HER AS
THE AUTHOR OF THEIR PEACE AND JOY.—HOOKER.

JURISPRUDENTIA EST DIVINARUM ATQUE HUMANARUM REBUM NOTITIA, JUSTI
ATQUE INJUSTI SCIENTIA.—ULPIAN.

1869.
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TO

COLONEL EDWARD LAKE, C.S.I.,

LATE FINANCIAL COMMISSIONER OF THE PUNJAB

AND SOME TIME COMMISSIONER OF THE JALUNDEWAR DIVISION

THIS WORK IS RESPECTFULLY DEDICATED

IN GRATEFUL REMEMBRANCE OF THE PERIOD

DURING WHICH THE AUTHOR ENJOYED

THE BENEFIT OF BEING ONE OF HIS ASSISTANTS.
PREFACE.

The publication of a Collection of the Acts in force in this Province now being brought out under the auspices of the Chief Court, as well as other causes, have led me to abandon my former intention of editing the enactments which embody the Substantive Civil Law of the Punjab; and the present volume is therefore confined to the Punjab Civil Code, together with a few Acts and Regulations which relate to subjects treated of by the Code.

I have taken advantage however of these narrowed limits to make the notes as complete as possible, and I believe all the published rulings of the Lahore Court, as also those of the Indian High Courts as contained in Sutherland's W. Reporter, in the Bengal Law Reports, Stokes' and Sullivan's Madras Reports, Reid's Bombay Reports, and those of the Agra High Court, with such of the Privy Council cases as are given in Sutherland's Collection, will be found under the heads to which the respective precedents refer. In those parts of the Code which treat of the law of Contract and of Wrongs I have also freely availed myself of those standard works of English law which are most in the hands of the Anglo Indian lawyer, but as the English Reports on which these works are based are not generally accessible in Indian Mofussil Stations I have for the most part omitted the references to them even when quoting the names of the cases.

Bearing in mind the frequency with which Civil Officers find themselves compelled to administer justice away from head quarters, and also the scanty Law resources of most district and private libraries except in Lahore itself, I have sought, especially in every dubious or difficult point, to give the rulings illustrating it in as much detail as might be, and usually in the words of the Judges and Law-writers themselves. While however I have aimed at supplying all that is needful for immediate use, I should not have given the references to the precedents and authorities with so much prominence in the text, were it not from the hope that when leisure and opportunity allow it, the reader will form his own judgment by a reference to the original sources; specially ought this to be the case where conflicting decisions show that the construction or the application of the law is more or less difficult and obscure. Optima est lex quæ minimum relinquit arbitrio judicis, optimus iudex qui minimum sibi; and if this be true universally, more
chiefly must it be so in India, where the absence of a formal legal education on the part of so large a portion of those who have to preside in the Anglo-Indian Courts furnishes a ready handle of attack. That any acquisitions of legal learning or acumen on the part of Indian Judicial Officers will altogether silence these attacks is too much to hope for, but it would do what is of far greater importance to the interests of the country; it would tend to introduce certainty into the decisions of the Courts, which would then be based on the results arrived at by the thought and learning of the sages of the Law, instead of on the mere quicksands of individual opinion on what may be right and just in the isolated case under consideration. "It is my wish and my comfort," said Lord Kenyon, "to stand super antiquas vias. I cannot legislate but by my industry I can discover what my predecessors have done, and I will servilely tread in their steps." Miserus est servitus, ubi jus est vagum aut incertum. And it seems one of the hopeful marks of the improvement now going on in our Indian Courts, that authority, rather than what was styled common-sense, is being more and more relied on for the solution of the questions which come before them; and if the present work at all contribute to progress in this direction I shall feel more than rewarded for the labor employed in its compilation. In conclusion, I cannot deprive myself of the pleasure of quoting the following words of Bacon—"Judges ought to remember that their office is jus dicere, and not jus dare—to interpret law and not to make law or to give law. * * * Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things integrity is their portion and proper virtue. 'Cursed (saith the Law) is he that removeth the landmark.' The mislayer of a mere stone is to blame; but it is the unjust Judge that is the capital remover of landmarks, when he defineth amiss of land and property. One foul sentence doth more harm than many foul examples; for these do but corrupt the stream, the other corrupteth the fountain—so saith Solomon 'Fons turbatus et vena corrupta est justus cadens in causa sua coram adversario.'"
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Page 500 on line 19, for page 221 read page 227.
  " 531 " 16, for that libel read that the libel.
  " 552 " 29, for Makh read Malik.
  " 552 " 40, for Mohinia read Mohim.
  " 567 " 10, for ever read over.
  " 614 " 31, for Baehin read Boehm.
  " 619 on line 31, for Madras High read 2. Madras High.
  " 624 on last line of the note, for Mukturn read Muhtun.
  " 625 on line 15, for 21 read 31.
  " 662 " 4, for is as.
  " 665 " 19, for ducentā est read ducentes nactus.
  " 665 " 25, for claim read clam.
  " 671 " 4, for no read ne.
  " 671 " 6, for habenerint read habuerint.
  " 671 " 19, for servii read Servii.
  " 671 " 35, for surendum read sciendum.
  " 671 " 37, for impovenda read impenenda.
  " 673 " 12, for Landar's read Sandar's.
  " 673 " 18, for Mr. Landars read Mr. Sandars.
  " 681 " 22, for terram. Titii read terram Titii.
  " 681 " 29, for Ceterem read Ceterum.
  " 701 " 27, for required read required it.
  " 701 on last line but one, for him negligence read him with negligence.
  " 706 on line 21, for sui read qui.

Appendix, xxxviii on line 33, for Section 70 read Section 10.
  " xxxviii " 18, for Section 302 read Section 332.
  " xxxviii " 19, for 1867 read 1865.
  " xl " 27, for Ganjad read Saiyad.
  " xlii " 8, for Case No. 49 read Case No. 69.
  " xliii " 18, for page 602 read page 502.
  " xliv " 9, read 2 before Madras High Court Reports.
  " liii " 18, for have meaning read have the meaning.
  " lxii " 11, for lxi read lxii.
  " lxiv " 4, for page 237 read page 207.

The jurisdiction of the Military Courts of Request as described at page 11 has been considerably modified by the Mutiny Act of 1869.
THE

PUNJAB CIVIL CODE.

CHAPTER I.

On the Admissibility of suits.

The jurisdiction of the Civil Courts of this province has been considerably extended by the operation of Act XIX of 1865 and Act VIII of 1859; and as the changes effected by these Acts have been authoritatively set forth in Book Circular No. XII of 1867 of the Chief Court, it will be convenient to quote here the earlier part of the Circular in extenso, and to introduce the parts which treat of the several paragraphs of Section I of the Punjab Civil Code under their respective heads.

BOOK CIRCULAR No. XII of 1867.

To

ALL COMMISSIONERS AND DEPUTY COMMISSIONERS
IN THE PUNJAB.

Dated Lahore, 10th April 1867.

The jurisdiction of the Civil Courts of the Punjab in respect of the subject matter of suits has been so materially affected by the introduction of recent enactments that the Chief Court find it necessary, with the sanction of the Hon'ble the Lieutenant Governor, to issue the following instructions on the subject:

2. Previous to the introduction of Act XIX of 1865, the jurisdiction of the Courts was chiefly regulated by the provisions of Section I, Part I, Punjab Civil Code, which empowered the Civil Courts to take cognizance generally of "all suits and complaints * * * respecting "all civil rights and matters, subject to such special exceptions" as are therein specified. These provisions were afterwards to
some extent modified, especially by the Circulars noted in the margin,* under which all suits for land and the rent of land (unless in cases of inheritance affecting at the same time both landed rights and other real or personal property) were excluded from the cognizance of the Civil Courts and were declared cognizable by the Revenue Courts only.

3. Thus, under the system till lately obtaining in the Punjab, may suits, really of a Civil nature, and which in other parts of India would have been tried in the Civil Courts, were in this province excluded from their cognizance, and were determined only by the Revenue Courts or by the Executive Officers of Government.

4. This system, however, has been materially modified by the introduction of Act XIX of 1865 and Act VIII of 1859.

5. Act XIX of 1865, which expressly professes to be an Act to define the jurisdiction of the Courts of Judicature in the Punjab, does not include the Revenue Courts of the province among the Courts of Judicature, nor does it recognize the exercise of Judicial powers by the District Officers on the Revenue side of their Courts, unless in districts where Settlement operations are in progress. In such districts the Act provides that Judicial and special officers may be empowered and directed to try suits regarding land, or the rent, revenue, or produce of land, on the Revenue and not on the Civil side of their Courts. But subject to this exception it is expressly provided that the Courts shall, on their Civil side, have power to try and determine suits of every description.

6. Further, it is provided by Section I, Act VIII of 1859, that the Civil Courts shall take cognizance of all suits of a Civil nature, with the exception of suits of which their cognizance is barred by any Act of Parliament, or by any Regulation, or by any Act of the Governor General in Council.

7. The effect therefore of these Acts is to confer upon the Punjab Civil Courts full jurisdiction in all suits of a Civil nature, except in cases in which their jurisdiction is barred by any Act or Regulation; in other words, if a person have a cause of action or right to bring a suit in conformity with the spirit of the Regulations or under any Act, it is competent to the Civil Courts in all cases, in the absence of any express legal enactment or provision to the contrary, to entertain the suit. Hence the jurisdiction of the Civil Courts is restored as regards the large family of suits relating to land, or the rent, revenue, or produce of land, unless, as before explained, the Local Government shall, in districts under settlement,
have specially directed the presiding officers to exercise their powers in regard to such suits on the Revenue, and not on the Civil side of their Courts. Hence also many matters which, under para. 2, Section 1, Part I, Punjab Civil Code, were formerly excluded from the cognizance of the Civil Courts have now become cognizable by them.

8. It is a question of some difficulty to determine once for all which of these matters are now within the cognizance of the Civil Courts, and which of them still continue cognizable only by the Revenue or other officers of Government. In course of time, as cases arise, the border line between the two jurisdictions will be determined definitely by the judicial decisions of the Courts, and until the question come before them judicially the Chief Court can make no authoritative ruling on the subject.”

PUÑJAB CIVIL CODE.

SECTION 1.

POWERS AND COMPETENCY OF THE CIVIL COURTS.

Para. 1.—The Civil Courts may take cognizance of all suits and complaints respecting the succession, or right, to real or personal property; debts, and accounts; contracts of all kinds; marriage, caste, adoption and other social transactions; claims to damages for civil injuries of all kinds, such as domestic wrongs, defamation, including libel and slander; personal hurt not specially punishable by the Criminal regulations; false and malicious charges and prosecutions; private nuisance; acts or words causing exclusion from caste; damage to person or property arising from gross negligence; and generally respecting all civil rights and matters, subject to such special exceptions as may be hereafter described.
From paragraphs 5 and 6 of the Circular quoted above it is clear that the opening clause of the Code is now rather a sketch of certain classes of cases which come before the Civil Courts, than an exhaustive catalogue. For convenience we give here the superseding section of Act VIII of 1859.

Section I.—The Civil Courts shall take cognizance of all suits of a Civil nature, with the exception of suits of which their cognizance is barred by any Act of Parliament or by any Regulation of the Codes of Bengal, Madras and Bombay respectively, or by any Act of the Governor General in Council.

The Civil Courts cannot take cognizance of acts not falling under Municipal Law. In *Forester and others v. the Secretary of State in Council of India*, the plaintiffs claimed to be entitled as heirs of Begum Sumroo to recover certain estates which the Government of India had taken possession of on her death. The Chief Court on appeal found that Begum Sumroo had been treated by the Indian Government up to her death as independent, and the people living in her pergunnas as subjects of another power, and that this was rightly done; for under their Charters, confirmed and recognized by Act of Parliament, the East India Company, in making peace or war, were empowered to represent in India the Executive Government as far as Municipal Law is concerned; and as further, in *Campbell v. Hall*, it was held that the Executive Government of Great Britain has power to grant or refuse terms of cession or capitulation to the inhabitants of conquered countries, and if terms be granted, to fix such as may be held expedient, to alter the form of the ruling authority or to leave it unchanged, and to alter either the whole or part of the laws of the subject land; but that, save so far as altered in that way, or perhaps controlled by natural equity, the old laws remain in force; the Governor General in 1805, after the war with Holkar, in which the Begum Sumroo had pursued a temporizing policy, was authorized when taking possession of the conquered territories beyond the Jumna so to limit the act of conquest as to exempt the lands of Begum Sumroo from being brought under the Government of the East India Company. This in effect maintained her in political relations with the Government, and prevented any act on their part towards her or her property from being rendered subject to the cognizance of a Court of Law. The Court further remarked that perfect independence seems not to be a necessary attribute to
sovereignty; and, according to Wheaton, Section 33, States, having a feudal relation to others, are still considered as sovereign so far as their sovereignty is not affected by this relation. Hence, in accordance with Kamachee Bhai Sahib v. the Secretary of State for India (Sutherland's Privy Council Judgments, page 373), the seizure of the estates claimed, whether they be regarded as the public domain of the Begum Sumroo or her private property, being an act done by a State, against a State, cannot be made the subject of an enquiry in a Municipal Court.—(2. Punjab Record, Case No. 13.) The foregoing abstract of the case is sufficient for the purpose of the present work, by shewing that the acts of the Government in annexing the territories of deceased native feudatory princes cannot be called in question in a Municipal Court: the reader is however recommended to carefully peruse pages 50—52 of the report, in which Mr. Justice Boulnois discusses the amenability of the Indian Government to the Local Courts in respect to its resumption of revenue-free grants, and especially of the application of Regulation XXXVI of 1803 to the estate in dispute.

In another suit between the same parties as those mentioned in the foregoing paragraph (2. Punjab Record, Orse No. 14), in which the plaintiffs claimed the value of certain arms and military stores which were seized on the annexation of the Begum Sumroo's principality, on the ground that such arms, having been purchased from the savings of her revenue, were as much the Begum's private property as the rest of her personal property, which had been acquired from the same source, and yet had been respected by Government and left in the possession of her heir, Mr. Dyce Sombre, the Chief Court held that, as it had been shewn that Begum Sumroo was a recognized sovereign, if in fact the Government, rightly or wrongly as regards general principles, had seized the whole of her property without distinction, the act could not have been questioned in a Court of Law: that from the Advocate General of Bombay v. Ameer Chund it appears that no distinction exists between the public and private property of an absolute sovereign: and from the case of the Secretary of State for India in Council v. Kamachee Bhai Sahiba that, even if property in its nature private be seized by the East India Company in the exercise of their sovereign power, that circumstance would give no jurisdiction to a Municipal Court. See also Ghulam Mahomed Niamat Khan v. Dale (1. Stokes' Madras Reports, page 281) in regard to the distinction between the public and private property of a Mohammedan sovereign, when the Government submits itself to the jurisdiction of the Courts of Law.
SUITS ARISING FROM ACTS OF STATE.

In Wagentrieb v. The Secretary of State for India in Council, the plaintiff, as legal representative of one Motee Begum, a Mohammedan British subject, claimed the value of certain house property in Delhi, which was taken possession of by Government on the recapture of that city from the rebels in 1857. The Chief Court held, reversing the decision of the Lower Appellate Court, that as the property claimed was seized by the Military authorities either at the time of the capture of Delhi, or early in the following year *nondum cessante bello*, since the Civil authority was not completely restored till July 1858, when the Civil Courts were re-opened, its appropriation by Government could not fall within the jurisdiction of a Municipal Court. Boulois J. observed—"A Government may exercise the power of war in putting down an insurrection of its own subjects, whenever the insurrection has risen to dimensions requiring the exercise of such powers, and these buildings were apparently seized as enemies' property. (Note upon belligerent powers exercised in civil war, Wheaton, para 296, edition of 1866 by Dana). Enemies' property is defined to be that which belongs to a person who, *whether attached to the enemy or not*, is resident in a place under the enemy's control. For four months Delhi had been in the firm possession of the insurgents, during which time Motee Begum had resided there. But even if these buildings were not enemies' property, still it must be remembered that in a state of war property seized under the mistaken supposition that it belongs to the enemy (although it may be released by the proper authority) *cannot be made the subject of a claim in a Court of Law*. Nor can the question whether, according to the rules of modern warfare, this property would have been seized, be now rendered matter of forensic jurisdiction, although military occupation does not, according to these rules, work a transfer of private and immovable property, for these rules belong to the law of nations not to positive law. "International law" said Pollock C. B., in the case of the Alexandra, "like the moral law, is part of the law of England, but only to the extent that the Courts will not help those who break it." The law of warlike capture is said to derive its rules from the assumption that communities are remitted to a state of nature at the outbreak of hostilities, and the institution of private property falls into abeyance so far as it concerns the belligerents.—*(Maine's Ancient Law, Chapter VIII.)* Either on this ground, or because the supreme authority of a nation must necessarily be exercised in war, *no capture can be dealt with in a Municipal Court*. This principle was asserted in *Le Caux v. Eden*, and *Lindo v. Rodney*, where the judgment of Lee C.J., in a previous case, to the effect that an acquisition in war, being *jus belli*, was to be determined according to the law of nations, and
not by the particular Municipal law of any country, was referred to with approval."

Roberts, J., while concurring in the opinion that the suit was inadmissible, based his decision on the ground that while the Government, by Regulation III of 1798, subjected itself to the jurisdiction of its own Courts, by enacting that the officers of Government employed in the collection of the revenue, the provision of the Company's investment, and all other financial or commercial concerns of the public, should be amenable to the Courts for acts done in their official capacity, in opposition to the Regulations, it does not appear by any subsequent enactment to have so subjected itself in any other matters. Then as to the subject-matter of the suit, he adds—"Ubi jus est ibi remedium" is no doubt a fundamental legal principle, but it is equally true that the remedy must be appropriately pursued. "It is not every substantial wrong, still less every imaginary grievance, which affords a right of action for redress. Nor is it true that for every kind of damage or loss occasioned by the act of another, a remedy is given by the law. It not unfrequently happens that damage, palpable and undeniable though it be, is in technical phraseology, damnnum sine injuriâ, that is, damage unaccompanied by any tortious or wrongful act whereof cognizance can be taken in a Court of Justice"—(Broom's Commentaries.) It may be that the plaintiff has suffered a wrong, but is it a "legal injury, a wrong cognizable or recognized as such by the law? I think not. Plaintiff complains of a wrong which was committed by the Government or its officers in the prosecution of a war, inter arma silent leges. The Courts of Justice were closed in Delhi by the mutineers in May 1857, and they were not re-opened by the British Government until July 1858. The property which plaintiff claims was seized and taken by the Government as booty or capture in war in this interval, and the question booty or no booty, is not triable by any Municipal Law. Not a single instance has been cited in which a Common Law Court in any country has assumed cognizance when a question of prize or capture in war was at issue. It is true that in Lindo v. Rodney and another, Lord Mansfield expressly guarded himself against giving any opinion "about booty in a mere land war"; but in the later case of Elphinstone v. Badree Chund, which arose out of hostilities by land forces on land, the Privy Council held "that the proper character of the transaction was that of hostile seizure," and that the Municipal Court had no jurisdiction to adjudge upon the subject. Nor is the principle affected by the nature of the war, as is evident from what occurred in the recent rebellion in the United States of America." The Court further held that the question was not altered by the proclamation of the Government, to the effect that where the first steps towards confiscation had been taken, persons submitting themselves would save their
property, as this, like the former proceedings, was a mere declaration of the sovereign will and pleasure of the Government, and could give rise to no legal obligation.—(2. Punjab Record, Case No. 6.)

In Salig Ram and Devi Singh v. the Secretary of State for India in Council, the plaintiffs claimed payment of a debt secured to them by a mortgage on certain property belonging to the deposed King of Delhi, which property had been confiscated to the Crown owing to the mutiny. The Chief Court held that the King of Delhi, being nominally a Sovereign Prince, the sequestration of his lands was an act of power on the part of the British Government, and not based on or amenable to Municipal Law; and further, that it was done flagrante bello, in the exercise by the State of the powers of war, which powers may be exercised in putting down an insurrection of its subjects; and for this reason likewise, no Municipal Court can declare the lands so seized to have been no prize, or establish any lien upon part of them in the hands of the captor, forasmuch as the seizure was an absolute and unqualified one, and made under circumstances which prevent any obligations arising from it, but such as the captor may be pleased to acknowledge, and also to prevent the Civil Courts from assuming cognizance of any such obligations. The Court further regarded the Circular Order (No. 112 of 1859) of the Judicial Commissioner, on the part of the Punjab Government, in which an intention was expressed of recognizing liabilities incurred by the rebel owners of forfeited estates, as a mere declaration of the pleasure of the Government, and not as creating rights enforceable in the Courts of Law.—(2. Punjab Record, Case No. 7.) In Narayan Dass v. Government of India, (10. W. Reporter, Privy Council Judgments, page 55), the Privy Council however decided that where the Government of India had undertaken to pay out of the assets of the Ex-King of Delhi such debts as could be shown to be due from him, any claim, not barred by the letter of any regulation or statute of limitations, which justly and fairly in equity and conscience could be made and substantiated against the Ex-King, is a claim to be allowed in the investigation which the Government has instituted before its judicial officers, irrespective of technical difficulties which might have attended legal proceedings against the King during his sovereignty, leaving of course the payment of that claim when established to be dealt with in reference to the assets out of which the payment is to be made.

In the Peninsula and Oriental S. Navigation Company v. the Secretary of State in Council of India, which was an action to recover damages for loss caused to the plaintiffs, owing
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Suits arising from acts of state.

Acts of their servants and workpeople.

To certain workmen employed in the Government dock-yard having dropped a piece of iron they were carrying in the middle of a public road, whereby a carriage horse, the property of the plaintiffs, which at the time was being driven on the road, was frightened and injured, the Calcutta Supreme Court held that, under the 21 and 22 Vic., C. 103, the Secretary of State in Council of India, so far as suing and being sued is concerned, was in the position of the late East India Company: that that Company, though invested with powers usually called sovereign powers, was not thereby rendered sovereign; whence the general principles applicable to sovereigns and states, and the reasoning deduced from the maxim of the English law that the king can do no wrong would have no force in their case; that not only were they not sovereigns, and unentitled therefore to all the exemptions of sovereigns, but that they were not the public servants of Government, and therefore did not fall under the principle of the cases with regard to the liabilities of such persons: but were rather a Company, to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purpose of Government and partly on their own account, which without any delegation of sovereign rights might be carried on by private individuals. Hence the Court concluded that where an act was done or a contract entered into in the exercise of powers usually called sovereign powers, that is to say, powers which cannot be lawfully exercised except by a sovereign, or by private individuals delegated by a sovereign to exercise them, no action would lie; but that where the Company incurred duties as private individuals, they could be sued; and on the same principle they were liable for the negligence of their servants or officers in navigating a river steamer, or in repairing the same, or doing any act preparatory to such repairs, since such act could not by possibility be said to be done in the exercise of sovereign powers, although it were an act which the East India Company were authorized to do by the 3rd and 4th Will. IV, by which the Government was vested in them in trust for the Crown.—(Selected Papers of the P. Law Society, Vol. 2, p. 1.) But a suit will not lie against Government for the proceedings of a Magistrate, who had demolished a chabutra by proceedings under Chapter XX of the Criminal Procedure Code, when the Government had in no way interfered and was not in possession of the ground.—(Bagashri Ddal v. the Government.—2. North-West Provinces High Court Reports, p. 81.)

No action will lie against a Commanding Officer for anything done by him in the course of discharging his duty, or incidental thereto.—(Johnstone v. Sutton, T. R. 493, 510, 784).
The jurisdiction of the Courts cannot be ousted by clauses, not uncommon in agreement deeds in this country, that in cases of dispute the decision of one of the contracting parties shall be accepted as final. Broom writes—"I cannot effectually contract with any one that he shall charge himself with the faults which I shall commit. A man cannot validly contract that he shall be irresponsible for fraud; neither will the law permit a person who enters into a binding contract, to say by a subsequent clause that he will not be liable to be sued for a breach of it."—(Broom's Legal Maxims, p. 668).

In the case of suits being brought in disregard of an agreement between the parties to refer their differences to private arbitration, it may be observed, that if A covenant with B, that in the event of his doing or not doing a particular act he will pay such an amount as an arbitrator to be appointed may agree on, there is no cause of action until such referee has ascertained and fixed the amount to be paid—(Addison on Contracts, p. 971, and Kindersley's V.C. judgment in Lee v. Page, of which an extract is given in Norton's Topics of Jurisprudence, p. 43.) So in Morgan v. Milman it was held, that where the price was to be ascertained by arbitration, the Court could not interfere where the price was not so ascertained.—(Norton's Topics of Jurisprudence, p. 429.) In Scott v. Avery it was decided that where a sort of condition precedent to bringing an action is created, the Courts cannot be resorted to before that condition be fulfilled. * But in Horton v. Sayer it was held that if parties agree that all disputes which may arise between them shall be referred to arbitration, such an agreement will not prevent either party suing the other; yet if such an agreement have been acted on, it does not lie in the mouth of either party to set it aside on the ground that the agreement to refer was illegal—(Norton's Topics of Jurisprudence, pp. 431, 432); and if it be raised by the defence that the disputes have been adjusted by arbitration, the answer is good. If, however, the dispute be about partnership accounts, it is still open to a party to shew error in them, though proof of the settlement is enough to throw on him the burden of proving where they are wrong.—(Sheikh Motlia v. Koku Mull, 1. Punjab Record, Case No. 47.)

Provisions in contracts, writes Addison, for the reference of disputes to arbitration are generally cumulative, giving a more simple and speedy remedy than the remedy of action, but not abolishing or taking away the right of action.—

* For a sketch of this case and remarks on it, see Norton's Topics of Jurisprudence, pp. 428-430.
FOR COSTS.—MILITARY COURTS OF REQUESTS.

(Addison on Contracts, p. 972.) Section 326, Act VIII of 1859, provides a means for obtaining an order of Court, to compel the performance of a written agreement to refer differences to arbitration. Section 327 of the same Act provides for the filing in Court of awards made previously by privately appointed arbitrators. Although the terms of a bond may give the obligee the right to execute it as a decree, he is not thereby deprived of the right to bring a separate suit on his security if he elect so to do.—Ram Kamal Chowdhry v. Mudhu Sudan Pal Chowdry—(4 W. Reporter, Civil Rulings, p. 81.)

On the principle de non apparentibus et non existentibus eadem est ratio, it was held in Gwynne v. Burnell, that where the sale of the principal debtor's lands and tenements was to be a condition precedent to plaintiff's right to sue the defendant, who was surety, on his bond, the fact that when the action was commenced, the obligor had lands, &c. of which however the plaintiff had no knowledge, did not prevent the latter's suing the defendant on the bond.—(Broom's Legal Maxims, p. 165.)

Suits cannot be brought for the recovery of costs incurred in Criminal cases, (Marples on Civil Procedure, p. 35), nor for those of a previous Civil suit (2. Punjab Record, Case No. 73).

"If a man compel another heedlessly, and without sufficient cause, to attend a Court of Justice, and by so doing, that other is prevented from earning any particular sum of money, I see no reason why he should not bring a suit for its recovery before the Small Cause Court."—(Judicial Commissioner's Ruling to the Civil Judge Jallaur, dated 12th February 1864—Thornton's Small Cause Court Manual, p. 179.) It may be doubted, however, whether this rule be correct, and whether generally such an action would lie.—See Broom's Legal Maxims, pp. 134 and 198, and Broom's Commentaries on the Common Law, p. 78.

By the Mutiny Act, Section 99, in all places in India in which any body of Her Majesty's forces may be serving beyond the jurisdiction of the Courts for enforcing small demands at the three Presidency towns, actions of debt and all personal actions against officers, or against persons licensed to act as sutlers, or other persons amenable to the provisions of this Act, not being soldiers,* shall be cogniz-

* By Section 2, the provisions of the Act are declared to extend to Commissioned and Non-commissioned Officers, to Warrant Officers, to all persons employed on the recruiting service receiving pay or allowances, to all persons employed in the Royal Artillery, Royal Engineers, and to Master Gunners, to Conductors of Stores, and to the Corps of Royal Military Surveyors and Draftsmen, and to all officers and persons serving on the Commissariat Staff, or Commissariat Staff Corps, and to officers and soldiers serv-
able before a Military Court of Requests, and not elsewhere; provided the value in question shall not exceed Rs. 400, and that the defendant was a person of the above description when the cause of action arose.

By Section 2, Act XI of 1841, actions of debt and other personal actions against native officers, soldiers, and other persons amenable to the Articles of War for the Native Army, or residing within any station or cantonment, and carrying on any trade or business in a native bazaar, shall be cognizable before a Military Court, and not elsewhere; provided the value in question shall not exceed Rs. 200, and the defendant was a person of the above description when the cause of action arose, and the suit was instituted; but no suits relating to caste disputes, or rights to real property are to be brought before such Military Courts.

The restrictions on suits brought against Police officers for their official acts, are contained in Sections 42 and 43 of Act V of 1861, which are as follows:—

Section 42.—All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done under the provisions of this Act, or under the general police powers hereby given, shall be commenced within three months after the act complained of shall have been committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant, or to the District Superintendent, or Assistant District Superintendent of the district in which the act was committed, one month at least before the commencement of the action. No plaintiff shall re-
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recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into Court after such action is brought by or on behalf of the defendant; and though a decree shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the Judge before whom the trial is held shall certify his approbation of the action. Provided always, that no action shall in any case lie where such officer shall have been prosecuted criminally for the same act.

The Calcutta High Court has held, that as this Section does not provide, as the Income Tax Act XXXII of 1860 does, that no suit shall be brought unless notice be previously given, the exception that no prior notice of suit was given must be brought in the original Court, and if not pleaded there cannot be made use of as a ground of appeal.—(8. W. Reporter, Civil Rulings, p. 425).

Section 43.—When any action or prosecution shall be brought, or any proceedings held against any Police officer, for any act done by him in such capacity, it shall be lawful for him to plead that such act was done by him under the authority of a warrant issued by a Magistrate. Such plea shall be proved by the production of the warrant directing the act, and purporting to be signed by such Magistrate, and the defendant shall thereupon be entitled to a decree in his favor, notwithstanding any defect of jurisdiction in such Magistrate. No proof of the signature of such Magistrate shall be necessary, unless the Court shall see reason to doubt its being genuine. Provided always, that any remedy which the party may have against the
authority issuing such warrant, shall not be affected by anything contained in this Section.

Suits by and against Municipal Committees are affected by the following provisions of Act XV of 1867.*

XV. Every Committee shall sue and be sued in the name of their President. Every contract made on behalf of any Committee in respect of any sum exceeding rupees twenty, or in respect of any property exceeding rupees twenty in value, shall be in writing, and shall be signed by the President or Vice-President (if any) and at least two other members of the Committee, and unless so executed shall not be binding on the Committee. No member of a Committee shall be personally liable for any contract made or expense incurred by or on behalf of the Committee, but the funds from time to time in the hands of the Committee shall be liable for, and chargeable with, all contracts duly made as aforesaid. Every member of a Committee shall be liable for any misapplication of money entrusted to the Committee to which he shall have been a party, or which shall happen through, or be facilitated by his neglect of his duty, and he shall be liable to be sued for the same in such Court as the Lieutenant-Governor shall direct as for money due to the Government.

XVI. No suit shall be brought against a Committee or any of their officers, or any person acting under their direction, for any thing done under this Act, until the expiration of one month next

* These Sections do not however apply to Municipal Committees appointed under Act XXVI of 1850 unless they shall have been specially extended by notification in the Punjab Gazette.—(See Section 3 Act XV of 1867.)
after notice in writing shall have been delivered or left at the office of the Committee or at the place of abode of such person, explicitly stating the cause of suit and the name and place of abode of the intended plaintiff; and unless such notice be proved, the Court shall find for the defendant; and every such suit shall be commenced within three months next after the accrual of the cause of suit, and not afterwards: and if any person to whom any such notice of suit is given shall, before suit brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover.

With reference to losses alleged to be caused by non-delivery of telegraph messages, Section 8, Act VIII of 1860, must be borne in mind.

**Section VIII.**—The Government shall not be responsible for any loss or damage which may occur in consequence of a person employed by the Government in the Electric Telegraph department, failing to transmit with accuracy any message entrusted to him for transmission; and no such person shall be responsible for any such loss or damage, unless he shall cause the same negligently or fraudulently.

On the admissibility of suits for losses caused by Carriers, see the Carriers Act, in the Appendix.

With reference to the illegality of suits arising out of Lotteries and Gaming transactions, see Act V of 1844, and Act XXI of 1848, in the Appendix.

Following the rules of the Equity Courts at home, a suit would lie in the local Courts for the cancellation, rescission, and delivery up of agreements and other instruments which have answered the end for which they had been created, or are voidable, or are in reality void and yet apparently valid. If, however, the illegality appear on the face of the instrument, it cannot prejudice the person sought
A suit does not generally lie to set aside the proceedings of the Criminal Courts. Suits are generally inadmissible to set aside the acts of the criminal authorities done under enactments which do not expressly reserve the right of civil action.—(Murpherson on Civil Procedure, p. 35.) So a party who had been ordered by the Magistrate, under the provisions of Section 308 of the Code of Criminal Procedure, to remove a shed he had erected, on the ground of its being an obstruction to a thoroughfare, was held in Bakas Ram Sohu v. Channun Ram to have no right of action against the person who had obtained the order of removal from the Magistrate to establish that the place of erection was not on a public thoroughfare but on a private one. If indeed a suit would lie to prove that the place was not a thoroughfare, the Government, as representing the rights of the public, would be a necessary party.—(7. W. Reporter, Civil Rulings, p. 11). See also Vol. 2. Civil Rulings, pp. 267,287, in which latter case the Court remarked—"The only proceedings of a Magistrate on this subject [removal of encroachments] which cannot be thus set aside, are those under Chapter XX of the Code of Criminal Procedure. If the Magistrate had desired to treat the alleged encroachment as a local nuisance, plaintiff would have been entitled to the benefit of the procedure under that Chapter, and the order of the Criminal Courts would have been final. But no such procedure having been followed, there is nothing whatever to bar an action to declare plaintiff's right." Neither does a civil action lie to recover property attached and sold under Section 185 of the Criminal Procedure Code.—(8. W. Reporter, Civil Rulings, p. 208.)

Where the defendants had been punished for assault, an action was held to lie against them to recover mainte-
nance for the time the plaintiff, whose leg had been amputated, was incapacitated for work through the injuries inflicted by them.—(Macpherson on Civil Procedure, p. 36.)

Where the plaintiff had become bail for the defendant in a Criminal Court, and his bail had been forfeited owing to the defendant's not appearing, the former was held entitled to recover the pecuniary loss consequently caused him, by an action in the Civil Court.—(Macpherson on Civil Procedure, p. 36.)

If a decree has been obtained by collusion, with intent to defraud a third person, he may sue to have the decree set aside.—(Macpherson on Civil Procedure, p. 37.)

A suit may be brought for the recovery of a sum awarded by the judgment of a foreign Court; the decree being the cause of action.—(Macpherson on Civil Procedure, p. 38.) By English law, a foreign or colonial judgment does not work a merger of the original ground of action; a plaintiff, therefore, when he requires to enforce such a judgment in England, has the option of reverting to the original ground of action or suing on the judgment. In the former case, although the judgment would be prima facie proof of the plaintiff's right, it would probably be open to the defendant to controvert the ground of action, notwithstanding the production of the judgment. If, however, the suit be brought to enforce the judgment, the defendant, while admitting its existence, may controvert it, if the said judgment appear on the face of the proceedings to be founded on an incorrect view of the English law, or of the law of nations, or to offend common reason and justice, or even to be grossly defective. The Courts would allow such a judgment, whether in personam, or in rem, to be impeached by extrinsic evidence, showing distinctly that the Court which pronounced it had no jurisdiction, or that it was obtained by fraud, or by means clearly contrary to natural justice; as for instance, without any notice or summons to or appearance of the defendant, or any equivalent proceeding. Lastly, it appears now to be settled, that when the judgment is that of a Court having jurisdiction over the parties and the subject matter of the suit, it cannot be impeached on the ground that it is erroneous on the merits, although there have been conflicting decisions on this point.—(2. Smith's Leading Cases, pp. 683—688.) The English law as here laid down appears to have been substantially followed by the Calcutta Court in Balla Ram Gooy v. Kamini Dassi.—(4. W. Reporter, Civil Rulings, p. 108.)

It must be borne in mind in receiving plaints based on alleged torts, that it is not every substantial wrong, still less every imaginary grievance, which affords a right of action for
redress. It not unfrequently happens, that damage, palpable and undeniable though it be, is technically speaking *damnum absque injuria*, that is, damage unaccompanied by any tortious or wrongful act, wherein cognizance can be taken in a Court of Justice. Hence it has been held, that no action lies for the loss inflicted on a schoolmaster by setting up a rival school adjacent to his own, or on a mill-owner by the erection of a mill contiguous to his own, and the consequent loss of custom or interruption of the current of air to his mill. So a man by building a house near the margin of his land, cannot prevent his neighbour from excavating his own land, although it may endanger the house, nor from building on his own land, although it may obstruct windows, unless, indeed, by lapse of time the adjoining land has become subject to a right, analogous to what in Roman law was called a servitude; and this will be the case, albeit the defendant had acted from malice.—( *Broom's Commentaries on the Common Law*, pp. 74-76.) See further on these subjects under Chapter XXIII. So in the Attorney General v. Doughty, the Court refused to restrain the defendants from proceeding with certain buildings, which would interfere with the prospect from Grays' Inn Gardens. Although, however, a man may so build as to deprive his neighbour's window of light and air in a lateral direction, to which he has not acquired a prescriptive right; he cannot so build as to interfere with the light and air falling perpendicularly on the adjacent land: *cujus est solum ejus est usque ad calum et ad inferos.*—( *Norton's Topics of Jurisprudence*, p. 519.) So too, no action lies, if defendant open a door on the way of the communication of the plaintiff, provided the door do not open on land belonging to the plaintiff.—*Buddhu v. Peeroo*, (1. *Punjab Record*, Case No. 90.) So houses may be pulled down or bulwarks ruined on private property for the public defence, without an action lying, or a man may pull down his neighbour's house to arrest a conflagration.—( *Norton's Topics of Jurisprudence*, p. 103.) If a ferryman overload his boat, a passenger may throw overboard goods, in a case of necessity, to save the lives of the passengers, since *necessitas inducit privilegium quoad jura privata and privatam incommunium publico bono pereunt.* Thus, too, if a highway be out of a repair and impassable, a traveller may justify trespassing on the adjoining land.—( *Broom's Legal Maxims*, pp. 11 and 3).

No action lies against an attorney suing the wrong party by mistake.

Similarly, in *Davies v. Jenkins* it was held, that an action will not lie against an attorney, who, being retained to sue a person of the same name as plaintiff, by mistake and without malice, takes all the proceedings to judgment and execution inclusive, against the plaintiff. For disparaging comments and criticism which are not actionable, see Chapter XX.
A man must not, however, pursue his lawful rights so negligently, as to cause avoidable damage to another. If a man, for instance, so negligently erect a hay-stack on the edge of his own land, that it ignites and fires his neighbour's house, an action will lie; or if he keep his fences so negligently, that his neighbour's cattle stray into his ground, and are there accidentally injured, he shall pay for it.—(Norton's Topics of Jurisprudence, pp. 105—110.)

2. The following matters are excluded from the cognizance of the Courts:—A suit may not be brought:

3. For any thing repugnant to positive law, morality or public policy:

"This exemption still remains in force. No right of action can spring out of an illegal contract; nor will a Court of Law lend its aid to enforce the performance of contracts, which are opposed to the policy of the law, or are founded on immoral considerations."—(Book Circular XII of 1867, of the Chief Court.)

Under this Section suits are inadmissible, in which the plaintiff sues to recover goods or their value, which the defendant had acquired by offences against public justice, as theft, * robbery, cheating, &c. In this case, however, the Civil remedy is only suspended until the party injured has performed his duty to society, by endeavouring to bring the offender to justice; hence, when plaintiff had charged the defendant with robbing him, and the Magistrate holding that the evidence failed to make out the charge discharged him, and the plaintiff subsequently sued to recover the money thus taken: the action was held to lie. For a mere misdemeanor, as assault, libel, &c. the Civil remedy may be resorted to at once.—(Judicial Commissioner's Ruling No. 60, Thornton's Small Cause Court Manual, p. 178, and authorities there quoted.) In Wickham v. Gatrill, a Banker's clerk had misappropriated his master's funds, but the false entries were not discovered till after his death, when the master filed a Bill against the personal representatives of the deceased for an account, the defendants demurred on the ground that the acts of the clerk were felonious, and there-

* In Sharma Charan Bose v. Bhokanath Datt the Calcutta Court seem to have held that where the facts as disclosed by the plaintiff appeared to show that the cause of action was an act amounting to theft on the part of the defendant, the right of redress by Civil action was not affected, and the plaintiff was not bound to institute Criminal proceedings in the first place.—(6, W. Reporter, Civil References, p. 9.) The soundness of this ruling may be more than questioned however.
fore could not be made the subject of a suit in equity. It was held, however, that the clerk having died before the felony was discovered, the rule of public policy never came into operation, and the demurrer was overruled with costs.—(Norton's Topics of Jurisprudence, p. 21.) Also see pp. 363—364 of the same work for analogous cases, in which the heirs were enabled to recover a trust which the deceased had created in evasion of the Statute Law, although the creator himself, had he survived, could not have done so.

Contracts to pay rewards for the discovery of stolen property are not illegal, provided that the party claiming reward have used all means in his power to cause the offender to be convicted, which is a question of fact for the Court to decide.—(Judicial Commissioner's Ruling No. 47, Thornton's Small Cause Court Manual, Addenda, p. 174.)

Contracts obstructing or interfering with the administration of public justice are null and void, such as contracts to compound a criminal offence not coming under the exception of Section 214 Indian Penal Code; but if money be paid to compromise a charge, such as wrongful restraint, which under the terms of that Section might have been made the subject of a suit for damages, a suit will lie to recover the money if the criminal proceedings be not discontinued.—(Motheeranath Bhumick v. Kenaram, 7. IV. Reporter, Civil Rulings, p. 33.) See also Vol. 5 Small Cause Court References, p 16, where the charge compounded was assault. So too contracts entered into in British territory for compounding the prosecution of criminal proceedings for an offence against the municipal law of a foreign country, which by the law of that country may be compounded, are valid and may be enforced.—(Subraya Pillai v. Subraya Mudali,* 4. Madras High Court Reports, p. 14.)

* The facts of this case were the following. The plaintiff charged the defendants before the authorities of Pondicherry with having fraudulently abstracted from his possession a bond for money due to him by the offender; thereupon an order was obtained for the defendant's extradition from British territory; while however the defendant was being brought into Pondicherry, he was met by the plaintiff, and a settlement of accounts took place, and the defendant executed a bond for the amount due. This arrangement was submitted for the consideration of the Court of Pondicherry, and sanctioned as a compromise of the offence by civil redress, and by its order further proceedings on the charge were suspended, in accordance admittedly with the provisions of French law in force in that settlement. The following extract from the Court's judgment deserves to be given at length. "Contracts for the compounding or suppression of criminal charges for offences of a public nature are illegal and void by a rule of the Common Law of England, which rests on the principle that contracts of that kind are manifestly opposed to public policy and mischievous to the interests of the State, and so long as there is no legislative provision recognizing such transactions within strictly prescribed limits, the soundness and expediency of the rule seems unquestionable. We think, too that, if closely governed by the principle, the rule is fitly and justly applicable to contracts between natives of this country in perfect consistency with their own peculiar civil laws and customs. Indeed
Similarly contracts are unlawful which bar a party from bringing a civil action, although it is not unlawful to agree to impose some private mode of settling the amount of damages to be recovered, or the time for payment as a condition precedent to the right to maintain an action.—(Addison on Contracts, p. 892.)

In like manner all agreements to pay money to induce a party to stifle or suppress evidence, or to give evidence in favor of one side only, or not to appear as a witness in a civil suit or a criminal prosecution, are null and void.—(Addison on Contracts, p. 892.) So also is a contract to pay money to a party to induce him to give evidence, since the money was to be given either for true evidence, in which case there was no consideration for the promise, as the witness when duly summoned according to law was bound to testify; or for favorable evidence either true or false, and then the consideration was vicious.—(Gashannah Chetti v. Ramaswami Chetti, 4. Madras High Court Reports, p. 7.)

The penal law of the country (Sections 213 and 214 of the Penal Code) makes it a crime to enter into agreements to conceal an offence, or to screen or abstain from proceedings against an offender, subject to an exception which appears to have been framed with reference to the same principle. A contract, therefore, for the compounding or suppression of a crime of a public nature, like that in the present case, committed within the territory of British India, would, we do not doubt, be held invalid, on both the grounds of its being contrary to public policy and malum prohibitum by legislative enactment. But it is clear that the common law rule can have no application to a contract for compounding the prosecution of criminal proceedings for an offence against the municipal law of a foreign country, and committed there, the law of that country permitting such a transaction, and this whether the contract be entered into there or in British territory. The rule of international law, that the law of the place of a contract governs its validity, is no doubt subject to the qualification that every State may refuse to enforce a contract when it is for the fraudulent evasion of its laws, or injurious to its public institutions and interests.—See Story on the Conflict of Laws, Sections 244 to 259, Wheaton's International Law, 179. And the suit in the present case would not be maintainable though the bond was executed in the French territory if the facts in evidence brought the transaction of compromise clearly within the principle of the common law rule. In whichever territory, then, the contract was entered into, the essential question is substantially the same, namely, whether the compromise was in its nature prejudicial, as being in contravention of public policy under the Government of British India, or injurious to the good order and interests of society in regard to the due administration of public justice or otherwise. And that we are of opinion is not in any degree shewn by the facts of this case. The bond, therefore, not being contrary to our law, or the rule of public policy, is enforceable. Mr. Wheaton, in the note at page 180 of his work, refers to an American decision in the case of Kentucky v. Bassford which appears to be very much in point. There a contract relating to lotteries, which were authorized by the law of Kentucky, but were illegal in New York, was enforced in New York, the Court laying down the qualification that an obligation to carry into effect a foreign law sanctioning what was plainly contrary to morality, would not be enforced." See too the Chief Court's judgment in Shah Gul v. Ikram (2. Punjab Record, Case No. 88) quoted below under Cl. 9 Section VI of this Code.
By the English law regarding champerty and maintenance, agreements to furnish money to be risked on the event of a law suit, or to aid and assist in the prosecution of law suits, in which the party making the agreement is in no wise interested, and in which he has no just or reasonable ground for interference, and similar officious and unwarrantable assistance in the promotion of suits on condition of sharing in the advantages thereof, are null and void. — (Addison on Contracts, p. 891.) The Madras High Court has however held that this doctrine of maintenance and champerty is not applicable to the natives of India, and in such cases the Courts “must look to the general principles, as regards public policy and the administration of justice, upon which the law at present rests. To that extent the law can properly be adopted and applied in perfect consistency with the Hindu law relating to contracts, or as ruled by the Privy Council in Fischer v. Kanula Naiker (Sutherland’s Privy Council Judgments, p. 393) maintenance “must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary.” — (Pitchakutti Chetti v. Kamala Nayakan, 1. Stokes’ Madras Reports, p. 153.) Hence while a contract, the effect of which is to assist another in carrying on litigation against a third party, when made with the express declaration that it was out of spite and ill-feeling against such third party, is a contract against public policy and cannot be maintained — (Boman Duss Basujee v. Haraboll Shaha, 10. W. Reporter, Civil Rulings, p. 140.); it does not follow but that money lent to a party who wanted it to expend in carrying on certain law proceedings may not be recoverable by suit. — (Nobin Chandra Ghose v. Bambogunath Gopi, Sutherland’s Civil Rulings for February 1864, p. 63.)

The Indian Courts also follow the equity in preference to the common law practice of the English Courts, in recognizing the right of a bonâ fide transferree of a debt, right or claim, to sue in his own name for the subject of the transfer, provided there be nothing in the claim transferred exclusively personal to the assignor, or which is opposed to public policy or morality. — (Judicial Commissioner’s Ruling No. 45, Thornton’s Small Cause Court Manual, Addenda, p. 174.) See too 9. W. Reporter, Civil Rulings, p. 243. It is indifferent as regards the right of action of the assignee of the thing in action, whether the obligor have assented to the transfer or not. — (1. Stokes’ Madras Reports, pp. 139, 150.) Neither is the obligee of a bond, who for good consideration had assigned all his right and interest in it to the plaintiff, liable to be made a co-defendant with the obligor in a suit by the assignee to recover the amount of the debt, if there
Contracts in restraint of trade are illegal by the common law of England, and as they are opposed to the general welfare and advancement of the community would probably be held to be unlawful in India also. Such are contracts in which a person stipulates not to practise his trade or avocation, and if the restraint be general and not confined to any particular locality, the fact of its being imposed for a short time only will not make it good. If however, the restriction be confined to reasonable limits, as to space, or as to a definite number of persons, as when an apprentice stipulates not hereafter to solicit custom from his master's customers, the agreement will stand. So a trader may sell a business secret, and restrain himself from using it hereafter; and Railway Companies and traders may agree not to compete with each other in a particular line of country; but the restraint must be confined within reasonable limits, for where it is larger and wider than is necessary for the protection of the party with whom the contract is made, it is illegal and void. See too 4. Madras High Court Reports, p. 77. There is no implied contract when a man sells the good-will of a business that he will not set up the same trade in opposition to the purchaser in the neighbourhood of the spot where the business is carried on. On like principles contracts creating monopolies are void.—(Addison on Contracts, pp. 897—900.)

Contracts in restraint of marriage, marriage brokerage contracts, or those tending to cause a separation between married persons, &c., are also void; but as they are not likely to come frequently before the Anglo-Indian Courts it will suffice to refer to Addison on Contracts, Chapter XXI.

Among other illegal contracts may be mentioned agreements or guarantees to indemnify persons against the consequence of their illegal acts, such as an undertaking to indemnify a man against the consequences of publishing a libel, or to pay a man for committing an assault.—(Addison on Contracts, p. 889.) So also all contracts tending to promote fornication and prostitution. Rent cannot be recovered when a landlord knowingly permits a lodger to carry on the trade of prostitution under his roof. So an action for expensive clothes supplied to a prostitute will break down, if it appear that the plaintiff "knew the defendant was a prostitute, expected to be paid from the profits of her prostitution, and that

* In Hilton v. Echersley a combination of Lancashire mill-owners who in opposition to their men, who were on strike, had agreed not to open their mills for twelve months except on terms agreed to by the majority, was adjudged void, as contrary to public policy and in restraint of trade.—(Warren's Law Studies, p. 266.)
CONTRACTS TO PROMOTE IMMORALITY. [Punjab Civil Code, sect. 1, clause 1.

he sold the clothes to enable her to carry it on." Neither can a shopkeeper recover the price of immoral or obscene prints and libels sold by him.—(Addison on Contracts pp. 889, 890.) So in Dilawar v. Mussumat Gulabi, 2. Punjab Record, Case No. 4, the Chief Court ruled that a bond given by a prostitute to the keeper of a brothel in which she was living, will in the absence of any explanation of the transaction lead to the conclusion that it was given for the purpose of carrying on the business of prostitution, that it was therefore based on an immoral consideration, and the claim was consequently not maintainable. See, however, 2. Madras High Court Reports, p. 56, where the Court held that prostitution was recognized and legalized by Hindu law, and that suits for its gains were therefore cognizable in Indian Courts.

Among other void contracts may be mentioned, contracts for the sale of public offices*; contracts to recommend parties for employment in offices of trust in consideration of a sum of money without the knowledge of the person who has the disposal of the appointment; or to puff a tradesman; since they are fraudulent in their nature.—(Addison on Contracts, p. 908.)

If a contract be made to procure the doing of something which the law makes punishable with fine, though the act be not otherwise expressly prohibited, the contract is illegal and void, as a penalty implies a prohibition.—(Broom's Commentaries on the Common Law, p. 356.)

But although when a contract grows immediately out of an illegal act, a Court of Justice will not lend its aid to enforce it, yet the taint in the original transaction will not vitiate every contract growing out of it, provided the plaintiff do not require assistance from the illegal transaction to establish his claim.—(Broom's Commentaries on the Common Law, pp. 357-360.)

On the principle—in pari delicto melior est conditionisdefendentis—if the plaintiff have paid the defendant money for an illegal purpose, as for smuggling, &c., and the latter refuse to account for the proceeds, and fraudulently or unjustly withholds them, the party aggrieved must abide by his loss; so too, suits are inadmissible in which the plaintiff seeks to

*Mr. Norton remarks on this head—"Especially odious are such contracts for the sale of any office connected with the administration of justice. It is to be feared that the peculiar position of public men in India, the sudden emergencies of sickness and the like have given rise to a somewhat lax morality in this respect, and that arrangements are constantly made between parties mutually desirous of throwing up and securing an appointment. The purchase of a house and furniture or the like is made a condition precedent of quitting—agreements which I conceive on the soundest principles of public morals could not be enforced if the question were raised."—(Topics of Jurisprudence, p. 263.)
recover back property given to a woman as præmia pudicitia. The true test, it is said, for determining whether or not the case be one of par delictum, is by considering whether the plaintiff can make out his case otherwise than through the medium, and by the aid, of the illegal transaction to which he was himself a party. Thus, where $A$ laid an illegal wager with $B$, in which $C$ agreed with $A$ to take a share, and $B$ lost the wager, and $A$ on the expectation that $B$ would pay the amount on a certain day, advanced to $C$ his share of the winnings, but $B$ died insolvent before the day, and the bet was never paid; it was held that $A$ could not recover from $C$ the sum thus advanced. The maxim, however, does not apply where an action is brought by one of the parties to the illegal proceeding to recover money received by a third party in respect thereof. Where, for instance, $A$ received money to the use of $B$ on an illegal contract between $B$ and $C$, it was held, $A$ could not set up the illegality of the contract as a defence in an action brought by $B$ for money had and received. Neither does the principle hold, unless both the parties are in delicto. When too a creditor, in defraud of his co-creditors, extorts secretly more favourable terms for himself than they are to receive, and the debtor having paid, sues to recover back the money, the action will lie, and does not fall under the maxim now being considered. For, as observed by Lord Ellenborough in Smith v. Cuff, this is not a case of par delictum: it is oppression on one side, and submission on the other. It never can be predicated as par delictum when one holds the rod, and the other bows to it.—(Broom's Legal Maxims, pp. 692—695 and 699.)

Joint tortfeasors.

On the principle discussed in the foregoing paragraph, an action for contribution cannot be maintained by one of several joint wrong-doers against the others, although the one who claims contribution may have been compelled to pay the entire damages recovered as compensation for the tortious act.—(Broom's Legal Maxims, p. 700.) See this recognized in Imam Buksh v. Ghulam Hussein, in which the plaintiff and defendant had been co-defendants in an action for libel, and the amount of the decree having been recovered from Imam Buksh alone, he sued Ghulam Hussain for contribution. The Chief Court held, that, as the plaintiff could not recover without putting in evidence the decree against himself, jointly with Ghulam Hussain, and that suit was for libel, he could not recover on the ground now under consideration; although the decision would have been the reverse had the former decree been for contract instead of tort.—(2 Punjab Record, Case No. 32.)

As being opposed to public policy, no claim to a monopoly or an exclusive right to exercise any employment within a certain locality, can be admitted by the Courts.—(Macpherson on Contracts, p. 381.)
See too paragraph 7, Section XXII of this Code, and the remarks thereon.

The Courts of law must be careful not to exceed the limits laid down in this Section, in rejecting actions as inadmissible. It does not follow because the plaintiff is one an honourable and upright man would not have preferred, that, therefore, it is in the eye of the law immoral or opposed to public policy. In Cowper v. Cowper, (2. P. Wms. 685) Sir Joseph Jekyll observed: "As to the hardship of setting up this right, I own, and cannot forbear declaring, that were I to consider the matter, not as sitting in judicature, but taking in all manner of considerations of honor, gratitude, private conscience, &c., I should think this claim should never have been made. Upon the whole matter, my opinion is, that this title should not have been set up; but now, it is so, it appears a plain and subsisting one."

(Warren's Law Studies, p. 516.)

"This exemption will continue in force so far as it relates to matters which have been judicially determined between the same parties by a competent tribunal, and in this respect agrees with Section II of the Code of Civil Procedure, which provides that:

"Section 2.—The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties and between parties under whom they claim."

"The exemption applies to decisions passed at a regular settlement by settlement officers acting judicially in matters within their jurisdiction. But the latter part of the clause declaring the exemption applicable to all cases relative to landed property in a district where a settlement may be in..."
progr-ass, is only true when the Local Government shall, under Section 21 of Act XIX of 1865, have empowered and directed the District Officers to try such suits on the Revenue, and not on the Civil side of their Courts."—(Book Circular XII of 1867, of the Chief Court.)

Section 21 of Act XIX of 1865 authorizes the Local Government to direct suits regarding land, or the rent, revenue, or produce of land, to be heard on the Revenue side of the District Courts, while a settlement of land revenue is in progress. It must be borne in mind, that in this Act. (Act XIX of 1865) the term "land" as defined in Section 2, does not apply to any land excluded from a settlement of land revenue, whether the revenue be paid to Government or to any assignee of Government.

The authority here given to decisions passed at a regular settlement, of course only refers to contested decisions; in other cases the entries made in the settlement papers, though excellent corroborative evidence, are not conclusive, and may be impugned, modified or reversed. See Pnuma and Noora v. Bairam and others, (1 Punjab Record, Case No. 31,) if an authority be needed. Again, in Boota v. Ameer Singh and others, the Additional Financial Commissioner observed, that an order passed by the Settlement Department, regarding which there is nothing to shew that the parties most interested were consulted, or even informed of what was going on, could not be assumed to have been accepted by the parties, because not appealed against in the Settlement Department, but might be brought before the Civil Courts in a regular suit by the person deeming himself aggrieved thereby.—(3. Punjab Record, Revenue Judgments, No. 4.)

As the question of res judicata would require to be treated at considerable detail in order that the illustrations might be of any real service, and since it is properly a point of procedure, I have reserved the subject for the Commentary on the Civil Procedure Codes, under the head of Section 2, Act VIII of 1859.

5.—A suit may not be brought for any matter connected with the assessment, distribution, or realization of the public revenue, such as over-collection, sales, farms, transfers, attachments, kham-holdings, and the like.
This exemption does not now hold good to the full extent here stated. The Civil Courts are still precluded from entertaining a suit, in which the alleged cause of action was the impolicy or inexpediency or oppressive nature of a revenue assessment or its unjust inequalities or unfair increase. An individual whose property was liable to assessment, would on those grounds have to seek relief from the Executive Government. But, on the other hand, there are many matters connected with the realization of the public revenue which may properly form the subject of a civil action. Regulation III of 1793 and Regulation II of 1803, which were passed for the purpose of extending and defining the jurisdiction of the Civil Courts in the older provinces, expressly declared that the officers of Government, employed in the collection of the revenue, and all other financial concerns of the public, should be amenable to the Courts for acts done in their official capacity in opposition to the Regulations: and there are subsequent Regulations, as Regulation XIV of 1793, to the same effect. There can be no doubt that the Civil Courts of the Punjab are now empowered to entertain suits in which the alleged cause of action is a matter connected with the realization of the public revenue."

— (Book Circular XII of 1867, of the Chief Court.)

6.—A suit may not be brought for any matter relating to the boundaries of mehals, mouzahs, or villages; or to alluvion and diluvion, that is, to land thrown up or carried away by the action of rivers.

"All these are matters within the jurisdiction of the Civil Courts, provided that they have not already been judicially determined between the same parties at settlement; in which case they would come under the exemption of para. 4. As regards cases of alluvion or diluvion, however, it should be understood that the assessment or remission of revenue on lands affected by the action of rivers is not a matter cognizable by the Civil Courts, but only matters relating to rights of proprietorship or occupancy in such lands."—(Book Circular XII of 1867, of the Chief Court.)

For remarks on the law as to the ownership and occupancy of alluvial land, see under Chapter XXI of this work.

7.—A suit may not be brought for any matter cognizable in summary suits, such as rents or perquisites of land, arrears due from a co-partner to the Lumberdar, illegal ejectment of tenant, or illegal attachment of his property, by landlord.
"Paras. 7 and 8 treat of matters which are all within the
cognizance of the Civil Courts, and not necessarily matters
to be disposed of solely by the Revenue authorities."—(Book
Circular XII of 1867, of the Chief Court.)

The distinctions between summary and other revenue
suits would appear to be done away; as the procedure of
the Civil Code applies to all suits triable in the Civil Courts,
and is also specially made applicable to suits heard on the
Revenue side of the District Courts during the progress of
a settlement of land revenue, by Section 21 Act XIX of
1865: and Act XXVI of 1867 has done away with the
difference formerly existing as to the rate of institution
stamp required for such suits.

8.—A suit may not be brought for the enforce-
ment of accessory rights in landed property, such as
the realization of Taluqahdari allowances, Chow-
drees' dues, dharat and bazaar collections in villages
and qusbehs. But nothing in this clause will bar any
action relative to town collections, which may exist in
any city, in addition to the duties leviable for munici-
pal and police purposes.

For the Chief Court's opinion on this Clause see the
extract from Book Circular XII, just quoted under Clause 7.

9.—A suit may not be brought in any matter
relating to the grant or payment of pensions.

"The grant of a pension is not subject to the cognizance
of the Civil Courts, but where a pension has been authorized
and confirmed by the Revenue authorities, a suit brought on
account of non-payment is not necessarily excluded from the
cognizance of the Civil Courts."—(Book Circular XII of
1867, of the Chief Court.) See too Macpherson on Civil Pro-
cedure, page 25.

10.—A suit may not be brought in any matter
relating to jagir, rent-free tenures, or other grants
made by Government, whether temporary or perma-
nent, or to the succession thereto, or to the shares,
rights, and interests therein; nor are the Courts con-
cerned in the realization of rents or revenues, by jagirdars, muafidars or rent-free holders; but if the jagirdars or muafidars shall have farmed those rents or revenues to a third party, possessing no proprietary rights in the estate, then suits between the jagirdar or muafidar, and such third party, may be entertained by the Courts.

"As in the case of the grant of pensions, so the Civil Courts have no power to entertain a suit against Government for a jagir or other assignment of land revenue, the original title to which has never been recognized or confirmed by Government. But the succession to such grants properly comes within the cognizance of the Courts of Civil Jurisdiction. It is of course competent to Government, at the time of making the grant, to annex to it any conditions which it may consider expedient; and possibly in some cases Government, by the terms of the original grant, may have reserved to itself the right of adjudication in questions of succession thereto. In such cases the jurisdiction of the Civil Courts would be excluded. But where there is no reservation in the original grant, the Government has divested itself of all right, save the reversionary right accruing on the failure of the lineal descendants of the grantee, and must be held to be precluded from all interference in the events of succession in the grant, which will fall under the cognizance of the Civil Courts. In like manner, in the absence of any express reservation in the original deed of grant, matters relating to the shares, rights, and interests in a jagir, or other assignment of land revenue, are cognizable by the Civil Courts. Further, the Civil Courts have jurisdiction in suits brought by the jagirdar or muafidar against the landowners to recover the revenue assigned under the deed of grant."—(Book Circular XII of 1867, of the Chief Court.)

11.—A suit may not be brought in any matter arising out of a public endowment, (that is, whenever any grant of land, its revenues or perquisites may have been made by Government for the use of any edifice or institution, secular or religious), the Court cannot interfere in regard to the application or distribution of such funds, or the appointment of trustees or admi-
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istration thereof. But nothing in this clause will pro-
hibit the Court from taking cognizance of suits arising
out of private endowments, made by individual appro-
priators or founders, or of suits connected with the
distribution of offerings, or subscriptions, made by the
public in favor of any religious or secular institution,
whether supported by grants from Government or not.

"There is now no reason why matters arising out of an
endowment made by Government for the support of an
institution, religious or secular, should be excluded from the
cognizance of the Civil Courts. The reasons which led to
the exclusion of these suits from the jurisdiction of the
Civil Courts, were the same as those which led to the
exclusion of all matters relating to jagirs and muafis
generally; but now that the Civil Courts have acquired
jurisdiction in matters relating to jagirs and muafis
generally, the mere fact that the jagir or muafi has been
assigned for the support of an institution, is no reason why
such cases should be removed from the cognizance of the
Civil Courts."—(Book Circular XII of 1867, of the Chief
Court.)

The Chief Commissioner issued the following directions
with reference to Civil officers interfering in disputes con-
ected with shrines, temples, mosques, tombs, and such like
institutions:

"The distribution of proceeds, the succession to the
rights arising from or privileges connected with these insti-
tutions may be made the subject of a Civil suit, just like
any other enjoyable thing. And the matter at issue in such
suit will be adjusted like any other case. If the existing
Punjab Code do not specifically provide for the point in
dispute, the Judge will proceed to ascertain the lex loci
after the manner prescribed in the said Code, and he will
conduct the case exactly according to the procedure pre-
scribed by rule.

"But the action of our officers will be strictly confined
to judicial enquiry upon suits preferred, to proceedings ac-
cording to usual procedure, to judicial decisions according to
law. Our officers will have nothing to do with the manage-
ment, or administration of these institutions; they will not
frame, nor cause to be framed, rules regarding them; they
will not make any general arrangements for the benefit of
or the better regulation of these institutions. They will settle particular disputes which may arise, but will not consider how such disputes may be prevented. The people must manage their own religious institutions. If such institutions suffer from internal disputes, that is their business not ours."—(Circular No. 23, dated 25th August 1858.)

The head of a temple of Biroh Mahadeo at Kangra was alleged to be so notoriously profligate that the female relatives of the worshippers were prevented from frequenting the shrine as usual; it was held that an action lay to determine whether the defendant was guilty of scandalous profigacy; and if so, whether such behaviour should entail removal from office; the parties to give evidence on the point being those who worship at or have interests in the shrine.—(Judicial Commissioner's Book Circular No. 21 of 1859.)

See too, on this head, Clause 6 Section XXII of this Code, and the case of Hassan Shah v. Hassuin Shah among the illustrations there; also Act XX of 1863 (an Act to enable the Government to divest itself of the management of religious institutions) at the end of Chapter XXII of this Volume.

12.—A suit may not be brought in any matter relating to the boundaries of Independent States, or feudal principalities.

"Matters of this nature do not come within the cognizance of the Civil Courts, unless incidentally. It is for Government in the Political department to adjust the boundary between the British territories and the dominions of independent princes and feudatory chieftains."—(Book Circular No. XII of 1867, of the Chief Court.)

An act however of a Political officer interfering with the private rights of parties, and not being itself a matter of political import, can be questioned in the Civil Courts.—(1 W. Reporter, p. 16.)

13.—A suit may not be brought in any matter relating to the proprietorship of rukhs, or other reserved Government grounds, or to the compensation for land taken up for public purposes.

"Questions relating to the proprietorship of rukhs or other reserved Government grounds are cognizable by the Civil Courts, unless they have been already disposed of judicially at the time of settlement in a suit between the
same parties; in which case the exemption of para 4 of this Code would apply. The acquisition of land for public purposes and the determination of the amount of compensation for such land are matters within the cognizance of the Revenue authorities, and are regulated by Special Acts.—(Book Circular XII of 1867, of the Chief Court.)

14.—A suit may not be brought in any matter relating to canals, roads, or other works of public utility, to the construction, preservation, arrangement thereof, or to objections urged by private individuals with reference to such works.

"The levy of rents, tolls, or dues on canals, and the protection of canals from injury, are regulated by Act VII of 1845, which was extended to the Punjab by Government Notification No. 1584, dated 24th August 1860, published in the Punjab Gazette of 29th August 1860. But many matters may arise in connection with canals, roads or other works of public utility, their construction, preservation, and arrangement, and the objections urged by private individuals with reference thereto, which would properly form subjects for determination by the Civil Courts; and if private individuals consider themselves aggrieved, in such matters, by the acts of the canal or other public officers concerned, there is no reason why they should be debarred from seeking relief by a suit in Court."—(Book Circular XII of 1867, of the Chief Court.) See also Act XII of 1866.

15.—A suit may not be brought in any matter relating to the proceedings of the Fiscal or Judicial Officers of Government.

"Many matters relating to the proceedings of the Fiscal officers of Government are now cognizable by the Civil Courts, as already observed in this Circular under the head of para 5 of the Code. As regards the proceedings of the judicial officers of Government, Act XVIII of 1850 protects officers acting judicially from being sued for acts done by them in the discharge of their judicial duty, provided that they, at the time, in good faith, believed themselves to have jurisdiction to do the act complained of; but where they have acted without such bona fide belief, they cannot claim protection under that Act from the consequences of having acted without, or in excess of, jurisdiction."—(Book Circular XII of 1867, of the Chief Court). Hence the Calcutta Court has held that no suit will lie against a Magistrate, acting in his judicial capacity, and bona fide, for
having fined the plaintiff for illegally exacting tolls.—(5. W. Reporter, Civil Rulings, p. 104.)

The Act just quoted is as follows:—

ACT XVIII of 1850.

An Act for the protection of judicial officers.

Passed by the Governor General in Council on the 4th April 1850.

For the greater protection of Magistrates and others acting judicially, it is enacted as follows:—

I. No Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially shall be liable to be sued in any Civil Court for any act done, or ordered to be done by him, in the discharge of his judicial duty, whether or not within the limits of his jurisdiction; provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court, or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court for the execution of any warrant or order, which he would be bound to execute if within the jurisdiction of the person issuing the same.

16.—A suit may not be brought in cases barred by the period of limitation, that is, twelve years from the date on which the cause of action may have arisen.

"The law of limitation has been materially altered since the publication of the Punjab Civil Code; and therefore the latter part of the exemption, (the portion in italics) has ceased for some time to be generally applicable. But the general principle is of course still true that no suit can be maintained in the Civil Courts unless it is instituted within the period of limitation prescribed by the
PARTIES TO SUITS.

law for the time being in force."—(Book Circular XII of 1867, of the Chief Court.) For the present law, the reader is referred to one of the numerous annotated editions of Act XIV of 1859.

17.—Suits regarding any matter or thing, within the jurisdiction of the Courts, may be brought by or against:—

18.—1st.—The Government, in its own name, or in the name of its officers;

2nd.—Independent Sovereigns and Chiefs who may have been recognized as such by the British Government;

3rd.—Corporations who may have been privileged by legislative enactment, or by the chief local authorities, to sue or be sued in their collective capacity, or in the name of their office bearers;

4th.—Persons resident beyond the limits of British territory (unless they be alien enemies) provided that security for costs be furnished;

5th.—All persons of every sort and condition resident within British territory, with certain exceptions to be hereinafter specified;

6th.—The duly authorized representative of any party belonging to the classes above described, except the plaintiff should sue in *forma pauperis*, in which case the pauper must appear in person, unless the party should be a female of high rank.

In the matter of suits against the Government, the reader is referred to the two cases of Forester and others v. the Secretary of State for India in Council, also to Wagentrieber v. the Secretary of State for India in Council, and Salig Ram and another v. the Secretary of State for India in Council (pp. 5—8 of this work); and for suits brought against Government in the name of its officers to the extract from Book Circular XII of 1857, given under Clause 5 on p. 28.
In the matter of suits by or against Sovereign Princes, the decisions of the English Courts seem to have established that a Sovereign is not liable to be sued in matters of State; but that if in addition to being a ruler of another country, he is also a subject of this realm, he is liable to be sued in respect of any acts or transactions done by him, or in which he may have been engaged, as such subject: that if the act be such, that it is doubtful whether it should be attributed to the character of Sovereign or to that of subject, it is to be presumed to be attributable to the former capacity.—(Duke of Brunswick v. the King of Hanover.) Neither can property belonging to Sovereigns in their public capacity be attached by their State creditors.—(Wadsworth v. The Queen of Spain, and De-Haber v. The Queen of Portugal.)

So a foreign Sovereign can sue for wrongs done to him by English subjects, without authority from the English Government, in respect of property belonging to him, either in his individual or corporate capacity; yet he cannot maintain a suit for invasions of his prerogative as a Sovereign.—The Emperor of Austria v. Day—(1. Smith's Leading Cases, p. 646, under Mostyn v. Fabrigas.) If however the foreign State have not been recognized by the British Government, its ruler cannot sue in our Courts. Section 6 Act II of 1855 requires the Courts to take judicial notice of the existence of all States which are recognized by the British Crown.—(Macpherson on Civil Procedure, p. 3.)

The manner in which Indian Princes might sue and be sued for claims, which are within the province of Municipal law, was provided for in Regulation IV of 1802, which was however repealed by Act X of 1861, Clause 4 Section 17, Act VIII of 1859 being the only enactment substituted for the repealed Regulation.

If an independent Rajah have landed property within British territory, and incur debts, and pledge the rents of the property as security for payment, his heir, who has succeeded him in the property, cannot successfully plead that according to the custom of the Rāj, he is not liable for the debts of his predecessor.—(Macpherson on Contracts, p. 11.)

The rules for taking security from plaintiffs, not residing in British territory, are given in Sections 34 and 35 Act VIII of 1859. For the subject of alien enemies, see below under Clause 21.

The Mutiny Act, while prohibiting the arrest of a soldier for any debt under Rs. 300, does not exempt him from being sued: on the contrary, soldiers are amenable in suits for debts, whatever may be the amount, to the same Courts to which officers are amenable in suits above Rs. 400. As
however the Military necessaries and equipments of a soldier cannot be seized under the decree of a Civil Court, and they have usually but little other property, it will follow that proceedings against them will generally be nugatory, not from want of jurisdiction, but a want of goods on which to make a levy.—(Judicial Commissioner's Book Circular No. 35 of 1857.)

For the Punjab law as to authorized representatives, see Section 17 Act VIII of 1859, and the proviso annexed to it when the Act was introduced into this Province. The law as to the personal attendance of plaintiffs suing in forma pauperis is given at Section 301 Act VIII of 1859.

19.—A Hindu or Mahammadan married woman may sue separately from her husband. Among the above classes husband and wife may sue each other.

When a Hindu is absent in a foreign country, his wife is competent, in order to prevent his rights from becoming barred by lapse of time, to assert them by suing on his behalf.—(Papammal v. Ramaswami Chetti—Madras High Court Reports, p. 365.) See also Section V of this Code.

20.—Suits may not be brought by or against:

21.—1st.—Minors, and persons incapable of managing their own affairs, such as lunatics and idiots, except in conjunction with their guardians and protectors;

A stranger cannot bring a suit on behalf of a minor unless he have obtained a certificate under Act XI of 1858 (4. North West High Court Reports, p. 92); neither can a

* According to Hindu Law, which in this respect is similar to English, a person dealing with a wife and seeking to charge her husband must show, either that the wife is living with her husband and managing the household affairs, in which case an implied agency to buy necessaries is presumed, or he must show the existence of such a state of things as would warrant her in living apart from her husband and claiming support or maintenance, when of course the law would give her an implied authority to bind him for necessaries supplied to her during such separation, in the event of his not providing her with maintenance. As according to Hindu law and usage polygamy is permitted, whatever may be thought of its morality, among Hindus, and the prohibition directed against it, except under certain justifying circumstances, such as the first wife's infidelity, bad temper, barrenness, or bearing only daughters, is, like so many other rules of Hindu law, directory only, and not imperative, the husband's marrying a second wife is not in itself cause sufficient to justify the first wife in separating herself and remaining apart; so that she would under those circumstances have no claim to maintenance, and, a fortiori, not to borrow money on her husband's credit for her maintenance.—(Virasvami Chetti v. Appaswami Chetti—Stokes' Madras Reports, page 375.)
sarbarakkar who is without a certificate and have not asked and obtained leave of the Court to sue—(4, North West High Court Reports, p. 220). For further information and Illustrations see Act XL of 1858 in the Appendix to this Volume.

In regard to suits on behalf of lunatics, see Act XXXV of 1858.

2nd. Suits may not be brought by or against English married women, except conjointly with their husbands, or except under those circumstances wherein, by the law of England, they may sue or be sued alone. The same rule will be applicable to married women of the class of East Indians of British descent;

It would appear from Sections 4 and 356 Act X of 1865 (Indian Succession Act) that European women, married in India on or after the 1st January 1866, can contract, sue and be sued, in respect of their own separate property and transactions; in which cases, the husband's estate would not be in any way answerable: also in such marriages the wife could alone be sued for debts and liabilities incurred by her before marriage, her husband not being answerable: and conversely, she alone could sue on rights belonging to her at the time of her marriage. Furthermore, married women in India can undoubtedly, whether living with or apart from their husbands, engage in business on their own account, and sue and be sued separately, on contracts arising out of such business; for, although they may so trade simply as agents of their husbands, in which case the husband, and not the wife, would be answerable.

As however married women of this class in India are not usually wealthy, the object of the creditor will be generally to charge the husband on the wife's dealings; and it is proposed therefore to state briefly what are the transactions, in which, in the eye of the law, the wife is merely the agent of her husband.

Every married woman who resides with her husband, and has the general management of his household affairs, is presumed to be his general agent, in all matters connected with the general economy of the house and family. And it is therefore no answer to an action against the husband for goods supplied to the family by the wife's order, to shew that the defendant was absent when the goods were ordered, and had furnished his wife with money to pay for them, unless it can also be shewn that the wife had, during the husband's absence and without his knowledge, placed both
herself and her children under the protection of her paramour. The implied authority however to bind the husband resulting from cohabitation may be discharged by the prohibition and countermand of the husband. And she has no implied authority to run into extravagance and to give orders beyond her husband's means. If, therefore, she orders wines and spirits, extravagantly expensive dresses, expensive music, jewels, &c., there must be reasonable evidence to show that she has made the order with the assent and authority of her husband; and tradespeople who intend to look to the husband for payment ought to ascertain whether he be aware of his wife's extravagance, and whether he sanction it or not. If a married lady go to a watering place (Indicte the hills) without her husband, and order expensive articles of dress, unsuitable to her husband's circumstances, and he disapprove of her extravagance as soon he is made acquainted with it, he will not be held responsible for the price. It is of course the duty of the husband, when he sees the wife indulging in these extravagances and knows that she has no separate income of her own, to give notice to her tradespeople that he does not sanction such transactions; as if he choose to lie by, he will be presumed to have ratified her acts. The mere fact however of the husband seeing the wife wearing some of the things ordered with it, will not sanction the whole of an extravagant order. A person who lends money to a married woman for the purchase of necessaries can recover the amount from the husband, by a suit in Equity.—(Addison on Contracts, pp. 767—769.)

In Montague v. Benedict, Holroyd J. remarked that the husband is responsible for necessaries provided for his wife when he neglects to provide them himself. Also that where the tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own risk; and if it turn out that the necessity does not exist, the husband is not responsible for what may be furnished to the wife, without his knowledge. And in Read v. Tkable, a new trial was granted, because the Judge only put it to the jury, whether the goods were necessary to the wife's station, without also submitting, whether or no on the facts proved, the wife had any authority, express or implied, to bind the husband by the contract.—(2. Smith's Leading Cases, pp. 412 and 422.)

If a tradesman, at the time he deals with and trusts the wife, do not know her to be a married woman, he cannot be said to have given credit to the husband; and if articles sold under such circumstances be not necessary for the wife, and have not been used by her, with the knowledge of her husband, and have not been consumed in the husband's

Married woman not warranted in running into extravagance.

Husband not generally responsible for expensive articles purchased by an absent wife without his privy.

Money lent to a wife to enable her to purchase necessities is recoverable in equity.

Dicta laid down in Montague v. Benedict.

The seller must establish not only that the articles were necessary to the wife, but that they were bought with the consent, express or implied, of the husband.

Case of articles supplied to a married woman, not known to be such by the seller at time,
Punjab Civil Code,

SUITS AGAINST EUROPEAN MARRIED WOMEN.

In cases of reputed marriages, the man's responsibilities are the same as those of a true husband.

A wife allowed by her husband to manage his business is constituted the former's agent in regard to it.

Settled estates of married women liable in equity for their debts.

Wife not responsible for necessaries purchased before tidings of the husband's death are received.

Case of the wife committing adultery.

household, nor have come in any shape or way to his use; and if he have not subsequently sanctioned or adopted his wife's proceedings, he cannot be made responsible for the price.—(Addison on Contracts, p. 770.)

If persons have lived together as man and wife, and be commonly reported to be married, this enables third persons to charge them with the duties resulting from such a status and relationship. And if it be proved that they have actually gone through the marriage ceremony, a plea that such marriage was illegal is no answer to an action for debt.—(Addison on Contracts, p. 770.) In Watson v. Threlkeld, Lord Kenyon went so far as to observe—"That if a man have permitted a woman to whom he was not married to use his name, and pass for his wife, and in that character to contract debts, he is liable for her debts, whether the tradesman who furnished the goods knew the circumstances to be so, or not." Having once held out the woman to be his wife, the reputed husband is bound, when the connection ceases, to make the termination of it notorious.—(Addison on Contracts, p. 784.)

If the husband have entrusted his wife with the general management of his trade and business, he clothes her with an implied general authority to enter into all such agreements and transactions as are usual and necessary for the purpose; and he is consequently alone responsible for his proceedings. But if she do not carry on the business under his roof, it must be shown that she acted by his express authority.—(Addison on Contracts, p. 767.)

In the case of women married in England, or in India before 1865, who have separate property settled on themselves, it is presumed that the Indian Courts, following the practice of the Court of Chancery, would allow the creditors, on proving their claims against the wife, to obtain satisfaction by laying hold on her separate estate. This practice however of holding the wife's settled estate as liable does not extend to transactions between the husband and wife: but if the latter have executed a bond or other instrument to enable her husband to raise money for his own purposes, or lent her husband the savings from her separate property, she is entitled to be repaid from her husband's estate on his death.—(Addison on Contracts, pp. 771 and 781.)

The husband's heirs, and not his widow, are responsible for necessaries purchased by the wife in the interval between the husband's death and the time when tidings of it reach his family if he die away from home.—(Addison on Contracts, p. 784.)

If the husband detect the wife in adultery, he may forthwith put her away and refuse to maintain her; and third
parties who after a separation on such grounds supply her with the means of subsistence have no claim against the husband in respect thereof, whether they had notice of the adultery or not at the time they furnished the goods. If the husband subsequently take back the wife, all her original rights are revived; or if he connive at her misbehaviour and permit her to remain under his own roof, he cannot refuse to maintain her. — (Addison on Contracts, p. 775.)

If the wife leave her husband without just cause, she cannot procure subsistence elsewhere at his expense. But if she return to her duty after a short interval, he is bound to receive her back, and if he refuse, his liability for her maintenance revives from the time of such refusal. But not so, if she have deserted him for a lengthened period. If therefore tradesmen supply goods to a wife living apart from her husband, and then seek to charge the latter, the onus of proof that the separation took place under such circumstances as will entitle them to recover from the husband rests upon them. If however the husband abandon his wife, or expel her from his house without being able to prove that she has forfeited her conjugal rights by adultery, or if by cruelty, or threats of personal violence, or by shameless and indecent conduct he render it morally impossible that she should continue to reside under his roof, he is liable for necessaries supplied to her by third parties, in accordance with his estate and circumstances, but he will not be answerable, if she choose to run into extravagance. — (Addison on Contracts, pp. 775—777.)

If the separation be by mutual consent, it is for the husband to shew that he has made his wife an allowance for necessaries and paid it, or that she had funds at her own disposal, and for the creditor to prove that such means are insufficient. If a wife leave her home in consequence of a quarrel with her husband, in which they are both to blame, and obtain lodging and necessaries from a stranger, the husband will be liable if he know where his wife is, and neglect to call upon her to return. In all cases of separation, where the husband has not forfeited his marital rights by cruelty, or profligacy, he may terminate his liability by calling on the wife to return, and prohibiting parties from continuing to give her credit. — (Addison on Contracts, p. 778, also p. 776.)

Transportation of the husband for a term of years by English law puts his wife in the condition of a feme sole until his return home after the expiry of his sentence. — (Addison on Contracts, p. 779.)

A married woman is responsible for all torts committed by her during her coverture; the husband being joined with her as co-defendant; but this must not be abused by a plain-
tiff attempting to declare on tort instead of on contract, so as to hold the husband answerable for an act he would not otherwise be liable for; hence, where a married woman commits a fraud, which is directly connected with a contract, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it along with her. This was the decision in a case (Liverpool Adelphi Loan Assn. Co. v. Fairhurst) in which the wife had falsely and fraudulently represented herself to the plaintiff as unmarried at the time of her executing a promissory note as surety for a third person, whereby the plaintiff was induced to advance a sum of money to that person.—(Broom's Commentaries on the Common Law, p. 597.)


3rd.—Alien enemies or subjects of a hostile power resident beyond the British territories.

Under the head of alien enemies are comprised, not only the natives of States with whom the British Government is at war, but also all British subjects, and subjects of neutral nations domiciled in an enemy's territory, or engaged in the service of an hostile power. They are disabled from contracting with British subjects, unless they have obtained a license to trade. But they may lawfully provide for the wants of Englishmen detained abroad; and on the return of peace enforce such contracts in our Courts. If after a contract has been made with an alien friend, war break out with his country, his right of action on the contract is suspended until the return of peace. If however a subject of a State at war with England, reside in British territory, with the license and permission of the Crown, he has the same rights and privileges as an alien friend: but the mere fact of his residing without let or hindrance is not evidence of a license from the Crown, unless it be shewn that the Government was cognizant of and sanctioned his stay. Prisoners of war detained in this country appear to have the rights of alien friends.—(Addison on Contracts, p. 934.)
CHAPTER II.

On Evidence.

The Law of Evidence for this province is at present mainly contained in Act II of 1855; together with Section II of the Punjab Civil Code, and the English Law of Evidence,* except in points where it has been modified by the Indian Act; the latter two authorities being admitted generally under the provisions of Section 58 Act II of 1855.

PART I.

ACT II OF 1855.

An Act for the further improvement of the Law of Evidence.

Whereas it is expedient further to improve the Law of Evidence; It is enacted as follows:—

I. This Section is repealed by Act VIII of 1868.

II. Within the territories in the possession and under the Government of the East India Company, all Courts of Justice, and all persons having by law or consent of parties authority to take evidence, shall take judicial notice of all Regulations and Ordinances made before or on the 22nd day of April 1834 by the Governor-General in Council of the Presidency of Fort William, in Bengal, by the Governor in Council of the Presidency of Fort St. George, or by the Governor in Council of the Presidency of Bombay, and having the force of Law in any part of the said territories,

* See Gooden on Evidence, p. iii; but in the Queen v. Khairullah, Peacock C. J. held that by the abolition of the Mahommedan Law of Evidence, the English Law of Evidence was not established in its place.—(G. W. Reporter, Criminal Rulings, p. 54.) Be this however as it may, so far as the English law and practice embodies sound deductions from general principles of justice and expediency, and is not at variance with Anglo-Indian legislation, it is undoubtedly entitled to the highest respect on the part of the Indian Courts.
and of all Laws and Regulations heretofore made by the Governor-General of India in Council, and of this Act, and of all Acts and Regulations heretofore made, or hereafter to be made by the Governor-General of India in Council, constituted for the purpose of making Laws and Regulations, whether the same be of a public or of a private nature.

So much of this Section as relates to Acts and Regulations made by the Governor General of India in Council, is repealed by Act VIII of 1868. See Section 7 Act I of 1868, where the contents of this second Section will be found re-enacted.

Judicial notice. Goodere (p. 308) defines "judicial notice" as that substitution for proof which is admitted by the Court in a knowledge attributed to its Judges, and by the assumption of certain things as realities without actual proof of their existence. This writer regards the provisions of this Act on the matter of judicial notice as cumulative on the rules of English practice, and appends a list of subjects, of which the English Courts take judicial notice, which should be consulted (pp. 309—311). See also Starkie, p. 735.

III. All Courts and persons aforesaid shall take judicial notice of all public Acts of Parliament and of all local and personal Acts declared by Parliament to be public and to be judicially noticed, and shall admit as primâ facie evidence of any private Act of Parliament, any copy thereof purporting to be printed by the King's Printer.

IV. Every Court shall take judicial notice of its own Members and Officers respectively, and of their deputies and subordinate Officers or Assistants, and also of all Officers acting in execution of its process, and of all Advocates, Attornies, Proctors, Wakils, Pleaders, and other persons authorized by Law to act before it.
In *Nilkunt Chuckerbudy v. Shib Narayan Kumur* the Calcutta Court ruled that, under the provisions of this Section, a Judge was warranted in looking into the books kept under the orders of the Court by its own officer, the Nazir, and in referring to any entries made therein, and that where an application had been admittedly made by the decree-holder, the Court was quite justified in finding upon the entry in its Nazir's book, that a warrant had been issued in accordance with that petition for the arrest of the judgment-debtor, which could not be executed owing to his absconding, and that the execution-creditor had therefore taken effectual steps for keeping his decree in force.—(8. W. Reporter, Civil Rulings, p. 277.)

V. All Courts and persons aforesaid shall take judicial notice of the names, titles, and authorities of the persons filling for the time being any one of the following offices in any part of the said territories:—Governor-General, Governor, Lieutenant-Governor or Deputy Governor, Secretary or Under-Secretary to Government, Commander-in-Chief, Bishop, Member of Council, Legislative Councillor, Judge of any of Her Majesty's Courts or of any Sudder Court, or of any Court of Judicature hereafter to be constituted in the said territories to or in which the powers of any of Her Majesty's Supreme Courts may be transferred or vested.

VI. All such Courts and persons aforesaid shall take judicial notice of all divisions of time, of the geographical divisions of the world, of the territories under the dominion of the British Crown, of the commencement, continuation and termination of hostilities between the British Crown and any other State, and also of the existence, title, and national flag of every Sovereign or State recognized by the British Crown. In all the above cases, such Court or person may resort
for its aid to appropriate books or documents of reference.

VII. Any Government Gazette of any Country, Colony, or Dependency under the dominion of the British Crown, may be proved by the bare production thereof before any of the Courts or persons aforesaid.

VIII. All Proclamations, Acts of State, whether Legislative or Executive, nominations, appointments, and other official communications of the Government appearing in any such Gazette, may be proved by the production of such Gazette, and shall be primâ facie proof of any fact of a public nature which they were intended to notify.

IX. This Section is repealed by Act VIII of 1868.

X. The Gazette or Newspaper containing any advertisement purporting to be published by virtue of any public Statute, Act, Regulation, or Ordinance, or of any Rule or Order of a Court of Justice or of any Board or Officer of Revenue, may be received by any such Courts or persons as aforesaid as primâ facie evidence that such advertisement was published duly under the authority from which it purports to proceed.

XI. All Courts and persons aforesaid may, on matters of public History, Literature, Science, or Art, refer, for the purposes of evidence, to such published Books, Maps, or Charts as such Courts or persons shall consider to be of authority on the subject to which they relate.
The note appended to Section 81 Norton's Law of Evidence may be consulted as to how far books are admissible as proof in English Courts.

XII. Books printed or published under the authority of the Government of a Foreign Country and purporting to contain the Statutes, Code, or other written Law of such Country, and also printed and published Books of reports of decisions of the Courts of such Country, and Books proved to be commonly admitted in such Courts as evidence of the Law of such Country, shall be admissible before any such Courts or persons as aforesaid as evidence of the Law of such Foreign Country.

XIII. All Maps made under the authority of Government or of any public municipal body, and not made for the purpose of any litigated question, shall prima facie be deemed to be correct, and shall be admitted in evidence without further proof.

A Divisional Bench of the Calcutta Court has recently ruled, in Gopalnath Singh v. Anundmayi Debi, that certified copies of survey measurements, chittas, field-books, and maps are admissible in evidence: Bailey J., basing their admissibility indeed, inter alia, on the authority of this Section, since they are the primary records, out of which a survey map is made.—(8. W. Reporter, Civil Rulings, p. 167.)

This Section makes Government maps evidence, not only with regard to the physical features of the country which are depicted upon the maps, but also with regard to the other circumstances which the officers deputed to make the maps are specially commissioned to note down, so that a Government survey map is evidence as to the boundaries of any plots or estates which stand under separate numbers in the Collector's books; but beyond this, they are not evidence as to rights of ownership.—Kumudini Debi v. Purno Chandra Mukerjee—(10. W. Reporter, Civil Rulings p. 300.) In a later case, at p. 343 of the same Reports, the Court regarded entries on the face of the map as proof, to some degree, of title.
The Privy Council held, in Kerr v. Nazar Muhammad and another, that a map made by a Government surveyor, for the purpose of adjusting a dispute between two estates, is not admissible as evidence to determine the boundaries between two other adjacent but different estates, the dispute regarding which had not been raised at the time when the map was made.—(Sutherland’s Privy Council Judgments, p. 546.)

Where one Court has acted on a map in a suit as genuine and correct, another Court is not therefore bound to receive and act upon it also.—Muhammad Ali Ahmad Khan v. Imdad-ur-Rahman Chowdhry—(Sutherland’s Civil Rulings for July 1864, p. 323).

It is necessary that old maps and all other ancient documents should be shewn to have come from proper custody; otherwise they are inadmissible. It need not be made out, however, that they have come from the most proper place of custody, since it will suffice if they have been obtained from a quarter where they might reasonably have been expected to be found.—(Norton’s Law of Evidence, Section 453.)

XIV. The following persons only shall be incompetent to testify.

1. Children under seven years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

2. Persons of unsound mind, who, at the time of their examination, appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; and no person who is known to be of unsound mind shall be liable to be summoned as a witness, without the consent previously obtained of the Court or person before whom his attendance is required.

In the case of children tendered as witnesses, the Court must either refuse to take their evidence under this Section, as holding them incompetent to testify; or else, if it consider them competent, their evidence must be admitted for
what it may be worth, not simply as corroborative, but as direct evidence.—(8. W. Reporter, Criminal Letters, p. 22.)

XV. Any person who, by reason of immature age or want of religious belief, or who, by reason of defect of religious belief, ought not, in the opinion of such Court or person, to be admitted to give evidence on oath or solemn affirmation, shall be admitted to give evidence on a simple affirmation, declaring that he will speak the truth, the whole truth, and nothing but the truth.

The Solemn Affirmation Act is Act V of 1840.

XVI. The provisions in the last preceding Section as to witnesses shall apply to testimony given by affidavit or otherwise in writing as well as to testimony orally delivered.

XVII. Any such witness wilfully giving false evidence shall be subject to be proceeded against in like manner, and to suffer, if convicted, the same punishment as if he had been sworn and had committed wilful and corrupt perjury. The indictment or charge shall be varied so as to meet the case.

The procedure to be followed when a person gives false evidence in a Civil Court is laid down in Sections 17, 18, and 20 of Act XXIII of 1861.

XVIII. No person shall, by reason of any interest in the result of any suit or of any interest connected therewith, or by reason of relationship to any of the parties thereto, be incompetent to give evidence in such suit.

XIX. Any party to a civil suit or other proceeding of a civil nature shall be competent and may be compelled to give evidence as a witness.
therein either on his own behalf or on behalf of any other party to the suit or proceeding, and also to produce any document in his possession or power, in the same manner as if he were not a party to the suit or proceeding. Provided that no Court or person as aforesaid, other than Her Majesty's Supreme Courts of Judicature, shall compel the attendance of any party to such suit or proceeding, for the purpose of giving evidence therein, except under and subject to the rules prescribed in that behalf in Act XIX of 1853.

The following are the unrepealed portions of Act XIX of 1853, the remainder having been repealed by Act X of 1861:

**ACT No. XIX of 1853.**

*Section XIX.*—A witness, not a party to the suit or proceeding in which he is summoned shall not be bound to produce his own title-deeds, unless he shall have agreed in writing with the party requiring the production thereof, or with some person through whom he claims, to produce such deeds.

*Section XXVI.*—Any person, whether a party to the suit or not, to whom a summons to attend and give evidence or produce a document shall be personally delivered, and who shall, without lawful excuse, neglect or refuse to obey such summons, or who shall be proved to have absconded, or kept out of the way to avoid being served with such summons, and any person who, being in Court, upon being required by the Court to give evidence
or produce a document in his possession shall, without lawful excuse, refuse to give evidence, or sign his deposition, or to produce a document in his possession, shall, in addition to any proceedings under this Act, be liable to the party at whose request the summons shall have been issued, or at whose instance he shall be required to give evidence or produce the document for all damages which he may sustain in consequence of such neglect or refusal, or of such absconding or keeping out of the way as aforesaid, to be recovered in a civil action.

Before the plaintiff in an action for damages against a defaulting witness can recover, it is necessary for him to prove that he has been endamaged by the omission of the defendant to appear, and the mere fact of the defendant's non-attendance as a witness is not of itself a good ground for the plaintiff to come against the defendant and to recover damages from him.—Dwarkanath Kooree v. Amunndo Chandra Sannel—(5. W. Reporter, Small Cause Court References, p. 18.)

The procedure substituted for Act XIX of 1853 is now contained in Sections 127, 162, 163, 164, 165 and 166 of Act VIII of 1859.

**ACT II of 1855.—(Continued.)**

**XX.** A husband or wife shall in every civil proceeding be competent to give evidence for or against each other. Provided that any communication made by husband or wife to the other during their marriage shall be deemed a privileged communication and shall not be disclosed without consent of the person making the same, unless such communication shall relate to a matter in dispute in a suit pending between such husband and wife.

On this subject, see below, Clause 2, Section II of the Punjab Civil Code.
XXI. A witness, whether a party or not, shall not be bound to produce any document relating to affairs of State, the production of which would be contrary to good policy, nor any document held by him for any other person who would not be bound to produce it if in his own possession.

The fifth edition of Norton on Evidence gives the following points as having been laid down in a recent case, Beaton v. Skene, with respect to State papers:

"If the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of Justice.

"The question, whether the production of the document would be injurious to the public service, must be determined, not by the Judge, but by the head of the department having the custody of the paper. Observe the language of Section 23 of the Evidence Act.

"If the head of the department do not attend personally to say that the production will be injurious, but send the document to be produced or not as the Judge may think proper, or if a subordinate be sent with the document with instructions to object, but nothing more, the case may be different.

"Sed per Martin B.—Whenever the Judge is satisfied that the document may be made public without prejudice to the public service, he ought to compel its production, notwithstanding the reluctance of the head of the department to produce it.

"Per Curiam.—Perhaps cases might arise where the matter would be so clear that the Judge might well ask for the document in spite of some official scruples in producing it."—(Norton's Law of Evidence, Section 355.)

Taylor on Evidence, Section 689, quoted in Section 355 of Mr. Norton's work, should be consulted for what kind of documents are regarded as State papers. The following ruling of the Judicial Commissioner is given here:

All public letters addressed by one officer to another are privileged and confidential; and it is a matter of judgment (not of right) whether copies should be granted: and, as a general rule, no lower Court can give a copy of a letter received from a higher Court.—(Judicial Commissioner's Ruling No. 14, Thornton's Small Cause Court Manual, Addenda, p. 16.)
XXII. A witness being a party to the suit shall not be bound to produce any document in his possession or power which is not relevant or material to the case of the party requiring its production, nor any confidential writing or correspondence which may have passed between him and any legal professional adviser. If any party, however, offers himself as a witness, he shall be bound to produce any such writing or correspondence in his custody, possession, or power, if relevant or material to the case of the party requiring its production.

It is a fundamental rule of English practice that a person is not bound to disclose his own title; and Mr. Norton considers that this Section is not really at variance with this principle, for a party at most is only compellable to produce documents relevant or material to the case of the party requiring their production, and whereas a claimant must recover on the strength of his own title, it could not help him to obtain the production of the title-deeds of the other party, as, even if by this means a flaw were discovered in his opponent's title, his own case would be nowise advanced; and therefore such deeds cannot be held to come under the description of "relevant or material."—(Norton on Evidence, Section 571.)

XXIII. Every witness summoned to produce a document shall if the same be in his custody, possession or power, be bound to bring it, or cause it to be brought into Court, although there be a valid objection to the right of the party calling for it to compel its production or to the reading or putting it in as evidence, or to the disclosure of the contents thereof, the validity of any such objection made by the person producing the document shall be determined by the Court; and for the better determination thereof, it shall be lawful for the Court to receive any admissible evidence.
which the person producing the document may give respecting it, and it shall also be lawful for the Court, except in the case of any document relating to affairs of State, to inspect the document, and, if necessary, to call to its assistance any person whom it may appoint to interpret the same. Such person, however, shall be previously sworn truly to interpret the same to the Court alone, and not to disclose the contents thereof except to the Court, unless the Court shall order the document to be given in evidence.

XXIV. A Barrister, Attorney, or Wakil shall not, without the consent of his client, disclose any communication made by the client to him in the course of his professional employment, nor any advice given by him professionally to his client, nor the contents of any document of his client, the knowledge of which he shall have acquired in the course of his professional employment. The privilege, however, is that of the client, and if any party to a suit shall give evidence therein, at his own instance, he shall be deemed thereby to have waived his privilege, and to have consented to the disclosure by such Barrister, Attorney, or Wakil of any matter as aforesaid, which may be relevant, and which the Barrister, Attorney, or Wakil would have been bound to disclose, but for the privilege of his client; and the Barrister, Attorney, or Wakil shall be bound upon examination to disclose any such matter.

The word "attorney" in this Section does not comprise mukhiars.

The Calcutta Court, on revising the case of the Queen v. Chandra Kant Chuckerbuty, laid it down that from the order of the words in this Section it is clear that by the
word "attorney" only attorneys of the High Courts are meant, and not mukhtars as well, who if included in the privilege would naturally follow in their proper order after wakils, and that therefore communications made by a client to his mukhtar are not by law privileged, but the mukhtar can disclose them validly in evidence.—(10. W. Reporter, Criminal Rulings, p. 14.) It may however, perhaps be urged that Clause 2, Section II, Punjab Civil Code makes such communications still privileged in the Punjab Courts, since the language used there is more vague and comprehensive than that of Section 24 of the Evidence Act.

Judges are not compellable by English law to testify as to matters in which they have been judicially engaged: nor can arbitrators be compelled to disclose the ground of their award.—(Norton's Law of Evidence, Sections 351 and 352.) But Magistrates are not incapacitated from giving evidence in actions for malicious prosecutions of matters which have come before them in the course of a preliminary enquiry into a criminal charge and which are otherwise admissible.—(3. Madras High Court Reports, p. 372.)

XXV. Any person present in Court, whether a party or not, may be called upon and compelled by the Court to give evidence, and produce any document then and there in his actual possession, or in his power, in the same manner and subject to the same rules as if he had been summoned to attend and give evidence, or to produce such document, and may be punished in like manner for any refusal to obey the order of the Court.

See the remark under the following Section.

XXVI. Any person, whether a party to the suit or not, may be summoned to produce a document without being summoned to give evidence, and any person summoned merely to produce a document, shall be deemed to have complied with the summons, if he cause such document to be produced instead of attending personally to produce the same.
Sections 25 and 26 are repealed by Act X of 1861, in so far as they are applicable to any suit or proceeding under Act VIII of 1859. Section 171 of the last named Act takes the place of Section 25, and Section 153 of Section 26.

XXVII. The Rules of evidence in Her Majesty's Supreme Courts as to matters of Ecclesiastical or Admiralty Civil jurisdiction, shall be the same as they are on the Plea side of the said Courts.

XXVIII. Except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such Court or before any such person. But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice or of a single witness in the case of perjury.

Where the Lower Court appeared to have thought that the evidence of the serving officer and the person who accompanied him on behalf of the plaintiff was not sufficient to establish the service of a notice of enhancement of rent, the Calcutta Court pointed out that the evidence of one witness, if believed, was sufficient by the law of this country to establish any fact to which the witness speaks directly.—*Rajah Prosmono Narayan Deb v. Raman Das.*—(10. W. Reporter, Civil Rulings, p. 236.)

XXIX. Where dying declarations are evidence, they shall be received if it be proved that the deceased was at the time of making the declaration, and then thought himself to be in danger of approaching death, though he entertained at the time of making it hope of recovery.

Although belonging to Criminal, rather than to Civil law, yet it may be mentioned here as at once illustrating the Section and an important principle in the Indian Law of Evidence, that a Divisional Bench of the Calcutta High Court ruled on the authority of the Full Bench judgment in
the Queen v. Khairullah, (see Note on p. 43.) that dying declarations in India are admissible where the deceased has been robbed, or raped, or assaulted, to prove such offence, and not merely, as is the rule of English practice, to establish the capital charge.—The Queen v. Bissorunjun Mookerjee—(6. W. Reporter, Criminal Rulings, p. 75.)

XXX. The party at whose instance a witness is examined may, with the permission of such Court or person, cross-examine such witness to test his veracity, in the same manner as if he had not been called at his instance, and may be allowed to show that the witness has varied from a previous statement made by him.

The Common Law Procedure Act 1854, (Section 23) enacts that—"If a witness upon cross-examination as to a former statement made by him relative to the subject matter of the case and inconsistent with his present testimony, do not distinctly admit that he has made such statement, proof may be given that he did in fact make it." And it is presumed that the principle would be adopted by the Indian Courts.—(Goodes's Law of Evidence, p. 256.)

"A party who calls a witness to give testimony on his behalf is not necessarily bound by the evidence which that witness gives; but the truth of his case ought to be very clearly made out if it be at variance with the evidence of such witness. If a man call a witness to prove the execution of a document, and that witness solemnly swear that the document was not executed, and he has the means of knowing the fact, it throws such a suspicion upon the case that the truth of the execution ought to be established by the clearest testimony."—Fazeelan Bibi v. Undah Bibi—(10. W. Reporter, Civil Rulings, p. 489.)

Besides the usual passages in works treating on the Law of Evidence, the reader is referred to Warren's Law Studies, pp. 1111—1119, for some good general remarks on examination and cross-examination; also to 6. W. Reporter, Civil Rulings, p. 181, for remarks on the latter subject; and to Broom's Legal Maxims, pp. 897—902, for the points on which skilled witnesses may, and may not, be examined.

XXXI. In order to corroborate the testimony of a witness, any former statement made by such witness, relating to the same fact, at or about
the time when the fact took place, or before any authority legally competent to investigate the fact, shall be admissible, and for that purpose a copy of any deposition or statement taken before any Court, Judge, Justice of the Peace, Magistrate or person lawfully exercising the powers of a Magistrate, or before a Commissioner or Superintendent for the Suppression of Thuggee or Dacoity in the discharge of his duty, shall, if certified by such Court, Judge, or other Officer above-mentioned, under his hand or the Official Seal of the Court, or under the hand or Official Seal of such Judge, to be a true copy of such deposition or statement, without further proof, be received as prima facie evidence that such deposition or statement was made, and that it was made at the time and place, and under the circumstances, if any, which shall be stated in the certificate or on the face of the deposition or statement.

XXXII. A witness shall not be excused from answering any question relevant to the matter in issue in any suit or in any Civil or Criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness, or that it will expose, or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind. Provided that no such answer, which a witness shall be compelled to give, shall, except for the purpose of punishing such person for wilfully giving false evidence upon such examination, subject him to any arrest or prosecution, or be used as evidence against such witness in any criminal proceeding.
XXXIII. A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction.

XXXIV. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. Provided always that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection, and be may thereupon make such use of it for the purposes of the trial as he shall think fit.

In Norton's Law of Evidence, 5th edn. pp. 226—236, the state of English practice as to shewing the witness the writing about which he is being examined is given in some detail, and should be consulted with reference to the discretion allowed to the Court by the concluding proviso of the section.

XXXV. An impression of a document made by a copying machine shall be taken without further proof to be a correct copy.

XXXVI. When an original document is out of the reach of the process of the Court, it shall be lawful for the Court, on application to it in any Civil suit or proceeding, and on notice to the
opposite party at a reasonable time before the hearing, to make an order for the reception of secondary evidence of its execution and contents.

In Naraguntty Luchmeedavumah v. Venugama Naidoo the Privy Council observed "that the Native Courts of India in receiving evidence do not proceed according to the technical rules adopted in England, and they would by their usual practice admit a copy of a public document, authenticated by the signature of the proper officer, as prima facie evidence, subject to further enquiry if it were disputed"; and their Lordships accordingly over-ruled the objections taken by the appellant's counsel to the document in dispute, a copy of a return made to the Collector, on the ground, inter alia, that the original had not been produced.—(Sutherland's Privy Council Judgments, p. 460.) And in a somewhat earlier case, The Zemindar of Karvelinagar v. Penuvasamy Venkatadri Naidoo, (p. 300 of the same Reports), their Lordships held that a document duly attested by the Collector as a copy of a document remaining in his office, was admissible in evidence for what it was worth, although non constat but that it might be a copy of a copy;* basing their ruling on the want of intimate acquaintance on the part of the practitioners and Judges of the Indian Courts with the principles which govern the reception of evidence in the Courts in England. But are not the words "when the original document is out of the reach of the process of the Court" intended to check such laxity, on the part, at any rate, of the Courts of original jurisdiction, in receiving such documents? It should be remembered that the latest of the above cases was instituted in 1855.

A power of attorney authorizing the registration of a deed of mortgage, and recognizing a previous power to execute the deed of mortgage, is admissible as original evidence to establish the validity of the deed, notwithstanding the non-production of the first power of attorney, being in no sense secondary evidence of the authorization of the agent.—Hussenee Jau v. Mukhdoomun—(2 W. Reporter, Civil Rulings, p. 44.)

* In Rejab Nizanwad Singh v. Nasib Singh, the High Court of Calcutta held that the copy of a copy of a summons, the original not being accounted for, was not admissible in evidence. It does not appear, however, that this copy came from a public office.—(6 W. Reporter, Civil Rulings, p. 80.) But where the absence of the original was accounted for, the Bombay Court, on the authority of a Privy Council case—Unide Royato Balaador v. Pemtwanani Naidoo—received in evidence a copy obtained from a public office and duly certified as a copy of a copy deposited there.—(5 Reid's Bombay High Court Reports, p. 48.)
Authenticated copies of documents, of which the originals are filed in another suit, are admissible in evidence when not objected to by the other side—Gour Suran Dass v. Kauhuy Singh—(2. W. Reporter, Civil Rulings, p. 237); but when objection is taken, the mere fact of the original being in another Court is not a sufficient reason for admitting secondary evidence regarding it—Srimati Gour Maite v. Hari Kishore Rai—(10. W. Reporter, Civil Rulings, p. 338).

Where an attested copy of a deposition made by a person yet alive was offered in evidence in the lower Court by the plaintiff, and was received without objection on the part of the defendant, the Calcutta Court on appeal allowed it to be used as proof.—Fukiruddin Muhammad Ahsan v. Kurin Bhusn—(5. W. Reporter, Civil Rulings, p. 43). So in Dinouessa Ahulya v. Anghur Ali, where a copy had been received without objection, the same Court, though remarking that it would have been more correct had the lower Court required the filing of the original, refused to interfere on special appeal.—(5. W. Reporter, Civ. Rul., p. 181.) See the same principle recognized in Vol. 10. Cir. Rul., pp. 139 and 267; and in Watson and Co. v. Sridhar Mandal, ( Vol. 10. Civ. Rul., p. 421) while upholding the decision of the lower appellate Court that the plaintiff was bound to produce certain original documents, and not mere copies made by their clerk, the Calcutta Court remanded the case to give the plaintiff an opportunity of establishing his case according to this more correct standard, since the Court of first instance had been satisfied with less.

If a party profess himself unable to procure the original of a document, the Judge must satisfy himself upon proper and sufficient evidence whether the excuse be well founded. A mere denial by the opposite party in pleading of possessing the document is not sufficient to justify the omission of the processes the law provides for his being called on to produce the original, and therefore if he reside at a distance a commission for his examination and calling on him to produce must be issued. If it then appear that secondary evidence is under the circumstances admissible, the Court before giving weight to such evidence must be satisfied on reasonable grounds that the secondary evidence so produced gives a correct copy or true version of the missing original.—Shookrom Sukal v. Ram Lal Sukal—(9. W. Reporter, Civil Rulings, p. 248). So in Fazil Sardar v. Chenain Biswas, it was held that the mere oral statement of the pleader was not sufficient in law to satisfy the Court, on the reason for the absence of certain documents being challenged, that they really were beyond the power of the parties who wished to use them as evidence.—(10. W. Reporter, Civil Rulings, p. 238). See too 1. W. Reporter, p. 147.
Where a Court is satisfied that a deed was executed and has been lost or destroyed, then it should receive secondary evidence of its contents, either documentary or oral. It is not necessary that the witnesses called for this latter purpose should be attesting witnesses; if they have seen and known the contents of the deed it will be sufficient, provided the Judge give credit to them and be satisfied of the due execution. It is not necessary that the witnesses should be able to state the exact contents of the deed. It will be sufficient of they can give generally the nature of the transaction.—Syad Latifulah v. Mussumat Naseebun—(10. W. Reporter, Civil Rulings, p. 25.)

See too Sections 50 and 51 of this Act.

XXXVII. An attested document may be proved as if unattested, unless it be a document to the validity of which attestation is requisite.

XXXVIII. The admission of a party to an attested instrument of its execution by himself shall be as against him sufficient praé facie proof of such execution of it, though it be an instrument which is required by law to be attested.

XXXIX. Any entry or statement, which would be admissible in evidence after the death of the person who made it, on the ground of its having been made against the interest of the person making it, or on the ground of its having been made in the ordinary course of business, shall be admissible, though the person who made it be not dead, if he is incapable of giving evidence by reason of his subsequent loss of understanding, or is at the time of the trial or hearing bond fide and permanently beyond the reach of the process of the Court, or cannot after diligent search be found.

It may be convenient for immediate reference to give here with some fulness the requisites for the admission as evidence of entries against interest and entries made in the course of business.
The leading case on the former subject is *Higham v. Ridgway*, in which it was decided that "if a person have peculiar means of knowing a fact and make a written entry of that fact which is against his interest at the time,* it is evidence of the fact as between third persons after his death. And therefore an entry made by a man-midwife, who had delivered a woman of a child, of his having done so on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery."—(*2. Smith's Leading Cases*, p. 270.)

There appears to be some doubt whether such an entry is admissible when it is the *only evidence* of the creation of the charge, of which it shews the payment. In *Doe Gallop v. Vowles*, a carpenter's bill for repairs done, with a receipt for the amount thereof in the deceased carpenter's handwriting, was rejected; it being contended that this was not an entry against the maker's interest, since though it shewed the demand had been paid, it was also the only evidence to shew that such a demand ever existed; and in *Higham v. Ridgway* Lord Ellenborough seems to have pointed at this distinction by commenting in his judgment on the fact that it appeared distinctly from other evidence that the work had been done for which the charge was made; but in *R. v. Inhabitants of Lower Heyford*, Parke, B. expressly over-ruled the doctrine of *Doe v. Vowles* as being he considered contrary in principle to *Higham v. Ridgway*.—(*2. Smith's Leading Cases*, pp. 282, 283.)

Even if *Doe v. Vowles* be still law, it does not necessarily apply to the case of a receiver charging himself with money on one side of the account, and discharging himself on the opposite, since in an action brought by his employer against the receiver, the first entry would be evidence against him, which the Court might believe while it discredited the part which went to his discharge; whereas in *Doe v. Vowles* it would have been impossible to use that part of the entry which militated to the disadvantage of the tradesman without first positively admitting that which was his interest. In *Knight v. The Marquis of Waterford* a steward's accounts contained an entry of the receipt of £30 as rent from a tenant, and on the opposite side an allowance of £13 for land tax &c., and both entries were sought to be put in as evidence, but the Court positively refused to admit the discharging entry.—(*2. Smith's Leading Cases*, pp. 286, 287.)

* The declaration must be made while the interest continues. One after its termination would be inadmissible.—(*Godwin's Law of Evidence*, p. 466.)
The declaration of a deceased occupier of land is admissible to shew of whom he held it. So a declaration of an owner, to shew that his land does not extend beyond a particular limit, accompanied by an act of forbearance to trespass beyond such limit, is receivable; but statements by a tenant against his own interest are not admitted when they are made in derogation of the title or rights of the landlord.—(2. Smith's Leading Cases, pp. 288, 289.)

Such entries are not the less admissible by reason of their being produced from a private memorandum-book preliminary to their being recorded in a public one which the writer might be bound to keep. Middleton v. Melton—(2. Smith's Leading Cases, p. 286.)

In R. v. Inhabitants of Worth, entries in a book by a deceased master of the hirings of a servant, and of wages paid to such servant, were held to be inadmissible, as merely shewing a contract, which must be supposed to have been made on equitable terms, and therefore not against the interest of the maker.—(2. Smith's Leading Cases, p. 289.)

Entries more than thirty years old and brought from the proper custody are admitted without proof of the death of the maker, or of the handwriting.—(2. Smith's Leading Cases, p. 289.)

In De Rutzen v. Farr, in order to prove the plaintiff's title to a market, accounts were put in, signed by a person who was steward to the plaintiff's ancestor, wherein he charged himself with the receipt of the rents, and others signed, not by the steward but by a person styling himself clerk to the steward: these latter entries were rejected on the ground that they did not charge the person whose name they bore, and that there was no evidence to show that he had authority to make his principal liable.—(2. Smith's Leading Cases, pp. 289, 291.)

Entries of this nature when admissible are evidence not merely of the fact of the payment, but also of the truth of the other facts stated therein, though not against the interest of the party stating them: thus in the principal case the date of the birth was held to be proved by the entry.—(2. Smith's Leading Cases, pp. 284, 285.)

The Sussex Peerage Case decided that these entries are only receivable as being against the interest of the party making them, when that interest is of a pecuniary nature—(2. Smith's Leading Cases, p. 294); hence declarations by a deceased witness to a deed, shewing that he was concerned in forging it were rejected in Stobart v. Dryden.

Such entries are only admissible when they are material to the merits of the case; otherwise their reception would
militate against the rule which excludes purely collateral matter.—("Norton's Law of Evidence, Section 179.")

They are not admissible when better evidence is procurable to establish the same fact, as where the maker of the entry is himself forthcoming; but they are not excluded on the ground that the fact to prove which they are adduced might be made out by evidence of another description: for example, in Higham v. Ridgway the evidence of the entry of the accoucheur would not have been rejected because the midwife who was present at the birth might have been at hand.—("Norton's Law of Evidence, Sections 180 and 186.")

Entries against interest need not be contemporaneous with the date of the transaction to which they refer.—("Norton's Law of Evidence, Section 182.")

For entries made in the course of business the leading case is Price v. Earl of Torrington. In this case the plaintiff, a brewer, claimed for beer sold and delivered, and the evidence given to charge the defendant was that the usual way of the plaintiff's dealing was that the draymen came every night to the clerk of the brewhouse and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names. The book so made was admitted on proof that the drayman was dead, and that the signature was in his handwriting.—("1. Smith's Leading Cases, p. 277.")

Entries of this class must be proved to have been made contemporaneously with the occurrence to which they relate.—Turner v. Hutchinson—("1. Smith's Leading Cases, p. 279.") In this respect they differ from those of the kind previously discussed.

In Chambers v. Bernasconi it was held that entries made in the course of business are not proof of any circumstances, however naturally they may find a place in the narrative, which are not necessary to the performance of the duty which led to the entry. In the case in question, the memo. in a bailiff's writing, found in the sheriff's office, and mentioning the place in which he had arrested the plaintiff, was not admitted to prove the locality, since that circumstance was merely collateral to the duty to be performed by the bailiff. Mr. Smith however rather questions in his notes the accuracy of the decision, on the ground that there was some evidence to shew that the bailiff was required in the course of his duty to record the place, as well as the time of caption.—("1. Smith's Leading Cases, pp. 279-281."). Norton however appends to his notice of this case that the decision in the case of Reg. v. The Churchwardens of Birmingham has put these entries on the same footing in this respect as entries against interest.
In Brain v. Preece it was the duty of A, a workman in a coal-mine, to inform B, the foreman, of the coals sold, and B, not being able to write, employed C to enter the sales in a book. At the trial A and B were both dead, but C produced the book, and deposed to having made the entries at B's direction, and read them over to him every evening, but they were rejected, apparently on the ground that the maker had no personal knowledge of the facts therein set down.—(1. Smith's Leading Cases, p. 281.)

In Davis v. Lloyd an entry made by the Rabbi of a synagogue, whose duty it was to perform the rite of circumcision, and to note the fact, was not admitted to prove the age of the child: for although Jewish children ought to be circumcised on the eighth day, the Rabbi could have no personal knowledge of this fact, and the child might have been brought on the seventh or ninth day.—(1. Smith's Leading Cases, p. 281.)

Declarations made by word of mouth in the course of the business of the individual making them, as well as verbal statements against interest appear to be equally admissible with written statements, although perhaps in most cases less trustworthy when admitted.—(Goodes's Law of Evidence, pp. 476 and 483; and Norton, Sections 172 note q. and 200 a.)

The following passage from Taylor (quoted by Norton, Section 199) sums up in brief the circumstances which are necessary to the admission of this kind of evidence—"It may be collected that in order to bring a declaration within the present exception, proof must be given that it was made contemporaneously with the fact which it relates, and in the usual routine of business by a person whose duty it was to make the whole of it, who was himself personally acquainted with the fact, who had no interest in stating an untruth, and who is since dead; and provided all the terms of this proposition be satisfied it seems to be immaterial, except so far as regards the weight of the evidence, that more satisfactory evidence might have been produced, that the declaration is uncorroborated by other circumstances, or that it consists of a mere verbal statement that has never been reduced to writing."

It will be observed that the Indian Evidence Act differs from English law, which only admits these two kinds of evidence when the maker of the declaration is dead.

XL. Any entry in any books proved to have been regularly kept in the course of business or in any public office, so far as such entry merely refers to and tends to identify by name, description,
number, or otherwise any Bank Notes or other Securities for the payment of money, or other property, and the payer-in or receiver of them, shall, in any case where such identification is necessary to be proved, be admissible in evidence for that limited purpose if it shall appear to have been made at or about the time of the transaction to which it relates, though the person who made it, or he on whose information it was made, is alive and capable of being produced as a witness.

XLI. Any receipt in writing, acknowledging the receipt of any money, valuable securities, or goods, shall, on proof of the execution thereof, be admissible in evidence before such Court or person aforesaid, not only against the party giving it but also against any person in whose favor such receipt would operate as a discharge, or to whom it would render the person giving it liable for the money, security, or goods acknowledged to have been received.

Receipts when tendered in evidence should not be received without some proof as to the handwriting of the parties who gave them, or some satisfactory account of the custody from which they came.—Woomesh Chundra Mookerjee v. Srimati Rama Dassi—(7. W. Reporter, Civil Rulings, p. 15).

Where however the wakil of a party distinctly admits that his client had received certain sums for which receipts are filed in Court, such admission is legal evidence, and does away with any necessity for otherwise proving the receipts.—Kalikhanand Bhattacharjee v. Giribala Debi—(10. W. Reporter Civil Rulings, p. 322).

XLII. Whenever a receipt would be admissible under the preceding Section if given by a principal, a receipt given by an agent or servant...
of such principal shall in like manner be evidence upon proof of the authority to give such receipt.

XLIII. Books proved to have been regularly kept in the course of business or in any public office, shall be admissible as corroborative, but not as independent proof of the fact stated therein.

"No account books shall be accepted as evidence, which do not comprise a day-book as well as a ledger."—(Judicial Book Circular No. XI of 1859.)

As Book Circular No. XI of 1859 states that the rules it enacts had received the sanction of the Government of India, the extract just made from it has apparently the force of law by the Indian Councils' Acts, unless this particular enactment be held to be invalid as inconsistent with the provisions of Section 43 Act II of 1855. The sooner, however, a rule so opposed to the true principles of the Law of Evidence is repealed the better.

"If the fact of a balance having been struck and entered in the ledger be asserted, the ledger must be produced as the best evidence, though inadmissible to prove the items, being unsupported by a day-book: if the balance be struck verbally, it may be proved by witnesses."—(Judicial Commissioner's Ruling No. 35—Thornton's Small Cause Court Manual, Addenda, p. 173.)

Where the objection had been taken that account books alone had been produced and attested by the gomashtah, and that, as such books were corroborative evidence merely, the plaintiff was bound to prove distinctly every item of the account by producing vouchers for all payments made, the Court over-ruled the contention, observing that "items which are declared to be false would perhaps require vouchers and special evidence to the transactions connected with those items. But it is unnecessary to prove by independent evidence the correctness of every item of an account extending over seven years in the absence of any denial of the correctness of any one of those items. The party sued may put in issue any or all of the items; but, if he fail to do so, there is no necessity for the Court examining in detail the correctness of each several item. The Privy Council have held that, although books are not conclusive evidence of the different items of entry contained in them, still the..."
necessity of strict proof is removed by the admission of a defendant, or by the absence of any evidence on his part to impeach the accuracy of the books.—(6. Moore's Indian Appeals, p. 88)"—Murti Ram v. Lalljee Sahoo—(Sutherland's Civil Rulings for April 1864, p. 174.)

In Mohkum Dass v. Buldeo Dass, the Chief Court laid down the rule as to what other evidence was requisite in order to admit account books as proof.—"Without proving the statement and admission of a balance, it would be sufficient for the purpose of letting in corroborative evidence if the plaintiff himself stated, on solemn affirmation, what the amount due to him was. This would authorize him to bring forward books, kept in the course of his business, as corroborative evidence. And if the evidence were believed, his case would be complete on the facts." Hence the plaintiff's gomashtah and two other witnesses having deposed that the defendant's agent agreed to a balance which was struck from the plaintiff's books, and the evidence of certain Sahoo cars having shewn that the books were properly kept, the Court held that the claim was established upon the facts in evidence with reasonable certainty, and decreed the amount accordingly.—(3. Punjab Record, Case No. 61.) An adjustment of accounts may of course be proved by oral evidence only.—(1. Stokes' Madras Reports, p. 183.)

Jumma wasil bāqi papers have been recently held by the Calcutta Court to come under this Section, and to be admissible as corroborative, but not as independent, proof of the facts stated therein.—(8. W. Reporter, Civil Rulings, pp. 280 and 465.) The contrary opinion thrown out at p. 329 of those Reports is based on reasons apparently not affecting these papers under the Revenue system prevailing in this Province. See also Vol. 7. Civil Rulings, p. 533, and Vol. 10. Civil Rulings, p. 291.

XLIV. The following documents may be admitted as corroborative evidence:—Certificates of shares, and of registration thereof, bills of lading, invoices, account sales, receipts usually given on the payment, deposit, or delivery of money, goods, securities, or other things, provided they be proved to have been given in the ordinary course of business.
XLV. A witness shall be allowed before any such Court or person aforesaid to refresh his memory by any writing made by himself or by any other person at the time when the fact occurred, or immediately afterwards, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. In such case the writing shall be produced and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it.

XLVI. Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document, provided the Court or person, under the circumstances, be satisfied that there is sufficient reason for the non-production of the original.

XLVII. In cases of pedigree, the declarations of illegitimate members of the family, and also persons who, though not related by blood or marriage to the family, were intimately acquainted with its members and state, shall be admissible in evidence after the death of the declarant, in the same manner and to the same extent as those of deceased members of the family.

This Section is more comprehensive than the present English practice, which restricts this kind of evidence to the declarations of relatives or members of the family, including illegitimate ones.—(Norton's Law of Evidence, Section 162; and Gooden on Evidence, p. 449.)

Hearsay pedigree evidence is excluded whenever the declarations are shewn to have been made after the dispute, in respect of which they are tendered in evidence, had once commenced, whether law proceedings had been taken at the
time or not. It does not yet appear to be decided whether such declarations would be admitted when made post illem motam, if it were shewn that the controversy was not known to the declarant.—(Goodwe on Evidence, pp. 457 and 460.)

XLVIII. On an inquiry whether a signature, writing, or seal is genuine, any undisputed signature, writing, or seal of the party, whose signature, writing, or seal is under dispute, may be compared with the disputed one, though such signature, writing, or seal be on an instrument which is not evidence in the cause.

A Court commits an error in law, warranting a remand on special appeal, if in making comparison of signatures it take for its standard a signature on a deed sought to be set aside as spurious.—Puran Chundra Chatterjee v. Grish Chundra Chatterjee.—(9. W. Reporter, Civil Rulings, p. 450.)

XLIX. Any power of Attorney, which has been executed at a place distant more than one hundred miles from the place wherein the action, suit, or proceeding is depending, may be proved by the production of it, without further proof, where it purports, on the face of it, to have been executed before, and authenticated by a Notary Public, or any Court, Judge, Consul, or Magistrate.

L. Whenever it is proved that a Letter Book is kept, and that, according to the usual course of business, letters are copied into such book and despatched, and the Letter Book is produced, and it is proved that the letter was despatched according to the usual practice, to the best of the knowledge and belief of the witness, having reasonable ground for forming that belief, the Court may presume the despatch of that letter according to the usual course of business.
LI. Any book proved to have been kept for marking the despatch and receipt of letters, containing an entry of the despatch of a letter, and an acknowledgment of the receipt of such letter, shall, on proof that such entry was made in the usual course of business, be prima facie evidence of the receipt of such letter.

Sections 50 and 51 should be carefully borne in mind, since it is essential that a party seeking to put in secondary evidence of a letter written to the opposite party, which the latter fails to produce when called on to do so, should first give independent proof that the letter had reached the alleged addressee; as otherwise a door would be opened for giving secondary evidence of a document which may never have been in existence.—(Norton's Law of Evidence, Sec. 577.)

LII. This and the following three Sections are repealed by Act VIII of 1868.

LVI. Whenever by any Statute or Act, Regulation or Ordinance now in force, or any Statute or Act to be hereafter in force, any certificate, certified copy, or other document, shall be receivable in evidence of any particular in any Court of Justice, the same, if it is substantially in the form and purports to be executed in the manner directed by the Statute, Act, Regulation, or Ordinance which makes it evidence, shall be prima facie evidence, where it is rendered admissible, without proof of any seal, stamp, signature, character, or authority, which it is directed to have, or from which it is directed to proceed.

LVII. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, independently of the evidence...
objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

In Mukh Ram v. Turtee and others the plaintiff's evidence mainly consisted of a deed of sale written in his book. The Chief Court held that although such document was not admissible owing to the Stamp Act, yet as the lower Court could have received it on the payment of a penalty, the case ought to be remanded for the purpose of levying it. But as issue had been joined on the factum of the deed, and both the lower Courts had found that the sale had taken place, the appeal on the merits must be rejected. — (2. Punjab Record, Case No. 59.)

LVIII. Nothing in this Act contained shall be so construed as to render inadmissible in any Court any evidence which, but for the passing of this Act, would have been admissible in such Court.

The following Statute was published in the Punjab Gazette of the 8th October 1868, for general information:—

31 VICTORIÆ, CAP. XXXVII.

The Documentary Evidence Act, 1868.

An Act to amend the Law relating to Documentary Evidence in certain Cases.

(25th June 1868.)

Whereas it is expedient to amend the Law relating to Evidence: Be it enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

1. This Act may be cited for all Purposes as “The Documentary Evidence Act, 1868.”
Mode of proving certain Documents.

2. Primâ facie Evidence of any Proclamation, Order, or Regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any Proclamation, Order, or Regulation issued before or after the passing of this Act by or under the Authority of any such Department of the Government or Officer as is mentioned in the First Column of the Schedule hereto, may be given in all Courts of Justice, and in all legal Proceedings whatsoever, in all or any of the Modes hereinafter mentioned; that is to say:

(1.) By the Production of a Copy of the Gazette purporting to contain such Proclamation, Order, or Regulation.

(2.) By the Production of a Copy of such Proclamation, Order, or Regulation purporting to be printed by the Government Printer, or, where the Question arises in a Court in any British Colony, or Possession, of a Copy purporting to be printed under the Authority of the Legislature of such British Colony or Possession.

(3.) By the Production, in the Case of any Proclamation, Order, or Regulation issued by Her Majesty or by the Privy Council, of a Copy or Extract purporting to be certified to be true by the Clerk of the Privy Council or by any One of the Lords or others of the Privy Council, and, in the Case of any Proclamation, Order, or Regulation issued by or under the Authority of any of the said Departments or Officers, by the Production of a Copy or Extract purporting to be certified to
be true by the Person or Persons specified in the Second Column of the said Schedule in connexion with such Department or Officer.

Any Copy or Extract made in pursuance of this Act may be in Print or in Writing, or partly in Print and partly in Writing.

No Proof shall be required of the Handwriting or official Position of any Person certifying, in pursuance of this Act, to the Truth of any Copy of or Extract from any Proclamation, Order, or Regulation.

3. Subject to any Law that may be from Time to Time made by the Legislature of any British Colony or Possession, this Act shall be in force in every such Colony and Possession.

4. If any Person commits any of the Offences following, that is to say,—

(1.) Prints any Copy of any Proclamation, Order, or Regulation which falsely purports to have been printed by the Government Printer, or to be printed under the Authority of the Legislature of any British Colony or Possession, or tenders in Evidence any Copy of any Proclamation, Order, or Regulation which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; or,

(2.) Forges or tenders in evidence, knowing the same to to have been forged, any Certificate by this Act authorized to be annexed to a copy of or Extract from any Proclamation, Order or Regulation;
he shall be guilty of Felony, and shall on Conviction be liable to be sentenced to Penal Servitude for such Term as is prescribed by the Penal Servitude Act, 1861, as the least Term to which an Offender can be sentenced to Penal Servitude, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.

5. The following Words shall in this Act have the Meaning herinafter assigned to them, unless there is something in the Context repugnant to such Construction; (that is to say,)

"British Colony and Possession" shall for the Purposes of this Act include the Channel Islands, the Isle of Man, and such Territories as may for the Time being be vested in Her Majesty by virtue of any Act of Parliament for the Government of India and all other Her Majesty's Dominions.

"Legislature" shall signify any Authority other than the Imperial Parliament or Her Majesty in Council competent to make Laws for any Colony or Possession.

"Privy Council" shall include Her Majesty in Council and the Lords and others of Her Majesty's Privy Council, or any of them, and any Committee of the Privy Council that is not specially named in the Schedule hereto.

"Government Printer" shall mean and include the Printer to Her Majesty and any Printer purporting to be the Printer authorized to print the Statutes, Ordinances, Acts of State, or other Public Acts of the Legislature of any British Colony or Possession,
or otherwise to be the Government Printer of such Colony or Possession.

"Gazette" shall include the *London Gazette*, the *Edinburgh Gazette*, and the *Dublin Gazette*, or any of such Gazettes.

6. The Provisions of this Act shall be deemed to be in addition to, and not in derogation of, any Powers of proving Documents given by any existing Statute or existing at Common Law.

**Schedule.**

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<td>Any Commissioner, Secretary or Assistant Secretary of the Treasury.</td>
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<td>The Commissioners for executing the office of Lord High Admiral.</td>
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<td>Any Commissioner of the Poor Law Board or any Secretary or Assistant Secretary of the said Board.</td>
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PART II.
PUNJAB CIVIL CODE.
SECTION II.
EVIDENCE.

1.—The Courts will admit evidence of all kinds, without any restriction (except such as may be hereafter noted,) but they will be careful to obtain the best evidence, and will not accept secondary when primary evidence may be procurable. As for instance, hearsay will not be taken when direct evidence is forthcoming, nor copies when originals can be obtained. Nor is the Judge restricted to the evidence tendered by the litigants; on the contrary, he is bound to seek for other evidence, if necessary. He will not decide a case till it shall have been elucidated in every manner which, in his judgment, may be needful, or practicable.

**Hearsay evidence.** Although owing perhaps to the popular language in which the Code is drawn up, this Section appears to admit hearsay, whenever direct, or immediate evidence rather, is unattainable, I believe the Punjab Courts have always been guided as to the admissibility of hearsay by the rules of English practice as modified by Act II of 1855: in fact, to admit hearsay simply because immediate evidence is not forthcoming would be to utterly ignore the most fundamental maxims on which the rules of evidence are based. For a sketch of the arguments in favor of extending the rules of evidence so as to admit hearsay in the Anglo-Indian Courts, see Selected Papers of the Punjab Law Society, p. 189; but do not the Courts of first instance at any rate, often want to be protected from being misled as much as an English jury does?

**Kinds of apparent hearsay which are in reality original evidence.** "There are three classes of declarations, which, though usually regarded as hearsay, are in truth original evidence. First, when the mere fact of the declaration having been made is the point in question; secondly, expressions of bodily or mental feelings where the existence or nature of them is the subject of enquiry; and lastly, where the declaration may be regarded as a part of the *res gesta,* or the transaction: the meaning of which seems to be, that when
it is necessary to enquire into the nature of a particular act, or the intention of the person who did the act, proof of what he said at the time of doing it is admissible in evidence for the purpose of shewing the true character of that act. All these three classes are really involved in the principle of the last."—(Warren's Law Studies, p. 1102.)

"In the Principles and Precedents of Mahammadan Law, it is stated without any qualification that 'hearsay evidence is admissible to establish birth, death, cohabitation, and the appointment of a kazee.' This is true (with the exception of cohabitation) in the sense that a witness may testify to the facts mentioned on hearsay. But it is not true, I think, that the Judge may himself infer the fact on hearsay evidence, which is probably the sense which would be put on the words by an English reader."—(Baillie's Digest of Mahammadan Law, p. 426. n. i.) The Mahammadan Law of Evidence is no longer the rule for the Anglo-Indian Courts, but should hearsay on these points ever be tendered on the authority of so well known a text-book as Macnaghten's, this explanation of its true meaning should be borne in mind, as shewing that even Mahammadan jurists rejected such evidence when it came before the Judge in its true form, although, with the wretched quibbling which disfigures so many of their rules, they admitted it without demur when disguised by the witness.

2.—Any person, capable of taking and comprehending an oath or affirmation, may be admitted as a witness: the parties themselves, their relatives, and others interested in the cause may bear testimony: a wife can give evidence against her husband, or the husband against his wife, without the consent of the other. But a legal practitioner cannot depose to circumstances, made known to him in professional confidence, without the consent of his client.

In the case of husbands and wives, this Clause omits the provision of Section 20, Act II of 1855, that such witnesses may not disclose any communication made by the one to the other during their marriage without the consent of the party making the same unless such communication shall relate to a matter in dispute in a suit pending between such husband and wife; but it may be presumed that the more special rather than the general rule, should...
be followed notwithstanding the language of Section 58 of Act II of 1855.

The admissions of a wife will only bind her husband where she had express or implied authority from him to make them. In Meredith v. Footner the wife of the defendant carried on the business of a shop, but the Court held that her admissions to the landlord of the shop about the amount of the rent was not evidence; had her statements related to the receipt of shop goods, it would have been different; but her husband's allowing her to conduct the business did not make her his agent with regard to the hiring of the shop.—(Norton's Law of Evidence; p. 117.)

With regard to the restrictions placed on legal practitioners, see the remarks under Section 24 of the Evidence Act, p. 54.

3.—Sirdars, or other persons of high rank, may, at the discretion of the Court, present their evidence in the form of a letter, for the attestation of which they will send an authorized agent or representative, and for the substance of which they will be responsible, even as if they had deposed to it in Court. The Judge may also issue a Commission of two or more persons for taking the evidence of females of rank, or other individuals, who cannot appear in Court. A set of questions will be given to the persons thus commissioned, who will cause the deponent's answer to be taken on oath in writing, in the hearing of the opposite party in the cause, or his Agent, and of the Commission; and in the sight of, at least, one member of the Commission. The Commissioners having delivered the evidence to the Court, will swear that it was really deposed to by the witness.

The law for the issue of commissions to examine absent witnesses is now contained in Sections 175, 176, 177, 178, 179 and 182 Act VIII of 1859.
4.—The Court can compel any person, whether party to the suit or not, to produce any book or document whatever that may contain matter relevant to the cause in hand. But if the document should be of a private nature, the judge will first inspect it himself, and ascertain its relevancy before filing it with the record.

The provisions of Sections 21, 22 and 23 of Act II of 1855 should be consulted on this subject.

5.—In all suits regarding the right and interests in land, the Judge must call for any records which may exist in the Collectorate Offices, regarding the subject matter of the suit; and a duly attested extract from the village record must be filed with the proceedings, if a regular settlement have been made. If this obligatory precaution should have been neglected in any case, then the decision cannot be upheld on appeal, till the defect has been amended, and the appellate authority will cause a rectification to be made accordingly. The Wajib-al-arz, or Administration paper, executed at the time of settlement, is valid evidence on all matters relative to village custom, and the internal economy of estates, and the mutual agreement of the co-partners, which shall not have been provided for by positive enactment.

This Clause appears to be based on the provisions of clause 1, Section 9, Regulation VII of 1822.

In Lal Singh v. Madhusudan Roy the Calcutta Court held that the Judge had committed an error in taking a Settlement Amin’s proceedings as evidence in favor of the plaintiff when the defendant was no party to those proceedings and it did not appear that they had been accepted as correct by the Settlement Officers.—(8 W. Reporter, Civil Judgments, p. 426.)
In *Mir Mahammad* and *Shaikh Kabir v. Mussummat Hijjo* and another, the Chief Court laid it down that—"It is right in the Court's opinion to hold that the wajib-al-arz, as far as it goes, establishes the true custom and rule of property prevailing in the village; signifying also the consent of the community to be bound by them. Accordingly, where it is expressed it cannot be departed from."—(2. *Punjab Record*, Case No. 54). See too the case of *Brahum v. Mussummat Doulat Bibee*, and other cases quoted below under Clause 5, Section III, *Punjab Civil Code*.

The wajib-al-arz binds the coparceners who have taken a part in its preparation and attested and verified it, but it is not conclusive evidence of custom between the coparceners and their tenants; though doubtless as a record made by a public officer in the discharge of his duty it is some evidence.—*Puchna v. Mahammad Tala Assad Ullah*.—(2. North-West High Court Reports, p. 217.)

An entry in the wajib-al-arz is only good for what it may be worth as evidence, and cannot be held to be like a judgment so as to require to be set aside by a suit subject to a limitation reckoned from the date of the instrument.—*Bhola Singh v. Bulraj Singh*.—(1. North-West High Court Reports, p. 233.)

6.—An entry in the Settlement records, if maintained by the superior Revenue authorities, constitutes a valid title to landed property. If any party object to such record, the Court will instruct him to file his objection before the Commissioner of the Division, and a reasonable time will be allowed for the disposal of such plea.

The following Circular of the Chief Court sets forth the present state of the law on this subject.

**BOOK CIRCULAR No. I OF 1867.**

"The Chief Court request the attention of the subordinate Civil Courts to the change introduced by the Code of Civil Procedure in regard to the admission of suits affecting the Settlement Record.

2. Hitherto in the Punjab the admission of such suits has been regulated by Financial Book Circular* No. XXXIII of 1860, under which it was necessary, whenever a person applied for the enforcement of a right not recorded at Settle-

*This Circular (No. XXXIII of 1860) has since been expressly repealed by Section 4 Act XXVIII of 1868.*
ment, or at variance with the record made at Settlement, for the Deputy Commissioner to cause a summary enquiry to be made as to the *prima facie* probable correctness of the claim, and if it appeared to have foundation to solicit the sanction of the Commissioner to the admission of a regular suit. Without such sanction the applicant was not entitled to enforce his claim by a regular suit.

"3. The effect of the introduction of the Code of Civil Procedure into the Punjab, is to supersede the provisions of Financial Book Circular No. XXXIII of 1860, so far as they require a summary enquiry to be made and the sanction of the Commissioner to be obtained before a suit affecting the Settlement Record can be admitted. With the correction of the Settlement Record, if wrong, the Civil Courts have no concern; but it is their duty to receive and determine all suits within their cognizance, notwithstanding that the right sought to be recovered or enforced may be at variance with the record made at Settlement."

The doctrine laid down in this Circular was also expressly recognized by the Chief Court in *Nirpoo v. Jagat Singh.*—

(2. Punjab Record, Case No. 57.)

A few remarks, chiefly on documentary evidence, may be added here on points regarding which Courts have often to pass orders out of hand.

"A written statement is not," observed Peacock, C. J., in *Sultan Ali v. Chand Bibi,* "a pleading in confession and avoidance, by which the defendant is bound by the confession and so compelled to prove the avoidance. A defendant's written statement may, like every other statement made by a defendant, be used as evidence against him; but, like every other statement made by a defendant, the whole statement must be taken together. If the written statement in the present case had been put in evidence against the defendants, then their admission of possession must be taken in conjunction with the other part, *vis:* that although the mortgage was taken by the plaintiff in his own name alone, it was taken for the benefit of the four brothers. The Judge, it is true, would not have been bound to believe that part of the statement which was in favor of the defendants; but it would have been evidence upon which he might act, if he believed it. Suppose a man should be sued for goods sold and delivered, and should state, and swear to the statement, that the goods were bought and delivered to him in a shop by a person whom he did not know, and that he paid for them at the time. If that statement were true, he could not honestly state that he had never bought the goods; and if the statement that he had bought them were to be taken against him.
without also taking his statement that he paid for them at the time, the greatest injustice might be done, for he would be unable to compel the attendance of the man who sold the goods, inasmuch as he was unknown to him; but if the plaintiff be unable to read one part of the statement as evidence against the defendant without reading in his favor what he said as to payment, the plaintiff would have to cite the man who sold the goods for the purpose of proving his case, and then if the witness should speak the truth, the defendant would make out his defence by eliciting from the witness on cross-examination the fact that the defendant had paid for the goods at the time."—(9. W. Reporter, Civil Rulings, p. 130.) So in Nilmonyce Singh Deo v. Ramanograh Roy, the same Judge remarked that "the general rule is, that where a person uses the admission of another as evidence, the whole admission must be put in. He cannot put in half and exclude the other half. Those who have to decide upon the evidence are not bound to believe the whole of the statement."—(7. W. Reporter, Civil Rulings, p. 29.) In Bykunt Kumar v. Chandra Mokum Chowdhry, however, the Court pointed out that the meaning of this doctrine is that if a man make a qualified statement, you cannot use the statement again against him apart from the qualification. But it was never intended to be laid down that if a man make a series of independent and unqualified statements these statements may not be used against him independently.—(10. W. Reporter, Civil Rulings, p. 190.) See too Sutherland's Civil Rulings for June 1864, p. 305, where the distinction between admissions and pleadings on this head is pointed out.

In Anandmayi Chowdhraim v. Shib Chandra Roy, the Privy Council laid it down, however, that the strict rule of English practice, that averments not traversed must be taken to be admitted, could not be applied to the pleadings in the Anglo-Indian Courts.—(Sutherland's Privy Council Judgments, p. 487.) See too the instructions enjoined on the Courts in Section 139 Act VIII of 1859.

Exhibits must be proved.

"The mere production of a document of recent date, however free from suspicion its appearance may be, is not proof of the genuineness of such a document, nor is it enough that a Court should not think that a paper which is produced is proved by the opposing party to be a forgery. What the Court is bound to do before it receives or acts upon such a paper is to decide as a matter of fact whether or not, upon the evidence adduced, the party who seeks to put the document in evidence have given sufficient legal proof of its being that which it purports to be."—Mears v. Dass Mani Dassi.—(5. W. Reporter, Act X Rulings, p. 12.) So the fact of registration and production in other cases was held not enough in
the case of a deed of sale to enable the party filing it to dispense with adducing evidence of the execution of the document.—Srisheedhar Lushkar v. Kala Chandra Lushkar.—
(3 W. Reporter, Civil Rulings, p. 216).

In Srikant Bhuttacharjee v. Raj Narayan Bhuttacharjee, Phear J. thus sets forth the law with reference to the maxim that documents more than thirty years old prove themselves—
"It is, of course, only matter of common sense that when the document is so old that the parties to it, and the witnesses have, in all probability, passed out of this world, it should not be taken as a fault in the party who relies upon it, that he is not able to produce evidence for the purpose of proving the factum of its execution. But the next best thing that can be done in the way of establishing its authenticity is always rigidly exacted of him before he is allowed to use it; namely, he is compelled to shew that the document comes from the custody in which, if it be a real and authentic document, it would naturally be expected to reside; and further in elucidation of this question, it may be necessary for him to give evidence of its being in essential respects a living and operative document, and to shew that up to the last point of time to which it applies, the parties have acted and facts have taken place in accordance with it." And further on in the same judgment the Court remarks—
"It seems to us obvious that there is in all cases only one mode of showing at a trial the custody from which a given document comes, namely, by the evidence of sworn witnesses who can speak upon the point."—(10 W. Reporter, Civil Rulings, p. 1.) See also pp. 238 and 340 of the same Reports, and Vol. 6, Civil Rulings, p. 82.

Where a party claims not under any general right of inheritance but expressly under a deed, he must prove that deed; and no legal presumption as to the contents of the deed can arise from a consideration of what the person through whom he claims would have been entitled to by the law of inheritance had there been no such deed as that set forth in the plaint.—Muad Mullick v. Belat Mullick.—
(9 W. Reporter, Civil Rulings, p. 385.)

When judgments have been originally delivered in English, copies of those English judgments, and not vernacular translations of them, must be tendered, if parties wish to put the judgment in evidence. But vernacular copies of formal decrees of a Court are admissible.—(10 W. Reporter, Civil Rulings, p. 239.)

A mere privately executed endorsement, unregistered and unproved, on the back of a decree, is no evidence of the transfer of the decree by the original decree-holder.—Ramu—

Proof required in the case of ancient documents.

A deed on which a party bases his claim must be proved.

Copies and not translations of judgments must be filed.

An endorsement of transfer must be proved by evidence.
LAW OF EVIDENCE (SUSPICIOUS AND ALTERED EXHIBITS.)

dhun Rukhit v. Punchannu Chukerbuty.—(10. W. Reporter, Civil Rulings, p. 144.)

A document is not to be rejected because papers of its class are often untrustworthy.

A Court is bound to arrive at a conclusion upon the question of the genuineness of documents tendered in evidence on a due consideration of all the evidence before it, and it has no right, without distinctly deciding whether the particular document put forward is or is not proved to be genuine, to decline to receive it for the mere general reason that it may possibly be false, as the Amin who prepared it very likely was bribed—Oman v. Kumar Promothonath Roy—(10. W. Reporter, Civil Rulings, p. 256); or because documents of that class are often forged, or witnesses of a certain class often tell lies. (1. Bengal Law Reports, Notes, p. xix.)

Deeds which have been tampered with.

When any deed, as for instance a bond, is altered in a point material by the obligee, or by a stranger without his privity, the deed thereby becomes void. So if the obligee himself alter the deed, though in a point not material, the deed is void,* but if it be so altered by a stranger without his privity it is not made void. The reason for these rules is that the law will not permit a man to take the chance of committing a fraud and when that fraud is detected or recovering on the instrument as it was originally drawn. This principle has been extended to bills of exchange, promissory notes and guarantees. Inasmuch as a deed cannot be altered after execution without fraud or wrong, and the presumption is against fraud or wrong, interlineations or erasures apparent on the face of a deed will be presumed to have been made before its execution: but as a testator may alter his will after execution without fraud or wrong, the presumption is that an alteration appearing on its face, in the absence of evidence to the contrary, was made subsequent to its execution.—(Broom's Legal Maxims, pp. 155—157.) But these presumptions of law will not in general be received in place of ample proof as to how the alterations were caused; for, as observed by Lord Wyndham in Petambar Manikjee v. Moti Chund Manikjee, if a plaintiff produce a bond or any other instrument, which appears to have been altered, the Court will not receive it, or act upon it, till it is most satisfactorily proved by all the subscribing witnesses at the least, and other evidence that the alteration was made antecedently to the signature.—(Sutherland's Privy Council Judgments, p. 72.)

If an alteration be made in a bill of exchange or promissory note with the consent of all the parties to it, still, as it thereby becomes a new contract, the old stamp will not

* See too the case of Kali Kumar Rai v. Gunga Narayan Datt Rai.—(10. W. Reporter, Civil Rulings, p. 280.)
LAW OF EVIDENCE (EXHIBITS WHICH HAVE BEEN ALTERED).

suffice, unless indeed the alteration were merely to correct a mistake, and so render the instrument what it was originally intended to have been.* But an alteration so made with consent before the bill or note has issued, that is, before it has come into the hands of some person entitled to claim on it, is of no importance, for up to the time of issue it is merely in fieri.—(1. Smith's Leading Cases, under Master v. Miller, p. 813.) The concluding portion of the notes in Master v. Miller may be consulted for instances in which instruments which by reason of alterations had become invalid, so far as they were proof of rights created by or resulting from their execution, yet were held not to be void for all purposes.

In Surbomungula Dassi v. Maharajah Sutesh Chandra Rai, where it appeared that matter had been subsequently added beneath the original lease, and that it could not be considered a document binding between the parties, the Court held that being in some degree accepted as genuine it was still evidence quantum valeat.—(2. W. Reporter, Civil Rulings, p. 231.)

In a case before the Privy Council in which it was contended that a document had been fraudulently tampered with while filed in Court by the record-keeper in collusion with the opposite party with the intent of throwing suspicion upon it, their Lordships observed, that “in an ordinary case the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail, from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this wholesome rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And such corroborative proof will be greatly strengthened if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document.”—Mussumat Khub Kunwar v. Mudnarayan Singh—(Sutherland's Privy Council Judgments, p. 465.)

Parol evidence is inadmissible to alter or substantially vary the effect of a written contract by shewing that the parties made, or intended to make, a different contract from that which they expressed in writing: but if an agreement by fraud or mistake be made to speak a different language from what was intended parol proof is admitted to shew the fraud or mistake.—(Broom's Legal Maxims, p. 640.)

* Although the cases in Smith only enunciate this doctrine with regard to alterations made by consent in bills and notes, on the principle ubi eadem ratio, ibi idem jus, the same rule would apply to all deeds requiring a stamp.
So parol evidence is received to shew that the contract was made in furtherance of some object forbidden by law, or upon an immoral consideration, or was obtained by duress, or that the contracting party was under disability to contract, from infancy, insanity or the like, or that the document was delivered as an escrow, and never had a legal inception.—(Norton's Law of Evidence, Sections 639, 640, 643, 644, 645 and 651.)

The question of the admissibility of parol evidence to shew that a deed, which is on the face of it a deed of out and out sale, was by virtue of a contemporaneous oral agreement a mortgage merely, was considered by a Full Bench of the Calcutta Court in Kasheenath Chatterjee v. Chundy Charan Banerjee, and the judgments of both sides should be carefully studied. Peacock, C. J. who, with the majority of the Court, was opposed to the admission of the evidence, considered that such evidence is not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import, although the subsequent conduct of the parties might be looked at to see whether they treated the transaction as a sale or a mortgage, in suits in which the rights of third persons were not concerned; but, added the learned Chief Justice, “the rights of a third party acting bona fide upon the faith of an absolute sale, such for instance as those of a bona fide purchaser for value from the apparent vendee, would not be affected by the acts or conduct of the original parties, and the third party would not be precluded by such acts or conduct from having effect given to the contract as expressed by the writing.”*—(5. W. Reporter, Civil Rulings, p. 68.) See too 1. W. Reporter, p. 76; Vol. 5, Civ. Rul. o. 104, in which last case, the Lower Court was directed to enquire into the conduct of the parties to see how they had acted under a deed purporting on its surface to be one of out and out sale—Vol. 6, Civ. Rul., p. 111; also 1. Bengal Law Reports, Civil Appeals, p. 37,† in which case there was a registered bill of sale and an unregistered ikrarnamah, shewing that the sale was not absolute, but only by way of mortgage, and it was held that though the Court could not look at the unregistered deed, it might conclude that the transaction was a mortgage and not a sale from the acts and conduct of the parties to it: see further 1. Bengal Law Reports, Original

* So in Moolook Chandra Surma v. Kooloo Chunder Surma, the High Court refused to admit oral evidence to shew that a registered deed of sale was intended to operate only as a conditional sale in order to defeat the plaintiff’s claim to pre-emption: the Court refusing even to inquire whether the acts of the parties shewed that their intention was different from that which their written deed expressed and was intended to express, when the result might prejudice a third party who had acted on the faith of the written document. —(5. W. Reporter, Civil Rulings, p. 76.)

† In the case of Shaikh Farabdi Sahani v. Shaikh Mohammad Hossein.
Civil Side, p. 28, and the case given in the notes there, where will be found some valuable remarks on the care with which our Courts, as Courts of equity, should scan all cases in which purdah ladies are concerned where they do not appear to have been protected by competent legal advice. A contradictory decision in 1. W. Reporter, p. 22, must be regarded as overruled. A contemporaneous oral agreement may be established as having been made to suspend the written contract of sale until an agreement for a re-sale had been executed.—Dada Honaji v. Babaji Jagushet.—(2. Reid’s Bombay High Court Reports, p. 38.)

In Chowdhry Dabi Parshod v. Chowdhry Doulot Singh the Privy Council held that the statement in a deed that a certain sum of money had already been paid, though prima facie, was not conclusive proof of its having been so paid, their Lordships, quoting the dictum of the Saddar Court with approval, that it is an understood thing that after documents are drawn out, money mentioned in them is paid, and therefore mention of the receipt of money is made in the document.” (Sutherland’s Privy Council Judgments, p. 161; and 10. W. Reporter, Civil Rulings, p. 407.) In Shewab Singh v. Shaikh Asghur Ali, the High Court held that though on the ground of constructive fraud oral evidence is admissible to prove a variance in the terms of a deed to the effect that the consideration stated to have been paid was not paid, such evidence could not be adduced to establish that by an additional oral contract it was agreed that the vendor should then only have a small portion of the consideration recorded in the deed as already received in full, and that his right to the rest was to remain in abeyance, and to depend on the happening of an uncertain future event—(6. W. Reporter, Civil Rulings, p. 268); nor is oral evidence admissible to prove that there was a different consideration from that expressed in the deed.—(5. Reid’s Bombay High Court Reports, p. 37.) See too 7. W. Reporter, Civil Rulings, p. 426, and 2. Madras High Court Reports, p. 174. In a case, however, in 7. W. Reporter, p. 334, where a Hindu had executed a deed of sale to his wife, and the deed set forth payment of the consideration money in full, the High Court refused, on the authority of Kashinath Chatterjee v. Chundy Charan Banerjee, (p. 88) to admit oral evidence to support the husband’s assertion that the sale was a sham one made only by way of precaution to protect the estate, as he was then leading a wild life, and that no consideration whatever had passed. See on this subject the Selected Law Papers of the Punjab Law Society for 1868, p. 179, and the Chief Court Ruling, in 3. Punjab Record, Case No. 80, there considered.

On the admission of the execution of a deed which contains the recital of the payment of consideration, the onus is upon the obligor who asserts that the consideration was not paid is not conclusive.

Onus probandi when the payment is denied.
was not paid under the bond but on a different transaction, “to prove that the facts stated by him in the bond were really different from what they were recited to be.”—Manik-babu Babu v. Ramdas Mazumdar.—(1. Bengal Law Reports, Civil Appeals, p. 93.)

Oral evidence, though it should be received with caution and scrupulously examined, is admissible to show that a verbal agreement was made when a bond was executed that it should not operate until a subsequent consideration had been received, and that in consequence the instrument had never become a binding agreement.—Anagurubala Chetti v. Krishnaswami Nayakan.—(1. Stokes' Madras Reports, p. 457.)

Oral evidence is admissible to show that the name of a party to a deed is inserted benami for that of another person.—Tara Mani Debi v. Shibnath Tulapattur.—(6. W. Reporter, Civil Rulings, p. 191.)

Verbal evidence is receivable to show that a written contract was subsequently modified or rescinded by a fresh agreement not expressed in writing.—Shade Ram and Shivdial v. Hurgopal and Tolee Ram.—(1. Punjab Record, Case No. 51.) See too Taylor on Evidence, p. 923, and Norton's Law of Evidence, Sections 654, 655; see also 7. W. Reporter, Civil Rulings, p. 553.

Although it be provided by a bond given on occasion of borrowing money that no payments are to be taken into account unless entered on the back of the bond, yet evidence is receivable to show that such payments were made though not entered; the prohibition being regarded as a mere precautionary measure between the parties.—(Macpherson on Contracts, p. 28, and 3. W. Reporter, Miscellaneous Appeals, p. 23.)

Oral evidence is admissible to explain a written document: as, for example, to show that a sale made by a widow was made under necessity, although in the deed the cause of the sale of the property was not recited—(1. W. Reporter, p. 94); or to prove that a particular estate was included in reality in a lease of lands though not expressed by name Dhunput Singh Doogur Rai v. Shaikh Jawahir Ali.—(8. W. Reporter, Civil Rulings, p. 152.) See Norton's Law of Evidence, Sections 660—665.)

The statement of a party to a suit is admissible original evidence against himself to prove the contents of a written instrument, even when the document itself is kept out of Court by the Stamp law.—Multiakaruppa Kaimdan v. Rama Pillai.—(3. Madras High Court Reports, p. 158.)
On the ground of want of mutuality a judgment in a criminal matter is not admissible in a civil suit—(Norton's Law of Evidence, Section 488, and Goedew on Evidence, p. 290); but Clause 16, Section VI of the Punjab Civil Code enacts that a duly authenticated copy of the judgment of a Criminal Court produced by the plaintiff in a civil action shall in the case of adultery constitute sufficient proof of the fact of the adultery. So a Magistrate, who is sued civilly for an act done by him in discharge of his duty, can put in the conviction of the plaintiff before him as Magistrate as a bar to the action.—(Broom's Legal Maxims, p. 90.) A plea of guilty however in a criminal trial, though not a verdict of conviction, may be considered in evidence.—Shumbu Chandra Chowdhry v. Madhu Kyburt.—(10. W. Reporter, Civil Rulings, p. 56.)

Judgments and decrees in previous civil suits and depositions taken in such suits are not admissible in evidence in actions in which one or both the parties are strangers to the proceedings so tendered in evidence, although nothing is more common than for the litigants to apply for the production of such evidence.—(Norton's Law of Evidence, Sections 476—478). See also 1. Reid's Bombay High Court Reports, p. 385: 1. W. Reporter, p. 271: Vol. 9. Civil Rulings, p. 450, where the Calcutta Court held that it was an error to look at a written statement made by a person, who was the alleged vendor of the plaintiff, and donor of the defendant, a few days subsequently to the deed of gift in a case to which the present suitor was no party. But in a special appeal, on the ground that the Lower Appellate Court had proceeded on the depositions of witnesses taken in another suit, and that the first Court had acted in the same illegal manner, the High Court held that as the appellant had not, when preferring his regular appeal, objected to the admission of the evidence, it was fairly presumable that it was admitted with his consent, and therefore that the Lower Appellate Court could not be said to be "wrong in reading as evidence in the suit evidence which had been read in the first Court unless it was objected to."—Rughoonath Pershad v. Hari Mohunt.—(10. W. Reporter, Civil Rulings, p. 37.)

Similarly, in Dimonna Ahalya v. Asghur Ali the Calcutta Court held that "the defendant in the present case, in which a vendee from A was plaintiff, was not estopped by anything that may have occurred in a case in which a third party was plaintiff and A and himself were co-defendants; and that consequently he was quite competent to question the title of the plaintiff's vendor."—(5. W. Reporter, Civil Rulings, p. 181.)
A judgment adduced in evidence is not to be rejected merely on the ground of its being *ex parte*.—_Aryan Sahu v. Anund Singh._—(10. W. Reporter, Civil Rulings, p. 257.)

An exception to the foregoing rule is made in the case of judgments regarding matters of a public nature; such as customs, prescriptions, tolls, boundaries between parishes counties or manors, rights of ferry, liability to repair roads, and the like, when the judgment is admissible but not conclusive evidence against strangers.—(_Norton's Law of Evidence, Sec. 479._) In _Durga Dass Roy v. Nurendu Kumar Dutt_ the Calcutta Court held that the decision in a suit between other parties respecting the boundary of two zamindaris in a part contiguous to that then in litigation was admissible in evidence. The Court came to this conclusion without entering on the question whether the boundary of a zamindari is or is not matter of general interest so as to bring the case within the acknowledged exception of English law, but simply on the ground that the question having been carefully and elaborately investigated the result of the enquiry, though not conclusive evidence, ought to be admitted for what it was worth in the subsequent suit.—(6. W. Reporter, Civil Rulings, p. 232.) It may however be doubted if this Divisional Bench decision be authority sufficient to warrant a Court in adopting the conclusions to which their reasoning leads.

Another class of judgments between third parties which are admissible in evidence are judgments in rem, but as the latest Indian authority on the subject, a Full Bench decision of the High Court of Calcutta in _Kanhyal Lall v. Radhas Charan_, laid it down that "there are no judgments in rem in the Mofussil Courts, and that, as a general rule, decrees in those Courts are not admissible against strangers either as conclusive, or even as prima facie, evidence to prove the truth of any matter directly or indirectly determined by the judgment or by the finding upon any issue raised in the suit, whether relating to status, property or any other matter," it would be out of place in the present work to do much beyond referring the reader to authorities on the subject. In _Mr. Norton's 5th edn. of the Law of Evidence_, pp. 263—271, or in 2. Stokes' Madras Reports, p. 276—289, will be found a carefully considered judgment of Holloway J., of the Madras Court, on the point; in 7. W. Reporter, Civil Rulings, p. 339, in the case of _Kanhyal Lall_ just referred to, the Calcutta Court expressed opinions in some respects different from those of Holloway J.; and lastly in the Selected Papers of the Punjab Law Society, No. 3, p. 53, the previous decisions and texts are carefully reviewed and analyzed. See also _Taylor on Evidence, Section 1209._ It may be added here, however, in order to meet definitely, as well as generally, certain popular misconceptions on the subject, that the Privy Council in the
Shivagnnah case decided that "a judgment is not a judgment in rem because in a suit by A for the recovery of an estate from B it has determined an issue raised concerning the status of a particular person or family."—( Sutherland's Privy Council Judgments, p. 526). So decisions by a competent Court as to whether Hindu families are joint and undivided or not, or upon questions of legitimacy, adoption, partibility of property, rule of descent in a particular family, and the like, are not judgments in rem or admissible in evidence against persons who were neither parties to the suit nor privies—( 7. W. Reporter, p. 341 ); and 3. Madras High Court Reports, p. 217; since this Full Bench decision overrules the cases given in 2. W. Reporter, Civil Rulings, p. 168, and Vol. 3. Civil Rulings, p. 15; See too 1. Bengal Law Reports, Civil Appeals, p. 69. Neither is a decision in a previous suit that a document is a forgery admissible against another person not a party to the first suit and claiming under the document in question.—( 7. W. Reporter, Civil Rulings, p. 347.) Again, a dissolution of marriage passed by a competent Court would not conclude third parties as to the facts on which the decree for dissolution or declaration of nullity proceeded.—( 7. W. Reporter, p. 344.) On the other hand, forfeitures pronounced under Act IX of 1859 are by virtue of the provisions of that Act absolutely conclusive: so too the grant of probate or letters of administration is conclusive as to the representative title of the executor or administrator.—Section 242, Act X of 1865.

A decree which would be conclusive evidence in a subsequent suit otherwise, is not the less so because at the time it may be appealed against by an appeal still pending. In such a case judgment should be in accordance with it, but upon application made to the Court and security being given execution should be stayed until the appeal is decided, and if the prior decree be reversed on appeal an application for a review of the subsequent judgment should be allowed.—Balikram Nathuram v. Guzerat Mercantile Assocn.—( 4. Reid's Bombay High Court Reports, p. 81.)

Case in which a decree which would be conclusive is under appeal.

In Huronath Sircar v. Preenath Sircar the High Court of Calcutta held that although as the issue in the present suit was not before the arbitrator, his award, nor the evidence on which it was based, would be in no way conclusive, yet so far as the present parties, or those under whom they claim, were parties to the arbitration proceedings, any admissions made by them (e.g. any map filed by them as correct) might be used as evidence, though not necessarily conclusive against them.—( 7. W. Reporter, Civil Rulings, p. 249.)

Admission made by a party in previous proceedings.

A party is not prevented by his previous statement from

Where a statement made by a party had been overruled and a different state of things found by the Court or
accepting a Court's finding on it as correct.

Statement made by an ancestor to avoid losing his appointment is not conclusive against the heir.

A joint and fraudulent statement by two co-defendants may be shown to be fraudulent when the parties are subsequently opposed as plaintiff and defendant.

Arbitrators to have existed, the plaintiff will not be precluded by his former allegation from accepting this finding as correct and bringing a suit in accordance with it—Ram Chandra Dey v. Kishen Mohun Shaha.—(7. W. Reporter, Civil Rulings, p. 68.) See too 1. W. Reporter, p. 310.

A false statement made by a Government official to avoid losing his appointment, to the effect that he held no land in the district where his appointment was, will not estop his heir from setting up the truth.—Shaikh Muhammad Wayez v. Mussumat Sagirunnissa.—(6. W. Reporter, Civil Rulings, p. 38.)

Where, in answer to a suit, two parties combine to make a statement to defeat a third party it is competent to either of those parties when they are opposed to each other in a suit to say that the combined statement was false and intended as a fraud against the third party. In such a case where the allegation is that both parties were in fraud when they made a particular statement, and one of those parties brings a suit and seeks to benefit by the joint fraud and to dispossess his companion in fraud, it is competent to the latter to say that the deed upon which the suit is brought was a mere fraud and was never intended to operate.”—Ram Saran Singh v. Mussumat Pran Pyari.—(1. W. Reporter, p. 156.) See also 2. Madras High Court Reports, p. 249.

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"When one party for the advancement of justice is permitted to remove the blind which hides the real transaction, as for instance in cases of fraud, illegality and redemption, in such cases the maxim applies that a man cannot both affirm and disaffirm the same transaction, shew its true nature for his own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships to the consideration of Indian appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience.”—Mukhan Lall v. Srikrishna Singh.—(2. Bengal Law Reports, Privy Council Cases, p. 44.)

The recital in the judgment in a suit of certain facts as proved is evidence in a subsequent suit between the same parties on a different cause of action.—Mussumat Reauzunnissa v. Lookun Jha.—(10. W. Reporter, Civil Rulings, p. 246).

But the fact that A had claimed certain property as being the adopted son of B, and his case had been dismissed on the ground that he had failed in proving the adoption, does not preclude A from claiming other property by virtue of the same alleged adoption in an action against the former defendant, provided that the second suit be brought on a different cause of action.—Kripa Ram v. Bhagawun Dass.—(1. Bengal Law Reports, Civil Appeals, p. 69.)
Where it was denied that the defendant had collected the rents of certain lands bona fide, inasmuch as in a suit in which the defendant had intervened, the plaintiff's title to the rents had been decreed, the Calcutta Court ruled that "when a decree is not executed within the period allowed by law for execution its operation ceases and it no longer remains a decree unless revived by order of a competent Court," and therefore the Lower Court was right in thinking that the decree was no evidence against the defendant having received the rents bona fide.—Ram Sundar Tewari v. Srinath Dewasi.—(10. W. Reporter, Civil Rulings, p. 215.) So the Agra Court also has held that a decree not executed within the period allowed by law becomes inoperative; and if the decree-holder have accepted a status at variance with that assigned him by the decree for a period beyond that of limitation he is bound thereby, and cannot fall back subsequently on the decree as a proof of title.—Ramjeeawan Rai v. Dip Narayan Rai.—(Full Bench Rulings of the North West High Court for March 6th 1867.)

"Admissions of a former owner of property, made after he has ceased to have any interest, are not evidence against the party in possession."—Khemun Kuree Choudhriin v. Gour Chandra Mookerjee.—(5. W. Reporter, Civil Rulings, p. 268.)

Rule 4, Section 97, Act XXXII of 1860 (Income Tax Act) enacted that all persons receiving rents or profits arising out of any lands or houses which had not come under a settlement of land revenue, should file a statement of all the several estates, tenures, sub-tenures, land and houses so held by them; the return to specify the nature of such estates, and also the amount of rents and profits accruing from the same in any shape or manner, the return to be accompanied by a rent-roll containing the name of every person to whom such lands or houses or any part thereof were underlet, and the amount of rent payable in each case. The rule then proceeds to declare that every such return and rent-roll shall be conclusive evidence against the person making such return in any suit for the recovery of rent as to the amount payable by any tenant included in such rent-roll for the period to which such return applied (the revenue year immediately preceding the year of assessment of the tax); and shall also be conclusive evidence against him in all other actions or suits, unless it shall be proved to the satisfaction of the Court or officer, before whom such return or rent-roll is offered in evidence, that any statement contained therein is erroneous, and that the error arose from accident, and not from any fraudulent intention, in which case the Court or Officer shall not be bound to treat the same as conclusive. The Calcutta
Interpretation of written instrument.

In conclusion, the following dicta on the interpretation of written instruments when admitted in evidence may be given here. "If the provisions (of the deed before the Court) be clearly expressed" observed Lord Cottenham in *Lloyd v. Lloyd*, "and there be nothing to enable the Court to put upon them a construction different from that which the words import, no doubt the words must prevail; but if the provisions and expressions be contradictory, and if there be grounds appearing upon the face of the instrument, affording proof of the real intention of the parties, then, that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey their intention."*—(Broom's Legal Maxims, p. 529.)

Use of technical expressions in a document.

When technical expressions occur in a document they must receive their legal meaning, unless it be clear from the perusal of the whole instrument that they not so used.—(Broom's Legal Maxims, p. 546.) For the interpretation of documents by the aid of custom and usage, see the next Chapter of this work.

How far the recitals of a deed are to be looked at in interpreting it.

Where the words in the operative part of an instrument are clear and unambiguous they cannot be controlled by the recitals of the deed, but when this is not the case, the recitals, and other parts of the deed may be looked at to ascertain the intention of the parties, and it is a rule that "however general the words of a covenant may be if standing alone, yet if from the covenants in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general senses which they import, the Court will limit the operation of the

* The true construction of the agreement depends upon the ordinary meaning of the words used; and if those words be plain and unambiguous it is quite clear that they must not be explained away by extrinsic evidence, and still less by mere reasoning from probabilities. There is no duty of a Court of Justice more imperative than that of upholding contracts into which parties have voluntarily entered under no mistake of fact.—(1. Stokes' Madras Reports, p. 284.)
The whole of Chapter VIII of the Legal Maxims deserves to be carefully studied with regard to the interpretation of written instruments. See also Broom's Commentaries on the Common Law, pp. 4—7, on the interpretation of statutes, and 2. Madras High Court Reports, p. 322, on the use of the preamble in construing an Act.

“I adhere most strongly,” observed Holloway J. in *Munda Chetti v. Timmaju Hensu*, “to the opinion that where a rule of law indisputably exists, it is the duty of judges not to fritter it away upon the specious pretence of bringing rules of law into harmony with what they may consider the requirements of society. If they be wrong in their view of such requirements, as is by no means unlikely, the evil done is unmixed: if right, the mischief still predominates over the good because it prevents that systematic reform from which alone good can result. Such systematic reform is for the Legislature.”—(1. Stokes’ Madras Reports, p. 38.)

PART III.

As the admissibility of evidence is frequently materially affected by the Registration Law, those portions of the Registration Act now in force which treat of the effects of registration are here given.

By notification No. 1465 of October 5th 1867 the Punjab Government extended Act XX of 1866 to the Punjab, with effect from the 1st day of January 1868.

ACT XX of 1866.

*An Act to provide for the Registration of Assurances.*

II. In this Act—unless there be something repugnant in the subject or context—

“British India” denotes the Territories which are or may become vested in Her Majesty, or Her successors by the Statute 21 & 22 Vic., cap. 106, entitled “An Act for the better Government of India,” except the Settlement of Prince of Wales’ Island, Singapore and Malacca:
"Year" and "Month" respectively mean a year or month reckoned according to the British Calendar:

"Section" denotes a Section of this Act:

"Lease" includes a counterpart, a kabuliyat, an undertaking to cultivate or occupy, and an agreement to lease; but not a putta or muchalka, as respectively defined in Section 3 of Act No. VIII of 1865 of the Governor of Fort St. George in Council, executed in the Madras Presidency:

"Will" includes a codicil and every writing making a voluntary posthumous disposition of property:

"Instrument" does not include a Will nor an Authority to adopt:

"Obligation" denotes any instrument by which one person (hereinafter called the obliger) binds himself absolutely or conditionally to pay money to another person (hereinafter called the obligee), and includes a Bond, a Bill of Exchange, a Hundi and a Promissory Note:

"Signature" and "signed" include and apply to the affixing of a mark:

"Immoveable Property" includes land, buildings, rights to ways, lights, fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth; but not standing timber, growing crops nor grass:

"Moveable Property" includes standing timber, growing crops, grass, fruit upon trees, and property
of every other description, except immovable property:

"Book" includes a portion of a Book and also any number of sheets connected together with a view of forming a Book or portion of a Book:

"Endorsement" and "Endorsed" include and apply to an entry in writing by a Registering Officer on a rider or covering-slip to any document tendered for registration under this Act:

"Representative" includes the guardian of an Infant and the Committee or other legal curator of a Lunatic or Idiot:

"Oath" includes a solemn affirmation:

"Imprisonment" means imprisonment of either description as defined in the Indian Penal Code:

"Person" includes any Company or association or body of persons whether incorporated or not:

"Addition" means the place of residence, and the profession, trade, rank or title (if any) of a person described:

Words in the singular number include the plural; words in the plural number include the singular, and words importing the masculine gender include the female;

And in any part of British India in which this Act operates, "Local Government" denotes the person authorized by law to administer the Executive Government in such part: "High Court" denotes the highest Civil Court of appeal therein: "District Court" means the principal Civil Court of original jurisdiction in a District, and includes
the High Court in its ordinary original Civil jurisdiction; and "Civil Court" includes a Revenue Court, but not a Court for the relief of insolvent debtors:

"General Registry Office" includes a Branch General Registry Office:

"District" and "Sub-District" respectively mean a District and Sub-District formed under this Act.

XVII. The instruments next hereinafter mentioned shall be registered, provided the property to which they relate shall be situate in a District in which, and provided they shall have been executed on or after the date on which the said Act No. XVI of 1864 or this Act shall have come or shall come into operation: (that is to say):—

1. Instruments of gift of immoveable property:

In *Putona Kolita v. Mutia Kolita*, the Calcutta Court ruled that as the words "instruments of gift of immoveable property" are not qualified in any way, it follows that all such instruments must be registered, whatever be the value of the immoveable property.—(2. *Bengal Law Reports, Appendix, p. 46.*

2. Instruments (other than an instrument of gift) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards to or in immoveable property;

Where a deed of sale had been registered but it was averred by the defendant that the transaction was really only a mortgage, in proof whereof he produced an unregistered ikrarnamah said to have been executed at the same time, the Calcutta Court ruled that, though this ikrarnamah had been correctly rejected as inadmissible in evidence, the
Judge had done right in looking at other and independent evidence, such as that respecting possession, adequacy of consideration, &c., and in finding on the acts and conduct of the parties that the transaction was a mortgage and not a sale.—Sheikh Parabdi Sahani v. Mahammad Hossein.—(1. Bengal Law Reports, Civil Appeals, p. 37.)

Where a money bond also pledges land as a collateral security, its registration is optional under Clause 7 Section 18, and the fact of its not being registered does not prevent it from being received in evidence in a suit to recover the money only.—Udaya Chand Jana v. Niti Mandal.—(9. W. Reporter, Civil Rulings, p. 111.) This decision was on a reference from a Small Cause Court, but the principle was also held to apply in Gopal Prasad v. Nandarani to similar suits when brought in the District Courts.—(1. Bengal Law Reports, Civil Appeals, p. 192.) In like manner a Full Bench of the Agra Court has held that an unregistered bond, containing a condition that the lender in default of payment is to be put in possession of certain lands, is admissible in evidence in a suit simply to recover the amount of the loan.—Eshree Rai v. Bindat Rai—(4. North West High Court Rulings, p. 60); and again, at p. 170 of the same Reports. An opposite view however appears to have been taken by the Bombay Court; See 4. Reid’s Bombay High Court Reports, Civil Appeals, p. 79.

XVII.—Clause 3. Instruments which acknowledge the receipt or payment of any consideration, on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest, and

4. Leases of immoveable property for any term exceeding one year:

Provided that the former part of this Section shall not apply to any Composition-deed, nor to any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company shall consist in whole or in part of immoveable property, nor to any endorsement upon or transfer of any debenture issued by any such Company: Provided also that, so far only as regards the Territories respectively under the Governments

An unregistered bond pledging land as security is admissible in a suit to recover the money.

Exception of composition-deeds.

And of transfers of shares and debentures in Joint Companies.
of the Lieutenant Governors of Bengal and the North-West Provinces, the local Government may, by order published in the Official Gazette, exempt from the operation of the former part of this Section any leases of immoveable property, executed in any particular District or part of a District, the terms granted by which shall not exceed two years, and the annual rents reserved by which shall not exceed fifty rupees.

A suit for rent ought not to be dismissed because the lease is not registered if the production of the document is not required by the pleadings.

Where the defendant admitted the plaintiff's title as landlord and also the amount of the rent, but pleaded payment of that sought to be recovered, the fact of the lease not having been registered was held no sufficient cause for the suit being dismissed, since the objection as to non-registration would only arise when the document had to be tendered in evidence upon any disputed point, whereas this case could proceed on the pleadings whether the lease were produced or not.—Saiyad Raza Ali v. Bhikun Khan.—(7. W. Reporter, Civil Rulings, p. 334.)

For the modification of the provisions of this Section by more recent legislation, see Act XXVII of 1868, at the end of this Section.

XVIII. Any of the documents next herein-after mentioned may be registered under this Act; (that is to say):—

1. Instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees to or in immoveable property:

2. Instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest:
3. Leases of immoveable property for any term not exceeding one year, and the pattas and muchalkas referred to in Section 2:

4. Awards relating to immoveable property:

5. Instruments which purport or operate to create, declare, assign, limit or extinguish, any right, title, or interest to or in moveable property:

6. Wills or Authorities to adopt a son.


It has been clearly laid down that execution and registration are not conclusive evidence of the payment of the consideration, even when the deed sets forth that it has been paid, since a little experience will shew that both frequently take place on the faith that the money will be afterwards paid; and indeed where there are circumstances of suspicion connected with the transaction, it may be the recital will not be deemed sufficient reason even for casting the onus on the defendant. To avoid the unsatisfactory course of having to admit evidence in reply, it is therefore the better course, when the consideration is denied, to call on the plaintiff in the first place to give evidence in support of the recital in the deed, although in an ex parte case when no suspicion is raised, proof of execution and registration may be sufficient to support a decree.*

Registration is not conclusive that the consideration has been paid albeit it be so set forth in the deed.

* A very interesting paper on this Chief Court ruling will be found in the Selected Papers of the Punjab Law Society for 1868, p. 179 There the writer comes to the conclusion that the true law of presumption in these cases is that "every recital in a bond or other deed that consideration has been paid, is prima facie evidence of receipt, i.e., it raises a presumption, which is however rebuttable: in the case of registered documents, especially where an admission has been made before the Registering Officer, the presumption becomes a very strong one, and it is for the party denying the consideration to show in the first instance that none passed." Further on the writer remarks that if there be suspicious circumstances, either stated by the
A fraudulent deed acquires no force merely by being registered.

Time from which registered document operates.

For the case of unregistered bonds pledging land as additional security, see above under Clause 2 Section XVII.

XLVII. A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

In order to prevent a registered deed from operating it is necessary to show that it was fraudulently executed, and that the party taking under it was wilfully and intentionally a party to the fraud, or at least that it was executed without consideration with a view to defeat rights arising from an unregistered transaction.—Ram Chand Kumar v. Madhu Sudan Mazumdar.—(7. W. Reporter, Civil Rulings, p. 119.) Indeed where fraud is charged the defendant ought to state not only that the document was fraudulent, but should set forth the way in which the fraud was intended to be carried out against him, and if he content himself with mere general allegations which commit him to nothing he has no right to complain if the Courts do not expressly raise the issue.—Boikanthanath Seth v. Bussick Lall Barmana.—(10. W. Reporter, Civil Rulings, p. 231.) In delivering his judgment in Sheikh Rahmatullah v. Sheikh Sariutullah Kagghi, Peacock C. J. observed—‘I am ready to admit that under Section 50 of the Registration Act, the word ‘instrument’ refers to an honest bond fide instrument, and does not include a fraudulent one. If a man should get a fraudulent deed registered before an honest one, he could not under Section 50 rely upon that document as an instrument. It is a well recognized maxim of law that no man can gain title by fraud.’—(1. Bengal Law Reports, Full Bench Rulings, p. 82.) See too 1. W. Reporter, p. 314.

XLVIII. All instruments duly registered under this Act and relating to any moveable or immovable property, shall take effect against any oral agreement or declaration relating to the same property.

defendant or observed by the Court, it may be that the prima evidence for the plaintiff is more or less rebutted, in which case there will be sufficient reason to shift back the onus on to plaintiff to prove payment. The contention of this paper seems to me strongly supported by a Madras case given in. 2. Madras High Court Reports, p. 174.
XLIX. No instrument required by Section XVII to be registered shall be received in evidence in any Civil proceeding in any Court, or shall be acted on by any Public Servant as defined in the Indian Penal Code, or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act.

The introduction of the present Registration law does not invalidate bonâ fide transactions which took place under the old law, when under that law registration was not compulsory on the class of documents under which title is now claimed: and this, notwithstanding the former document may have been, and was not, presented for registration under the provisions of Section 100 of the Registration Act.*—Girija Singh v. Giridhari Singh.—(1. Bengal Law Reports, Civil Appeals, p. 14.) So if a document, as a bond, for instance, for more than Rs. 50, required to be registered under the former law in force when it was executed, but need not to be so according to the provisions of this Act, its non-registration will be no bar to its being given in evidence in a suit instituted after this Act came in force.—Maya Dass v. Koudain.—(4. Punjab Record, Case No. 46.)

In a suit upon a deed which created an interest in immoveable property, but had not been registered as required by law, the Madras Court ruled that as the document was admitted by the defendant, its production was unnecessary, and that the plaintiff was entitled, notwithstanding the defect of non-registration, to whatever relief the effect of the plaint and answer taken together would entitle him to.—Chedambaram Chetti v. Karunalyavalangapaly Taver.—(3. Madras High Court Reports, p. 342.)

* C. Anything contained in this Act to the contrary notwithstanding, every instrument of the kinds mentioned in Sections XVII and XVIII, which shall have been executed in any such part of British India before the date on which this Act shall come into operation therein, shall be accepted for registration if it be duly presented for registration within twelve months from such date.
Following the authority of the case of Rahmanullah v. Sarindullah, given in the next para of these remarks, the Chief Court has ruled that if a party come into Court relying on a document, which is inadmissible under the Registration Law, he cannot prove his case by secondary evidence, the reduction of the contract to writing forming a complete substitution, and wholly extinguishing the parol obligation which may have previously existed. This overrules the Judicial Commissioner's Ruling No. 44 in Thornton's Small Cause Court Manual, p. 174.—Maya Dass v. Koulain.—( 4. Punjab Record, Case No. 46.)

In Sheikh Rahmanullah v. Sheikh Sariuddin Kagghi, four out of a Bench of five Judges of the Calcutta Court ruled in a case, in which registration had been refused owing to a dispute between the parties before the Registering Officer as to the force of the instrument, that so long as the deed remained unregistered, the Courts could not in any civil proceeding act upon it, or receive it in evidence, or give it any effect: that the plaintiff ought to have appealed from the refusal to register under Sections 82 to 84 of the Registration Act, and that not having done so the Civil Courts could not remove the cloud from his title by giving him a declaration of right to the property comprised in the unregistered conveyance.—( 1. Bengal Law Reports, Full Bench Rulings, p. 58.) This decision appears to shake the force of a case reported in 9. W. Reporter, Civil Rulings, p. 351.

Where the obligor or grantor fraudulently refuses to register, the Agra Court ruled that the Registration Act then in force ( Act XVI of 1864 ) "contained nothing to limit or affect the right conferred by law on a purchaser to enforce specific performance of the contract of sale, and that the Code of Civil Procedure in the Sections relating to decrees and the execution of decrees has made sufficient provision for compelling a complete performance of the contract, whether by execution of a conveyance or by its registration, or otherwise."—( 1. North West High Court Full Bench Rulings, p. 148.) This decision seem applicable to the present law, as the terms used in both Acts are very similar. See also 8. W. Reporter, Civil Rulings, p. 423. But where the document is one whose registration is optional, and the contract contains no express condition for registering, the Calcutta Court has held that a suit does not lie against the vendor or obligor to enforce registration.—Mussumut Surnam Batti v. Budhesari.—( 10. W. Reporter, Civil Rulings, p. 313.) And again, p. 360,

L. Every instrument of the kinds mentioned in Clauses 1, 2 and 3 of Section XVIII shall, if duly registered, take effect, as regards the property com-
prised therein, against every unregistered instrument relating to the same property, whether such other instrument be of the same nature as the registered instrument or not.

LI. Suits to recover money lent or interest, or for the breach of any contract, may be brought within six years from the time when the cause of suit arose, in every case in which there is an engagement or contract in writing, provided that such engagement or contract be duly registered under this Act.

LII. Whenever the obligor and obligee of an obligation shall agree that, in the event of the obligation not being duly satisfied, the amount secured thereby may be recovered in a summary way, and shall at the time of registering the said obligation apply to the Registering Officer to record the said agreement, the Registering Officer, after making such enquiries as he may think proper, shall record such agreement at the foot of the endorsement and certificate required by Sections 66 and 68, and such record shall be signed by him and by the obligor, and shall be copied into the Register Book No. 1 or No. 6, as the case may be, and shall be *prima facie* evidence of the said agreement.

LIII. Within one year from the date on which the amount becomes payable, or, where the amount is payable by instalments within one year from the date on which any instalment becomes payable, the obligee of any such obligation registered with such agreement as aforesaid, whether under the said Act No. XVI of 1864 or under this Act, may present a
petition to any Court which would have had jurisdiction to try a regular suit on such obligation for the amount secured thereby, or for the instalment sought to be recovered.

The petition shall, where a stamp is required by law, bear a stamp of one-fourth the value prescribed for a plaint in such a suit, and may be amended by permission of the Court, and the statements in the petition shall be verified by the petitioner in the manner required by law for the verification of plaints.

On production in Court of the obligation and of the said record signed as aforesaid, the petitioner shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any) to the date of the decree, and a sum for costs to be fixed by the Court.

Such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure.

The Calcutta High Court, in *Krasto Kishore Ghose v. Bgyonath Mazumdar*, ruled that “in cases of application to a Court under Section 53 Act XX of 1866, the Court ought not to summon the defendant; the intention of the Act being that the applicant should merely, on production of the obligation and the record duly signed obtain a decree for the sum mentioned in the petition, or any less sum which may appear to be due, with interest and costs.”—(6. W. Reporter, Civil References, p. 11.)

The Calcutta Court has held that two cases only are provided for under this Section, viz. one where the whole amount of the obligation becomes due; and the other, where any instalment, when the amount is payable by instalments, becomes due; but the third case is not mentioned, viz. where the amount of a bond payable by instalments becomes due through an instalment not having been paid, and therefore a sum so falling due cannot be recovered by petition in a summary way under this Section 53.—(2. Bengal Law Reports, Original Jurisdiction, p. 151.)
A party taking proceedings under these Sections must produce the original bond; he cannot on the averment that the original is lost, file a copy only. In such a case of the deed itself not being forthcoming the obligee must proceed by regular suit.—Sriram Roy Chowdhry v. Kalimadi Moollah.—(9. W. Reporter, Civil Rulings, p. 477.)

The true construction of Section 52 does not require the Registering Officer to record the agreement of the parties with his own hand. The Calcutta Court also ruled, on occasion of the same reference, that the document with the endorsement of registration and the agreement recorded thereon becomes a record, and is of itself *prima facie* proof of the registration of such document and further agreement, without proof of the signature of the Registrar as to either matter, though the Court, if it see cause, can require further evidence.—Habibo Sobair v. Mir Hossain Ali.—(5. W. Reporter, Small Cause Court References, p. 14.)

Where the registered instrument does not provide for the payment of interest, none should be allowed when it comes to be enforced by the procedure of these Sections as a decree of Court.—Kalbu Ram Babu v. Durga Nath Taluadar.—(10. W. Reporter, Civil Rulings, p. 175.)

*B* having given his creditor a bond payable in three months, which had been registered and made recoverable in a summary way, was unable to meet his liability, and in order to obtain further time executed a mortgage of certain property as additional security, and the Court held that this fresh security did not work a merger; since it was not coextensive with the former one, and as it did not appear to have been given in satisfaction of the first, the creditor on the expiry of the additional grace could proceed to enforce his bond by summary process.—Ram Gopal Law v. Blaquiere.—(1. Bengal Law Reports, Original Side, p. 35.)

A summary application under Section 53 cannot be entertained at the suit of the assignee of the obligee.—Gour Mohun Dass v. Ram Rup Mazumdar.—(10. W. Reporter, Civil Rulings, p. 84.) Nor can the summary proceedings be taken against the heir of the obligor.—Ram Narayan Dass v. Srimanth Poddar.—(9. W. Reporter, Civil Rulings, p. 498.) See too 3. Madras High Court Reports, p. 199.

**LIV.** In any proceedings under this part of this Act, the Court may order the obligation sought to be proceeded upon to be forthwith deposited with an Officer of the Court, and may further order...
that all proceedings shall be stayed until the plain-
tiff shall have given security for costs thereof.

LV. After decree, the Court may under special
circumstances set aside the decree, and if necessary
stay or set aside execution; but there shall be no
appeal against any decree or order made under
Section LIII, Section LIV, or this Section.

LXXXII. Every Registering Officer who shall
refuse to register a document, except one which he
has a discretion to refuse to accept for registration,
or except one which he has refused to register
solely because the property to which it relates is
not situate within his District or Sub-District, shall
make an order of refusal, and record his reasons for
such order in his Book No. 2, and endorse the words
"Registration refused" on the document; and on
application made by any person executing or claim-
ing under the document, and on his furnishing a
stamped paper of the value of eight annas, shall
without unnecessary delay give him a copy of the
reasons so recorded. No Registering Officer shall
accept for registration a document so endorsed, un-
less and until an appeal shall have been presented
under the provisions herein contained and decided
in favour of the appellant.

LXXXIII. Appeal shall lie against an order
of a Sub-Registrar refusing to admit a document to
registration (whether the registration of such docu-
ment is compulsory or optional) to the Registrar
to whom such Sub-Registrar is subordinate, if pre-
sented to such Registrar within thirty days from
the date of the order, and the Registrar may
reverse or alter such order. Provided that, when-
ever the Registrar shall himself as Sub-Registrar have passed the order appealed against, the appeal shall lie to the Registrar General. Any Registrar or Registrar General who shall refuse to direct the registration of any document, shall make an order of refusal and record the reasons for such order in his Book No. 2, and on application made by any person executing or claiming under the document, and on his furnishing a stamped paper of the value of eight annas, shall without unnecessary delay give him a copy of the reasons so recorded.

LXXXIV. If a Registrar or Registrar General shall under Section LXXXII make an order of refusal to register any document referred to in Section XXIX, or if a refusal to register shall have been made under Section XV of Act XVI of 1864, or if he shall under Section LXXXIII on appeal make an order of refusal to direct the registration of such document, it shall be lawful for any person claiming thereunder, his representative, assign or agent, authorized as aforesaid, within thirty days after the making of such order of refusal, to apply by petition to the District Court, in order to establish his right to have such document registered.

The petition shall be in the form contained in the Schedule* to this Act, or as near thereto as cir-

*SCHEDULE.

Form of petition under Section LXXXIV.

To the Judge of the District Court of
The day of , 186 .

Stamp 8 annas.
cumstances will permit, and shall be accompanied by copies of the reasons recorded under Sections LXXXII and LXXXIII, and the statements in the petition shall be verified by the petitioner in manner required by law for the verification of plaints, and the petition shall, where a stamp is required by law, bear a stamp of eight annas, and may be amended by permission of the Court.

The document shall be admissible in evidence on the presentation and hearing of the petition,

The petition of A. B. of
Sheweth:—

1. That by an instrument dated the day of and made between C. D. of the one part and your petitioner of the other part, certain lands were conveyed to your petitioner absolutely.

2. That such instrument was executed by the said C. D. on the day of 186.

3. That the property to which such instrument relates is situate in the Sub-District of the Sub-Registrar of and in the District of

4. That on the day of your petitioner presented the said instrument for registration under "The Indian Registration Act, 1866," in the Office of the said Sub-Registrar, and on such presentation the said C. D. appeared personally before the said Sub-Registrar, and admitted the execution of the said instrument [or falsely denied the execution of the said instrument].

5. That the said C. D. is personally known to the Sub-Registrar [or adduced evidence that he was the person he represented himself to be, or That your petitioner adduced evidence that the said C. D. was the person he represented himself to be].

6. That the said Sub-Registrar therupon made an order of refusal, dated the day of 186, to register the said instrument, and gave your petitioner a copy, which is filed herewith, of the reasons for such order.

7. That your petitioner on the day of appealed to the Registrar of , against such order.

8. That the said Registrar therupon made an order of refusal, dated the day of to direct the registration of the said instrument, and gave your petitioner a copy, which is filed herewith, of the reasons for such order.

9. That the reasons referred to in paragraphs 6 and 8 are, as your petitioner submits, insufficient, [or That your petitioner has complied with the requirements of the said Act so far as it has been possible for him to do so].

Your petitioner therefore prays that your Honor will order the said Sub-Registrar to register the said instrument.

Form of verification.

I, A. B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

(Signed) A. B.
anything hereinbefore contained to the contrary notwithstanding.

The Court shall fix a day for the hearing of the petition, not less than two days after the service next hereinafter mentioned, and shall direct a copy of the petition, with a notice at the foot thereof of the day so fixed, to be served on the Registering Officer, and on such other person (if any) as the Court shall think fit; and the provisions of the Code of Civil Procedure as to the service and endorsement of summonses shall apply, mutatis mutandis, to copies of petitions under this Section.

On the day so fixed as aforesaid, the Court may, if it shall think proper, and if the requirements of the law for the time being in force have been complied with on the part of the petitioner, so as to entitle the document to registration, order such Registrar or Registrar General to register the document, or to direct its registration in the proper manner, and he shall thereupon obey such order, and shall, so far as may be practicable, follow the procedure prescribed in Sections LXVI, LXVII and LXVIII, and (provided the document be duly presented for registration within thirty days after the making of such order) the registration pursuant to such order shall take effect as if the document had been registered when it was duly presented for registration to the Officer so refusing as aforesaid.

Provided that when the Officer presiding over the District shall himself as Registering Officer have made any order appealed against under this Section, the petition shall within sixty days after
the making of such order be presented to the High Court, and the provisions contained in the former part of this Section shall, mutatis mutandis, apply to such petition and the order (if any) thereon.

If the Registrar have no doubt that the instrument really has been executed by those by whom it purports to have been executed his clear duty is to register it. If the deed contain recitals, those recitals cannot bind third parties who are strangers, and who have not executed the deed, nor can the rights of such third parties be legally in any possible way affected by them; the existence therefore of such recitals in the instrument is in no wise a sufficient cause for refusing registration.—Mutakhdhrai Lall v. Sheikh Fazl Hussein.—(6. W. Reporter, Miscellaneous Rulings, p. 131.)

The duty of the Registrar is set forth in the 36th Section of the Registration Act,* and under its provisions he

* XXXVI. Subject to the provisions contained in this Section, and in Sections LXXVI, LXXX, LXXXIV and LXXXIX, no document shall be registered under this Act, unless the persons executing such document, or their representatives, assigns or agents, authorized as aforesaid, appear before the Registering Officer. He shall thereupon enquire whether or not such document was executed by the persons by whom it purports to have been executed, and, in the case of any person appearing as a representative, assign, or agent, satisfy himself of the right of such person so to appear.

If all the persons executing the document appear personally before the Registering Officer and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document;

Or, in the case of any person appearing by a representative, assign or agent, if such representative, assign or agent shall admit the execution;
is not warranted in refusing to register simply because the
parties are at variance as to whether the consideration have
been paid in full or not.—(1. Bengal Law Reports, Original
Civil Side, p. 47.)

The Madras Court has held that the two things which
by Section 21 are absolutely required as conditions, without
compliance with which registration is prohibited, are, first,
that the instrument shall contain a description of the prop-
erty sufficient to identify it, and, secondly, that if the
instrument contain a map or plan, then a copy or copies
of that map or plan shall accompany the instrument, when
presented for registration; while the other provisions of
the Section are directory only, indicating the intention of
the Legislature as to the kind of description ordinarily to
be required, but not importing the absolute necessity of
strict compliance therewith, in order to entitle an instrument
to registration, if the description which is given be sufficient
to identify the property. And consequently a District Court
at any rate, when acting under this Section is bound to
satisfy itself whether the description be sufficient for iden-
tification, notwithstanding the failure to supply some
particular point mentioned in Section 21 or in the Rules.—
Case of Narainaswami Pillai.—(4, Madras High Court
Reports, p. 91.) In a subsequent case, at p. 101 of the
same Reports, the Court held that where two instruments
are contained on the same paper, and relate to the same

Or, if the person executing the document
shall be dead, and his representative, assign or
agent, shall not appear before the Registering
Officer, or shall refuse to admit the fact of execu-
tion, but such Officer shall nevertheless be satisfied
of the fact of execution;

The Registering Officer shall register the
document as directed in Section LXVIII.

The Registering Officer may, in order to satis-
fy himself that the persons appearing before him
are the persons they represent themselves to be,
or for any purpose contemplated by this Act, exa-
mine any one, whether summoned or not under
Section XXXVII, present in his Office.
Attendance of the executing party is not absolutely necessary in proceedings under this Section before the District Court.

The District Court may order registration in cases in which the Registering officers have properly refused it.

The order of the District Court is not appealable.

Where a Court has decided, as between the plaintiff and defendant, according to the provisions of Section 84, that the defendant was entitled to obtain registration of a certain deed, it is not open to the plaintiff to bring a suit to obtain a declaration that the defendant had fabricated the deed and falsely pretended that it had been executed by the plaintiff. — Ram Chandra Pal v. Bicharam Dey. — (10. W. Reporter, Civil Rulings, p. 329.)

For further information on this subject the reader is referred to a useful work on the Registration Law by Mr. Carr Stephen.
ACT No. XXVII of 1868.

An Act to exempt certain Instruments from the Indian Registration Act, 1866.

Whereas it is expedient to exempt expressly from compulsory registration under the Indian Registration Act, 1866, certain documents heretofore or hereafter executed by or in favour of Government; It is hereby enacted as follows:—

I. Nothing contained in the said Act shall be deemed to require, or to have at any time required, the registration of any of the documents or maps comprised in the Schedule hereto annexed.

But all such documents and maps shall, for the purposes of sections forty-eight and forty-nine of the same Act, be deemed to have been and to be registered in accordance with its provisions.

II. Subject to such rules and the previous payment of such fees as the Local Government may from time to time prescribe in this behalf, all documents and maps specified in the first, second, and third clauses of the said schedule shall be open to the inspection of any person applying to inspect the same, and subject as aforesaid, copies of such documents shall be given to all persons applying for such copies.

III. A copy of every document mentioned in the fourth clause of the said schedule and executed on or after the first day of May 1866, shall, in the case of every such document heretofore executed, as soon as may be after the passing of this Act, and in the case of every such document hereafter executed, as soon as may be after its execution, be
sent by the Local Government to the Registrar or to every Registrar within whose district the whole or any part of the immoveable property comprised in such document is situate, and shall be filed by him in his Book 1.

IV. This Act shall be read with and taken as part of Act No. XX of 1866.

SCHEDULE.

(1). Documents issued, received, or attested by any officer engaged in making a settlement or revision of settlement of land revenue, and which form part of the records of such settlement.

(2). Documents and maps issued, received, or authenticated by any officer engaged on behalf of Government in making or revising the survey of any land, other than waste land, and which form part of the record of such survey.

(3). Documents which, under any law for the time being in force, are filed, annually by patwáris or other officers charged with the preparation of village records.

(4.) Sanads, inám title-deeds, and other documents purporting to be or to evidence grants or assignments by Government of land or of any interest in land, in reward for special services.
CHAPTER III.

PUNJAB CIVIL CODE.

SECTION III.

Hindu and Mahammadan Law, and Lex Loci.

1.—The Hindoo and Mahomedan Codes, and the Lex Loci or local custom, or other system of law, obeyed by any tribe or sect, may be followed in all matters of civil right, and social importance, which are not opposed to morality, public policy, or positive law, and which may not have been provided for by any specific rule.

The provisions of this Section are based on Section 15 Regulation IV of 1793, which is as follows:—

XV. In suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions, the Mahammadan laws with respect to Mahammadans and the Hindu laws with respect to Hindus, are to be considered as the general rules by which the Judges are to form to their decisions.

2.—Those who belong to the Sikh persuasion are, in civil and secular affairs, generally bound by the Hindu Law.

The Privy Council decided, in the case of Abraham v. Abraham, that upon the conversion of a Hindu to Christianity the Hindu law ceases to be obligatory on the convert. He may by his course of conduct after his conversion shew that he has renounced his old law, as by intermarrying, and closely uniting himself with the class known as East Indians, or he may shew, on the contrary, that he intends abiding by it in matters with which Christianity has no concern, such as his rights and interests in, and powers over, property. The Regulation which prescribes that the decision shall be according to equity and good conscience, is complied with, in the case of converts, by deciding according to the usages of

The decisions of the Courts to be conformable to the Mahammadan law with regard to Mahammadans, and to the Hindu law with regard to Hindus for the cases herein specified.

Law binding on Native Christians.
the class to which the convert may have attached himself, and the family to which he may have belonged.—(Sutherland's Privy Council Judgments pp. 501—512; and 1 W. Reporter, p. 22.)

3.—If the parties to a suit belong to different sects or different tribes, and if the law, which they respectively observe, should be conflicting, with regard to the point in dispute, then the Judge, having considered the bearings of both laws on the particular case, will decide according to equity and reason.

The Regulation law on the subject is contained in Sections 8 and 9 Regulation VII of 1832:

VIII. Such part of Clause second Section 3 Regulation VIII of 1795, enacted for the province of Benares, which declares that “in causes in which the plaintiff shall be of a different religious persuasion from the defendant, the decision is to be regulated by the law of the religion of the latter, excepting where Europeans or other persons, not being either Mahammadans or Hindus, shall be defendants, in which case the law of the plaintiff is to be made the rule of decision in all plaints or actions of a civil nature,” is hereby rescinded, and the rule contained in Section 15, Regulation IV of 1793,* and the corresponding enactment contained in Clause first Section 16 Regulation III of 1803, shall be the rule of guidance in all suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions that may arise between persons professing the Hindu and Mahammadan persuasions respectively.

* This Section is given above under Clause 1.
IX. It is hereby declared, however, that the above rules are intended, and shall be held to apply to such persons only, as shall be bond fide professors of those religions at the time of the application of the law to the case; and were designed for the protection of the rights of such persons, and not for the deprivation of the rights of others. Whenever, therefore, in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu, and the other of the Mahommedan persuasion, or where one or more of the parties to the suit shall not be either of the Mahommedan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party, or parties, of any property to which, but for the operation of such laws, they would have been entitled. In all such cases the decision shall be governed by the principles of justice, equity and good conscience, it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles.

4. In any of the matters described in the first Clause of this Section, the Judge may place a definite issue before persons learned in the Native-law, and file their written opinion with the record. But if possible the Judge also will consult authorities, and form his own opinion. If the case should have been decided by Arbitrators, the Court will observe whether their award is in accordance with law and custom.
The Code of Civil Procedure does not appear to authorize the course prescribed in the first part of this Clause, and the Court would now have to acquire the information by examining skilled witnesses in native law, as witnesses in the case. Section 9 Act XXIII of 1861 empowers the Court to summon any witnesses whose evidence it may deem necessary, though not named by the parties.

The following lucid sketch of the nature and sources of Hindu law is taken from a recent Privy Council Judgment in the case of the Collector of Madura v. Matu Ramalinga Sathupathy. "The remoter sources of the Hindu law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one, and rejected in another part of India, schools with conflicting doctrines arose. Thus the Mitakshara, which is universally accepted by all the schools, except that of Bengal, as of the highest authority, and which in Bengal is received also as high authority, yielding only to the Dayabhaga in those points where they differ, was a commentary on the Institutes of Yajnavalkya; and the Dayabhaga, which, wherever it differs from the Yajnavalkya, prevails in Bengal, and is the foundation of the principal divergencies between that and the other schools, equally admits and relies on the authority of Yajnavalkya. In like manner there are glosses and commentaries upon the Mitakshara, which are received by some of the schools that acknowledge the supreme authority of that treatise, but are not received by all. This very point of the widow's right to adopt is an instance of the process in question. All the schools accept as authoritative the text of Vasishtha, which says—'Nor let a woman give or accept a son, unless with the assent of her lord.' But the Mithila school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and therefore, that a widow cannot receive a son in adoption, according to the Dattaca form at all. The Bengal school interprets the text as requiring an express permission given by the husband in his life-time, but capable of taking effect after his death; whilst the Mayukha and Kanstubha treaties which govern the Marhatta school, explain the text away by saying that it applies only to an adoption made in the husband's life-time, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus, upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to
adopt being independent of the husband. The duty therefore, of an European Judge, who is under the obligation to administer Hindu law, is not so much to enquire whether a disputed doctrine be fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and have there been sanctioned by usage. For under the Hindu system of law clear proof of usage will outweigh the written text of the law.” And again, “Their Lordships cannot but think that the opinions of the Pandits have been too summarily dealt with by the Judges of the High Court. These opinions at one time enjoined to be followed and long directed to be taken by the Courts, were official, and could not be shaken without weakening the foundation of much that is now received as the Hindu law in various parts of British India. Upon such materials, the earlier works of European writers on the Hindu law, and the earlier decisions of our Courts were mainly founded. The opinion of a Pandit which is found to be in conflict with the translated works of authority may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country.”—(1. Bengal Law Reports, Privy Council Cases, p. 1.) In an earlier case their Lordships remarked that “where an opinion apparently discordant from works of current and established authority be delivered by Pandits it must not be taken on their authority to be a correct exposition of the law. They should be questioned further as to authorities, usage and general received opinions. Such an enquiry might produce a conviction that the Pandits on a new case delivered rather their own notions of expedient law, as law, than delivered it on the force of the opinions of any writers or authoritative expounders of the Hindu law.”—( Sutherland’s Privy Council Judgments, p. 479).

Although now the Civil Courts cannot as a rule set aside the award of arbitrators appointed by the parties to the suit, yet if the award were manifestly at variance with known law and custom the case might come under the provisions of Sections 323 and 324 Act VIII of 1859.

5.—Whenever it may appear that the Hindoo, Mahomedan, or other Law, has been, in any district, superseded by local usage, and that both the parties would ordinarily be bound by custom rather than by law, the Court may ascertain the custom.
from competent and experienced persons, and decide according to it. Evidence regarding the existence and nature of the custom must be filed with the proceedings, unless such custom be notorious, or have been affirmed in previous proceedings.

The following remarks, taken from the Selected Papers of the Punjab Law Society, p. 20, may be given here. "The customs that can be called general in this Province, are such as are agreed to by Hindus generally, by Musalmans generally, by Sikhs generally: some few there may be in connection with land which are held by land-holders of whatever creed generally. It is then of the highest importance to study them, but there is an especial difficulty connected with them, and that is that after you have ascertained the existence of the custom, you have further to enquire as to the extent of its applicability, for that after all will determine the question whether the custom be "general" or whether it belong to the class of "local custom." In England local customs are very generally attached to the place, so that even though new people should come to such a place, the custom would affect them in virtue of their residence. But in this country I apprehend that customs, though called "local" are really much more "tribal;" they exist in certain places because certain castes, tribes, &c., occupy those places: if the tribe went away the custom would not remain, but would go with them to the place of their new abode."

The following eight essential features of a legal custom, according to English law, are extracted chiefly from Broom's Legal Maxims, pp. 883—888, and Broom's Commentaries on the Common Law, pp. 12—18.

(i.) A custom in order that it may be legal and binding must, according to Blackstone, "have been used so long that the memory of man runneth not to the contrary; so that if any one can shew the beginning of it, it is no good custom. For which reason, no custom can prevail against an express Act of Parliament, since the Statute itself is a proof of a time when such a custom did not exist." Proof however of the enjoyment of a custom for so comparatively short a time as twenty years in the absence of evidence to the contrary has been held sufficient to establish that the custom had existed immemorially. Although the niceties of English law on this point are probably inapplicable to Indian practice, yet it may safely be held that no custom ought to be regarded as part of the unwritten law of the land, which
carries on the face of it, or can be shewn to be of recent growth, such as alleged customs based on the existence of the English land-settlement, or customs alleged to exist with regard to the letting of bungalows in cantonments or civil stations.

(ii.) A custom must have been continued; because any interruption would cause a temporary ceasing, and the revival would give a new beginning which would be within time of memory and therefore the custom would be void by the first rule. But this must be understood with regard to an interruption of the right, for an interruption of the possession only for ten or twenty years will not destroy the custom. As, if the inhabitants of a village have a right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the right be anyhow discontinued for a day, the custom is quite at an end. So in Ghaman v. Ghulam Mahammad, the Chief Court observed that it was clear that from the date of annexation, the 29th March 1849, up to the date of the institution of the suit, the distinction between the Khattree and Khwojah residents of the town of Chuckowal, and the non-proprietary cultivators residing in the same town, in the matter of the sale of their houses or building sites, has not existed, and the custom alleged by the plaintiffs to exist of first obtaining their assent to such sales has fallen into disuse. To form the basis of a right custom must be continuous, and here it has been shewn to have been interrupted for more than 16 years. The Court accordingly dismissed the plaintiff's case.

(3. Punjab Record, Case No. 52.)

(iii.) A valid custom must have been peaceably enjoyed and acquiesced in, and not subject to contention and dispute: for as such custom derives its force and authority from common consent, the fact of its having been immemorially disputed either at law or otherwise would be proof that such consent was wanting. Hence conflicting decisions of the local Courts in different suits as to the existence of a custom are not alone legal proof of the prevalence of the custom, though accordant ones which had not been appealed from, or which had been confirmed on appeal, might suffice.—(1. W. Reporter, p. 234; and Vol. 9, Civil Rulings, p. 538.) So in Huro Mohun Mookerjee v. Rani Lalain Mani it was laid down that "litigation is a test of the existence of a custom, but not the sole proof."—(5. W. Reporter, Act X Rulings, p. 42).

(iv.) A custom must be reasonable, or rather it must not be unreasonable. A custom therefore may be good, though the particular reason of it cannot be assigned, for it sufficeth if no good legal reason can be assigned against it.
Thus a custom in a parish that no man shall put his beast into the common till the 3rd of October, would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad; for, peradventure the lord will never put in his, and then the tenants will lose all their profits. A custom, however, is not unreasonable, merely because it is contrary to a particular rule of the common law, for *consuetudo ex certâ causâ rationabili usitata privâ communem legem*. Nor is a custom unreasonable, because it is prejudicial to the interests of a private man, if it be for the general benefit; as the custom to turn the plough upon the headland of another, in favour of husbandry; and to dry nets upon the land of another, or to take water from his well. It is not an unreasonable custom, that a tenant who is bound to use a farm in a good and tenantable manner shall be at liberty on quitting the farm to charge his landlord with a portion of the expenses of draining land, which requires draining according to good husbandry, though the draining be done without his landlord's knowledge or consent. And a custom that a tenant shall have the way-going crop, after the expiration of his term, albeit against the law of emblements, is reasonable and good. A custom for copy-holders of inheritance in a manor without licence from the lord to dig clay without limit in and from their copyhold tenements for the purpose of making bricks to be sold off the manor, was held to be reasonable. But a custom, which is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason, for it could not have had a reasonable beginning. Hence a custom, that the lord of the manor shall have £3 for every pound breach of any stranger, or that the lord of the manor may detain a distress taken upon his demesnes, until fine be made for the damage at his will, is bad. In these and similar cases the customs themselves are held to be void on the ground of their having had no reasonable commencement, being founded in wrong and usurpation and not on the voluntary consent of the people to whom they relate; for it is a true principle that no custom can prevail against right, reason, or the law of nature. The will of the people is the foundation of that custom, which subsequently becomes binding upon them; but if it be grounded not upon reason, but error, it is not the will of the people, and the maxim applies *malus usus est aboliendus*.

*(v.)* A custom ought to be *certain*. And therefore a custom that lands shall descend to the most worthy of the owner's blood is void, for how shall this worth be determined? But a custom that lands shall descend to the next male heir
to the exclusion of females is certain and good. So a custom to pay a year’s improved value for a fine on a copyhold estate is good, for albeit the value is a thing uncertain, it may at any time be ascertained, and \textit{id certum est quod certum reddi potest}. But in \textit{Broadbent} v. \textit{Wilks} a custom was adjudged to be bad that when the lord of the manor or the tenants of his collieries sunk pits in certain freehold lands within the manor, the lord and his tenants might, for the working of the pits and to get coals thereout, cast the earth and stones &c. coming therefrom in heaps on the land \textit{near} to such pits there to remain and continue at his and their will or pleasure, as being uncertain, especially by reason of the expression “near to,” to which phrase no precise and definite meaning can be attached; and also as being unreasonable, as it might go to deprive the tenant of the whole benefit of his land, and it could not be presumed that the tenant at first would have come into such an agreement.

(vi.) A custom when established must be \textit{compulsory}, and not left to the option of every man whether he will use it or not: therefore a custom that all the inhabitants of a particular district shall be rated towards the maintenance of a bridge will be good; but a custom that every man is to contribute thereto at his own pleasure is idle and absurd, and, indeed, is no custom at all.

(vii.) Customs must be \textit{consistent} with each other: one custom cannot be set up in opposition to another, for if both be really customs then they are of equal antiquity, and must have been established by mutual consent, which to say of contradictory customs is absurd.

(viii) With reference to the interpretation of customs it must be remembered that where they derogate from the rights of property, they must be \textit{construed strictly}, and are not to be enlarged beyond the usage.

“A custom in one parish or manor is no evidence of a similar custom in the one adjoining. So I apprehend of adjacent villages* in the Mofussil”—(\textit{Norton’s Law of Evidence, Section 68}). For some interesting remarks on the origin and binding force of customary law, see the judgment of Frere and Holloway J. J. in \textit{Tara Chand} v. \textit{Rib Rani}, in 8. Madras High Court Reports, p. 50.

* In the analogous case of calculation of mesne profits, where both parties to the suit had adduced calculations made in neighbouring villages as evidence to establish their respective cases, the Calcutta Court held, though these calculations, if objected to, would not have been strictly legal evidence between the parties, the conduct of both sides had amounted to a virtual consent that they should constitute the materials on which the Court was to act.—\textit{Amar Moulah} v. \textit{Hills}.—(10. \textit{W. Reporter, Civil Rulings}, p. 129.)
There is no such thing as a valid custom of a single family.

In a case in which a special family custom was pleaded, at variance with Hindu Law and the ordinary custom among persons bound by that law, the Bombay Court held, following a decision of the Madras Court (3. Madras High Court Reports, p. 50), that no evidence of the acts of a single family repugnant or antagonistic to the general law will establish a valid custom or usage which can be enforced by a Court of Justice.—(4. Reid's Bombay High Court Reports, p. 113.)

Besides the local customs discussed above, the Punjab Courts recognize, it may be presumed, certain quasi-customs or usages, known at home as "customs of the country." These are usages which, unless excluded expressly or impliedly by agreement between the parties, regulate to some extent the relation of landlord and tenant, or affect the rights of in-coming and out-going tenants. A custom of this kind must be reasonable, and sufficiently definite and certain, but need not be shewn to have existed immemorially, and will be established on proof of a usage recognized and acted upon in the particular district, applicable to farms of a like description with that in regard to which its existence is specifically asserted.—(Broom's Commentaries on the Common Law; p. 19.)

The leading case on this subject is Wiglesworth v. Dallison, in which a tenant who held by a lease by deed was allowed, by virtue of a custom of the parish, to have the way-going crop after the expiration of his term, albeit the lease was silent on the point. From the judgment of Parke B. in the cognate case of Hutton v. Warren, Mr. Smith collects (1. Leading Cases, p. 529) that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they silent,

1st.—In contracts between landlord and tenant,
2nd.—In commercial contracts,
3rd.—In contracts in other transactions of life, in which known usages have been established and prevailed.

"But that such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and this inconsistency may be evinced—

1st.—By the express terms of the written instrument,
2nd.—By implication therefrom."

In Braham and others v. Doulat Bibi and others, the Chief Court recognized and upheld a local custom, which invalidated a gift of ancestral landed property made by a widow in favor of her daughter and son-in-law, although it
might have been a good grant according to Mahammadan law. The Court also pointed out that, although in this particular case the administration-paper, when rightly interpreted, was not at variance with the lex loci, yet that this paper, "though furnishing strong presumptive evidence of the custom, and consent to be bound by it on the part of a village, cannot be held to be conclusive, when contrary to the proved custom. Error might be shewn, and the establishment of custom depends upon facts."—(2. Punjab Record, Case No. 93.) But the record of a usage in the wajib-al-arz is presumptive evidence of its existence, and throws the onus of proof on the party controverting it.—Bhawal Shah v. Mussumat Roslan (3. Punjab Record, Case No. 87). In a dispute however about tenure, the Chief Court ruled that long possession for generations might throw suspicion on the accuracy of the record, so as to leave the burden of proof where it would have been had the entry not existed.—Buldeo v. Hafiz Ali—(4. Punjab Record, Case No. 15.)

6.—If one party should elect that the suit be decided by custom, and the other by law, the Court will determine whether, in the particular case, the law or the custom has most authority. If there should be any doubt as to the prevalence of the custom, the law will be followed.

7.—The laws and customs, as above described, should especially be observed in matters relating to inheritance, special property of females, marriage, divorce and adultery, adoption, wills, legacies, gifts, and partition. On the other hand, there are many matters in which their observance should be avoided, such as the prohibition of interest; civil disabilities on account of caste, religion, sex, disease, and other disqualification not allowed under British rule; rights connected with slavery; forfeiture of property, by reason of conversion to a religion, other than that in which the party may have been brought up; various periods of minority; absence of any law of limitation for suits, trial by ordeal, &c.
Local standards of weight and measurement.

Evidence may be taken to establish the existence of different and double standards of weights and measurements existing in any particular locality.—Bhoggobuthy Charan Bhattacharjv v. Tamiruddin—(1 W. Reporter, p. 224.)

The Act which abrogates so much of native law as causes a change of religion to produce civil disabilities, is Act XXI of 1850. See below under Clause 19 Section IV Punjab Civil Code. For the age of majority see Clause I Section VIII of this Code.

8.—In all commercial transactions, not specially provided for, the usage of trade will be followed, and will be ascertained in the manner already prescribed in Clause 5 of this Section.

"Mercantile contracts," observed Coleridge J. in Brown v. Byrne, "are very commonly framed in a language peculiar to merchants: the intention of the parties though perfectly well known to themselves, would often be defeated, if this language were strictly construed according to its ordinary import in the world at large; evidence, therefore, of mercantile custom and usage is admitted in order to expound it and arrive at its true meaning. Again, in all contracts, as to the subject matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included however, as of course, by mutual understanding: evidence, therefore of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten. But, in these cases, a restriction is established on the soundest principles, that the evidence received must not be of a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less. Neither in the construction of a contract among merchants, tradesmen or others, will the evidence be excluded because the words are, in their ordinary meaning, unambiguous; for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than "a thousand," "a week" "a day"? Yet the cases are familiar in which "a thousand" has been held to mean twelve hundred; "a week," a week only during the theatrical season; "a day" a working day. In such cases the evidence neither adds to, nor qualifies nor contradicts the written contract;
it only ascertains it by expounding the language” used by the contracting parties.—(Broom’s Commentaries on the Common Law, p. 512.)

Thus in Syers v. Jonas there was a contract made for the sale of a specific parcel of tobacco, which made no reference to any sample, yet evidence was received to shew that, by the usage of the tobacco trade, sales were always made by sample. In Metzer v. Bolton, the plaintiff was engaged as a commercial traveller at a yearly salary, but although engaged for a whole year he was discharged before the expiry of the specified term, and the Courts received evidence to shew that there was a usage in the trade to dismiss on three months notice.—(Broom’s Commentaries on the Common Law, p. 509, 510.)

But when an Act of the Legislature has given a definite meaning to any particular word denoting weight, measure, or number, no evidence of custom will be admitted to attribute any other to it.—(1. Smith’s Leading Cases, p. 534, under Wigglesworth v. Dallison.)

Evidence of usage is however inadmissible if it be inconsistent with, or if expressly or by implication it contradict the terms of the written contract between the parties. “Usage” says Lord Lyndhurst, “may be admissible to explain what is doubtful, it is never admissible to contradict what is plain.”—(Broom’s Commentaries on the Common Law, p. 510.) Hence in an action on a warranty for the sale of “prime singed bacon” evidence of a usage in the bacon trade that a certain latitude of deterioration called “average taint” was allowed to subsist before the bacon ceased to be prime bacon, was rejected.

Terms not incidental to those expressed in the written contract can not be annexed to it by oral evidence of a particular usage of trade.—(1. Smith’s Leading Cases, p. 537.)

When evidence of the usage of a particular place is admitted to add to, or in any manner affect the construction of a written contract, it is only on the ground that the parties who made the contract were both cognizant of the usage, and must be presumed to have made their agreement with reference to it. Thus in Kirschner v. Venus the plaintiffs, resident at Sydney, who were indorsees for a bill of lading made in Liverpool, were held not to be bound by an alleged custom in Liverpool of which they were ignorant, that, though, by the terms of the bill of lading, the freight was payable in Liverpool at a certain time after sailing, still the ship-owner, if it were not paid, had a lien for it at the port of discharge.—(1. Smith’s Leading Cases, p. 541, under Wigglesworth v. Dallison.)
A custom having prevailed among the shawl-weavers of Amritsar, that when an artizan-weaver left one master, without having repaid, in labour or cash, the advances made to him, the next employer who might engage him should be held responsible for the debt to the first;—the Local Government, on a reference from the Commissioner, held that the custom was not to be recognized by the Courts, as being prejudicial to the true interests of trade, and to the well-being of the commonwealth.—(Judicial Book Circular 71 of 1859.) Without having recourse to the dens ex machinā of His Honor the Lieutenant Governor, might not the local Courts have disposed of the alleged custom by holding it was bad as not being a reasonable one?

9.—In the following Sections the leading principles of the Hindoo and Mahomedian Codes will be laid down, and their applicability to the practice of the Courts will be explained.
CHAPTER IV.

PUNJAB CIVIL CODE.

SECTION IV.

Inheritance.

1.—There is no distinction between real, personal, ancestral, or acquired, property, in the Hindoo and Mahomedan Laws of inheritance; although in the Hindoo Law such distinction is recognized in the disposition, and distribution of property.

It has been fully settled by the Privy Council in what is known as the Shivagungah case that a Hindu subject to Mitakshara law may die possessed of a share in joint family property, and also of separately acquired property, and that the two will not necessarily devolve on the same heir, but that they may either descend to different persons, or, if descending to the same persons, may descend in a different way and with different consequences.—(Sutherland's Privy Council Judgments, p. 520.)

2.—By the Hindoo Law the sons are first entitled to the inheritance; then the grandson and great grandson in the male line.

When a Hindu disappears and is not heard of for a length of time no right accrues to any person as heir to the person so disappearing until twelve years have been completed from the time when he was last heard of.—Janmujay Mazumdar v. Keshab Lall Ghase.—(2. Bengal Law Reports, Civil Appeals, p. 134.)

When in default of sons, the grandsons inherit, they take per stirpes; the sons, however numerous, of one son taking no more than the sons, however few, of another son. So, in default of sons and grandsons, the great grandsons also take per stirpes; the sons, however numerous, of one grandson taking no more than the sons, however few, of another grandson. They will take the shares to which their respective fathers would have been entitled, had they survived.—(Macneighten's Principles of Hindu and Mahammadan Law, p. 18.)
In Luchomun Prasad v. Debi Prasad the contention that under Mitakshara law the existence of a son excludes a grandson, whose father had died before the grandfather, from the inheritance was overruled by the Calcutta Court, who held on the contrary that the word "putro" included male issue in the male line to the fourth generation, and that therefore the one was not an obstruction to the other.—(1. W. Reporter, p. 317.)

3.—In default of these [descendants in the male line] the widow, or widows, may inherit, on a life tenure only; a virgin widow, whose husband may have died before completion of the marriage, can also inherit. After the widow's death the daughters, and their sons, will inherit, provided that such succession be not opposed to local custom.

According to all but the Bengal school, the widow succeeds to the inheritance only when her husband was living in severalty; otherwise an undivided brother is looked on as the next heir. If there be more than one widow their rights are equal.—(Macnaghten's Principles of Hindu and Muhammadan Law, p. 19.) See too, 2. Stokes Madras Reports, p. 123. But in the Shivagungah case (Sutherland's Privy Council Judgments, p. 520) it was laid down that when a member of a joint Hindu family died without male issue, leaving separately acquired property, his widow or daughters would succeed to this separate estate in preference to the undivided brethren. This judgment must be taken to over-rule two of a contrary purport given in 1. Stokes Madras Reports, pp. 374 and 412.

A distant heir can sue to recover possession of the estate from a widow on the ground that she is wrongfully in possession, being only entitled to maintenance, if the intermediate heirs shall have renounced their rights of succession in the plaintiff's favour.—Mussumat Ladniah v. Sanvali.—(4. North West High Court Reports, p. 191.)

By local or family custom, a widow may be entitled to a portion of her husband's land, besides a cash allowance for maintenance, even when the brother is the heir at law. Such a custom was found to prevail among the Singhpoorias in the Umballah district.—Sobah Singh v. Mussumat Altar Kour.—(3. Punjab Record, Case No. 30.)

On the other hand, among the minor Cis-Sutlej Chiefs it has been established that by the orders of Government passed at the time when their sovereign rights were taken away,
and which orders have the force of law, females are altogether excluded from the succession either to the jagir or to the other moveable and immoveable estate, and that in these families the widows are entitled only to suitable maintenance.

—Jasmair Singh v. Mussumat Harcourt.—(4. Punjab Record, Case No. 40.)

A widow succeeding as heir to her husband is entitled to recover property in which her husband had a vested interest under a will or deed, but the actual enjoyment of which stood postponed at the time of his death.—Hursh dial Debi v. Rajessari Debi.—(2. W. Reporter, Civil Rulings, p. 321.)

"When it is sought to exclude female heirs from succession to a husband or father under the Mitakshara on the ground that the estate was joint, it must be shewn to have been so at the time of his death, and not merely at the death of a pre-deceasing brother."—Mussumat Pitum Kunwar v. Jay Kishen Dass—(6. W. Reporter, Civil Rulings, p. 102.)

In cases among Bengalees, governed by the Daya Bhaga, under which a widow succeeds even in an undivided family, the possession of a brother of the deceased husband will be that of a trustee for the widow, and not adverse to her.—Chandra Kant Surmah v. Bungohee Deb Surmah.—(6. W. Reporter, Civil Rulings, p. 61.)

The late Supreme Court of Calcutta held that the widow's estate could not be considered as one given by way of maintenance, but as an absolute life interest, so long as it was not used in a manifestly improper way: and therefore a widow was entitled to save as much as she pleased from the estate, and dispose of such savings away from her husband's heirs.* In Haridass Datt v. Runjanmani Dassi, the Court observed that "the estate, though sometimes so expressed to be, is not an estate for life: when a widow alienates, she does so by virtue of her interest, not of a power, and she passes the absolute interest, which she could not do, if she had but a life estate."—(Macpherson on Mortgages, p. 28.) And in Kamavadhani Venkata Subbaiya v. Jogsa Narasingappa the Madras Court laid it down that the widow's right to the fullest beneficial interest had long been recognized. She takes as heir a proprietary estate in the

* In Chandrabali Debi v. Brody a Divisional Bench of the Calcutta High Court held that while a Hindu widow could make the fullest use of the usufruct of the estate during her life, whatever part she left behind became the property of the next heir, and was not liable for the widow's personal debts: that if she chose to economize she could in her lifetime give away her savings to whom she pleased, but if she left them undisposed of at the time of her death, they would form part of the estate, and as such go to the next heir of her deceased husband.—(9, W, Reporter, Civil Rulings, p. 55.)
A widow may come to hold adversely to the rights of her husband's kindred.

A widow is not bound to give security before receiving compensation for lands taken for a public purpose.

Power of the widow over her moveable property.

Execution sale of a widow's right and interest.

Relinquishment of the estate by a widow in favor of the reversioners.

A widow may come to hold adversely to the rights of her husband's kindred. In Bhoolur and others v. Mussumat Bakshes the Chief Court finally decided, reviewing its previous judgment, that a virgin widow, whose title to her first husband's land, had been upheld against the kindred of that husband after her second marriage in a contested suit at the time of the revision of the Settlement, held from that time adversely to the rights of such kindred, and consequently, that action brought by them sixteen years after the former suit to annul an alienation made by the defendant was barred by lapse of time.—(2. Punjab Record, Case No. 82, reversing the decision given as Case 11 of the same Volume).

A Hindu widow cannot be compelled, without proof of waste, to give security before she receives from a Railway Company the money due as compensation for the lands of her husband's estate taken by them, since she is as clearly entitled to this money as she is to the other property of her husband, to be held by her according to the ordinary Hindu widow's estate.”—Bhui Bassini Dassi v. Boli Chand.—(1. W. Reporter, p. 125.)

In Durga Dayi v. Puran Dayi the Calcutta Court, in accordance with precedents of the Calcutta Supreme Court, the Madras Sudder and the Bombay High Court, ruled that a childless Hindu widow under Mitakshara law, has absolute power over moveable property left by her husband, and can alienate it to whom she pleases. Hence she can sell Government promissory notes, which do not come under the term “corody**” which is used solely with reference to land.—(5. W. Reporter, Civil Rulings, p. 141.) See too Mussumat Thakur Dayi v. Rai Baluck Ram.—(10. W. Reporter, Privy Council Cases, p. 3.)

An execution sale of a widow's rights and interests in an estate she inherited from her husband, in satisfaction of a money debt due by her to the execution-creditor, does not touch the estate.—Ram Sewak Roy v. Sheo Gobind Sahu.—(8. W. Reporter, Civil Rulings, p. 519.) See a like decision in Vol. 6. Civil Rulings, p. 304.

A widow in possession can relinquish her husband's estate and by relinquishing anticipate for the reversioners their period of succession, and if she do this in favor of second reversioners with the consent of the first, then or

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*Corodies or assignments on land are classed in Hindu law amongst things immovable. A corody is defined in Colebooke's Daya Bhaga, Chapter 11, Para 13, page 26, as "something fixed by a promise in this form 'I will give that in every month of Kartik.'"
afterwards expressed, the relinquishment is valid; and this notwithstanding that it may be expressed in a form which, under some circumstances, might be open to question.—Protab Chandra Roy v. Srinuaky Joy Mani Dabi.—(1. W. Reporter, p. 98.) In such a case, the recipient becomes absolutely entitled to the property, which on his death passes to his heirs, while the interests of the widow are entirely extinguished.—(8. W. Reporter, Civil Rulings, p. 500). But a mere petition filed in a suit to the effect that the widow has relinquished her title to the property in dispute in favor of the plaintiffs, who are the reversionary heirs, is not equivalent to a legal relinquishment of her interest.—Ooma Charan Kundu v. Bhuban Mohun Pal Poddar.—(10. W. Reporter, Civil Rulings, p. 98.)

Hence where a widow ceded her life interest to the then heirs, accepting a maintenance allowance instead, the property vested at once in the donees, and when other persons subsequently claimed the property as being the husband's heirs, time ran against them from the date of the cession by the widow, and they acquired no cause of action by the death of the widow.—Kali Kumar Nag v. Kashi Chandra Nag.—(6. W. Reporter, Civil Rulings, p. 180.)

In the Shivagungah case the Privy Council held that "assuming the widow to be entitled to the estate at all, the whole estate would for the time be vested in her absolutely for some purposes, though in some respects for a qualified interest; and until her death it could not be ascertained who will be entitled to succeed. The same principle which has prevailed in England as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."—(Sutherland's Privy Council Judgments, p. 520.) The force of this ruling was subsequently considered by the High Court in Kanhya Lal v. Radha Charan, and it was then laid down that "the suits to which the Privy Council intended to refer appeared to be suits in which the title of the settler or the validity of the estate tail was in issue, and not to suits against the tenant in tail in which a question might incidentally arise and be determined as to who was the remainder-man who would be entitled to succeed upon the termination of the estate tail," and that therefore a plaintiff claiming the estate on the widow's death was not bound by a decree to which he was not a party which the defendant had obtained against the widow in her lifetime invalidating certain alienations made by her, and in which his title as next reversioner had been recognized.—(7. W. Reporter, Civil Rulings, p. 339.) As the heirs are bound by decrees relating
Limitation which
bars the widow in
general bars the
heir.

There is no pre-
sumption against the
validity of a widow's
alienations.

Alienations effec-
ted by a widow.

Although the widow cannot dispose of the smallest
part of the estate, except for necessary purposes, there is no
presumption against alienations by her, and such alienations
are to be supported unless proved to be improper.—(Macph-
erson on Mortgages, p. 25.)

In the case of a mortgage effected by a widow of her
late husband's estate, the Calcutta Supreme Court, following
the analogy of the leading case of Hanuman Prasad Pandy
(see below under Clause 8 of Section VIII of the
Punjab Civil Code) has held that one who lends money to a
Hindu widow is bound to enquire into the necessity of the
loan* and to satisfy himself as well as he can that the widow
is acting in the particular instance for the benefit of the
estate: but if he do so enquire and act honestly, the real
existence of an alleged sufficient and reasonably-credited
necessity is not a condition precedent to the validity of his
mortgage: and he is not bound to see to the application of
the money.† A bona fide mortgagee will not suffer when he
has acted honestly and with due caution, even though he be
himself deceived.—(Macpherson in Mortgages, p. 25.) The
same rule also applies to alienations by sale. A mere de-
claration of necessity is not sufficient by itself to justify a
purchaser in proceeding to buy.—(Gungagobind Bose v. Sri-
mulky Dhunni and Ram.)—(1. W. Reporter, p. 60.) See
also 5. W. Reporter, Civil Rulings, p. 245. So the mere
confession by the widow of a debt of the husband is not, on
the face of a recorded protest by the husband's relations,
evidence that the debt really was the debt of the husband.—
(2. W. Reporter, Civil Rulings, p. 170); but where the

* As to the duty of the mortgagee or purchaser to make enquiries as to
the necessity for the alienation see 2. W. Reporter, Civil Rulings, p. 124, and
Vol. 9, p. 380, where on the authority of the leading case the High Court
held that after a lapse of time and enjoyment and apparent acquiescence the
purchaser may be absolved altogether from shewing anything more than the
fact of a sale under some ostensible plea of necessity made to him long
previously by a person who had at the time the management of the property.
† Where a widow mortgaged property to her brother to pay off loans
she had contracted for the marriage expenses of her daughter, the High
Court held that notwithstanding the relationship of the mortgagor and
mortgagee, the latter was not bound to look to the appropriation of the
money. He satisfied himself that there was a legal necessity for the loan
and there his responsibility ceased. He had no control over the marriage,
or how it was to be spent, or whether the whole sum advanced was spent in
the marriage or not.—Ram Panchad Singh v. Maunmat Nagmuni Koser
(9. W. Reporter Civil Rulings, p. 501),
The Settlement papers in the case of village communities usually prescribe the contingencies which justify an alienation of her estate by the widow, but in other cases, or where the wajib-al-arz is silent it should be borne in mind that it is only allowable when made on account of some necessity, as the providing for her own maintenance [paying the Government revenue. —6. W. Reporter, Civil Rulings, p. 55] or for any indispensable duty connected with her husband, such as acts designed for his spiritual benefit, or the payment of his debts. Mr. Macpherson indeed is speaking of the law in Bengal, but in this respect it harmonizes with the rules prevailing in the Punjab. —(Macpherson on Mortgages, p. 24.) But in Ramdhan v. Mussumat Kurn Kour, the Chief Court held that a wish expressed by a man that his widow should build a temple and sink a well would not authorize the latter in alienating ancestral real property to the prejudice of her late husband's brother, the reversionary heir. —(1. Punjab Record, Case No. 89.) Nor is the making a pilgrimage to Benares such a legal necessity as to justify a sale by the widow.

—Huro Mohun Andhikarree v. Srimati Anluck Mani Dassi.—(1. W. Reporter, p. 252.) But see the case of the Collector of Masulipatam v. Cavaly Vencalta Narainapah, where the Privy Council laid it down as indisputable, that “for religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, the widow has a larger power of disposition than that which she possesses for purely worldly purposes.” —(Sutherland’s Privy Council Judgments, p. 479.) See also the judgment of Mitter J. in Janmanjai Malluck v. Rasmani Dassi, to the effect that a widow who sells property to obtain the means of performing a family shradh is held to be using and not wasting her late husband's estate.—(10. W. Reporter, Civil Rulings, p. 309.)
A reversioner cannot claim to set aside a sale made by a widow upon payment of the amount which it was necessary for the widow to raise, nor should the sale be set aside in the proportion which the sum, for the raising of which necessity is shewn, bears to the whole amount for which the estate was sold.—Sugeram Begum v. Juddubans Sahaye.—(9. W. Reporter, Civil Rulings, p. 284.) And in a similar case, Peacock C. J. observed that "if there were any necessity such as the Hindu law warranted for a sale of part of the property, and the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorized her to raise, it appears to me that the sale would not be absolutely void as against the reversioners, but that they could only set it aside upon paying that amount which the widow was entitled to raise with interest."* And again below he remarks—"I am not all sure that even if it could be made out that it would have been more beneficial for the widow to mortgage instead of selling, the purchase could be set aside. My impression is that if a widow elect to sell, when it would be more beneficial to mortgage, the sale could not be set aside as against the purchaser, if the widow and the purchaser be both acting honestly. It must be remarked that if a widow were bound to mortgage, the interest of the money raised by mortgage must be paid out of the estate, and thus the income of the widow would necessarily be reduced for the benefit of the reversionary heirs."—Phul Chand Lall v. Bughubans Sahaye.—(9. W. Reporter, Civil Rulings, p. 108.)

In an earlier case, however, Tiluck Roy v. Phulman Roy, a Divisional Bench had held that the existence of a debt, liquidation of which is already provided for by lease of ancestral property, is no justification for a subsequent sale of the same property.—(7. W. Reporter, Civil Rulings, p. 450.) It may be doubted perhaps whether in the face of the reasoning of the learned Chief Justice of the Calcutta Court, this latter precedent will be implicitly followed.

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*In Ram Gopal Ghose v. Bulldoob Bose, where the widow's estate had been advertised for sale in payment of law expenses arising out of litigation in which she had been engaged relating to her late husband's property, the High Court, finding that the purchaser had paid a fair price for the property and had acted throughout bona fide, held that the mere fact that only two-thirds of the purchase money had been paid to the creditors did not invalidate the conveyance, the buyer not being bound to see to the application of his money.—(Sutherland's Civil Rulings for July 1864, p. 385.) So where a widow, who was one of the heirs of A sold her share for Rs. 995, to pay an ancestral debt of Rs. 670, and it was contended that the sale was invalid, as there was no necessity for her selling her whole share, the Court held that "the mere fact of the property being sold for a higher price than the amount of the debt to liquidate which it was sold is not a reason for considering the sale invalid when the purpose for which the sale is made, namely the payment of the ancestral debt, is quite legal.—Chitra Narayan v. Ula Kumvari.—(3. Bengal Law Reports, Civil Appeals, p. 201.)
For the time within which suits to annul alienations by a widow, or to obtain a declaration that they are not binding on the reversioners, must be brought, see Tremlett's Law of Limitation, p. 41.

Where a deed of sale executed by a Hindu widow had been attested by the two next reversioners the High Court, while declining to follow a precedent of the late Sudder Court to the effect that an attesting witness must be taken in a matter of law to be an assenting party to the deed which he attests, and considering that the assent was not in law conclusive so as to preclude the necessity of all further enquiry, yet deemed the fact of the two persons most interested in contesting the sale if it were unnecessary, having been called in to execute the deed the strongest possible evidence of good faith on the part of the purchaser.—Madhab Chandra Hajra v. Gobind Chandra Banerjee.—(9. W. Reporter, Civil Rulings, p. 350.) So in Kali Mohan Deb Roy v. Dhunun Joy Shaha, the consent of the reversioner was thought to raise a strong presumption that some necessity existed. "It is not binding evidence," the Court observed, "upon the present heir, but in the absence of any evidence proving fraud and collusion, or that no necessity did exist, we think that the consent of the reversioner is evidence of great weight."—(6. W. Reporter, Civil Rulings, p. 51.) At p. 54 of the same Reports, the fact of the plaintiff having attested the conveyance executed by the widow was taken to shew an acquiescence on his part, which prevented his impeaching the act on the ground of waste.—Gopal Chundra Manna v. Gour Mani Dassi.

In Shubankari Dassi v. Chand Mani Dassi the Calcutta Court expressed an opinion that a sale of property by a Hindu widow for just debts in conformity with Hindu law made with the consent of the reversioner may be valid, although the debt, which created the necessity, was not of the ancestor's time but one of the widow's own contracting.—(7. W. Reporter, Civil Rulings, p. 336.)

In Kartick Kurnokar v. Dhumo Mani Gupta the consent of all the heirs living at the time of the execution of a bill of conveyance by a Hindu widow, either by direct consent or attestation, was held to be requisite in order to make the sale binding against the reversioners.—(Sutherland's Civil Rulings for June 1864, p. 268). In this case the question of necessity does not appear to have been raised at all. See Sutherland's Civil Rulings for April 1864, p. 148, for a like ruling.

"A deed of alienation by a childless Hindu widow of her late husband's property is not good against any one, unless it can be shewn to have been made either with the consent of the immediate heirs, or under one of those exigencies which
give a widow a power of sale," and accordingly a judgment-creditor of the widow was held to be entitled to attach property which she had previously conveyed by gift to the plaintiff, on proof that the conveyance had been made without the consent of the reversioner—Srimati Chandra Mani Dassi v. Jaikishen Sircar.—(1 W. Reporter, p. 107.)

In Narayan Dass v. Mukhan and others, the reversioners paid off the amount for which the widow in possession had mortgaged a house belonging to her late husband's estate, and claimed by virtue of their having done so to be entitled to immediate possession as having bought out the widow: the Chief Court held however that the plaintiffs were only entitled to a declaratory decree restraining the widow from alienating the property, and awarding them possession in case of their surviving her. The Court refused to make any money decree, as it appeared that the plaintiffs had paid the money for their own object, to clear an incumbrance, without receiving or intending to receive any sufficient transfer of mortgage.—(1 Punjab Record, Case No. 22.)

Similarly, a Full Bench decision of the Calcutta High Court has ruled, first, that "a conveyance by a Hindu widow, though not for allowable purposes, was binding during the life-time of the widow, and that the reversioners were not entitled during her life-time to recover the property either for their own or the widow's use,"* and secondly, "that the reversioners might, during the life-time of the widow, bring an action to declare the conveyance not binding beyond the life-time of the widow,† and might also obtain the interference of the Court to prevent waste."—(1 W. Reporter, p. 338.) See too a Full Bench decision of the Agra Court to the same effect in 4 North-West High Court Reports, p. 55; also Sutherland's Civil Rulings for May 1864, p. 250; 1 W. Reporter, p. 47; Vol. 2. Civil Rulings, p. 245; Vol. 5, Civil Rulings, p. 131, where the reversioners having sued simply for possession, it was held that the Court, on proof that the alienating widow was still alive, ought merely to have dismissed the suit, and was not warranted in proceeding to decide on the validity of the sale, the plaint not having sought that alternative relief—Vol. 6. Civil Rulings, p. 222; Vol. 7. Civil Rulings, p. 167, where Norman J. while refusing to interfere with the possession as the purchaser appeared to

* See for like decisions of the Madras Court, 2. Stokes' Madras Reports, pp. 396, 393, 399, and Vol. 3 p. 116; and for those of the Bombay Court, 1. Reid's Bombay High Court Reports, p. 331.

† A ruling to this effect will also be found in 3. Punjab Record, Case No. 98.

But in a like case, where the relief which the first Court had granted was not objected to on regular appeal, as unprayed for, the High Court refused to entertain the objection on special appeal.—Bama Sundari Dassi v. Bama Sundari Dassi.—(10 W. Reporter, Civil Rulings, p. 133.)
have acted bona fide, observed that if he had colluded with the widow, and his purchase had been fraudulent or wholly fictitious, he would not have hesitated to "give possession to the heir or a receiver as manager for the party entitled during the life of the widow, and to protect the estate for the benefit of the reversioner".—Vol. 7. Civil Rulings, p. 303; Vol. 8. Civil Rulings, pp. 157 and 522; Vol. 9. Civil Rulings, p. 505; Vol. 10. Civil Rulings, p. 276. In Chattar Narayan v. Musumut Wooma Kunwree the Court remarked that "it is clear that if a reversionary heir had in all cases to wait until the death of the life tenant, before he could bring his declaratory suit, much of the evidence which would support his claim would be lost to him by the mere efflux of time; to say nothing of the possibility of the life-tenant committing such acts of waste as to endanger or perhaps to destroy the corpus of the property." (8. W. Reporter, Civil Rulings, p. 273.) See too Vol. 1, p. 359.

Where the immediate reversioner is not in a position to sue, especially when such reversioner is a woman having qualified and limited rights similar to those of the widow, whose acts of waste are complained of, the next reversioner, who has full and unlimited rights, may intervene in order to protect his own future rights.—Bul Gobind Ram v. Hirusarani.—(2. W. Reporter, Civil Rulings, p. 255.) See also a Full Bench ruling of the Agra Court in 4. North-West High Court Reports, p. 55. So too the next reversioner may sue, when the widow, who should have brought the suit, has relinquished her life interest and declared her assent to the suit proceeding.—Bhim Ram Chuckerbutty v. Hari Kishore Rai.—(1. W. Reporter, p. 359.) The general rule is however, that only immediate reversioners can impeach the widow's acts.—(Sutherland's Civil Rulings, for April 1864, p. 148; 10. W. Reporter, Civil Rulings, p. 309.) And the incompetency to sue on the ground of not being the next reversioner is so vital a defect that it will be fatal to a suit if taken for the first time orally in special appeal.—Radha Kishen v. Bakhtawar Lal.—(1. North-West High Court Reports, p. 1.)

A reversioner can always interfere during the widow's life-time to prevent waste.—(2. W. Reporter, Civil Rulings, p. 272.) "The plaintiff would, indeed, have a right," observed the Court in the case of Pran Puttee Koer, "to sue and restrain the widow from waste; but his right to do this arises less from the necessity of protecting his own interests than from the function vested by the Hindu law in the next male heir of a person whose estate descends to a female, namely, that of protecting the estate. And it is obvious that if heirs in expectancy were debarred from suing to protect waste until the succession had actually accrued, the waste would in most cases be past remedy and the estate
Injury to the estate must be shown to be probable in order to justify depriving the widow of the estate.

An invalid adoption is not a ground for dispossessing the widow.

Where waste is proved the Court should appoint a Manager, who may be the reversioner.

A widow cannot endow an idol with her husband's estate.

Onus probandi.

irretrievably impaired."—(2. Hay's Reports, p. 608.) See too 8. W. Reporter, Civil Rulings, p. 273, and the Full Bench Rulings quoted in the beginning of the previous para but one of these remarks.

Mr. Scarlett, in his edition of the Punjab Civil Code, states that the High Court of Calcutta has held that in order to support a suit for divesting a Hindu widow of her estate, there must be clear evidence of acts on her part tending to injure the property, so that the interference of the Courts is necessary to prevent ultimate injury to the reversioners.

An adoption made by a widow in virtue of an alleged power from her deceased husband, which she knows to be false or fabricated, is not such an act of waste as to entitle the reversioners to possession of the estate, although they may sue to prove the adoption invalid.—Kunal Mani Dassi v. Allabhoopathy Dassi.—(1 W. Reporter, p. 257.)

Where waste had been proved on the part of the widow, the High Court held that the lower Courts had erred in giving the reversioner possession and directing his name to be registered as a joint proprietor with the widow; the proper course being to appoint a manager accountable to the Court for all his acts in respect of the estate, who should be required to render accounts periodically and to be put in possession of all the property in the widow's own possession. There is nothing to prevent the Court appointing the reversioner as such manager, if he be a fit person for the appointment. Leases, however, given by the widow cannot be interfered with unless the lessees be making waste, in which case the Court can take measures to preserve the property given in lease.—Mossman Maharam v. Nanda Lall Misser.—(1. Bengal Law Reports, Civil Appeals, p. 27.)

In Kartick Chandra Caluckerbutty v. Gour Mohun Rai the Calcutta Court held the widow was not justified by Hindu law in endowing an idol with her husband's property or with a portion of it, to the detriment of the reversioners.—(1 W. Reporter, p. 48.)

When a Hindu widow dies possessed of property, it is for those who claim it adversely to the natural heirs, and against the presumption, that the property was acquired either directly from that left to her by her husband, or indirectly by speculateing with that property as a nucleus and so increasing it, fully to prove their special pleas, and to shew that it came into the widow's hands from other sources.

A suit by a reversioner to set aside the illegal acts of a widow will abate if the widow happen to die during the litigation.—Ramjan v. Mussumati Lachi.—(1. North West High Court Reports, p. 49.)

In Bhagwan Dholi v. Myna Bhaiee the Privy Council laid it down that “according to the law of the Benares school, notwithstanding the ambiguous passage in the Mitakshara, no part of her husband’s estate, whether moveable or immovable, to which a Hindu woman succeeds by inheritance, forms parts of her stridhan or particular property: and that the text of Katyayana, which is general in its terms, and of which the authority is undoubted, must be taken to determine, first, that her power of disposition over both is limited to certain purposes; and secondly, that on her death both pass to the next heir of her husband.”—(9. W. Reporter, Privy Council Judgments, p. 23.)

Purchases made by a Hindu widow from savings from her husband’s estate belong to her only as the lands from which the purchase money was acquired belong to her: and therefore she is unable to alienate this acquired property except under such circumstances as would enable her to part with the property of her deceased lord.—Nihal Khan v. Har Charan Lall.—(1. North West High Court Reports, p. 219.)

In the case quoted in the previous paragraph but one, the Privy Council laid it down that “the estate of two widows who take their husband’s property by inheritance is one estate. The right of survivorship is so strong, that the survivor takes the whole property to the exclusion even of daughters of the deceased widow.”—(2. Macnaghten’s Hindu Law, p. 38, n. i.) They are therefore in the strictest sense co-parceners; and between undivided co-parceners there can be no alienation by one without the consent of the other.” Similarly in Jijoyamba Bayi v. Kamakshi Bayi Siaibah the Madras Court held that one of such co-widows could not have her portion absolutely partitioned off from the joint estate; although by an agreement inter se not prejudicial to the rights of the next heir, they might provide for such separate enjoyment by an apportionment of the property; but a case may be made out entitling one of several widows to the relief of separate possession of a portion of the inheritance, when from the nature and situation of the property and the conduct of the co-widows, it appears to be the only proper and effectual mode of securing the enjoyment by the plaintiff of her right to an equal share in the estate.—(3. Madras High Court Reports, p. 424.)

* See also 1. Stokes’ Madras Reports, p. 223, where it is laid down that even a childless widow totally excludes the daughters of a co-wife from the inheritance.
The Chief Court in Ramdhun v. Mussumat Karm Kour held that a Hindu widow forfeits her life estate in her husband's property by unchastity; and that Clause 19 of this Section, whatever be its true meaning, ought not to be construed as abolishing "a canon of Hindu Law so well established as that which requires chastity in the Hindu widow in remaining unmarried." In this case no defence by the widow on the ground of re-marriage was set up.—(2. Punjab Record, Case No. 85.)

The Bombay Court however has held that although by Hindu Law incontinence excludes a widow from succession to her husband's estate, yet if the estate have once vested in the widow, it is not liable to be divested unless her subsequent incontinence be accompanied by loss of caste; and since Act XXI of 1850 was passed, the inheritance will not be lost even if she be put out of caste, since that Act is not limited to renunciation of religion only, but also includes deprivation of caste, and that too without restriction to any particular ground of such deprivation.—Parvati v. Bhiku—(4. Reid's Bombay High Court Reports, Civil Appeals, p. 25.)

Although the Shahstras impose on the widow the duty of living with the relations of her deceased husband, that duty has been regarded by the British Courts as a moral duty which they will not lend their aid to enforce, and of which the non-performance does not deprive the widow of her right to inherit."—Umril Kowri v. Kidarnalli—(4. North-West High Court Reports, p. 182.)

In Mul Singh v. Mussumat Rup Kour the Chief Court held, in accordance with a precedent of the Agra Sudder Court, that the widow of a deceased son will not inherit on the death of her father-in-law in priority to her deceased husband's sister living at the time of her father's death.—(1. Punjab Record, Case No. 65.)

According to the Mithila school an unmarried daughter is preferred to one who is married: failing her, married daughters succeed without any distinction as to childlessness or indigence.—(Macnaghten's Principles of Hindu and Mahommedan Law, p. 22.) It may be doubted however if Panjabi custom recognizes any difference in the rights of different classes of daughters to the succession. But in all claims by daughters to the inheritance Clauses 6 and 7 of this Section of the Code should be carefully borne in mind.

In cases governed by the Law of Bengal the unmarried daughter is first entitled to inherit; if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have male issue are together entitled to the succession. Daughters who are barren, or widows without male issue, or mothers of daughters only, can under no circumstances inherit. By the law of Benares, preference is given
to the maiden daughter: failing her the succession devolves on the married daughters who are indigent to the exclusion of wealthy daughters, who succeed in default of indigent daughters. But no preference is given to a daughter who has, or is likely to have, male issue over a daughter who is barren or a childless widow.—(Macnaghten's Principles of Hindu and Mahommadan Law, p. 22; and 1. W. Reporter, p. 177.)

According to the Mitakshara law, a maiden daughter does not, where the family is joint, succeed to her father's estate in preference to her paternal uncle.—Mussumat Tulsiv. Mahadeb Raot.—(6. W. Reporter, Civil Rulings, p. 197.)

In Must Ram and Mathra Dass v. Mussumat Lorendi and another, the Chief Court held that, while a childless widowed daughter may inherit real property from her father in preference to distant male heirs, she does not do so absolutely, but on a title analogous to that of a widow; and consequently she cannot alienate it save on proved necessity.—(2. Punjab Record, Case No. 40.)—Macnaghten also (p. 22) remarks that the daughter's interest is not absolute.

If there be sons of more than one daughter they take per capita, and not as son's sons do per stirpes, on the general principle that property which had devolved on a daughter is taken at her death by the heirs of the father, and not by the heirs of the daughter; and the father's heirs in such a case would be the daughter's sons who are entitled to equal shares.—(Macnaghten's Principles of Hindu and Mahommadan Law, pp. 24-26.)

In cases governed by the law of Bengal, if the unmarried daughter who has succeeded to the inheritance in preference to her married sisters, subsequently marry and die leaving a son, that son will succeed to the exclusion of the sisters and sister's sons.—Radha Kishen Manji v. Rajah Ram Mandal.—(6. W. Reporter, Civil Rulings, p. 147.) For another Bengalee case in which the law of succession, according to that school, is set forth in the case of a man leaving a widow, a son who dies childless and a daughter who bares sons, see Vol. 2. Civil Rulings, p. 277.

For the authority of the wajib-al-arzin in regulating the right of succession, whenever it speaks expressly on the point in issue, see the case of Mir Mahammad v. Mussumat Hijo at p. 82 of this work.

4.—In default of these, the parents, first the mother, then the father, will succeed; and after them, the brothers, or their issue, and after them the sisters and their issue.
The mother’s interest is not absolute, and is of a nature similar to that of a widow. In a case of property which had devolved on a mother by the decease of her son, the law officers of the Sudder Court held that the rules concerning property devolving on a widow equally affect property devolving on a mother. On her death the property devolves on the heirs of her son, and not on her own heirs. —(Macnaghten’s Principles of Hindu and Mahammadan Law, p. 27.) See a like decision at 2. Stokes’ Madras Reports, p. 402.

In Amir Chund and others v. Sahiba the Chief Court ruled that there is no distinction between brothers of the whole and half blood in questions of inheritance,* where the prevalence of the custom of chunda-vund has not been established; and further, that according to Hindu law sons of deceased brothers do not take the inheritance jointly with their uncles.† Bouloois, J. remarked that—“The defendant’s plea that the system called patni bhaga or chunda-vund prevailed in the village and in the family of the litigants has not been proved; and no distinction is made by the Punjab Code of Civil Law between uterine brothers and brothers of the half blood in questions of inheritance. By para 4 Section IV Part I of the Code, after ‘the parents, the brothers or their issue inherit;’ but the rule is more fully laid down at p. 29 of Macnaghten’s Hindu Law (edition by Wilson). ‘In the succession to the estate of the grandfather, the right of representation undoubtedly exists, that is to say, the son of a deceased son inherits together with his uncle; not so in the case of property left by a brother; the brother’s son being enumerated in the order of heirs to a childless person’s estate, after the brother, and entitled to succeed only in default of the latter.’ According to the Mitakshara, para 8, Section IV—‘In case of competition between brothers and nephews, the nephews have no title to the succession.’ And so also Macnaghten says (p. 30, edn. by Wilson) ‘In default of brothers, their sons inherit in the same order, but in regard to their succession, there is this peculiarity, that if a brother’s sons whose father died previously to the devolution of the property, claim by right

* See too 2. W. Reporter, Civil Rulings, p. 41, and the authorities there quoted, and the case of Kylash Chandra Sircar v. Guru Churn Sircar, where the Calcutta Court, after reviewing the texts on the subject, came to the conclusion that the undivided immovable estate was taken by all the brothers of the whole and half blood equally, and that the preference given to the uterine brethren according to some authorities must be taken to relate to divided and moveable property.—(3. W. Reporter, Civil Rulings, p. 49.)

† In Burhan Deo Roy v. Panchoo Roy the Calcutta Court held that under Mitakshara Law a separated half brother would take the inheritance on the death of his brother’s widow, if he survived her, to the exclusion of the son of a pre-deceased associated brother of the whole blood.—(2. W. Reporter Civil Rulings, p. 123.)—See too Vol. 9, Civil Rulings, p. 464.
of representation, they take per stirpes with their uncle, being in that case grandsons inheriting with a son."—
(1. Punjab Record, Case No. 82.) But by local or family cus-
tom a brother's son may inherit with a brother, see Gopal
Singh v. Kushal Singh.—(3. Punjab Record, Case No. 62.)

Macnaghten however writes—"In default of father and
mother, brothers inherit: first, the uterine associated
brethren; next the unassociated brethren of the whole
blood; the associated brethren of the half blood, and fourth-
ly the unassociated brethren of the half blood. The above
order supposes that the deceased had only uterine, or only
half brothers, and that they were all united or all separated.
But if a man die, having an uterine-brother separated, and
a half brother associated or re-united, these two will inherit
the property in equal shares.—(Macnaghten's Principles of
Hindu and Mahammadan Law, p. 29.) But see the first note
to the last paragraph.

Where A and B, two brothers, had acquired a joint
landed estate by grant from Government, in which acquisi-
tion their other two brothers C and D did not share, and
A died leaving a son, after which B deceased leaving his
associated nephew, two widows, and his unassociated brothers
C and D, the Chief Court held that the unassociated brothers
under Hindu law would succeed to B's estate in preference
to the associated nephew, but that the widows would be
entitled to hold the estate for their life as against the
separated brothers or their representatives rather, the
brothers C and D having died between the death of B and
the time of suit. The Court further held that another estate
purchased by B, after the death of A, and when he was
separate in estate and food from C and D, with the proceeds
of the joint estate of himself and his associated nephew,
devolved by survivorship exclusively on the nephew on B's
death, and that B's widows had no title whatever to it.—
Dewan Sufa Chand v. Dewan Hemraj.—(4. Punjab Record,
Case No. 59.)

In the absence of any express agreement to the con-
trary, the mere fact that the eldest brother, in a division of
the father's estate, got a somewhat larger share than his
younger brothers, will not operate to deprive him of any
share which he may subsequently be entitled to succeed to on
the death of any of these younger brothers; the presumption
being that, according to a very common practice, he received
the excess in virtue of his being the eldest-born.—Gopal
Singh v. Kushal Singh.—(3. Punjab Record, Case No. 62.)

When the succession devolves on brother's sons alone,
as nephews, they take per capita as daughter's sons do.—
(Macnaghten's Principles of Hindu and Mahammadan Law, p.
Nephews exclude great nephews, and nephews of the whole exclude those of the half blood.

In Gulab Singh v. Nihal Singh, the Chief Court held first that nephews are entitled to succeed before the sons of nephews, and secondly that nephews of the whole blood, that is, the sons of uterine brothers of the deceased, exclude the sons of brothers of the half blood, or of brothers by the same father as deceased but by different mothers.—(3. Punjab Record, Case No. 112.) So too the Calcutta Court has ruled—"There is, under Hindu law," that Court observed in Kyalash Chandra Sircar v. Guru Charan Sircar, "no analogy between whole and half-brothers and their respective sons; and whilst there are some authorities which might, at first sight, seem to make the whole brothers succeed in preference to those of the half-blood, all are agreed that when the succession devolves on nephews, those of the whole blood peremptorily exclude those of the half blood."—(3. W. Reporter, Civil Rulings, p. 43.) This decision was adhered to subsequently on an application for review.—(6. W. Reporter, p. 93.) Associated nephews also exclude the sons of separated brothers.—Kesabam Mahapatra v. Nand-Kishor Mahapatra.—(8. Bengal Law Reports, Civil Appeals, p. 7.)

A nephew is not competent under law to object to any alienation of ancestral property even directly made by his uncle.—Gunga Den Rawan v. Madhu Sarun.—(4. North-West High Court Reports, p. 4.)

Brother's grandsons.

"In default of brothers' sons, their grand-sons inherit in the same order, and in the same manner, according to the law as current in Bengal; but the law of Benares, Mithila, and other provinces does not enumerate the brother's grand-son in the order of heirs, and assigns to the paternal grandmother the place next to the brother's son." (Macnaghten's Principles of Hindu and Muhammadan Law, p. 31.) But he has been held able to succeed as one of the Sapindals, in the failure of nearer heirs, even in cases governed by Mitakshara law.—(6. W. Reporter, Civil Rulings, p. 159.)

Brother's granddaughters.

A brother's son's daughters are not heirs according to Hindu law.—(Radha Pyari Dassi v. Durga Mani Dassi.—(5. W. Reporter, Civil Rulings, p. 131.)

A sister by Hindu law is not an heir.


A sister succeeding on a sister's death is not bound by decrees obtained against the latter in her life-time.

In Joygobind Sohoy v. Mahlab Kunwar, Peacock C. J., in delivering the judgment of the Court, observed—"The plaintiff in this case claims as heir of her father. She does not claim as heir of her sisters; and although she and her
sisters took the estate as heirs of the father, still her sisters
had merely the right, which a female takes by inheritance,
namely a right which continues only during her life. The
sisters could not transmit the estate to their heirs, but the
estate upon their death passed to the plaintiff as heir of
her father. Therefore the plaintiff is not bound by the
decrees which were obtained against the sisters during their
lives.”—(7. W. Reporter, Civil Rulings, p. 1.)

In Mussunat Thakurain and another v. Mohun Lall,* quoted
with approval in Mohunnee Ram v. Mohunna Ram (1. Punjab
Record, p. 52), an alleged adoption by a Hindu widow
was set aside in favor of a son of the sister of the last male
owner, on failure of the proof of the existence of any
Samânodakas, or lineal male descendants of the fourteenth
degree, or Bandhus † or cognate relations. (These two
classes of relations together with the Sapindas will be found
deﬁned in Maunaghten’s Principles, pp. 36, 37, and in 6. W.
Reporter, Civil Rulings, p. 158.) As however in the case
then before them the Chief Court found the plaintiffs were
within the fourteenth degree of relationship to the deceased,
and that local custom also was adverse to the succession of
sisters’ sons, the Court decreed the real property to the
plaintiffs in opposition to the sister’s sons, who had been
living with the deceased for some years. The Court refused
however to compel the defendants to account for the move-
able property of their uncle, which had been allowed them
by the Court of ﬁrst instance. In Gurmuck v. Gumani and
others, which was also a dispute between a sister’s son and
the defendants, claiming as male heirs, the case was remar-
ed, on the authority of Mussunat Thakurain v. Mohun Lall,
that it might be determined whether or no, the defendants
were within the fourteenth degree of lineal descent.—(1. Punjab
Record, Case No. 30.)

In Ganpat v. Kanah the Chief Court recognized the
right of a sister’s son to inherit by virtue of the custom
prevailing in his neighbourhood, in the absence of male
heirs within the fourteenth degree, although under Mitak-
shara law a sister’s son is not enumerated among the heirs.
—(3. Punjab Record, Case No. 19.) For the Hindu law on
the point, which, as here stated, is adverse to the right of

* The decision of the Agra Court in this case was however reversed on
appeal by the Privy Council, who decided that a sister’s son was not in
the line of heirs, and therefore the plaintiff had no right to sue.—(Sutherland’s
Privy Council Judgments, p. 681.)

† The Privy Council in Girdhari Lall v. The Government of Bengal,
reversing the judgment of the High Court—(4. W. Reporter, Civil Rulings,
p. 19.), held that the list of Bandhus given in Article 1, Section 6, Clause 3
of the Mitakshara is not exhaustive, but is used simply as a proof or illustra-
tion that there are three kinds or classes of Bandhus.—(10. W. Reporter,
Privy Council Judgments, p. 31.)
sisters' sons being reckoned among the heirs;* see the Privy Council Judgment in Musunmat Thakurain v. Mohun Lal. (Sutherland's Privy Council Reports, p. 681); 1. W. Reporter, p. 74, where the Calcutta Court remarked that "the sister's son, except in Bengal, is no heir according to the Mitakshara or the Mithila school"; also 1. Stokes' Madras Reports, p. 85, and Macnaghten's Principles, p. 31, to the same effect, with the addition that in Bengal cases even he is reckoned after the brother's grand-son; 1. W. Reporter, p. 360, and Vol. 2, Civil Rulings, p. 180, where a sister's daughter was also held to be no heir. But a Full Bench of five Judges of the Calcutta Court has recently held that a sister's son, under the Mitakshara system even, inherits as a bandhu.—Amrita Kumari Debi v. Lakhi Narayan Chuckerbutty.—(2. Bengal Law Reports, Full Bench Cases, p. 28.)

According to Bengal Law, a grand-son, born after the death of his maternal uncle but during the life-time of his maternal grand-mother, may inherit from her the property which she inherited from the uncle (her son).—Radha Gobind Dass v. Sheikh Mewaan.—(1. W. Reporter, p. 124.) See too p. 353 of the same Reports.

In Ray Devi v. Moolla the estate of one Harji was claimed by the plaintiff, who was the widow of Bhana, a first cousin of the deceased, on her own account and that of her son Ruldu. Her suit was opposed by the defendant, who claimed through his mother, the niece, and his grand-mother the sister of Harji. Part of the immovable property was the joint undivided property of the deceased and of Bhana. The Chief Court, affirming the judgments below, held that Ruldu if alive was the heir; but that if he were dead, of which there was no proof, then his widow, and after his widow, his mother the present plaintiff would succeed. But on the ground apparently that the defendant had performed the obsequies of the deceased, the Court refused to decree an account of the moveables against the defendant.—(1. Punjab Record, Case No. 76.)

5.—It is not necessary to trace the succession further, especially as there is some uncertainty with regard to the remoter branches, and in such cases the Court can decide, either by legal analogy, or with reference to custom.

* As pointed out however by Mitter J. in the Calcutta Full Bench case alluded to at the end of the paragraph in the text, the Counsel for the respondent declined to defend the case, on the ground of a sister's son being a bandhu, and relied on proving him to be a sapinda; the Privy Council Judgment therefore in reality only disposed of the point that he is not a sapinda.
The further steps in the succession according to various schools are given briefly in Macnagthen's Principles of Hindu and Muhammadan Law, pp. 32–37; but a reference to authorities will for the most part be only useful for the purpose of enabling the Court to test and weigh the evidence as to the lex loci which would usually govern the succession in such cases.

In Tara Chand Ghose v. Padam Lockun Ghose, the Calcutta Court ruled that according to Hindu law, where re-union has taken place among certain members of a family after partition the members of the re-united family and their descendants succeed to each other to the exclusion of the members of the unassociated or unreunited branch.—(5. W. Reporter, Civil Rulings, p. 249.)

In Churut Singh v. Sobha Singh and others, the Chief Court held, on the authority of Macnagthen's Principles, that a son of a paternal uncle is not entitled to share the estate with the paternal uncle except in the case of succession to the estate of a grand-father.—(2. Punjab Record, Case No. 16.)

"A Hindu inheritance cannot remain in abeyance for an unbegotten heir, such not being a posthumous son, but must vest in the heirs existing at the time of the death of the person whose inheritance descends."—Koylashnath Dass v. Gyamani Dassi.—(Sutherland's Civil Rulings for June 1864, p. 314.) In Kalidass Dass v. Krishan Chandra Dass a Full Bench of the Calcutta Court ruled that an estate once vested cannot be divested by the birth of an heir subsequently to the devolution of the estate unless the child shall have been conceived in the womb at the time the inheritance descended, "for a son in the womb is in point of law in existence."—(2. Bengal Law Reports, Full Bench Rulings, p. 103.)

Should cases come before the Punjab Courts involving the inheritance of Bengalis leaving property in this Province, the law which would usually have to be applied, would be that of Bengal, since it is a rule that a person settling in a foreign district shall not be deprived of the law of his native district, provided he adhere to its customs and usages.—(Macnagthen's Principles of Hindu and Muhammadan Law, p. 38.) The onus of proving that the immigrant has adopted the rites, customs and succession rules of his new domicile in lieu of those of his place of origin rests on the person asserting it, the legal presumption being the other way.—(Sutherland's Civil Rulings for February 1864, pp. 56 and 93.) The mere fact however that one of the present parties to the action had agreed in a previous suit that a question of adoption should be tried by the law of the domicile which on that head happened to be simpler than the law of the
place of origin is no sufficient proof that the family was regulated by that law in all other matters, such as inheritance &c.—Ram Bromo Panday v. Kamini Sundari Debi. (1. W. Reporter, p. 125.) But proof that in matters connected with succession the law of the country of the domicile has been adopted negatives any presumption arising from the observance of ancient customs in other matters.—Chandra Leekhur Roy v. Nabin Sundar Roy.—(2. W. Reporter, Civil Rulings, p. 198.)

6.—It is, under all circumstances, doubtful whether a daughter can be allowed to succeed to her father's immoveable or ancestral property, in preference to his male relatives; she might succeed if the property were moveable and acquired. But if when debarred from the succession, she should be unmarried, then a portion must be reserved from the estate, sufficient to defray the expenses of her marriage.

7.—If the father should have held a share with his brothers in a joint undivided property, the daughter will not succeed to the share before the father's brethren. Among many families, and especially among co-parcenary communities, there is a disposition to keep the succession in the male rather than in the female line; and members
without male issue are not allowed to adopt sons-in-law, as their heirs, from other villages, to the exclusion of their male relatives, against the wish of the brotherhood.

8.—By the Mahomedan law the primary distinction is between legal and residuary shares. The legal sharers are those whose shares must first be separated off; the residuaries may divide the remainder after the legal sharers have been satisfied. The legal sharers are the parents, the grandfather and grandmother, the husband and wife, the brother, the sister and the daughter. The residuary sharers are chiefly the sons and their descendants. After these come the distant kindred.

It is a general rule of Mahammadan inheritance law that the son of a person deceased shall not represent such a person if he die before his father; thus, if A have three sons B, C, D., and D. die before his father leaving a son E., on A's death E. will not take with his uncles B. and C. pure representation.—Macnaghten's Principles of Hindu and Mahammadan Law, p. 152.)

The same rule applies to the rights of husbands and wives to inherit from each other. "Whatever may be the position and rights of a husband being the only surviving heir of his wife," observed the Court in Mussummat Ekin Bibi v. Mir Ashraf Ali, "it is a first principle of Mahammadan law that there is no representation in matters of succession, and therefore those rights do not descend to the heirs of a husband who has predeceased the wife, and who are themselves no relations of the wife. In fact, under the Mahammadan system marriage is purely of the nature of a contract, and after that contract is dissolved by death or in any other way, the parties or their heirs bear no more relation to one another, than the heirs of those persons who were at some former time partners in the same mercantile house."—(1. W. Reporter, p. 152.)

In Mussummat Mehrunnissa v. Wazir Ali, the Chief Court held that among Mahammadans of the Shiia persuasion, a husband is heir to half the estate of a childless wife, notwithstanding she may have separated herself from him and resided until her death with her family; and that the wife.

No right of representation.

The heirs of the predeceased spouse do not inherit from the surviving spouse.

Rights of husband and wife to inherit from each other among the Shiahs.
is at liberty during her life-time to alienate her whole estate by gift.—(3. Punjab Record, Case No. 75.) And conversely, the Calcutta Court ruled that there appeared to be nothing against a childless widow among the Shias inheriting from her husband.—Raisunnissa Begum v. Rani Khajurunnissa.—(10. W. Reporter, Civil Rulings, p. 462.) In Mussunmat Tununjat v. Mehndi Begum however the Agra Court laid it down that among that sect a childless widow takes no part of her husband's immovable estate, but that she is entitled to a share in the proceeds of the building materials of houses and buildings.—(4. North West High Court Reports, p. 13.)

A maternal grand-father, and the mother of the maternal grand-father are excluded from the number of sharers or residuaries.—(Macnaghten's Principles of Hindu and Mahammadan Law, p. 157.) Where a Mahammadan woman bore a son to an European with whom at the time she cohabited who was brought up by his father as a Christian, the mother in such a case was held not to be entitled to inherit from him, as the provisions of the Mahammadan law are inapplicable; but the son should, according to English law, be considered as a nullius filius, and the State alone be entitled to his property.—Zuhooran v. Burgess.—(1. W. Reporter, p. 272.) See too the Secretary of State v. the Administrator General of Bengal, where the property of an illegitimate son of an Englishman by a Musalmani, who had during his life-time professed in a general way the Christian religion, was held on his death without a written will to pass to the Crown as ultimus heres, to the exclusion of the mother, the mistresses and the illegitimate children of the deceased.—(1. Bengal Law Reports, Orig. Side, p. 87.)

By Mahammadan law a widow who inherits real property, takes it in full ownership free from the restrictions which fetter the Hindu widow: nor can this principle be set aside, except on complete proof of the existence of a local custom to the contrary.—Mussunmat Rani v. Ghulam Ghons. (2. Punjab Record, Case No. 3.) See too 1. W. Reporter, p. 79.

For the effect of death-bed divorces on the rights of inheritance of the parties, see below under Clause 8 Section VI Punjab Civil Code.

A distinction is made between the two descriptions of half-brothers, and half-sisters. Half-brothers and half-sisters, who are by the same father only, can never inherit a half-brother's estate while there are both brothers and sisters by the same father and mother; but those by the same mother only do inherit with brethren of the whole.
blood.—(Macnaghten's Principles of Hindu and Mahammadan Law, p. 155.) Thus in Kamala v. Jamala, where A. and B. were sons of a deceased zemindar by one wife, and C. by another wife, the Chief Court awarded B. the whole of A's. land on the latter's death to the exclusion of C., no custom to the contrary having been satisfactorily established.—(2. Punjab Record, Case No. 63.)

"According to the Mahammadan law want of chastity in a daughter, before or after the death of her father, or whether before or after her marriage, is no impediment to her inheritance."—Noronaran Roy v. Memaco Chund Neugy.—(6. W. Reporter, Civil Rulings, p. 303.)

In Haku v. Wazira it appeared that a Musalman landowner, by name Mahtab, had died leaving a widow and four daughters only. His widow, Mussumat Bhaggan, took possession of the land, and on her death, Wazira, who had married one of the daughters and lived with Mahtab and Bhaggan, obtained possession of the estate. All the biswah-dars of the village, under the general allegation of being male heirs, claimed the inheritance. On appeal, the Chief Court ruled that the right heirs of Mahtab were, in default of heirs within five degrees of kindred, his daughters, and remanded the case for an enquiry into the relationship of the plaintiffs to Mahtab.—(2. Punjab Record, Case No. 31.)

The acknowledgment of the father renders the son or daughter a legitimate child and an heir, unless it be impossible for the son or daughter to have been so either from the difference of their respective ages, or from the descent of the acknowledged child being already established from another.—(Baillie's Digest, p. 405; and 5. W. Reporter, Civil Rulings, p. 132.)

"If the claimants be equal in proximity to the deceased, and there be no child of an heir among them, the property is to be equally divided among them, if they be all males or all females; and if there be a mixture of males and females, then in the proportion of two parts to a male and one to a female."—(Baillie's Digest, p. 706.) See this law quoted and followed in 10. W. Reporter, Civil Rulings, p. 315.

Questions as to succession among converts to Islam from Hinduism must be regulated by Mahammadan law; since the doctrine of Abraham v. Abraham does not apply to the case of parties adopting a religion such as Mahammadauism, in which the whole law of the succession to property is bound up with the faith itself.—Sarmast Khan v. Kadir Dad Khan (Full Bench Ruling of the North-West High Court, of September 5th, 1866.) See too Vol. 2, p. 61, of the general rulings of that Court.
9.—Of the legal sharers above enumerated, there are some who do not receive their share under all circumstances. For instance, if the parents are surviving, the grandfather and grandmother have no claim to a share; nor have brothers and sisters any claim when there are children. There are also some legal sharers whose share differs according to circumstances. For instance, if there are no children, the legal share of a widow is one-fourth, of a parent one-third; if there are children, the share of a widow is only one-eighth, and of a parent one-sixth.

In \textit{Mussumat Hatibz v. Mussumat Mehdu} the Chief Court, on the authority of Macnaghten's Principles of Hindu and Mahammadan Law, section II, paras 21 and 25, interpreted* the word "children" in this Clause to mean only "male children."—(\textit{4. Punjab Record, Case No. 7}.)

Daughters without sons are legal sharers, and so are sisters, without brothers; otherwise they become merely residuaries.—(Macnaghten's Principles of Hindu and Mahammadan Law, p. 153, note.)

On the authority of Macnaghten's Mahammadan Law the Calcutta Court held, in \textit{Mussumat Azizunnisa v. Ruhman Ullah}, that the daughters of a deceased brother of a person who demises cannot take any share of such person's property so long as a brother and sister, or only a brother survives.—(10. W. Reporter, Civil Rulings, p. 306.)

A child in the womb inherits. If he be one whose birth will exclude the other heirs, as in the case of a son when the other heirs are brothers or sisters or paternal uncles, the whole inheritance must be reserved to await the result of the birth. When only some of the heirs would be

* In their judgment in this case the Court expressly considered the point whether reference could be made to Mahammadan Law, as declared by Macnaghten, in order to ascertain the proper meaning of an expression used in the Punjab Civil Code. In resolving this in the affirmative the Judges remark—"In para 1 of the Commentary on Section IV of the Code, circulated along with it by authority, it is said ‘that the principles contained in this Section are to be found in * * * Chapter VIII and Chapter I Macnaghten's Mahammadan Law, and in the translation of the Surajeh and Shurifiah Vol. VIII of Sir William Jones' works,' and in para 2 that 'details regarding distant kindred and the succession of collateral branches have not been attempted. In cases of doubt references could be made to the works above
excluded, as when there is a grandmother and a brother, the grandmother's sixth, to which she is entitled whether the child be borne alive or not, is to be paid her and the rest of the estate reserved. If the child be only a partial excluder, as when there is a husband or wife besides him, the smaller of the shares, to which the party may be entitled, is to be paid him or her, and the remainder retained. If the child be only a participator with the other heirs, and neither a total nor a partial excluder, as when the deceased has left sons and daughters and a pregnant widow, the share of one son is to be reserved.—(Baillie's Digest, p. 702.)

A missing person is regarded as alive so far as regards his own property, and dead as regards the property of others, until such a time has elapsed that it is inconceivable that he should be still alive, or till his contemporaries be dead; after which he is to be accounted dead with respect to his own property as from the day when such time was completed, or the last of his contemporaries died, and with respect to the property of others, as if he had died on the day of his being missing. When one has died to whom the missing man is an heir, his share is to be reserved until the time above defined has arrived, when if he have continued missing, his own property is to be divided amongst those of his heirs who are then alive; but what has been reserved for him from the estates of other persons is to be returned to the heirs of such persons, as if the missing person had never cited.' It is clear therefore that a reference to the recognized authorities named in the Commentary is contemplated by the Code in cases of doubt. It is also plain that if the word children in the Code do not mean male children, a rule of inheritance differing from that of Mahommadun Law has been enacted by this provision of the Code. If a new law have really been enacted in the Code it would prevail over the provisions of the Mahommadun Law, as it has been definitely settled that the Principles of Law, called the Punjab Civil Code, have the force of law in this province; it is material therefore to consider whether this were the intention of the Code. We think that it is manifest from the language of paras 1, 8, 9, of Section IV, Part I, that the intention was merely to give an abstract of the principles of inheritance under the Mahommadun Law of Inheritance. The only exception is stated in Section 13, where usage is recognized as superseding the strict rule of Mahommadun Law; but no question of usage is raised in this appeal. And if any doubt could still exist with regard to the intention of the Code in this respect, it would be finally set at rest by the language of para 3 of the Commentary on this Section, which proceeds thus—'Under the Regulations (Regulation VIII of 1786,) questions of importance regarding inheritance are left exclusively to be determined by Native Law. Neither in this Section is any innovation proposed. The only deviations are those cases where acknowledged custom may have superseded the law. The Commentary on the Principles of Law circulated with it, so far as it declares this law and explains those principles, is of equal force and effect with them, the whole forming what is ordinarily called the Punjab Civil Code. We are accordingly of opinion that we are bound to reconcile the rules of inheritance laid down in this Section of the Code with those contained in the above recognized authorities on Mahommadun Law, as far as we possibly can; and on this principle we decide that the word children in the above quotation from the Code has exclusive reference to male children.'
10. The relative positions of legal and residuary sharers may be thus illustrated. If a man, an owner of property, die intestate, leaving a widow, a father, a mother, a daughter, legal sharers, and two or more sons, residuary sharers, then of the whole property, the widow will take one-eighth, the father one-sixth, the mother one-sixth, and the daughter a variable share according to the number of sons (her share being half the amount which may be determined to be the share of a son); and these legal shares, having been first separated off, the remainder will be divided in equal shares among the sons. If a man die, leaving a widow only, and two or more sons, then the widow will take her eighth, and the remainder will be divided amongst the sons. If, again, a man die leaving only sons, and no widow, nor parents, nor daughter, then the sons will divide the entire estate. Thus the portion of legal sharers is determinate; while the portion of residuary sharers is indeterminate, and varies as the number of legal sharers may be greater or less.

In Ameeha Bibi v. Zeifa Bibi, the Calcutta Court decided, on the authority of Macnaghten's Precedents of Mahammadan Law, that one of two sharers can give over his share to the other even before partition.—(3. W. Reporter, Civil Rulings, p. 37.)

11.—When the sharers are numerous, the distribution will be effected by four kinds of numbers:—First "Mutamasil" or equal, second "Mutadakhil" or concordant, third "Mutawafiq".
or composite, fourth "Mutabayun" or prime. The arithmetical details of such division are to be found in the "Seerajeeah," or rule of Mahammadan inheritance.

When a creditor or heir has entered into a composition for some part of the estate, the rule is to treat that part as if it were not in existence; and then to divide the remainder according to the shares of the remaining heirs.—(Baillie's Digest, p. 722.)

12.—The above rules of Mahammadan inheritance are ordinarily acknowledged by Shiahs as well as Sunnis.

13.—In some agricultural districts the usage, among Mahammadans, has superseded the law of inheritance, and has become nearly assimilated to the Hindu system. Where such usage is defined, and certain, it will be followed in preference to the law.

Among the Khwajahs of Kussoor in the Lahore district there is a local custom that in default of issue the widow shall take the estate absolutely, to the exclusion of the sisters of the deceased.—Mussumat Begum v. Mussumat Hijani—(3. Punjab Record, Case No. 27.) See too Case No. 29 of the same Volume, where the influence of custom on the succession of daughters among the Mahammadan Rajputs of the Jullundhur district is discussed.

The general lex loci both among Mahammadans and Hindus of the Punjab is that married daughters are not entitled, in the presence of their father's nephews to inherit any of their father's landed estate as of right, in the shape either of a specific share of the land, or of an arbitrary quantity of it by way of maintenance: and therefore if a claim to inherit be set up by a married daughter under these circumstances the onus is strongly upon her to shew that amongst her tribe the custom is different.—Waga v. Mussumat Mehr Bibi.—(3. Punjab Record, Case No. 78.)

For the criteria of a usage or custom in the legal sense, see above, pp. 124—129.
14.—By the Hindu law, the various heirs, according to their legal order, inherit successively; by the Mahammadan law they may inherit simultaneously. Under the latter system the inheritance may, at the same time, in part ascend lineally, and in part descend lineally.

15.—Although by Hindu law the aged parents and the nearest female relatives, such as widow or sister are not entitled (as by the Mahammadan law) to specific and prior shares, yet they are, in all cases, entitled to maintenance from the heirs in possession of the inheritance, and if, after the father's death, the sons divide a joint inheritance equally, the widow, if there be one, may claim a share.

A widow of a Hindu who was a member of a joint family and died in the lifetime of his grand-father, is not entitled to the share which would have devolved on her husband on the death of the head of the family had he survived. —Bindu Bashini Dassi v. Anund Chandra Pal.—(2. W. Reporter, Civil Rulings, p. 180.)

It is not necessary when a Court has to fix the rate of maintenance to be allowed to a Hindu widow to allow such a sum as is needful to maintain her in the same state as her husband would have maintained her in.—Kali Pershad Singh v. Kapur Kunwari.—(4. W. Reporter, Civil Rulings, p. 65.)

Where the widow claims maintenance from a brother of her husband on the ground of his having inherited property from the father, the amount of this income must be taken into consideration in fixing the rate of maintenance, and not merely the necessities of the plaintiff. It should also be kept in mind that if the income of the payer from ancestral property, or, in case of personal liability, if his personal property be small, it may be more convenient to maintain the plaintiff if she live in his house than if she were to live separate.—Bhagwan Chandra Bose v. Bindu Bashini Dassi—(6. W. Reporter, Civil Rulings, p. 286.) See too, 1. Bombay High Court Reports, p. 194, where the Court remarked that "a widow has by Hindu law a legal right to maintenance, and the amount should be determined on a consideration not
merely of her absolute necessities, but also of the circumstances of the family. In the words of Sir T. Strange "she should be provided for by an assignment of land or an allowance of money, in either case proportioned to her support and that of those dependent on her, including the performance of charities and the discharge of religious obligations, and this always with reference to the amount of the property so as at the utmost (as has been said) not to exceed a son's or other parceller's share."

The obligation of a Hindu to maintain his son's widow is limited by his means of doing so, and therefore it is an error in law for a Court to assign a particular rate of maintenance without making an enquiry as to the defendant's means of complying with the order, when the objection of poverty has been put forward.—Rultan Chand Shurt v. Srimati Hari Mani.—(5. W. Reporter, Civil Rulings, p. 225.)

A majority of a Full Bench of the Calcutta Court, however, held that according to the law as administered in Lower Bengal the duty of a father to maintain a son's widow who refuses to reside in his house, is a mere moral obligation, not enforceable at law. Peacock C. J., who delivered the judgment of the Court, distinguished between the case of a son's widow claiming support from her father-in-law, who is not the heir of his son in preference to the widow, and a widow demanding maintenance from the heirs of her husband, who have taken his estate by inheritance; the obligation of an heir to provide out of the estate which descends to him maintenance for certain persons whom the ancestor was legally or morally bound to maintain being a legal as well as moral obligation, for the estate is inherited subject to the obligation of providing such maintenance. A son who takes his father's estate by inheritance is bound to maintain his father's widow, such maintenance being a charge on the estate payable so long as the widow continues chaste, whether she continue to live in the family of the heirs or not, but kinsmen are not legally, if they be morally, bound to support the widows of the family who are destitute of the means of subsistence, unless they take some property liable to the charge.—Kashinath Dass v. Khetramani Dassi—(9. W. Reporter, Civil Rulings, p. 413.) This decision, upheld on appeal by a Court of seven Judges—(2. Bengal Law Reports, Full Bench Cases, p. 15), over-rules the contrary ones in Sutherland's Civil Rulings for April 1864, p. 177, and in 2. W. Reporter, Civil Rulings, p. 134.

On the authority of this case of Kashinath Dass v. Khetramani Dassi, a Divisional Bench of the Calcutta Court held that a widow who claimed maintenance from the brothers of her deceased husband, into whose possession the family property had descended, could only obtain the bene-
A widow does not forfeit her right to maintenance by quitting the house of her husband's family.

The rate of maintenance may be altered on due cause shown.

A Small Cause Court cannot decree maintenance.

Enforcement of a decree for maintenance.

Rights of a decree-holder for maintenance.

When a widow can follow family property sold to charge it with her maintenance.

Besides the obiter dictum in the foregoing Full Bench decision, the question whether the heirs of her husband were bound to continue to maintain a widow, who without any unchaste or criminal motive refused to reside with the family of her late husband, was considered in Aholya Bhai Debi v. Lucki Mani Debi, and the Court found that residence with the relations of the deceased husband was a moral and not a legal duty, and no forfeiture should be imposed on a widow who for no immoral purposes shows a preference for dwelling elsewhere than with her husband's family, but the latter are bound to support her.—(6. W. Reporter, Civil Rulings, p. 37.) This decision was in accordance with one of the late Supreme Court, and was followed by another High Court Bench in a case reported in 9. W. Reporter, Civil Rulings, p. 152. In this last case the Court also ruled that there is nothing to prevent an order for increasing or decreasing the amount of maintenance on sufficient cause being shown, but when the Court augments the amount, the increase should be awarded only from the date of suit, and not from the time when the former payments ceased.

"A Small Cause Court has jurisdiction only as regards arrears of fixed maintenance, and not for the determination of the right to receive it."—Bhagwan Chandra Bose v. Bindu Bashini Dassi.—(6. W. Reporter, Civil Rulings, p. 286.)

In Premo Bibi v. Dasso Debi the High Court held that where the holder of a decree for maintenance is opposed in execution by the heirs of her judgment-debtors, the questions arising between them can not be determined in execution, but must be tried in a regular suit.—(10. W. Reporter, Civil Rulings, p. 93.)

In Jooravun Singh v. Mussumat Jhoota, the Calcutta Court laid it down that "in equity a Hindu woman holding a decree for maintenance against a person who has no other property besides the one, the proceeds of which are at present in dispute, is justly entitled to a preference over any other judgment-creditor."—(2. W. Reporter, Miscellaneous Rulings, p. 29.) The facts of this case are not given unfortunately in the judgment, for see Section 270 Act VIII of 1859.

In a case in which a purchaser of property was kept out of possession by a widowed relative of the seller, the High Court expressed an opinion that the widow's claim to maintenance would not necessarily render the sale of the property subversive of her right, for there might be other
property in the hands of the seller, out of which the main-
tenance could be derived, and even if there were no other,
there was nothing to prevent her suing to establish her
right to make her maintenance a charge upon the property
sold.—Anund Mayi Gupta v. Gopal Chandra Banerjee.—
(Sutherland’s Civil Rulings, for June 1864, p. 310.) Where
however a widow had relinquished by an agreement with her
brothers-in-law her claim to a share in the estate for a money
annuity, she was considered to have no right to demand that
the estate of one of the brothers which had been sold should
be charged in the hand of the buyer with the payment of
her annuity, as it was clear by the agreement she had given
up her right to the land and trusted to the surviving
brothers personally for her maintenance.—Paro Bibi v.
Gangadhar Banerjee.—(6. W. Reporter, Civil Rulings, p. 198.)
So in Hira Lall v. Musumut Konsillah the Agra Court laid
it down that a Hindu widow’s right to maintenance is an
actual lien on the property of her deceased husband, and
not a mere right of personal action against the heirs; and
therefore remains claimable out of the property after its
alienation by the heirs on their making default, unless the
widow have bargained to forgo her right.—(2. North West
High Court Reports, p. 42.) The maintenance must however
be sought in the first place from the heirs, and only by follow-
ing the estate as a last resort.—(p. 134 of the same Reports.)

Since the maintenance of the widow is a charge on the
whole estate, and consequently upon every part thereof, a
decree may be passed against one only of the sharers, who
consequently may sue the other sharers for contribution.—(4.
Reid’s Bombay High Court Reports, p. 73.)

For the rights of wives to maintenance, see under Clause
5 Section VI of the Punjab Civil Code; and for the rights of
widows on partition, see Clause 9 Section IX of the same.

Although a Hindu widow may have shared in the family
estate and maintained herself by independent trading for
many years, she is still entitled to maintenance from her
husband’s relatives should she become destitute.—Bai
Lakshmi v. Lakhindass Gopaldass.—(1. Bombay High Court
Reports, p. 13.)

There is no principle or rule of Hindu law which recog-
nizes any authority in a widow entitled only to mainte-
ance to make contracts for necessary supplies binding upon the heir
in possession of the family property; although, if the widow
can enforce payment of a suitable amount of maintenance
from the heir for the time during which she incurred her
debt to the plaintiff, the latter will be entitled on equitable
grounds to be considered an assignee of his proper debtor, and
to stand in his place to the extent of the amount ascer-
A right to maintenance being a personal right cannot be attached by a decree-holder, but he may put up to sale maintenance alleged to be due to his debtor for time past and gone; in which case the purchaser must of course take the risk of finding that the arrears have been paid up or enjoyed, and that nothing remains to pass by the sale.—Mussamat Dulun Kunwar v. Sangan Singh.—(7. W. Reporter, Civil Rulings, p. 311.)

16.—The performance of obsequies by Hindu law devolves on the heir of the deceased, but the discharge of this duty does not, per se, confer a right of succession.

It may be stated as a general principle of Hindu law that he with whom rests the right of performing obsequies is entitled to preference in the order of succession; but there are exceptions to this rule; for instance, in the case of a widow dying, and leaving a brother and daughter surviving her, when the daughter takes to the exclusion of the brother although the exequial ceremonies must be performed by the latter. The passages of Hindu law which intimate that the succession to the estate and the right of performing obsequies go together do not imply that the mere act of celebrating the funeral rites gives a title to the succession; but that the successor is bound to the due performance of the last rites for the person whose wealth he inherits.—(Macnaghten's Principles of Hindu and Mahamudan Law, p. 39.)

"The following question was referred to a jury of Hindus at Lahore:—If a Hindu widow die leaving no assets, and her elder son, with whom she was living, advance the whole of the funeral expenses, and sue his younger brother for his share, is the latter liable?

The jury were unanimously of opinion that,—

First. In a case, where the mother leaves no assets, both sons are bound to contribute in equal shares to necessary funeral expenses, but if one son make an extravagant funeral, the other son could not be bound to share in that extravagance, unless he had agreed to do so. By 'necessary expenses' are meant such expenses as may be deemed necessary with regard to the status of the deceased.—(The jury refer for their authority to the Daya Bhaga, a section of the Biwardya division of the Mitakshara.)
Secondly. In a case where the mother leaves assets, the elder brother would not have, according to the Shastras, a claim upon his younger brother for a share of the funeral expenses, because the eldest son is allowed a twentieth share of the property in excess for this very purpose: but as the rule of the Shastras regarding the additional share of property devolving on the eldest son is not carried out in practice, the same principle will ordinarily apply as in the former case. —(Judicial Commissioner's Ruling, No. 23—Thornton's Small Cause Court Manual, Addenda, p. 166.)

17.—In neither the Hindu nor the Mahomedan law is primogeniture admitted; the sons inherit equally. The doctrine of primogeniture may indeed find some support in the ancient Hindu law as regards a larger share being allowed to the elder son. But this principle is not admitted in the present age except among independent Princes and Royal Families; and even then it would apply to the descent of the sovereignty (Raj) and not to the private property of the Prince.

But for a custom prevailing among some classes of allowing the eldest son a somewhat larger share on partition, see before, p. 149.

Seniority by birth, independently of the dates of the marriages of their respective mothers, gives among legitimate half-brothers such privileges as by Hindu law primogeniture may happen to confer, as, for example, succession to a zamindari, a right to the management of the joint property &c.; an exception perhaps being made in favor of the son of the first wife.—Sivananjanja Perumal Sethurayar v. Muttu Ramalinga Sethurayar.—(3. Madras High Court Reports, p. 75.)

18.—Among village communities the inheritance is sometimes divided equally between the issue of each wife. The system is called “choonda vund” in the provincial dialect, and “Patni Bhaga,” in legal phrase, and according to it, if a man left two sons by one wife, and one son by another wife, the two sons would receive one-half of the property, and the one son the other half.
In the matter of claims to the inheritance of a brother by a different mother, see the case of Amir Chund v. Sahiba (p. 148) where the parties are Hindus; and that of Kamala v. Jamala where they are Mahammadans.

19.—None of the disqualifications and disabilities declared in the Hindu or Mahammadan law, whether relating to physical, mental or moral infirmity, to sect or religion, to ceremonial defects, to degradation or expulsion from caste, will be allowed by the Courts to operate as grounds for exclusion from inheritance. No disability can have legal effect, unless it be specially declared and sanctioned by positive law.

The Act which put an end to forfeiture of inheritance rights by reason of a change of religion is Act XXI of 1850, which will be found appended at the end of this Chapter. The following illustrations of it are subjoined here.

In Mahataba v. Jabha the defendant admitted that the plaintiff was entitled to the share in the ancestral estate claimed by him, but pleaded that he had forfeited his rights by embracing Islam. The Chief Court affirmed the judgments of the lower Courts in favor of the plaintiff in accordance with this Section and Act XXI of 1850 "which being declared to extend "throughout the territories subject to the Government of the East India Company," applies to the Punjab."—(2. Punjab Record, Case No. 67.)

A Hindu widow changing her religion and then remarrying does not lose the estate she inherited from her first husband.

In Gopal Singh v. Dhungrazee, the Calcutta Court held that where a Hindu widow had embraced Islam, and afterwards married a Mahammadan, Hindu law did not apply to her, and Section 2 Act XV of 1856 notwithstanding, no forfeiture of the estate she had inherited from her first husband took place. The Court accordingly dismissed the suit of the plaintiff, who had claimed the property as reversionary heir.—(3. W. Reporter, Civil Rulings, p. 206.)

With reference to the language of Act XXI of 1850, Mr. Baillie writes—"This [enactment] removes the disqualification of the apostate himself; but his children, if brought up in his new faith, would be still excluded from the inheritance of their Musalman relatives by mere difference of religion—an objection that is left untouched by the Act; while, apparently, there would be no objection to the relatives inheriting from the apostate and his children, for being no longer of the Musalman religion, his or their
succession could hardly be regulated by Mahammandan law.”
—(Baillie’s Digest, p. 701, note 2.) But might it not be
answered that the children of the convert “were excluded
from the communion” of Islam, and therefore within the
letter of the relief of the Act, as they certainly would be
within its spirit?

For the case of unchastity in a Hindu widow entailing
forfeiture of inheritance, see the case of Ramdhun v.
Mussumat Karm Kour, before, p. 146.

20.—When any member of a family voluntarily
retires from the world, and enters a religious
order, he loses all claim to his patrimony, and any
property which he may subsequently acquire, will
not be inherited by his blood relatives, but will
belong to the institution to which he is attached.

In Tilack Chandra v. Shama Charan Prokash, the Calcutta
Court held that the fact of the defendants being by name
Bairagis did not exclude them from their rights of inheri-
tance, since it appeared that they had not become ascetics
and left “the household order, but still bought, sold, married
and had children.”—(1. W. Reporter, p. 209.) And in
Jagannath Pal v. Bidyanund, where the plaintiff had become
a Bairagi, and as he said “relinquishing the world,” set out
on a pilgrimage to various places sacred among the Hindus,
the same Court held that “a Hindu becoming a bairagi, if he
choose to retain possession of or to assert his right to pro-
property to which he is entitled, does an act which may be morally
wrong, but, in which he will not be restrained by the
Courts.”—(1. Bengal Law Reports, Civil Appeals, p. 114.)

See too, Clause 6, Section XXII of the Punjab Civil Code.

21.—The Courts will assume charge of prop-
erty represented as heirless, or for which no
claimant may be immediately apparent. The
Judge will cause enquiries to be made, and may
advertise for claimants. If heirs should be forth-
coming, distribution and assignment will be made
according to the rules of inheritance. If no heirs
should be found the property will lapse to the State.

22.—Nothing in this section can apply to
families in which the order of succession may have
been fixed by the Government.
ACT No. XXI of 1850.

(Passed on the 11th April, 1850.)

An Act for extending the principle of Section 9, Regulation VII. 1832, of the Bengal Code, throughout the territories subject to the Government of the East India Company.

Preamble.

Whereas it is enacted by Section 9, Regulation VII. 1832, of the Bengal Code, that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Mahammadan persuasion: or where one or more of the parties to the suit shall not be either of the Mahammadan or Hindu persuasions: the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws they would have been entitled;" and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company, It is enacted as follows:

I. So much of any law or usage now in force, within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as Law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.
CHAPTER V.

PUNJAB CIVIL CODE.

SECTION V.

Special Property of Females.

1.—By the Hindu and Mahammadan law, a married woman may possess distinct property of her own. The property of the wife does not necessarily vest by marriage in the husband. The wife has ordinarily the sole control over her peculium.

"The Hindu law recognizes the absolute dominion of a married woman over her separate and particular property, except land given to her by her husband. He has nevertheless power to use and consume it in case of distress, and she is subject to his control even in regard to her separate property."—(Macnaghten's Principles of Hindu and Mahammadan Law, pp. 136 and 43.) So in Teencowree Chatterjee v. Dinonath Banerjee, the Calcutta Court held that a woman "is at liberty to dispose of her stridhan at her pleasure, by gift, or will, or sale, except in the case of immovable property given to her by her husband."—(3. W. Reporter, Civil Rulings, p. 49.) See also for a similar ruling, l. Stokes' Madras Reports, p. 85. But in Dautuliari Karapparay v. Mallapudi Rayudu the Madras Court expressed a very strong opinion that a Hindu wife cannot without the consent of her husband absolutely alienate during her coverture even her own landed property.—(2. Stokes' Madras Reports, p. 360.)

2.—By the Mahammadan law, whatever has been specially given or bequeathed to, or settled on, a female, whether married, or unmarried, is her sole property which she may dispose of in the ordinary manner, and which will descend to her heirs in the usual routine of succession. But at the time of marriage it is competent for the bride, or her parents and guardians, to vest all her pro-
perty in the husband, who would, on his part, usually agree to pay more than an equivalent in the shape of dower.

3.—By the Hindu law the "stridhan," or special property of females, admits of much detailed specification, for which indeed there is some necessity, inasmuch as the succession to such property is governed by peculiar rules. Of the numerous kinds of stridhan some are doubtful, and others do not possess the full legal attributes of such property.

4.—The real stridhan may be described as immoveable property given before marriage, or at the time of marriage, by the bridegroom, the parent, or other near relative; property which the female may acquire by her own skill, art, or industry; and property which she may acquire or amass from the proceeds of the stridhan. Articles of ornament or attire, given by the husband after marriage, or acquired in any other manner, would ordinarily be included; provided that the husband himself made no claim to them. Over other kinds of property especially immoveable, however acquired or inherited, the female would have control, acting under the general guidance of the husband or natural guardian, and at her death the inheritance would run in the ordinary course.

According to the Benares school inherited property does not constitute stridhan.

In Bhagwan Dhi v. Myna Bai the Privy Council decided that "according to the law of the Benares school, notwithstanding the ambiguous passage in the Mitakshara,* this decision must be taken to over-rule the more qualified finding of the Calcutta Court, on the authority of the Mitakshara, that the immoveable estate only inherited by a woman from her husband or son did not become stridhan.—(3. W. Reporter, Civil Rulings, pp. 105, 140.)
no part of her husband’s estate, whether moveable or im-
moveable, to which a Hindu woman succeeds by inheritance
forms part of her stridhan or particular property.”—(9.
W. Reporter, Privy Council Cases, p. 23.) This same doc-
trine was virtually recognized in a case coming under the
law of Bengal, reported in 3. W. Reporter, Civil Rulings, p.
49, and directly in another Bengal law case, Chandrabali
Debi v. Brody, where the Court further held that the
widow’s savings from her life-estate, if undisposed of by her
during her life-time, could not be considered as stridhan.—
(9. W. Reporter, Civil Rulings, p. 584.) See also 2 Stokes’
Madras High Court Reports, p. 402, where property inherited by
a mother from her son was held not to be stridhan; and in a
later case generally that no property acquired by a woman
by inheritance constitutes a part of her stridhan.—Senga-
malathammul v. Valaynda Mudali.—(3. Madras High Court
Reports, p. 313.) See also 4. Reid’s Bombay High Court
Reports, Original Jurisdiction, p. 163.

“ A gift of money by a son to his mother, for the pur-
poses of maintenance of the mother, comes within the defin-
ition of stridhan given in the Hindu law.”—Mussumat
Durga Kunwar v. Mussumat Teju Kunwar.—(5. W. Repor-
ter, Miscellaneous Rulings, p. 53.)

The burden of proving property to be stridhan rests
with those claiming to be entitled to it by virtue of its
being such.—Srimati Chandra Mani Dassi v. Joykishen
Rulings, p. 326.

5.—To the “stridhan,” as above described,
when left by an unmarried female, (sometimes
called also Kumaridhan), the heirs are the
brother, father, mother successively, and failing
them, the paternal kinsmen. To the stridhan left
by a married woman, the daughters succeed, first
the unmarried, then the married; after the daugh-
ters the sons, and then the husband or his family.
But such property, having once descended accord-
ing to the above rules, will thenceforth descend in
the usual manner.

The succession to a married woman’s stridhan is given
in greater detail by Macnaghten, who writes—“To such
property left by a married woman, given to her at the time

Hei x to the strid-
Rah given at mup-
tials.
of her nuptials, the heirs are her daughters; the maiden, as in the ordinary line of inheritance, ranking first; and then the married daughter likely to have male issue. The barren and the widowed daughters, failing the first two, succeed as co-heirs. In default of daughters, the son* succeeds; then the daughter's sons; the son's son; the great grandson in the male line; the son of a contemporary wife, her grandson, and her great grandson in the male line. In default of all these descendants, supposing the marriage to have been celebrated according to any of the first five forms, the husband succeeds, and the brother, the mother, the father. — (Macnaghten's Principles, p. 42.) Hindu marriages in this Province usually fall under the first, or fifth form. — (p. 62 of Macnaghten's Work.) Failing the above, the heirs are successively as follows: — the husband's younger brother; his younger brother's son, his elder brother's son; the sister's son, the husband's sister's son; the brother's son, the son-in-law, the father-in-law; the elder brother-in-law, the Sapindas, the Sakulyas, the Samānoddakas.

To such property left by a married woman given to her by her father, but not at the time of her nuptials, the heirs are successively, a maiden daughter; a son; a daughter who has, or is likely to have male-issue; daughter's son, son's son; son's grandson; the great-grandson in the male line; the son of a contemporary wife; her grandson, her great-grandson in the male line. In default of all these, the barren and widowed daughters succeed as co-heirs, and then the succession goes on as enumerated in the foregoing paragraph. To such property left by a married woman but not given her by her father, and not given her at the time of her nuptials, the heirs are in the order just quoted, except that the son and unmarried daughter inherit together, and not successively; and that the son's son is preferred to the daughter's son. — (Macnaghten's Principles of Hindu and Mahammadan Law, pp. 42, 43.)

In accordance with the foregoing rules, in Satnaiga Singh v. Missumat Shib Kon, the Chief Court held that the plaintiff, who was the son of a contemporary wife, was entitled to the stridhan of the last surviving widow of his father, a Sikh gentleman of Lahore, as against the defendant, who was the widow of another step-son, who had pre-deceased the lady whose property was in dispute. — (1. Punjab Record, Case No. 37.)

6.—But among the Sikhs and Hindus of this Province, it is doubtful whether the law regarding

*The adopted son will succeed to stridhan after the daughters, as a son born, and so be will to the stridhan of a co-wife. — Trencourse Chatter- jee v. Dinonath Banerjee. — (3. W. Reporter, Civil Rulings, p. 40.)
stridhan is invariably or strictly observed. In many localities the sons do succeed in preference to the daughters to the special property of their mother, and the husband regards his wife's property as merged in his own. The Courts will decide, when disputes regarding stridhan may arise, whether the family in question ought to be bound by the lex loci, or by the strict provisions of the law.

7.—In carrying out execution, the Court may, at its discretion, exempt the stridhan, as above described, from liability for debts contracted by the husband, or guardian, for his sole and special benefit; provided that such property is bona fide held separately. But the Court will be cautious in admitting claims to such exemption. If the debt be for ordinary household expenditure, or for purposes in which the wife has a joint interest with the husband, then the exemption will be disallowed, especially where it is not rendered imperative by local custom.

8.—In case of adultery, the woman, to whatever sect or class she may belong, will be liable to deprivation of her special property, which would then revert to her husband or children as the case may be.
CHAPTER VI.

PUNJAB CIVIL CODE.

SECTION VI.

Marriage, Divorce, Adultery and Seduction.

1.—By the Mahammadan law, marriage is a civil contract, to be agreed to by parties of age and discretion. Minors may promise marriage with consent of their parents or guardians. Parents do usually promise on behalf of their children, and such engagements are treated as obligatory when the parties come of age, however doubtful such obligation may be according to the strict letter of the law.

I believe that cases seldom or ever come before the Punjab Courts, in which a declaration of nullity of marriage is sought on the ground that some requisite formality has been neglected: in fact, para 7 of this Section is strongly adverse to such claims. It will be sufficient therefore to state briefly here the requisites to a valid Mahammadan marriage, with references to Baillie's Digest for those who may wish to pursue the subject further. The following points are essential to the accomplishment of a valid marriage:

I. Proposal and acceptance.—(Baillie's Digest; pp. 14 to 22.) The acceptance must not be conditional.—(p. 17.) The declaration and acceptance must both be expressed at one meeting—(pp. 10 and 11): and though the acceptance need not follow immediately the declaration, it must not vary from its terms.—(p. 11.)

II. The marriage is void, if the contracting parties do not possess understanding; and voidable if they be under puberty, and marry without the consent of the guardian.—(p. 4.)

III. The woman must be one who can be lawfully contracted to the man.—A Sunni is not incapacitated from marrying a Shiah.—Ghulam Hussain v. Setabah Begum.—(6. W. Reporter, Civil Rulings, p. 88.)
IV. The contracting parties must each hear the words spoken by the other.—(p. 5.)

V. The marriage must be contracted in the presence of more than one competent witness: freedom, sanity, puberty, and Islam are the requisites for the competence of the witnesses, and it is essential that one of them should be a man. The witnesses must hear and understand the words of both the contracting parties.—(pp. 5 to 10.) Objections as to character and relationship do not apply to witnesses in a marriage contract.—(p. 6.)

VI. The consent of the woman, if she have arrived at the age of puberty, must be given.—(p. 10 and pp. 50 to 61.)

VII. The husband and wife must both be known or identified.—(p. 12.)

There are in general no options of inspection, defect or stipulation, in marriage, as in the contract of sale.—(Baillie’s Digest, p. 21.)

Certain adult male relations in successive order, as given in Baillie’s Digest, pp. 45 and 46, are styled guardians, and have the power of giving a female or male during minority in marriage, and an insane person though adult; but an executor has no power, quoad his executorship, to contract a minor in marriage. When an infant has two guardians equal in degree, as two brothers, or two paternal uncles, and either of them contract him or her in marriage, the transaction is lawful.—(Baillie’s Digest, pp. 45 to 50.) Where the nearest relation was in jail under conviction for murder, a marriage contracted by the mother and grandmother of the bride was deemed to be valid in Kahu Shaikh v. Gharib-ullah.—(10. W. Reporter, Civil Rulings, p. 12.)

Either, or both of the parties marrying may be represented by an agent, who must contract in the name of his principal, who alone is entitled to the rights, or is liable to the obligations, of the contract. The act of an unauthorized agent may be subsequently ratified by the party in whose name he has acted.—(Baillie’s Digest, Book I, Chapter VI.)

The effect of a contract of marriage is to legalize the mutual enjoyment of the parties: to place the wife under the dominion of the husband: to confer on her the right of dower, maintenance, and habitation: to create between the parties prohibited degrees of relation, and reciprocal rights of inheritance: to enforce equality of behaviour towards all his wives on the part of the husband, and obedience on the part of the wife: and to invest the husband with a power of correction in cases of disobedience.—(Macnaghten’s Principles of Hindu and Mahommadan Law, p. 215.)
2.—By the Hindu law marriage is a sacrament, and may be solemnized by one of eight different forms. In this system also the principle of a contract by mutual agreement is sanctioned; but parents betroth their infant children, and confirm the betrothal by ceremonies, and such contract is binding on the parties when they come of age; if indeed they have not been already married during their childhood, as is usually the case.

The eight forms of marriage are given at pp. 62 and 63 of Macnaghten's Principles. Although the form of marriage affects the descent of the stridhan (see p. 174 of this work), yet as the usual Hindu marriages of this Province, at least among the well-to-do classes, to whom stridhan disputes are usually restricted, belong to the first five kinds, in which the stridhan inheritance rules are identical, the question is not one of much importance.

Although by Hindu law no one but the father, while the father is alive, can give his daughter in marriage, yet the father can delegate this power to another; and therefore when a father gave over his daughter while an infant to a third person and left her with him till she was of marriageable age, and then really allowed her to be married to the plaintiff, and did nothing to impeach the marriage for four years, the High Court held that the father had virtually constituted the party to whom he intrusted his daughter her guardian, and had acquiesced in and ratified the act by which he gave her in marriage.—Golamee Gope Ghose v. Juggessur Ghose.—(3. W. Reporter, Civil Rulings, p. 193.)

Hindu marriage is complete and irrevocable immediately on the performance of certain ceremonies, without consummation.—(Macnaghten's Principles of Hindu and Mahamadan Law, p. 60.)

Since Hindu law is against marriage between parties of different castes, local custom is the only authority by which such a marriage can be sanctioned; and therefore when in such a case the validity of the marriage is questioned, the Courts must distinctly find whether the custom exist or not.—Mela Ram Nudial v. Thanuram Bamun.—(9. W. Reporter, Civil Rulings, p. 552.)
3.—By the Hindu and Mahammadan law, second marriages on the part of men are legal. They are also legal on the part of women by the Mahammadan law, but they are not recognized by the Hindu law, (though constantly contracted among the lower castes); such marriages, when contracted, will be recognized by the Courts, and will not involve forfeiture of property, or any other civil disability. But the widow, on her re-marriage, cannot retain any property she may have inherited on a life tenure, from her late husband. The right of marrying a widow cannot appertain to the brother, or other relative, of the deceased husband, but such a marriage is lawful if the widow give her consent. If the children, by her first husband, reside with her, after the second marriage, they have no claim to inherit the property of their step-father, but they would be entitled to maintenance.

The Act of the Legislature which legalizes the re-marriage of Hindu widows is Act XV of 1856, and is here given in extenso.

ACT No. XV OF 1856.

(Received the assent of the Governor-General on the 25th July, 1856.)

An Act to remove all legal obstacles to the marriage of Hindu Widows.

Whereas it is known that, by the law as administered in the Civil Courts established in the territories in the possession and under the Government of the East India Company, Hindu widows, with certain exceptions, are held to be, by reason...
Marriage of Hindu widows legalized.

Rights of widow in deceased husband's property to cease on her remarriage.

of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property: and whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the Civil law administered by the Courts of justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own consciences: and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain: and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare: It is enacted as follows:—

I. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

II. All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no
power of alienating the same, shall, upon her re-marriage, cease and determine as if she had then died; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

In Akora Suth v. Borcani, the Calcutta Court held that a widow who had re-married did not thereby lose her right to inherit from her son by her first husband, who happened to die after his mother's re-marriage; as the right entirely accrued to her after her second marriage.—(2. Bengal Law Reports, Civil Appeals, p. 199.)

III. On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband, the guardian of his children, the father or paternal grandfather, or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in Civil cases in the place where the deceased husband was domiciled at the time of his death, for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who, when appointed, shall be entitled to have the care and custody of the said children, or of any them, during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother. Provided that, when the said children have not property of their own sufficient for their support
and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

Nothing in this Act to render any childless widow capable of inheriting.

Saving of rights of widow marrying except as provided in the three preceding Sections.

Whatever ceremonies now constitute a valid marriage shall have the same effect on the marriage of a widow.

Consent to re-marriage of a widow who is a minor.

IV. Nothing in this Act contained shall be construed to render any widow, who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if, before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

V. Except as in the three preceding Sections is provided, a widow shall not, by reason of her re-marriage, forfeit any property, or any right to which she would otherwise be entitled; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

VI. Whatever words spoken, ceremonies performed, or engagements made, on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, shall have the same effect, if spoken, performed, or made on the marriage of a Hindu widow; and no marriage shall be declared invalid on the ground that such words, ceremonies, or engagements are inapplicable to the case of a widow.

VII. If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her
father, or if she has no father, of her paternal grandfather, or if she has no such grandfather, of her mother, or failing all these, of her elder brother, or failing also brothers, of her next male relative. All persons knowingly abetting a marriage made contrary to the provisions of this Section shall be liable to imprisonment for any term not exceeding one year, or to fine, or to both. And all marriages made contrary to the provisions of this Section may be declared void by a Court of law. Provided that, in any question regarding the validity of a marriage made contrary to the provisions of this Section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated. In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

4.—In both the Hindu and Mahammadan law, there are prohibited degrees. Polygamy is sanctioned by the Mahammadan law, to a certain extent, and among the Hindus it is customary.

The relations with whom it is prohibited to contract matrimony (among Hindus) are thus enumerated by Manu. "She who is not descended from his paternal or maternal ancestors within the sixth degree, and who is not known by her family name to be of the same primitive stock with his father or mother, is eligible by a twice-born man for nuptials and holy union."—(Macnaghten's Principles of Hindu and Mahammadan Law, p. 64.)

By Mahammadan law all ascendants on either the father's or the mother's side; all descendants; sisters and half sisters and their descendants; descendants of brothers; aunts paternal and maternal, and the aunts of his ascendants are prohibited to a man for ever on account of consan-
guinity.—(Baillie's Digest, p. 23.) On the score of affinity marriage is forbidden with the ascendants or descendants of a man's wife, or with the wives of his descendants or ascendants. This prohibition of affinity is established by illicit intercourse, as well as by marriage.—(pp. 24 to 30.) Again, every woman who is prohibited by reason of consanguinity or affinity, is also prohibited by fosterage.—(p. 30.) Neither can a man at the same time be married to two women, who are so related by consanguinity or fosterage that if we suppose either of them to be a male, it would be unlawful for them to intermarry.—(pp. 30 to 35.) Lastly, it is not lawful for a man to marry a woman whom he has repudiated three times, till another husband has consummated with her.—(p. 43.)

Polygamy allowable.

A Musalman may have four wives at the same time.—(Macnaughton's Principles of Hindu and Mahammadan Law, p. 215.) "Polygamy is also legally prohibited to male Hindus unless for some good and sufficient cause, such as is expressly declared a just ground for dissolving the former contract, as barrenness, disease, and the like. This precept however is not much adhered to in practice."—(p. 60.)

5.—By the Hindu and Mahammadan law, wives are, under all circumstances, except adultery, entitled to maintenance, and this right is claimable in a Civil Court.

If a convert relapse to Hinduism he does not cease to be bound to maintain a wife whom he may have married while a Christian.—(4. Madras High Court Reports, Appendix, p. iii.)

The following rules concerning maintenance in the case of Mahammadans are selected from Baillie's Digest.

A husband is bound to maintain his wife whether she be poor or rich, enjoyed or unenjoyed, if she be not too young for matrimonial intercourse.—(p. 438.)

If the woman be "nashizah" or rebellious, that is, if she have quitted her husband's house and denies herself to him, she has no right to maintenance until she return to her duty.—(p. 438.)

Sickness or insanity does not deprive the wife of her right to be supported.—(pp. 439 and 440.)

A wife when keeping her iddut after repudiation is entitled to maintenance and lodging under all circumstances, unless the separation have been caused by the fault of the wife, as by her apostatizing, or having connection with her
husband's near kindred. But during this time she must remain in due seclusion.—(pp. 450 to 452.)

A widow during her iddut has no right to maintenance, whether pregnant or not.—(p. 452.)

No one shares with the husband the obligation of maintaining his wife, even if he be poor, and the wife have near kindred in easy circumstances. In such a case however the kindred might be ordered to support her, and to have recourse against the husband for the amount so expended.—(p. 463.)

Proper maintenance comprehends food, raiment and lodging, the food being flour, water, salt, wood, and oil, and ordinary condiments—(p. 442): the raiment is a suit supplied twice a year, and adapted to the winter and summer respectively—(p. 448): and the lodging required is a separate apartment—(p. 448). Where however a monthly allowance is decreed, the poverty or affluence of both husband and wife are to be considered in fixing it, and the rate fixed when the husband is poor may be subsequently increased if he become rich.—(pp. 441 and 442.) It is however to be presumed that in fixing a money rate of maintenance regard should be had to the actual supplies, in lieu of which this money is directed to be paid. The maintenance of a woman during her iddut is to be determined on the same principles as maintenance of marriage.—(p. 452.)

A woman is not entitled to maintenance antecedent to the order of the Judge, or the mutual agreement of the parties; even though she may have previously incurred debts, and this whether the husband be present or absent. But if she contract debts on account of her maintenance, after it has been secured to her by decree or mutual consent, the husband will be liable to her creditors. If the maintenance be allowed to fall into arrears, and either the husband or the wife die, the arrears, as well as any debts the wife may have contracted for her support, cease to be recoverable. So, on the other hand, in the case of death or repudiation, the wife is not liable to restore any maintenance which may have been paid in advance.—(pp. 443 and 444.)

Analogously, a woman, to whom no maintenance has been assigned by the Judge until the expiry of her iddut, has no longer any right to it. And even if assigned her by the Judge, yet if she receive nothing from her husband till her iddut be over, she has no recourse against him, unless she have actually incurred debts for her maintenance by direction of the Judge.—(p. 452.)

Inability to maintain a wife is not a valid ground for separating her from her husband.—(p. 443.)
A Hindu wife who elopes from her husband's home is not in general entitled to maintenance.

A Hindu wife, who without her husband's sanction leaves him to live with her own family, has no right to ask maintenance from him, and the question whether she be guilty of unchastity or not is quite immaterial when it appears that the wife eloped from her husband's house and continues to reside apart from him.—Kuliyanesuri Debi v. Dwarkanath Surmah Chatterjee.—(6. W. Reporter, Civil Rulings, p. 116.) But when a wife had left her home and carried on an independent calling by working as a coolie, to which occupation it did not appear that the husband had objected, or had given her notice to relinquish it and return home, the Court held that on her desire to return to her husband's house, she was entitled to maintenance, since he refused to receive her, although no misconduct was proved against her, "no authority being adduced to show that a Hindu wife, by a single act of disobedience forfeits her right to maintenance for ever."—Nitya Laha v. Sundari Dassi.—(9. W. Reporter, Civil Rulings, p. 475.)

See too the remarks regarding the rights of Hindu widows to maintenance, so far as it is applicable to the enforcement and recovery of such rights generally, at pp. 162—165 of this Volume.

Section 316 Act XXV of 1861 does not deprive the wife of any remedy in the Civil Courts which she would otherwise have had; a wife can therefore recover maintenance from her husband either by a Civil or a Criminal proceeding.—(6. W. Reporter, Civil Rulings, p. 57.)

6.—A husband may bring an action for the custody of his wife, but the Court will not restore the wife against her will, unless assured of her good treatment.

In 1859, Circular No. 144 (Book Circular No. 81 of 1859) was issued to explain an apparent discrepancy between the rule embodied in this Section, and rule 4 of Circular No. 691 of 1849 of the late Board of Administration, to the effect "that no wife will be forced to live with her husband." The Judicial Commissioner points out that the Board's Circular refers to the Criminal and not to the Civil Courts; and continues:—"Suits for the custody of wives will be heard on the Civil side; should the Court be satisfied that the woman will in all probability be well treated, it will pass an order directing her return, at the same time making her over to her husband." "The parent, or brother, or other near relative, with whom she may have taken refuge, may be sued jointly with the woman herself."
About a year subsequently, this Circular and the enactment of the Code to which it refers were considerably modified by Book Circular No. 35 of 1860, and as this Circular has unfortunately the force of law by the Indian Councils' Act, it results that the Punjab Courts are powerless to decree restitution of conjugal rights, however frivolous may be the objections of the woman, if she only persevere in refusing to return: a state of things as opposed to the interests of morality, as it is to the wishes of the people and to the law prevailing in the eastern portions of the Presidency and in England.

BOOK CIRCULAR No. XXXV of 1860.

Circular No. 71, dated 15th August 1860.

I have the honor, with the concurrence of His Honor the Lieutenant Governor, to issue the following instructions in modification of those contained in my predecessor's Circular No. 144 dated 23rd November 1859, regarding suits for the custody of wives.

2.—Wives should not, as a matter of course, be made over to their husbands against their own will, even though the Court be assured of their good treatment. Officers should, in the first instance, endeavour to ascertain what the woman's wishes really are, and use every endeavour by mediation to effect a reconciliation: if the woman of her own free will steadfastly refuse to go with her husband, she should not be forced to do so, or punished for non-compliance. Compulsion shall only be used in cases where the Judge is convinced that the woman's refusal is made solely at the instigation and under the influence of her friends.
In a recent suit before the Privy Council, Baghur Rahim v. Mussumat Shamsunnissa Begum, the state of the law with regard to the restitution of conjugal rights among Musalmans was much considered; and their Lordships laid it down that such suits were to be decided generally by the principles and rules of Mahammadan law, although cases might occur, in which it would not be sufficient to show that by that law the plaintiff was entitled to a decree for restitution: for example, if cruelty to a degree rendering the wife's return unsafe were established, the Court might refuse to send her back; or if it were properly proved that the husband had failed grossly in the performance of the obligations imposed on him by the marriage contract for the benefit of the wife, this might constitute just grounds for refusing him the assistance of the Court. So, too, there might be cases in which the Court would qualify its interference by imposing terms on the husband. The Court moreover rejected most fully the contention that the Anglo Indian Courts should not entertain suits for the restoration of a Mahammadan married woman against her will to her husband, because some of the obligations, whose specific performance the Courts would thus be decreeing, are, as they are given with prurient particularity in certain Mahammadan treatises, such as British Courts could not enforce. — (8. W. Reporter, Privy Council Cases, p. 12). Of course the principles enunciated in this decision must be applied with caution in this Province, owing to the anomalous state of our local law, as shewn above.

Among Mahammadans "a charge of adultery does not operate as a divorce, though a false charge might be an item of ill-usage towards making up a sufficient answer [in a suit for restitution of conjugal rights]. A true charge would be no step towards such an answer. And "a woman who marries a Mahammadan knows that he may have more than one wife; but if he marry a second wife, and they make the position of the first wife unreasonably hard and disagreeable she would be justified in leaving."—Jan Bibi v. Shaikh Munshi Bepari.—(3. W. Reporter, Civil Rulings, p. 93.)

For the right of the woman to refuse herself to her husband until her dower be paid, see below under Clause 10 of this Section. This right was also recognized in the case of Jan Bibi, quoted in the last para.

Where a man had divorced his wife by pronouncing a triple divorce, and subsequently sued for her society on the ground of a re-marriage, "a mere declaration by the defendant that she was the wife of the plaintiff contained in a mortgage deed (assuming that she executed the deed with a full knowledge of the mode in which she was described in
it) would not be evidence of the removal of the legal impediment to the re-marriage which was proved to have been created by the divorce. Neither could a presumption be drawn from the fact of the re-marriage that the impediment had been removed, and that the defendant had again become lawful to the plaintiff for re-marriage.” The Court ought not, therefore, in the absence of proof that after the plaintiff had divorced his wife she had been married to another man who had divorced her or died, to compel her to rejoin the plaintiff, and live with him in intercourse which according to the Mahammadan law would be illicit and criminal.—Aktarruwalla v. Shariat Ullah.—(7. W. Reporter, Civil Rulings, p. 268.)

Where the suit for restitution of conjugal rights originates through one of the parties to the marriage having embraced Christianity, the case would be governed by the procedure and rules laid down in Act XXI of 1866. This Act however does not apply to cases in which the convert was originally a Mahammadan, as according to the law of that creed abandonment of Islam by either party is a de facto dissolution of the marriage.—(Baillie's Digest, p. 182.)

In Gurmuck Singh v. Munsunnat Gulabi, the Chief Court held that, as it had been found that the marriage had been consummated, the decree ought to be in the form of a declaration that the wife must return to her husband and live with him, without any order for damages in case of non-compliance. The Court further pointed out that in executing the decree, it was highly irregular to issue an order to the police to transfer the wife to her husband’s custody. The duty of the Court was to have summoned the wife, and in the event of her refusal to go with her husband to satisfy itself, as required by Clause 6 Section VI, Punjab Civil Code, that her husband would treat her well; and, if so satisfied, in the event of the wife persisting in her refusal, to have enforced its decree by imprisoning her in the Civil Jail, as provided by Section 200 of Act VIII of 1859.”—(3. Punjab Record, Case No. 7.) This ruling of the Lahore Court is in accordance with one of the Calcutta Court given in 6. W. Reporter, Civil Rulings, p. 105, and as there pointed out by Macpherson J. under Section 200 of Act VIII of 1859 the decree may be enforced not only by the imprisonment of the wife, but by the attachment of her property, or by both imprisonment and attachment. The Court there also held an order restraining the mother of the wife, who was also defendant, “from preventing in any way the return of the latter to her husband,” was quite proper. In accordance with the decision just given the Calcutta Court, in Kuber Kharasa v. Jan Kharasa ruled that the form
of the decree in such cases should be that "the plaintiff is entitled to his conjugal rights, and that his lawful wife, Mussummat N., be ordered to return to his protection."—(S. W. Reporter, Civil Rulings, p. 467.) See too Vol. 9. Civil Rulings, p. 552; and 2. North West High Court Rulings, pp. 111, 170, 337; and Vol. 4 of the same Reports, p. 88.

7.—In any class or sect, a marriage, otherwise unobjectionable, will not be set aside by the Courts to the prejudice of the heirs, on account of an alleged informality, provided that the parties shall appear to have acted in good faith. Among Sikhs what are known as "Chudur dalna" marriages are valid. By the Hindu law, among the lower castes, if an agreement shall have been made, and co-habitation ensued, marriage may be presumed, although the full religious ceremony may not have been performed.

Mr. Scarlett appends as a note to this Clause, a ruling of the Judicial Commissioner to the Commissioner of Peshawar, to the effect that—"The Punjab Civil Courts have no power to decree a dissolution of marriage." So far as Christian marriages (until the recent Divorce Act was passed) or Hindu marriages (saving the jurisdiction conferred by Act XXI of 1866), are concerned, this is undoubtedly correct; but with regard to Mahammadan marriages the dictum cannot be supported in its present unqualified form, as no less than seven of the thirteen different kinds of repudiation recognized by that law require a judicial decree.—(Baillie's Digest, pp. 50—53.) They are as follows:

Option of puberty.

I. When minors are contracted in marriage by any one except the father or grand-father, on arriving at puberty they have an option, and may either cancel or abide by the marriage: the decree of a Judge however being requisite in the matter.—(Baillie's Digest, pp. 50—53.)

II. When a woman has contracted herself in marriage, or has been given in marriage by a guardian, then in the first case, any of the agnate guardians (that is, male relations who trace their kinship through males) and in the second, any guardian nearer to the woman than the consenting one, can call on the Judge to annul the marriage, if the
husband be not the woman's equal in certain particulars, described at pp. 62 to 67.—See 1. North West High Court Reports, p. 130. It is doubtful by Mahammadan law whether the guardians cannot interfere to cancel the marriage, even after the birth of a child, but not, I should think at all doubtful that no British Court would lend its assistance in such circumstances except upon very cogent reasons.—(pp. 62 to 71.)

III. Similarly, the guardians can intervene when a woman has married for less than her proper dower, and compel the dower to be made up to the proper sum, or separate the parties.—(pp. 71 and 74.)

IV. The fourth case in which the assistance of the Judge is requisite is that called technically "Lián." This however requires the intervention of the Court in a manner so opposed to the procedure now prevailing that it may be presumed to have become virtually obsolete in British India. It is fully discussed in Book III, Chapter X, of the Digest.

V. When one of two married persons who are Hindus, or fireworshippers, embraces Islam, that creed is to be offered to the other, and if he, or she, persist in refusing, the Judge is to separate them.—(Baillie's Digest, pp. 180—182.) It is not probable however that the British Courts would deem it equitable to allow Mahammadan law to be interposed to annul an Hindu marriage, because one of the parties subsequently might choose to embrace Islam. In fact, the provisions of Regulation VII of 1832, which enact that in suits of every kind in which both parties are not of the same persuasion, the law to be followed is that of justice, equity and good conscience, would prevent a party to what was at the time regarded as an indissoluble contract, being deprived of his, or her, interests under it by an act of the opposite contracting party. The case of a marriage among Mahammadans being entirely dissolved by the abandonment of Islam by one of the parties is different, as in that case the parties contracted with the knowledge of this possible contingency.

VI. and VII. Jubb, and impotence, on the part of the husband. The former (mutilation) is defined at p. 27, and the latter at p. 345 of Mr. Baillie's Work. As suits for separation on the ground of impotence are, unlike the cases mentioned above, sometimes brought in our Courts, it may be convenient to sketch the procedure prescribed by Mahammadan law for the decision of such suits; both as being that to which the parties are legally entitled (Punjab Civil Code, Section III, Clause 7), and also as being of a nature likely to put a check on litigation of so unpleasant a kind. When a woman claims separation on this ground, the Judge
is to ascertain if the husband have had intercourse with the plaintiff or not. If it shall appear that he has, the application is to be dismissed; but if this be not clearly established, and the case be one of alleged impotence, it is to be postponed for one year, to run from the time of litigation, such postponement to be made whether the man require it or not. On the expiration of the period, the parties must again attend, and if it be established that intercourse has not taken place, the Judge must allow the woman the option of separating, where the husband has been mutilated the order is passed without a postponement. If intercourse have once taken place, and the husband subsequently become impotent or mutilated, the wife has no right to claim an option of revocation, nor if she knew the husband to be incompetent at the time of marriage.—(Baillie's Digest, Book III, Chapter XI.)

The Judge must annul an invalid marriage.

The seven cases treated of in the foregoing para. of these remarks are those of valid marriages which the Judge may be called on to annul; but, besides these, there are marriages invalid per se.—(See under Clause I of this Section pp. 176, 177.) When such an invalid marriage has taken place, the Judge must separate the parties.—(Baillie's Digest, p. 156.)

The invalidity of the marriage does not bastardize the offspring.

The legitimacy of a child born of an invalid marriage is not affected by reason of the invalidity.—(Baillie's Digest, p. 157.)

Co-wives are entitled to separate dwellings.

It may be added here that it is not lawful by Mahammadan law for a husband to place two co-wives together in one habitation without their consent, from its necessarily giving occasion to disputes.—(Baillie's Digest, p. 190.)

8.—By the Hindu and Mahammadan law, a divorce is allowable; but, except in the event of adultery, the divorced wife has special claims on the husband. By the Hindu law, she may claim compensation up to one-third of the husband's property; and by Mahammadan law, she may claim the unpaid residue of her dowry.

Rights of a Hindu wife when put away.

In the event of a man (Hindu) forsaking his wife without just cause, and marrying another, he shall pay his first wife a sum equal to the expenses of his second marriage, provided she shall not have received any stridhan, or make it up to her if she have; but he is not required in any case to assign her more than a third of his property. In all cases, and
for whatever cause, a wife may have been deserted, she is entitled to sufficient maintenance. In the Mitakshara a distinction is made where a second wife is married, if there be a legal objection to the first, she is entitled to a sum equal to the expenses incurred in the second marriage, but where no objection whatever exists to the first wife, a third of the husband's property should be given as compensation. But in modern practice a husband considers it quite sufficient to maintain a superseded wife by providing her with food and raiment.—Macnaghten's Principles of Hindu and Mahomedan Law, p. 61.)

By Mahomedan law when a man divorces his wife it is necessary that he be sane and adult: a divorce by a boy, who has not attained to puberty, being invalid.—(Baillie's Digest, p. 208.)—Repudiation by a drunken man, who has not been made drunk against his will or for a necessary purpose, is valid.—(p. 209.)

Repudiation is either revocable or irrevocable, and its effect is a total separation between the parties on the completion of the "iddat," when it is revocable, and without such completion when it is irrevocable.—(Baillie's Digest, p. 205.) Hence when a man has divorced his wife by one or by two revocable repudiations, he may retain her, whether she be willing or not, whilst in her iddut, such revocation being established either by words, or by his actions.—(pp. 285—289.) The repudiation of an unenjoyed wife is irrevocable.—(p. 226.)

When a man gives his wife a revocable repudiation and either of them happens to die before the expiration of her iddut, then, under all circumstances, they are reciprocally entitled to inherit. So if a man be in his death illness, and give his wife an irrevocable repudiation or divorce her three times, and die of the same sickness he was suffering from when he repudiated her, before the expiry of her iddut, she will be entitled to inherit from him, provided, indeed, she

* When a man divorces a wife after consummation, whether the marriage were valid or not, or when a separation takes place under the options of puberty, or want of equality, the woman has to keep an iddut for three months, or if she be pregnant till her delivery. The iddut of a woman on the death of her husband is four months and ten days, whether the marriage had been consummated or not, or till delivery, if she be pregnant. Whilst keeping her iddut, the woman ought to remain in seclusion in her own house, but the widow has greater license than the woman whose husband is still living.—(Baillie's Digest, Chapters XII and XIII.) For the right of the woman to inheritance during her iddut, see remarks under Clause 5 of this Section.

† In Mosaffer Ali v. Musunmat Kamarunissa Bibi the Calcutta Court expressly ruled that if a man give his wife a revocable repudiation and do not recall her until she have completed her iddut, a suit by him for the restitution of conjugal rights will not lie against her.—(Sutherland's Civil Rulings for January 1894, p. 38.)
was competent to inherit at the time of the divorce, and that the repudiation did not take place at her request.— (Baillie's Digest, Book III, Chapter VI.)

When a man has repudiated his wife irrevocably, without giving her three repudiations, he may marry her again during her iddut or after its expiration: but when he has repudiated her three times, it is not lawful for him to remarry her until she have been married to a stranger, who after consummation has repudiated her, or died leaving her a widow.— (Baillie's Digest, p. 290.)

Khola divorces.

"It appears that by Mahammadan law divorce may be made in either of two forms, tilacq or khola. Divorce by tilacq is the mere arbitrary act of the husband, who may repudiate his wife at his own pleasure, with or without cause. But if he adopt that course he is liable to repay her dowry or dyn-mohr, and, as it seems, to give up any jewels or paraphernalia belonging to her. A divorce by khola is a divorce with the consent and at the instance of the wife, in which she gives, or agrees to give, a consideration to the husband for her release from the marriage tie. In this case the terms of the bargain are matter of arrangement between the husband and wife; and the wife may, as the consideration, release her dyn-mohr, or other rights, or make any other agreement for the benefit of the husband. It seems that, according to existing usage, a divorce by tilacq is not complete and irrevocable by a single declaration of the husband, but a divorce by khola is at once complete and irrevocable from the moment when the husband repudiates the wife, and the separation takes place. In these particulars, the two modes of divorce differ. * * * The divorce is the sole act of the husband, though granted at the instance of the wife and purchased by her. The kholanamah is a deed securing the husband the stipulated consideration, but it does not constitute the divorce. It assumes it and is founded upon it. The divorce is created by the husband's repudiation of the wife and the subsequent separation. The law might have provided that non-payment of the consideration should invalidate the divorce, but it is clear, as well from the opinion of the Law Officers of the Indian Courts, as from the authorities cited at our Bar, that the law is otherwise. The non-payment by the wife of the consideration for the divorce no more invalidates the divorce than in England the non-payment of the wife's marriage portion invalidates the marriage.—Buzl ul Rahim v. Mussumat Latifunmisa.— (Sutherland's Privy Council Judgments, p. 446.)

A deed setting forth a repudiation may be binding on the husband though not
it was only signed in the presence of the woman’s father, and not in her own.—(8. W. Reporter, Civil Rulings, p. 28.)

9.—By the Hindu law a pecuniary consideration may be legally received by the father of the bride. Such transactions, though not uncommon in practice, are, in their nature, mercenary, and are morally reprobated even by the Hindu law. They cannot prove the subject of a suit, and if a sum should have been promised by the bridegroom, the father-in-law cannot recover it by action.

The following important Circular of the Judicial Commissioner on this subject demands a place here.

CIRCULAR 102.

Dated Lahore, 30th October 1858.

"I have the honor to issue the following rules for the guidance of judicial officers in the trial of civil suits arising out of contracts of betrothal and marriage.

2. No provision is made by the present law for cases the converse of those which by Section VI Clause 9 of the Civil Code are prohibited from being heard in the Courts; namely, when a bridegroom has paid in whole or in part a valuable consideration for the bride, and the father of the girl refuses to complete the marriage. Valuable considerations of this kind are, in my opinion, illegal and opposed to the spirit and letter of the Civil Code, and the bridegroom expectant should not be allowed to sue for any sum he may have thus paid to the father of the bride.

3. But though the consideration is illegal, the contract of betrothal is not thereby made void, because a consideration is by our law no essential part of a contract. In such cases therefore the proper course would be to disallow all claims to the recovery of the money paid, but to permit the injured party to sue on account of the breach of betrothal contract for damages for injured feelings, and the recovery of any legitimate costs incurred; leaving it to the Court to award damages, large or small, according to its estimate of the injury done.

* The validity of the contract could still be upheld on other grounds, as the mutual promises of the contracting parties constitute reciprocally good and valid considerations for the compact.
"4. When a betrothal has been contracted, and the bridegroom dies before the completion of the marriage one of the brothers sometimes claims the right of marrying the bride: or if the bride die, the expectant bridegroom insists that the relations of the deceased girl shall find him some other bride, or refund the costs incurred in his betrothal. In neither of these cases ought parties to be allowed to institute a suit in our Courts. Contracts of betrothal should be considered strictly personal, and voided by the death of either of the betrothed parties, as by the act of God. By this rule also, where reciprocal contracts of betrothal are made between the sons and daughters of two or more families, each party will be bound by his or her own contract, and the breach of engagement by one party will not entitle the other party to violate his engagements, but only to recover damages in the Civil Courts."

"5. It sometimes happens that a man having betrothed himself to a girl, before completion of the marriage takes a wife from another family, and the father of the betrothed girl, naturally anxious to secure for his daughter the honor and privilege of a first wife, refuses to allow the celebration of the marriage. It seems to me that the girl who was first betrothed has a right to demand that her marriage be completed before her bridegroom takes another woman to wife; and that if the bridegroom in such a case married into another family, the father would be justified in breaking off an engagement previously formed with his daughter.

"6. In trial of betrothal and marriage cases, therefore, judicial officers will be guided by the following rules in addition to those already in force:—

Rule I.—In cases of breach of marriage or betrothal contracts, no person who has paid valuable consideration for a bride shall be entitled to recover the same by an action in Court. He may sue, on the breach of contract, for damages to injured feelings, of legitimate expenses, but not for any specific sum paid as the price of the woman.

Rule II.—Contracts of betrothal shall be considered strictly personal, and dissolved by the death of either of the betrothed parties.

Rule III.—If a person, who has contracted a betrothal with a girl, before completion of his marriage with her contract a marriage with another woman, the earlier betrothal engagement may be broken off at the option of the betrothed girl, or her relatives."

A suit to recover ornaments presented by the plaintiff to his betrothed in contemplation of marriage, or their value,
is different from a claim to recover the consideration paid to the parents of the bride to obtain their consent to the betrothal, and such a suit undoubtedly lies under the Punjab Civil Code. The injured party, if he intend to claim damages for the breach of the contract, must, however, include them with his suit to recover the value of the presents; he cannot split his claim.—Gaman v. Kabul and Mussamat Subhanee.—(3. Punjab Record, Case No. 69.)

In Shah Gul v. Ikram, the plaintiff sued to recover a sum of money he had paid at defendant's request and on his account, as a consideration for a bride for defendant. The transaction took place in foreign jurisdiction, the parties being however for the time domiciled in British territory. The Chief Court, while laying down that "where the lex fori and the lex loci contractus come into direct collision, the county of nations must yield to the positive law of the land," observed, with respect to the clashing of the foreign and home law, that "it is to be observed that the sale of a wife is not only prohibited in the Punjab, but it is declared by the Code to be 'morally reprobated.' If the transaction were simply prohibited, the plaintiff could recover: but the Code uses general language. However, in our opinion this language is not used without some qualification. It would be difficult to say that the Code pronounces this a turpis causa (out of which non oritur actio) not only as between the parties to the sale, but also as regards a person who is not actually a party in the transaction, but who, knowing the object to which the money was to be applied lent it to the party who paid it for the wife. It might be argued that the Code by expressly prohibiting the enforcement of such a contract of sale, may be taken to exclude the case of the lender of the money for the sale. The Court concludes that if this transaction had taken place between British subjects in British territory, the plaintiff might recover, not being in pari delicto with the purchaser of the wife."—(2. Punjab Record, Case No. 88).

10.—By the Hindu and Mahammadan law, the dower of a married woman, if not entirely paid up at the time of marriage, is claimable, by her, at any subsequent time, and especially in the event of divorce. Among Mahammadans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay. Such contract, if enforced by a Court, would ruin a defendant who had
divorced his wife without reflecting on the liability
to which he was subject. Still, although the full
amount need not be decreed, yet in the event of a
divorce, without valid cause, heavy damages will
be awarded to the wife, in proportion to the means
of the husband.

Dower defined.

Dower is defined by Mahammadan law writers as "the
property which is incumbent on a husband, either by reason
of its being named in the contract of marriage, or by virtue of
the contract itself, in exchange for the usufruct of
his wife."
The dower must be something that is corporeal and pos-
sesses value, and the lowest amount is ten dirhems, coined
or uncoined; but there is no maximum limit.—(Baillie’s
Digest, pp. 91, 93.)

Reciprocal mar-
rriage engagements
do not constitute
valid dowers.

Hence when one man gives his daughter or sister in
marriage to another on condition that the other will give
him his daughter or sister in return, the right to the person
of each woman being the dower of the other, the contracts
are effected, but the condition is void, and each woman is
entitled to her proper dower.—(Baillie’s Digest, p. 94.)

When the woman
is entitled to her
"proper dower."

Where the thing assigned for dower is not a fit subject
for dower; either as being incorporeal, or as having no legal
value, as when a Moslim marries a Moslimah for wine
or a hog, or when the thing assigned is not in existence at
the time, as the future produce of certain trees or lands; or
when the dower is left to be fixed by the husband or wife
or a third party, and he fixes it below the "proper dower;"
in all these cases the wife is entitled to her proper dower.
The amount of this "proper dower" is to be determined
with reference to the family of her father when on a footing
of equality with her in respect of age, beauty, city, under-
standing, religion, and virginity. By her father’s family
are to be understood her full sisters, her half-sisters by
the father, her paternal aunts, and the daughters of her
paternal uncles; no regard being paid to the dower of her
own mother unless she happened to be of her father’s family.
It is also said that the condition of the husband in respect
of wealth and lineage should be like that of the husbands
of the women with whom she is compared.—(Baillie’s Digest,
pp. 93—95.) So in Shah Nojamuddin Ahmad v. Bibi
Hoscinu the Calcutta Court observed that "when a cus-
tomary dower is made out, it must we think be by showing
a custom of the women of the woman’s family to receive,
rather than of the men of the husband’s family to pay, a
certain dower; the Mahammadan dower being the consider-
ation paid by the bridegroom for the marriage, and therefore regulated by the position and dignity of the bride, especially since Mahammadan men often contract most unequal marriages, though we would not exclude altogether from consideration the means and position of the bridegroom."—(4. W. Reporter, Civil Rulings, p. 111).

"In the very great majority of cases, and especially when the sum given [as dower] is large, it is customary to reduce the agreement to writing in the form of a kabinnamah duly attested and registered."

Accordingly, when no such document is forthcoming, the Calcutta Court has repeatedly ruled that very satisfactory evidence indeed is requisite to support the claim—(7. W. Reporter, Civil Rulings, p. 496; Vol. 1, p. 31; Vol. 4, Civil Rulings, p. 111). Where however the husband refuses to give a writing for the dower he cannot be compelled to do so.—(Baillie’s Digest, p. 133). Hence in Taju Bibi v. Nuran Bibi the Calcutta Court held that it was an error in law to suppose that a claim for dower could only be proved by the deed of dower itself.—(1. W. Reporter, p. 31; and Vol. 5, Civil Rulings, p. 23.)

The liability to dower on the part of the husband is confirmed or established by one of three things—consummation, a valid retirement of the married pair into privacy, and the death of either husband or wife, and that whether the dower be named, or be the proper dower. If however the marriage be dissolved by a cause, other than the death of one of the parties, before consummation or a valid retirement, and such cause have proceeded from the husband, he is liable for half the specified dower, or if no valid dower were specified in the contract then for a present of certain articles of dress (mootit); but if the cause shall have proceeded from the wife, then he is not liable for anything. But when dower has once been perfected, it does not drop though a separation should afterwards take place for a cause proceeding from the wife, as by her abandonment of Islam, &c. —(Baillie’s Digest, pp. 96 and 101.) For the description of what according to Mahammadan lawyers constitutes a valid retirement, see pp. 98—101 of Mr. Baillie’s Work, and for that of mootit pp. 97 and 98.

It is usual to divide the dower into two parts, one termed moowujul or prompt, which is immediately exigible: the other moowujul or deferred, which is not exigible till the dissolution of the marriage. The payment even of the exigible part of the dower is not unfrequently postponed.

* Although such appears to be the custom within the jurisdiction of the Calcutta Court, so far as my own limited experience avails, I should be inclined to doubt whether among Punjabi Mahammadans a regular kabinnamah is usually drawn up.
How the amount of the dower to be regarded as prompt is to be adjusted when the parties have not defined it in the contract.

When the parties have explained how much of the dower is to be moofijjul or prompt, that part of it is to be promptly paid. When nothing has been said on the subject, both the woman and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman, and so much is to be moofijjul or prompt, accordingly, without any reference to the proportion of a fourth or fifth; but what is customary must also be taken into consideration. Where however it has been stipulated that the whole is to be moofijjul or prompt, the whole is to be so to the rejection of custom altogether."

In a note to the foregoing, Mr. Baillie contends that Macnaghten's dictum, that where it has not been expressed whether the payment is to be prompt or deferred, it must be held that the whole is due on demand, is incorrect, being based on a misquotation from the Shurh i Vikayah. He adds that in a case decided by the Agra Court it was held that the wife could not claim the whole of her dower as exigible, while her husband was alive, where no specific amount had been declared to be exigible, but one-third was to be deemed prompt, and two-thirds deferred.—(Baillie's Digest, p. 126.) This rule was followed by the Bombay Court in Fatimah Bibi v. Sadruddin.—(1. Reid's Bombay High Court Reports, p. 307.) In Bibi Jamila v. Malleeka and Saiyad Mahammad, however, the Calcutta Court followed.
It may be laid down as a general rule that the parties may agree on an increase or abatement of the dower during the continuance of the marriage. For the niceties of the subject, however, see Baillie's Digest, pp. 111—114.

A man may become surety for the dower, in which case the woman may proceed against the surety, leaving him to recover from the husband; and this if the person guaranteeing the dower be her own father or other guardian who gave her in marriage.—(Baillie's Digest, pp. 140, 141.)

A woman may refuse herself to her husband as a means of obtaining payment of so much of her dower as is muvājžul or prompt, so that if the husband have paid all but one dirhem, she may refuse herself to him and he cannot demand back what is paid. (See 1. North-West High Court Reports, p. 130.) Where the dower is however all deferred to a definite period, there is a difference of opinion among the Authorities as to whether the husband can demand her person in the interval.—(Baillie's Digest, pp. 124—128).

If a husband give a wife money on account of dower, and she buy property with it, in the absence of any proof of fraudulent intent, this would be a valid transaction as against the husband's heirs suing to get possession of the purchase from the widow.—Shaikh Naso v. Mahatal Bibi. (4. W. Reporter, Civil Rulings, p. 93.)

A woman may refuse herself to her husband as a means of obtaining her exigible dower.

A woman may buy property with money paid her by her husband as dower and keep it against his heirs.

Payments avowedly in satisfaction of dower, when void against the husband's creditors.
Dower is recoverable by the wife's heirs on her death from the husband.

"A Mussimana wife's dower, even though it be in the hands of her husband, is considered to be her estate, held by him in trust for his wife, and on her death becomes divisible among her heirs. The limitation law applicable to a suit by those heirs is not that relating to suits on contracts, but that relating to suits to recover inheritance."—Shahzada Muhammad Faez v. Shazadi Umdah Begum.—(6. W. Reporter, Civil Rulings, p. 111.) Shares of dower, when received by the legal inheritors thereof, cease to be dower, and become part of the recipient's estate, and therefore children cannot follow their mother's dower into the hands of other legal shareholders, or claim at their death, except in the capacity of heirs.—(Sutherland's Civil Rulings for April 1864, p. 199.)

In Mussumat Ladoo v. Mahumdee, the plaintiff, a divorced wife, having sued for the full amount of her stipulated dower, Rs. 8,000, the Lower Courts, considering the means of the husband, that he only paid Rs. 47 as revenue to Government, awarded her Rs. 300 as a proper sum. The Chief Court, on the authority of this Clause, upheld the decree, holding that the sum awarded was just both with due regard to the defendant's (husband's) circumstances in life, and also the amount required by the plaintiff for her support. (2. Punjab Record, Case No. 49.) In a recent Oude case before the Privy Council, Mulkah Do Ali M. Nawab Tajdar Bahu v. Mirza Jahan Kudr and others, their Lordships, after deciding that the Punjab Civil Code was generally in force as law in that Province, held that the local Courts were bound to apply the provisions of Clauses 10 and 11 to the cases in which an extravagant dower had been fixed, beyond the means of the bridegroom to satisfy, and were at liberty to exercise a discretion in the division of the property in dispute between the widow and the heirs.—(Sutherland's Privy Council Judgments, p. 554.) See too, Baillie's Digest, pp. 116—118 on Sumat.

11.—At the husband's death the dower is treated as a debt, and takes precedence of the claims of heirs, but not of other debts; it stands on the same footing with them. In this case the Court, would possess the modifying power of Clause 8, and award to the widow a fair sum with reference to the assets of the estate and circumstances of the heirs.

* But in a more recent case, Mir Mohar Ali v. Amani, the correctness of the precedent in the text was questioned, and another Divisional Bench held that at any rate in the case of deferred dower, the claims of the heirs of the deceased wife against the widow is a simple money claim founded solely on the contract entered into by the husband, the rule of limitation applicable being that contained in Clauses 9 and 10, Section 1 of Act XLI of 1859.—(2, Bengal Law Reports, Civil Appeals, p. 306.)
A widow has a lien for her dower over the husband's estate.

A vendee cannot disregard a dower lien.

The lien is not invalidated by reason of the amount due being disputed.

Form of action to be brought by an heir when some dower is admittedly due.

A claim for payment of the dower does not imply a claim of lien over the estate.

"The widow of a Musalman in possession of her husband's estate under a claim of dower has a lien upon it as against those entitled as heirs, and is entitled to possession of it as against them till her claim of dower is satisfied; and if after having actually obtained possession of the estate of her deceased husband the widow be deprived of possession by a decree in favor of heirs who take with notice of the existence of her claim to dower, and more particularly where her right to sue to establish her claim to dower has been expressly reserved, the heirs may be held to take the property subject to a lien which is not divested by the decree.—Woomatul Fatimah Begum v. Mirumunnissa Khanum.—(9 W. Reporter, Civil Rulings, p. 319.) In this case the Court expressly impugned the judgment in Bibi Salamat v. Montla Baksh (5 W. Reporter, p. 194) as conflicting with the principles of Mahammadan law. But the heirs of a wife dying in her husband's lifetime have no right of lien over the husband's property to the extent of the unpaid dower.—Mir Makar Ali v. Amani.—(2 Bengal Law Reports, Civil Appeals, p. 306.)

A party who has purchased property, of which the vendor's mother, a widow, was in possession in respect of her unpaid dower, has been held to have no right to eject the latter, whatever be the title he had secured by his purchase, since a dower lien is a valid one.—Bandah Ali Khan v. Mussumat Choti Bibi.—(1 North West High Court Reports, p. 273.)

A widow is entitled to a lien for whatever dower remains due to her, although there may be a dispute as to what is the amount actually due, having reference either to the amount originally fixed as dower, or to the amount satisfied by payments. If, therefore, some amount be admittedly due on this account, an heir seeking to recover the estate instead of bringing an action of eviction against the widow should institute his action for an account of what is due to the defendant for dower, praying that upon satisfaction of that amount he might be put in possession of his share of the inheritance.—Ahmad Hossein v. Mussumat Khadeja.—(10 W. Reporter, Civil Rulings, p. 369.)

A claim for the money amount of dower, and a claim to establish a lien on specific property, constitute two entirely distinct causes of action, and therefore a plaint which sets up the first claim simpler cannot be treated as if really set up the latter.—Mussumat Wafeah v. Mussumat Saheeba. In the same case it was ruled that where a widow, who had taken possession of her husband's property, was ejected in a suit brought by the heirs, who obtained an absolute decree of right in them as against the widow, her defence that the property was partly her own and partly
purchased from her husband by her being over-ruled, she could not subsequently sue to establish a lien for dower over the same property, since between the parties the right of lien was virtually a res adjudicata.—(8. W. Reporter, Civil Rulings, p. 307.)

A Mahommadan lady in possession of property by virtue of her dower lien has no power to alienate more than her own inheritance share in it, but she can mortgage her hypothecated interest therein.—Mussumut Kamrunnissa Begum v. Mahammad Hossein.—(1. North West High Court Reports, p. 287.) See too Vol. 3., p. 300.

12.—If in any tribe or sect a contract of betrothal shall have been entered into by parents on behalf of their children, which contract may be broken by either of the children when they arrive at years of discretion, then an action for damages will lie against the parent who has broken the contract or whose child may have refused to ratify it. So also if the marriage shall have been solemnized during the infancy of the parties, and shall not have been actually consummated, and if, in such case, either of the parties, on coming of age, may refuse to acknowledge the marriage, or may contract another marriage, then an action for damages will lie against both the child who violates the contract, and the parent who made it. But heavier damages will be allowed in this case than in a breach of betrothal. In either case the action may be brought either by the aggrieved party, or by his or her parents, or jointly by both, and in either case larger damages will be assessed if the aggrieved party should be a female. The right of making contracts of the above nature will rest with the parents or guardian. It will be explained hereafter to whom the guardianship ordinarily pertains; if the contract be made by proxy, the agent should, if possible, be furnished with written instructions.
Circular 102 of 1858, given above in extenso under Clause 9 of this Section (p. 195) should be consulted on this subject.

A contract of betrothal made in regard to a girl, not born at the time of the contract, is null and void.—Diyada v. Bhama.—(1. Punjab Record, Case No. 80.)

In Mahammad Baksh v. Mussumat Jinaat Bibi Mehru the Chief Court amended a decree for damages for breach of betrothal, by striking out the name of the child who had broken the contract; as by this Clause the action in such cases lies against the parent only, who in the present suit was the mother.—(1. Punjab Record, Case No. 59.)

Where the parents after betrothing their daughter in marriage die, the guardians of the girl can only be responsible for their own breach of the contract “although it may be right to say that they are prevented by the previous contract of the parents from making another.”—Ram Chund v. Lallji.—(3. Punjab Record, Case No. 21.)

In breach of betrothal suits the period of limitation runs from the date of the breach and not from that of the contract.—(1. Punjab Record, Case No. 69.)

Where a marriage has been solemnized but not consummated and the married woman is an adult, the Courts have jurisdiction to decree consummation.—Chougatta v. Rajan.—(4. Punjab Record, Case No. 13.)

13.—In any case it will be competent for the defendant to adduce reasons for non-fulfilment of the contract of betrothal or of marriage, such as immorality or misconduct on the part of the plaintiff, physical defect, or incapacity and the like, and the Court will decide whether these reasons are sufficient, either for mitigation of damages, or for the dismissal of the suit; but the Judge will be cautious in admitting the validity of such reasons. In no case can the Court compel either party to complete the marriage against his or her will.

14.—In the case of adults, breach of promise of marriage will be actionable, and damages may be decreed to the aggrieved party.
Breach of promise of marriage.

In suits for damages brought under this Clause, the plaintiff must establish mutuality of obligation, as the promise of the one party to marry is the consideration for the promise of the other party.—(Addison on Contracts, p. 13.) Such acceptance of the offer by the plaintiff may be established through the medium of her conduct and actions at the time as well as by express words; as if a man ask a woman to come to India to marry him, her consequent going there would prove acceptance on her part. So when a gentleman asked for and obtained the consent of the parents to his marriage with their daughter, in the presence and hearing of the latter, her silent acquiescence, in standing by and saying nothing, afforded as cogent proof of her assent as an express affirmative.—Daniel v. Bowles.—(Addison on Contracts, p. 744.) "Sue patris voluntati non repugnat consentire intelligitur."—Dig. L. 23 tit. 1, 1, 12.

If one party to the contract be a minor the other is bound.

It is, however, a principle of the English common law that if a contract have been entered into between an infant and a person of full age, the former may take advantage of his minority and resist the completion of his contract, but that right cannot be urged by the other to show that as there was not a mutual obligation, there was no consideration for his promise. If therefore, a person of full age enter into a contract of marriage with a lady who is a minor, the latter may sue the former upon the contract, albeit she herself is not liable to an action for a breach of promise.—Addison on Contracts, pp. 15 and 937.)

A conditional promise is a good consideration, if the condition be reasonable.

If a man promise to marry a woman, on condition of her coming to where he may be residing, or doing any other particular act or thing, there is sufficient consideration for the promise; and if the condition precedent be accomplished, the man will be responsible for the non-fulfilment of his promise. The validity of conditional promises of marriage will depend on the reasonableness of the condition, and the time limited for its accomplishment. If therefore, the marriage is to depend on the happening of a distant and uncertain event, which may in all probability not take place during the lives of the parties, it would be a contract in restraint of marriage and therefore void.—(Addison on Contracts, p. 745.)

Instances of bad plea in answer to this action.

It is no answer to an action of this nature to shew that the plaintiff at the time of making the promise was engaged to some one else, and that the pre-engagement was concealed from the defendant. Neither is a party bound to disclose that at some previous period he had been confined in a lunatic asylum. If however the woman at the time of the betrothal was of loose and immodest character, and this was unknown at the time to the man who promised to marry her, he is entitled, as soon as he learns her real character,
to break off the engagement. General reputation of want of chastity must be established in such a case, or there must be full proof of particular instances of misconduct. So too, if false representations be made by the girl, or by her friends in collusion with her, as to her circumstances and situation in life, and the amount of her fortune, such fraud will be an answer to any action which may be brought for the breach of the promise to marry. But if the plaintiff herself were no party to the fraud, and made no false representation and were guilty of no wilful suppression of the truth, the defendant cannot escape from liability.—(Addison on Contracts, p. 746.)

The common law does not discourage long engagements to be married, if the parties be young, otherwise they are voidable as being in restraint of marriage. If no time be fixed and agreed on, it is in the eye of the law a contract to marry within a reasonable time after request. If both parties lie by for an unreasonable period, and do not treat the contract as a continuing one, the engagement will be deemed to be abandoned by mutual consent. If the time of performance be fixed, and by bodily disease it becomes impossible for one party to go through the ceremony without danger to health, this is a valid ground for postponement, by giving notice to the other party.—(Addison on Contracts, p. 745.)

If the party making the promise were already married, and therefore incapable of entering into the contract, this incapacity constitutes no excuse for non-performance, unless it were known at the time to the opposite party. Previous insanity and confinement in a lunatic asylum constitute no excuse for non-performance of a contract of marriage.—(Addison on Contracts, p. 745.) If after mutual promises of marriage have been exchanged one of the parties by bodily disease becomes unfit for the procreation of children, the party so unfitted is not entitled thereby to treat the contract as dissolved if the other party still desire its performance; but the latter may break off the engagement.—(Addison on Contracts, p. 747.)

In actions for breach of promise of marriage, the motives or conduct of a party in breaking the contract may be taken into consideration in assessing the damages.—(Norton's Topics of Jurisprudence, p. 126.)

By English law in actions on breach of promise of marriage, neither of the parties to the contract is admissible as a witness. No such exclusion however appears to be recognized by the Punjab law of evidence.
15.—Any person who seduces an unmarried female, residing with her parents or guardian, may be cast with damages by the Court, at the suit of the parent or guardian. If the female should have been betrothed, and if it appear that the marriage has been prevented by reason of the seduction, then heavy damages will be assessed.

16.—If after the marriage has been consummated, and co-habitation ensued, either party should violate the vow, he or she will be liable to all the pains and penalties of adultery, both criminal and civil. If the defendant should have been already punished criminally, that fact will not bar a civil action. A duly authenticated copy of the judgment of the Criminal Court, produced by the plaintiff in a Civil action, will constitute sufficient proof of the adultery, and the Judge will at once proceed to assess the damages, either with or without the aid of assessors.

It will be observed that this clause admits the judgment of a Criminal Court as conclusive proof of adultery in an action for damages; a departure from the general rule which excludes a judgment in a criminal matter from being admitted in a civil action, owing to the want of mutuality.

17.—Whenever a decree is issued with reference to a breach of contract, or to adultery, the plaintiff is entitled to indemnification for any expenses incurred in dower, gifts to relatives, or on other accounts, as well as to damages for injured feeling, and honor.

In assessing damages for a breach of a contract of betrothal no distinction should be made between articles given "socially" and those given "ceremonially." If the presents were made in consequence of the betrothal, they cannot be thus classified, and the plaintiff is entitled to recover all, or
the value of all. The expenses of feasts, not being the direct consequence of the betrothal, ought to be disallowed. Damages in respect of hatak izzat or loss of reputation are to be claimed along with the damages for pecuniary loss in the action on the breach of contract. — Nabi Baksh v. Sadik. — (4 Punjab Record, Case No. 23.)

In concluding this Section, it may perhaps be of use to make the following extracts from the Commentary originally published with the Code:

"In the proposed rules the chief deviations from the native laws are: legalizing the re-marriage of widows among Hindus (since extended to all British India by Act XV of 1856); the rule regarding the amount of dower payable on divorce among Musalmans; the rules regarding the non-performance of betrothal agreements; and the breach of marriage contracts not accompanied by cohabitation.

6. "The rules under the last head will alone require comment. The custom of betrothing and marrying infants is not to be applauded; indeed it is repugnant to European ideas that parents should make such agreements on behalf of their children; and it is difficult to condemn the children, if, when they come of age, they refuse to ratify such contracts: still, the consequences of the refusal are embarrassing, and the custom of early betrothal and marriage is so deeply rooted in the native mind, that it cannot be disregarded. If either of the contracting parents should break, or cause the child to break, a contract of betrothal, then of course he, or she, is liable to be cast in a suit for damages and indemnification. But if a contract of betrothal be broken by either of the children, then it is proposed to hold him, or her, blameless: the parent who made the contract ran a risk in making it, and must be responsible for the consequences of its non-performance.

7. "But there remains a class of contracts of marriage between children, undertaken by parents on their behalf, and which have not been ratified by cohabitation. If either of the children break the vow thus vicariously made, ought he, or she, to be held guilty of adultery, or be held blameless, or be singly cast for damages and indemnification, or be cast jointly with the parents?

8. "Now whatever the native law may declare, the child in this case, is not morally guilty of adultery; and it is not proposed to subject him, or her, to the pains and penalties of that crime. But, on the other hand, constituted as native society is, the child cannot be considered quite blameless: no positive injury perhaps is committed; still, much disgrace and unhappiness is inflicted on the opposite party, and one, who knowingly inflicts such disgrace, must
give some compensation. The matter is much more serious than non-performance of betrothal, and the child cannot be freed from liability. But if the child be mulcted with damages, the parent who was the original contracting party is also liable. It has therefore been proposed that, in such a case, the child and the parent should be sued jointly.

9. "If after cohabitation has ensued upon marriage, the vows are broken, then the adulterer, or adulteress, is solely amenable: the responsibility of the parent can no longer be enforced."
CHAPTER VII.

PUNJAB CIVIL CODE.

SECTION VII.

Adoption.

1.—By Hindu law, any man, having no son born to him, may adopt one, who will subsequently perform those obsequies which are considered to be of such paramount religious importance. A widow may also adopt a son if she shall have received permission, verbal or written, from her husband, during his lifetime, to do so. One son only can be adopted; but in the event of his death, a second adoption will be lawful. There are no prohibited degrees in adoption; on the contrary, if the adopted son be nearly related to the adopter, that is a favorable circumstance. And at all events the parties concerned in the adoption must belong to the same caste. A father may not give away his only son in adoption, inasmuch as he would thereby leave himself without a son to perform his obsequies.

The following rules relative to adoption are extracted chiefly from the sixth chapter of Macnaghten's Principles of Hindu and Mahammadan Law, and are placed together under this first Clause of the Section for the sake of clearness, instead of being scattered through different parts of the chapter. The subject divides itself into four main heads—(i) who may adopt: (ii) who may give in adoption: (iii) who may be adopted: (iv) the rights acquired by adoption.

(i.) Who may adopt.

I. It is requisite that the party adopting should be destitute of a son, and son’s son, and son’s grandson; a daughter’s son is not however a bar to the right of adoption. (Macnaghten's Principles, p. 69, and note on that page.)

Requisites to enable a man to adopt a son.
II. But a man may adopt, although he have male issue, if such issue be disqualified by any legal impediment (such as loss of caste) from performing the exequial rites. — (Note on p 69.)

Second adoptions.

III. A man who has already adopted a son cannot adopt a second during the life-time of the first. — (p. 83.) This doctrine was fully discussed and affirmed by the Privy Council in Atchama v. Ramanadha Babu; and is there expressed in the form that the second adoption will be invalid, "the first adopted son still existing, and remaining in possession of his character of a son." — (Sutherland's Privy Council Judgments, p. 197.) If however a man do make a second adoption, and the first adopted son from ignorance of the law or other cause allow the second son a share in the father's land, a suit to oust him on the ground of the illegality of the adoption will be barred by limitation if brought more than twelve years after the death of the adopt- ing father. — Radha Kishen Mahapater v. Srikishen Mahapater. — (1. W. Reporter, p. 62.)

IV. Two persons, even two brothers, cannot join in the adoption of one and the same son. — (p. 81.)

V. An unmarried person, or one who is blind, impotent, or lame, is competent to adopt. — (note on p. 69.) So also is a widower. — Nagappa Udapa v. Subba Sastry. — (2. Stokes' Madras Reports, p. 367.)

VI. But not only can a man adopt but a woman can do so likewise. If however she adopt according to the Dattaka form, she must have "the consent of her husband, or according to the law laid down in some authorities, the sanction of his kindred.*" — (pp. 70 and 84; and 3. Madras High Court Reports, p. 283.) In Kallu and Tansukh v. Mussunmat Ladéa and Bhurea the Judicial Commissioner held that the assent of the kindred was not essential to the validity of the adoption. In the same case the adoption of another party by a widow was set aside, as it did not appear that the widow had received the permission of her late husband to adopt a son. This case came, it may be added, from the Delhi Division. — (1. Punjab Record, Case No. 3.)

VII. Although a widow may have been authorized by her husband to adopt a son, or two or more sons in succession, she cannot be compelled to act up to that permission, and may claim to enter on the inheritance, instead of carry-

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* See before, p. 122 for a succinct account of these divergencies as given in the Privy Council Judgment in The Collector of Madura v. Mutu Ramalinga Sathapathy.
PARTIES COMPETENT TO ADOPT.

VIII. In a Privy Council case, Sundar Kumari Debi v. Gangadhar Pershad Tiwari, their Lordships threw out an opinion that a power to adopt may be given even verbally—(Sutherland's Privy Council Judgments, p. 297); while in Pratima Sundari Chowdhrai v. Avund Kumar Chowdhry, the Calcutta Court held that there is no need for a deed of adoption to be drawn up in any stereotyped form, and that though the absence of registration and of stamped paper might give rise to inferences against the genuineness of such a deed, they would not invalidate it if proved to be an authentic document. In this case also occurs an obiter dictum in favor of the validity of mere verbal permission to adopt.—(6. W. Reporter, p. 133.) In Rupmoiyuri U/lowdkranee v. Ramlall Sir-car, the Court held that the rule for testing the validity of a power to adopt "was contemporaneity of execution and publication, and, in the absence of this test, all the circumstances bearing upon the alleged deed and all the probabilities for and against its genuineness must be thoroughly considered."—(1. W. Reporter, p. 145.)

IX. A widow succeeding to her son as his heir does not lose the right to exercise a power of adoption given her by her late husband, as by making the adoption she divests only her own estate.—Bykant Mani Rai v. Kisto Sundari Rai.—(7. W. Reporter, Civil Rulings, p. 392.) But when a son has succeeded to his father's property, and dies childless and is succeeded by his widow, the latter acquires a vested interest in her husband's estate as widow, and a new heir cannot be substituted by an act of adoption on the part of her mother-in-law to defeat that estate.—(Sutherland's Privy Council Judgments, p. 574.) This indeed was a Bengal case, and by Bengal law a childless widow has a superior title to an associated brother, but the principle would probably apply to cases coming under the law of Benares, that an estate which has already devolved on the son's widow cannot be divested by a subsequent adoption by the father's widow.

X. A man having a legitimate son may not only authorize his wife to adopt a son after his death, failing such legitimate son, but also, failing the son so adopted, to adopt another in his room. An authority, however, to a wife to adopt in the event of a disagreement merely between her and a son of the husband living at the time will not avail.—(p. 84.)

XI. There is a conflict of authority as to whether a widow, having adopted one son with the sanction of her husband, is at liberty, in the event of the death of such
adopted son, to adopt another, without having received conditional permission to that effect from her husband.—(p. 84.)

XII. If however the widow adopt in the Kritrima form, the sanction of the husband is not required. In this case, however, the son succeeds only to the peculiar property of his adopting mother.—(p. 86.)

(ii.) Who may give in adoption.

XIII. A man may not give a child in adoption who has only one son, nor ought he to give his eldest son, but if such a son be given the transfer once made cannot be annulled.—(p. 70.) The question of the invalidity of an adoption by reason of the adopted child being the eldest son of his natural father was however raised in a case given in 1. W. Reporter, p. 137; but the Calcutta Court refused to entertain it on special appeal, as it had not been pressed on the Lower Courts at any stage of the trial, or even set forth specifically in the petition of special appeal. In Sutherland's Civil Rulings for March 1864, p. 133, such an adoption was held to be improper, but not illegal when actually accomplished: in this case the family were Sudras. In a recent decision of the Calcutta Court, Rajah Upenra Lall Roy v. Srimati Rani Prasanna Mayi, a Divisional Bench has held that the adoption of an only son is actually invalid and void.—(1. Bengal Law Reports, Civil Appeals, p. 221.) On the other hand, in Chinna Goundan v. Kumara Goundan (1. Stokes' Madras Reports, p. 54) the Madras Court has held that such an adoption, when made, is valid, and a decision of the Bombay Court of the same purport as the Madras one will be found in 4. Reid's Reports, p. 191.

XIV. A man however having a son, and the son of a deceased elder son, may give the former away in adoption, since the latter bears to him the relation of a son to all intents and purposes.—(p. 80.)

XV. A man cannot give his brother in adoption.—(p. 69.) See 2. Madras High Court Reports, p. 129.

XVI. A mother, with her husband's consent, can give a son in adoption (p. 67) but not otherwise; and such sanction must be previously obtained.—(p. 85.)

(iii.) Who may be adopted.

(a.) In the Dattaka form.

XVII. A Dattaka son must be of the same tribe as the adopting father, but should not be an elder relation, such as the paternal or maternal uncle.

XVIII. Among the three superior classes, the son should not be the child of one whom the adopter could not have married, such as his sister's son, or daughter's son (p. 70,
and 1. Stokes' Madras Reports, p. 420. ) This rule is however peculiar to Dattaka adoptions, the practice in Kritrima ones being just the reverse (See Rule XXII below.) It seems therefore to be regretted that in two cases which have come before the Chief Court, the published reports (2. Punjab Record, Cases Nos. 24 and 83) do not make it clear whether the adoptions were in the Dattaka or Kritrima form. In the former suit, Mutassadi Mall v. Mussumat Lajwanti and Ram Chand, a Khatri gave permission shortly before his death to his wife to adopt his sister's son, and the Chief Court remanded the case for further enquiry, holding that, unless there were a local custom to the contrary, such an adoption would be invalid among Khatris by virtue of the doctrine set forth in the present rule. In the second case, Maya Dass v. Sawan, the Court upheld the adoption of a sister's son, as the further investigation in the case of Mutassadi Mall had shewn that generally throughout the Punjab, the adoption of a sister's son was regarded as valid. The remark in the Code, "that there are no prohibited degrees in adoption; on the contrary, if the adopted son be nearly related to the adopter, that is a favorable circumstance," is probably made in this general and unqualified form owing to the great preponderance of Kritrima over Dattaka adoptions in this province. The Editor of the Punjab Record appends as a note to the report of the second case (No. 83) that—"The effect [of this decision] will probably be that in future the adoption by a Hindu of a sister's son will be accepted prima facie as a valid adoption, the onus of proving a contrary custom in any particular locality or tribe being cast on the party alleging it." Should it however be clearly established that the adoption was in the Dattaka form, and had taken place among the twice-born classes, I see nothing in either of these decisions to prevent the Courts from throwing the burden of proof on those who allege a local custom at variance with recognized Hindu Law.

XIX. Where there is a brother's son, he should be selected for adoption in preference to all other individuals: but this is not so universally indispensable as to invalidate the adoption of a stranger.—(p. 71.) Hence the adoption of one who was stranger in blood to the adopter's family was recognized in Kula and Tansakh v. Mussumat Ladea and Bhurea—(1. Punjab Record, Case No. 3.)

XX. The adopted son must be initiated in the name of the family of the adopting father with the prescribed forms and solemnities; although the exact performance of these ceremonies is not indispensable.—(p. 71.) But even if the performance of the religious rites may be waived, the giving and receiving of the son must be an actual giving and
an actual receiving of the child in order that the adoption may be valid. Accordingly in *Sri Narayan Mitter v. Srimati Krishna Sundari Dassi*, the Calcutta Court held that a mere constructive giving and taking by the execution of two deeds of agreement by which the plaintiff and defendant covenanted that the son of the latter should be given to and received by the former in adoption was not in itself sufficient to constitute an adoption.—(2. Bengal Law Reports, Civil Appeals, p. 279.) Hence also it follows that an orphan cannot be given in adoption.—Subbaiyammal v. Ammakutti Ammal.—(2. Stokes' Madras Reports, p. 129.) See above, Rule No. XV. Where no objection had been taken in the Lower Courts to the form of the disputed adoption, in regard to the omission of any of the wonted ceremonies, or the age of the adopted son, the Agra Court refused to allow these points to be put forward on special appeal.—Kunwar Daryao Singh v. Kunwar Karun Singh—(1. North West High Court Reports, p. 31.)

XXI. For the age of the Dattaka son at the time of adoption, see the remarks under Clause 3 of this Section.

(b.) *Who may be adopted in the Kritrima form.*

XXII. In the case of the Kritrima son, the only restriction is that of tribe; it being essential that the tribe of the adopting father and the adopted son should be the same. There is no condition as to age, or relationship; so that it is said that a man may adopt his own brother, or even his own father.—(p. 79.) So in *Mukkun v. Nikka* the Chief Court upheld the adoption of a Kritrima son of the age of thirty, the fact of the adoption having been fully proved.—(3. Punjab Record, Case No. 87.)

XXIII. There is no condition as to the performance of ceremonies (p. 79): the form being instantaneously perfected by the offer of the adopting and the consent of the adopted party (p. 85); which consent, however, must be given during the life-time of the adopting party.—(p. 80.)

(iv.) *The rights resulting from adoption.*

(a.) *In the Dattaka form.*

XXIV. The Dattaka son loses all claim to the property of his natural family; but for the purposes of marriage and mourning he is not considered in the light of a stranger, but the prohibited degrees continue in full force as if he had never been removed. So too his natural family has no claim whatever to any property to which he may have succeeded in his new family.—(p. 72, and 1. Stokes' Madras Reports, p. 180.) If however the adoption be invalid, the natural rights of the so called adopted son remain, and he
acquires none in the adopting family.*—(1. Stokes' Madras Reports, p. 363.)

XXV. In Sadanund v. Mussumat Swaro Mani Debi the Calcutta Court held that an adopted son was entitled to succeed as heir not only to his adopting father's ancestral estate, but also to all acquisitions made by the father out of the proceeds of such estate, and that a will therefore disinheriting such an adoptive son in favor of a third person was void as to the ancestral estate and the acquisitions made therefrom.—(8. W. Reporter, Civil Rulings, p. 455.)

XXVI. He inherits collaterally as well as lineally in his adopted family (pp. 72 and 83, and the case of Sambhuchandra Choudhry v. Narayani Debi—(Sutherland's Privy Council Judgments, p. 25.) But he has no legal claims to the property of a Bandhu† or cognate relation.—(p. 82.) He will inherit the stridhan of his adoptive mother in the same manner as a natural son.—(See before Note on p. 174 of this work.)

XXVII. "Where a legitimate son is born subsequently to the adoption, he and the adopted son inherit together; but the adopted son takes one-third according to the law of Bengal, and one-fourth† according to the doctrine of other schools. If two legitimate sons be subsequently born, then according to the Benares school the property should be made into seven parts, of which the legitimate sons would take six; and according to the law as current elsewhere, into five shares, of which the legitimate sons would take four, and so on, in the same proportion, whatever number of legitimate sons may be born subsequently."—(p. 73.) "The position of an adopted son is affected only by the birth of a subsequent legitimately begotten son of the adopting father, so that when an adopted son comes to share with heirs other than the legitimately begotten sons of his adoptive father in the property of kinsmen, he takes the share that they would have. He represents his adoptive father, and is entitled to the share that his father would have obtained."—Tara Mohun

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* In a case given in 1. Stokes' Madras Reports, p. 45, a Hindu whose adoption was invalid was held entitled to maintenance in the family of his adopter; but this is doubtless an erroneous decision.

† A man's Bandhus are of three descriptions; personal, paternal and maternal. The personal kindred are the sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle. The paternal kindred are the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. The maternal kindred are the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle.—(Macnaghten's Principles, p. 37.) But the Privy Council has recently determined that this list is by way of illustration and not exhaustive, see note on p. 151 of this work.

‡ See also 1. Stokes' Madras Reports, p. 45.
XXVIII. "A boy adopted by a widow with the permission of her late husband has all the rights of a posthumous son, so that a sale made by her to his prejudice of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity."—(p. 73.) Therefore "a widow has no rights beyond those of maintenance, in a case where a valid adoption makes the adopted son the legal heir."—(7. W. Reporter, Civil Rulings, p. 450.) In Rajkrishna Roy v. Kishori Mohun Mazumdar, the Calcutta Court, however, ruled that "a sale by a widow with the consent of all legal heirs at the time existing would be binding on reversioners and is binding on the adopted son."—(3. W. Reporter, Civil Rulings, p. 15.)

(b.) Rights resulting from a Kritrima adoption.

XXIX. A Kritrima son, as well as his issue, continues after the adoption to be considered a member of his natural family; and he takes the inheritance both of his own family and that of his adopting father.—(p. 79.) In Bhagat Singh and others v. Budhu, which from the alleged age of the adopted son would appear to have been a case of Kritrima adoption, occurs a remark to the effect that the adopted son is disqualified from inheriting from his own natural father.—(2. Punjab Record, Case No. 51.) It is true that this is a mere obiter dictum, as the point in question was not then before the Court, but it should be borne in mind that this is precisely one of the points in which the results of Dattaka and Kritrima adoptions are diametrically opposite to each other.

XXX. The relation of a Kritrima son extends to the contracting parties only; the son so adopted not being considered the grandson of the adopting father's father, nor the adopted son's son, the grandson of his adopting father. Hence such a son does not inherit collaterally.—(p. 80.) The features of Kritrima adoption set forth in this and the following rule were recognized by the Calcutta Court in Mussunmat Shibo Koeree v. Jugan Singh—(8. W. Reporter, Civil Rulings, p. 155.)

XXXI. A person adopted in this form by the widow does not hereby become the adopted son of the husband, even though the adoption should have been permitted by him, (p. 80), but he succeeds to his adopting mother's stridhan, and will perform her obsequies (p. 86.) According to Mithila law the widow can adopt a son for herself in this form without her husband's consent.—The Collector of
For the effect of Dwyámusháyana adoptions, see the remarks under the next Clause of this Section.


2.—The son thus given, and adopted, acquires all the legal rights of a lawfully begotten son of the adopter. But he becomes separated from his natural parents; his relation to the giver ceases, and a relation to the adopter commences. He has, ordinarily, no claim to inherit property from his blood relations, nor have they any claim on his property. But if the natural parents should, after giving away a son in adoption, be bereft of their other sons, then the adopted son may become the heir of his natural parents as well as of his adopted parents, and may perform, with religious efficacy, the obsequies of both. If lawfully begotten sons should be born after the adoption, then they will share with the adopted son. By the Hindu law an adopted son may be disinherited for gross misconduct, but this doctrine must be applied with caution.

It should be borne in mind that the opening clauses of this para treat of a son "given and adopted," that is to say, a Dattaka one. Besides the instance mentioned in the text, Kritrima sons inherit from both the natural and adopted parents (Rule XXIX), and also sons adopted in the Dwyámusháyana form, which is thus described by Macnaghten. In this form "the adopted son still continues a member of his own family and partakes of the estate both of his natural and adopting father, and so inheriting is liable for the debts of each. To this form of adoption, the prohibition as to the gift of an only son does not apply. It may take place either by special agreement that the boy shall continue son of both fathers, when the son is termed Nitya Dwyámusháyana adoptions.
The rules bearing on this Clause are Nos. XXIV, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI.

3. — The proper age at which the child should be adopted is a disputed point among Hindu jurists. If he be adopted as Dattaka, or "given," (the most orthodox form) the adoption should take place before he attains the age of five, or at the most of eight, years. If he be adopted as Kritrima, or "made" (a less authoritative form,) then no age whatever is fixed. The adopted son should be given to the adopter, but cannot be purchased by him.

The question of the limit of age beyond which a Dattaka adoption cannot take place is discussed at pp. 74—79 of the Principles of Hindu and Mahammadan Law, where it is shewn that, even according to the authority which allows the widest margin, the Dattaka Chandrika, it is essential that among the three superior tribes, adoption should precede investiture with the characteristic cord (upanayana), and among Sudras that it should take place before marriage. See also 3. Madras High Court Reports, p. 28. But in this province, the provisions of the following Clause of the Code should be kept in mind.

4. — The strict rules of the Hindu law of adoption, especially as regards age, are frequently disregarded in this province. But such informality will not be held to vitiate adoptions contracted bona fide. The main principles, however, as laid down in the Section are entitled to observance.

musháyana; or otherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated Anitya Dwyámusháyana; and in this latter case, the connection between the adopting and adopted parties endures only during the life-time of the adopted. His children revert to their natural family. With a legitimate son subsequently born, the Dwyámusháyana takes half a share of his adopting father's property"—(Macnaghten's Principles of Hindu and Mahammadan Law, p. 74.)
In an inheritance dispute between certain Jat agriculturists, the Chief Court held that the fact of the defendant having lived with the deceased for many years as his son cultivating the land, and that he had subsequently performed his obsequies, and taken no share of the estate of his natural father, was proof sufficient to constitute an adoption and render the defendant sole heir to the deceased, albeit the performance of any ceremonies of adoption could not be shewn to have taken place.—Lehna Singh v. Cheina—(3. Punjab Record, Case No. 111.)

“When there is satisfactory evidence shewing a party to have been given and received in adoption, and when the adoption has been continuously recognized for a series of years, and the party adopted is shewn to have had possession, either in person or through his guardian, of property which would devolve upon him by reason of such adoption, in such a case, after the lapse of 20 years, the Court may very well dispense with formal proof of the performance of the ceremonies; and unless it were distinctly shewn on the part of the person contending against the adoption that ceremonies had not been performed, the party adopted would be entitled to enforce all his rights as adopted son.” Saboo Bewah v. Nakagum Maiti.—(2. Bengal Law Reports, Appendix p. 51.)

Conversely, subsequent acts at variance with the existence of the alleged adoption, such as the alleged adoptive son marrying his daughter into the caste or family of the adopting father, will have great weight in determining whether the claimant be validly adopted or not.—Harsahai v. Bhawani Dass.—(4. Punjab Record, Case No. 43.)

5.—Contracts relative to adoption are actionable in a Civil Court. But no particular deed or writing is requisite in the formularies of adoption.

The person who sets up an inheritance claim by virtue of having been adopted, must himself prove the adoption.—(2. W. Reporter, Civil Rulings, p. 326.) But where the plaintiff sues for a declaration that an adoption is invalid, he is bound to prove the invalidity, and the onus in such a case is not to be cast on the defendant of shewing that it is valid.—Brojo Kishori Dassi v. Srinath Bose.—(9. W. Reporter, Civil Rulings, p. 407.) In the same case the Court remarked that “a stranger who has no interest in the matter, has no right to commence a suit and to ask a Court for a declaratory decree that the adoption of a particular person is invalid. It might be very reasonable at the instance of a presumptive reversionary heir whose estate would not accrue till the death of the widower to try whether an adoption made
by a widow were valid or not, and upon proof of the invalidity of the adoption to declare that it was invalid. In such a case if the reversionary heirs should be compelled to wait until the death of the widow before they could get the question tried as to the validity of the adoption they might have to wait until all the witnesses who could prove the invalidity of it were dead, for the widow might outlive all the witnesses. Such a suit might, we apprehend, be maintained by the presumptive reversionary heirs for the benefit of the persons, whether themselves or others, who might be the heirs of the husband at the time of the widow's death, in the same manner as the presumptive reversionary heirs may sue to restrain a widow from committing waste, although, if the widow should survive them, they would sustain no injury by the waste."

An adjudication on adoption is not a judgment in rem. See before, p. 93 of this work, and the ruling in Krija Ram v. Bhagawan Dass.

In a suit by an adopted son on a bond the defendant cannot raise the question of the validity of the adoption.

In Bhowani Pershad Surnah Khan v. Dhurm Narayan Neogy, where the plaintiff sued on a bond as executors of an alleged adopted son of the party in whose favor the bond was made, the High Court held that when the defendant questioned the title of the plaintiff, it was sufficient for him to show that he had obtained a certificate under Section 2 Act XXVII of 1860, or that he was in de facto possession of the deed upon which the suit was instituted as heir of the obligee; since when he had proved one or other of those states of circumstances he had done sufficient for the purposes of the suit, and that the lower Court had therefore erred in law in requiring the plaintiff to prove the validity of the adoption against the defendant who impugned it.—(3. W. Reporter, Civil Rulings, p. 25.) See Rules XX and XXIII.

6.—By the Mahammadan law no special formularies, or legal consequences, are attached to adoption. The adopted son has no peculiar rights, except such as the adopter may confer on him. But by becoming naturalized in another family, he does not forfeit inheritance in his own.

No authority in favor of the right of an adopted son to inherit as among Musalmans.

In Khwajah Ohid Khan v. The Collector of Shahabad the question of the right of an adopted son to inherit among Musalmans was considered, and no authority either from Mahammadan law or from decided cases could be discovered in support of the claim.—(9. W. Reporter, Civil Rulings, p. 502.)
7.—Nothing in this Section can apply to families where adoption may have been declared void, as regards the succession to public grants or to feudal privileges, distinct in their nature from private rights.

"Adoption among Musalmans is of no more legal importance than in England. But among Hindus, in efficacy and validity it is analogous to the practice of the Romans and the Athenians. Under the Regulations the decisions of the Courts on this head are entirely guided by Hindu law, and in the present Section no deviation is proposed. Some portions of the law are uncertain; indeed, Sir W. Macnaghten declared that there was no topic of Hindu jurisprudence more surrounded by doubts and difficulties. Fortunately, however, the obscurities hang over matters of secondary importance, such as whether adoption must take place at an early age; whether a widow can adopt a second son on the death of the first; whether the adopted son is entitled to inherit the property of his foster (sic) father's collateral relations. A question on each of these points might be answered in the affirmative. But disputes on such remote points are not likely to arise in our Courts, (the formalities of adoption not being strictly observed in this province); and if they should arise, they will not be perplexed by Pandits, or disturbed by the doctrines of rival schools."—(Commentary on the Punjab Civil Code.)

In concluding this Chapter, the following extract from Lord Wynford's remarks in delivering the judgment of the Privy Council in Sutroogun Sulputty v. Sabitra Dye is deserving of being quoted, and pondered on. After lamenting that the law allows an irrevocable act which defeats the just expectations of the relatives of the deceased, to be proved at any distance of time after it is supposed to have been done by verbal testimony only, neither registration nor written evidence being essential to the validity of the act, His Lordship adds—"I would say that in no case the rights of wives and daughters should be transferred to strangers or to more remote relations, unless the act of adoption, by which this transfer is effected be proved by evidence, free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth."—(Sutherland's Privy Council Judgments, p. 37.)
CHAPTER VIII.
PUNJAB CIVIL CODE.

SECTION VIII.

Minority, Parental Authority and Bastardy.

1.—The period of legal minority, for persons of all tribes and classes and of both sexes, will extend to the age of eighteen years.

Various Acts of the Legislature prescribe special periods of majority in regard to the matters of which they treat. The Indian Succession Act, (Act X of 1865) defines a minor as any person who shall not have completed the age of eighteen years. The Indian Marriage Act (Act V of 1865) uses the word minor as signifying a person who has not completed the age of twenty-one years. The Native Converts Marriage Dissolution Act (Act XXI of 1866) requires the male party to a suit for conjugal society to have completed the age of sixteen years only, and the female party to have completed the age of thirteen: while the Indian Penal Code (Section 361) recognizes a kind of maturity in the male at fourteen years, and in the female at sixteen, by fixing these as the limits of age, which a person must be shewn not to exceed in order to constitute the enticement of him, or her, from the keeping of a lawful guardian a penal offence.

Warren in his abridgment of Blackstone’s Commentaries (p. 319) writes—"As the law in general does not take notice of the fractions of a day, if a person be born on the first day of January, he is of age on the morning of the last day of December, though he may not have lived twenty-one years by nearly forty-eight hours."

The incidental mention of a child’s age in the recital of a Mahammadan will is no proof of the exact age of such child. And the granting a certificate to the guardian of the child after the testator’s death is only proof of her being a minor at that time, but does not establish her exact age.—Nil Mani Chowdhry v. Mussumat Zahirumissah Khanum.—(S. W. Reporter, Civil Rulings, p. 371.)

2—If the guardianship of the person or property of a minor shall have been fixed by private arrangement, testamentary or otherwise, the Court
will not interfere, unless there should appear special grounds for interference, such as the proof or the apprehension of fraud, injustice or injury to the minor's person or property.

In *Soobah Durgah Lall Jha v. Neelanund Singh*, the Calcutta Court ruled that though the mother is the natural guardian of her child, there appear to be no provisions of Hindu law "which prohibit a father from appointing by writing or by word any other person than the mother to be the guardian of his minor children"—(7. W. Reporter, Civil Rulings, p. 74.)

3.—Where no previous arrangement shall have been made, the Courts may appoint guardians and managers. But if the minor be a landed proprietor, the appointment rests not with the Court but with the revenue authorities. Managers and guardians, appointed by the Courts, are responsible to them. In making such appointments, the Court will be guided by the following rules:

In the case of Charlotte Twitchen, which was an application to the Lahore District Court to appoint a guardian to an European British subject who was a minor, the proceedings having been removed into the Chief Court under the provisions of Section 14 of Act IV of 1866, that Court held that, while by Section 7 Act IX of 1861 the jurisdiction of the Punjab Courts was not barred by any jurisdiction vested in the High Court of Fort William, yet that the Punjab District Courts, and consequently the Chief Court, have no power to appoint guardians to *European British subjects*, since such authority cannot be exercised without an express grant from the Crown or the Legislature; and in the opinion of the Court no such grant has been made or can be inferred from any Regulation or Act. It is true that Act IX of 1861 speaks of minors generally, but this Act, which treats exclusively of procedure, is merely an Act to amend the previously existing law for hearing suits relative to the custody and guardianship of minors; that law being contained in Act XL of 1858, which Act, even if it apply to the Punjab, expressly excludes the case of European British subjects.—(2. Punjab Record, Case No. 23.)

Section 16 Act XL of 1858 requires the Curator appointed by the Court to furnish annually within three months from the close of the year of the era current in the district
an account of the property in his charge, exhibiting the amounts received and disbursed on account of the estate and the balance in hand. See 3. W. Reporter, Civil Rulings, p. 59.

4.—By the Hindu and Mahommadan law, the guardianship of the person and property of a minor, devolves successively on those parties, who are nearest of kin according to the rules of inheritance, that is to say, first the mother, then the paternal and the maternal male relatives in order. As regards the property, however, the mother would be expected to act in concert with some male relative. But this principle need not always be carried into effect.

The person who by Hindu law has the right of guardianship of a female minor is not necessarily the person who has the right of disposing of her in marriage. In some cases the rights are found to go together; in others however they are severed and vest in different persons. Thus, while the mother is entitled to be guardian, failing the father, she does not stand next to the father as regards the right of giving her daughter in marriage. In a case reported at Volume II of Macnaghten's Hindu law, p. 204, it was held that the elder brother of a minor, and not the minor's mother, was entitled to dispose of him in marriage, because it is laid down in the Mitakshara that in the first instance the father is to perform the initiatory ceremony, such as the marriage of his daughter: in default of him the grand-father: on failure of the grand-father, the brother: the uncle and his son (next in order): and that on failure of all the persons above enumerated, the mother has the right of disposing of her in marriage.—(7. W. Reporter, Civil Rulings, p. 323.)

The practice of the Courts in appointing a guardian to a Hindu minor, has always been to give the preference to the father, then to the mother (whose right, as indeed the right of the father and others, though long and universally acknowledged, is one of practice rather than positive law), and after the mother to the male paternal relations. But when the male paternal relations did not come forward and the claim to the guardianship lay between the stepmother and the paternal grand-mother, the Calcutta Court, disregarding as incorrect a law a contrary ruling of the Bombay Sudder, held that the term mother in this matter did not include a
step-mother, and that as against her the paternal grandmother had a preferential claim to the guardianship of the minor.—Maharani Ram Bansi Kunwari v. Maharani Subh Kunwari.—(7 W. Reporter, Civil Rulings, p. 321.) See too Macnaghten's Principles of Hindu and Mahammadan Law, p. 117-118, where it is added that in default of the mother, the elder brother is entitled to the guardianship, then the paternal relations generally, and failing them the maternal kinsmen according to their degree of proximity: but the appointment of guardians universally rests with the ruling power. The Calcutta Court in Fuggoo Daye v. Ramk Daye and others held that proximity of connection does not necessarily entitle a person to the office of guardian: indeed the nearest legal relative if out of caste is not a proper selection for a guardian of Hindu minors.—(4 W. Reporter, Miscellaneous Appeals, p. 3.)

Guardianship of a female minor.

The guardianship of a female (whether she be a minor or adult) rests with her father until she is disposed of in marriage; and if he be dead, with her nearest paternal relations. After her marriage, a woman is subject to the control of her husband’s family, first, her husband is her guardian, then, failing him, her sons, grandsons and great-grandsons; in default of them, her husband’s heirs generally; failing these her paternal relations, or in their default, her maternal kindred.—(Macnaghten’s Principles, p. 118.) In Item Singh v. Bhagwan Singh two persons set up a claim to the legal custody of two female infants of tender years against their father, on the ground of an alleged marriage of their sons to the infants. The first Court distinctly found that from the age of the children, their marriage could only have been a mere form, and that the form had been shown by the decision of Brahmins to be informal. The Court also found the transaction to be merely a fraudulent device to deprive the father of the custody of his children, to which he was entitled by nature. The Chief Court dismissed the appeal, observing that the “Hindu law, (1 Strange 44,) requires the consent of the father, or whoever is entitled to the custody of the girl, and there can be little doubt that this marriage was invalid. But even if the informal proceedings were valid as a betrothal, the father under the circumstances of this case is entitled to the custody of the children, and their ages are six and four. Their mother does not oppose the claim; and as against the alleged husband, they must undoubtedly be declared subject to their father’s care and control.”—(1 Punjab Record, Case No. 101.)

Custody of infants of tender years according to Mahammadan law.

By Mahammadan law, a mother has the best right to the custody of her infant children (even against the father, See Sutherland’s Civil Rulings, for March 1864, p. 131.) unless her character be such as to render her unfit for the post;
failing her, the maternal grandmother, how high soever; and after her the father's mother, how high soever; than the full sister, the half sister by the mother, the daughter of the full sister, the daughter of the half sister by the mother; next the maternal aunts in the same way; and then the paternal aunts. The daughters of uncles and aunts, whether paternal or maternal, have no right whatever to the custody of children. The rights of all the abovenamed women are made void by marriage to any one who is not related to the infant within the prohibited degrees. These rights of custody revive however on the dissolution of the marriage. When a boy reaches the age of seven, and a girl that of puberty, the right of custody passes to the agnate relations (usubah;) of these the father is first; then the paternal grandfather, how high soever, the full brother, the half brother by the father, the son of the full brother, the son of the half brother by the father, the full paternal uncle, the half paternal uncle by the father, then the sons of paternal uncles in the same order. A girl should not however be given into the custody of a son of the paternal uncle; since no male has a right to the custody of a female child, save one who is within the prohibited degrees of relationship to her: if too the agnate guardian be profigate, he should be excluded from having the custody of a female minor. When a child is with one of its parents the other is not to be prevented from seeing and visiting it. — (Baillie's Digest of Mahammadan Law, pp. 431—435.) The father and paternal grandfather and their executors, and the executors of such executors have also control over the property of the minor for beneficial purposes: but, in their default, this power does not vest in the remote guardians, but devolves on the ruling authority. — (Macnaghten’s Principles of Hindu and Mahammadan Law, p. 221.) In accordance with Mahammadan law, as set forth in the foregoing passage, in Shahzadah Fatah Ali Shah v. Fazilatunnisa Bibi, the mother was held entitled to the custody of her son, a child under the age of seven, as against the father. — (Sutherland's Civil Rulings, for March 1864, p. 13.) Also in 6. W. Reporter, Miscellaneous Rulings, p. 125, the paternal uncle was determined to have no legal right (according to Mahammadan law) to the guardianship of the property or custody of the person of a minor as against the mother.

5.—Guardianship is of two descriptions; first, the protection of the minor's person, his maintenance and tuition; second, the management and custody of his property. These two charges may be reposed in the same person or in different persons.
6.—The guardianship of the person should not be entrusted to the next heir of the minor, or to any other person, who may have an interest in outliving him. With this restriction, however, it is not only permissible but desirable that the charge should be entrusted to some near relative who may take a natural interest in it.

7.—Neither is the management of property to be committed to the next heir. But the duty does not necessarily belong to one of the relatives of the minor. It may happen that the person, who is the best qualified for the guardianship of the person, such as a mother or sister, is the worst qualified for the management of the property. The services of the most capable person, whether related or not related to the minor, will be sought for.

The legal guardian is not the only person who is entitled to sue on behalf of a minor; for it may be doubtful who is the legal guardian, or the guardian himself may be the person who withholds the right, or does the injury, or he may neglect to give the needful protection to the minor: and therefore any friend of a minor, whether his regular guardian or not, may sue on his behalf to establish his right. This liberty, however, does not apply to cases in which a person who is not the legal guardian claims to receive money on behalf of a minor. The consent of the minor to the institution of a suit on his behalf is unnecessary.—(Macpherson on Civil Procedure, p. 12.) See the provisions of Section 19 Act XL of 1858.

The commentary on the Civil Code contains the following observations on this part of the Section—"In the Section on Minority, the policy of the English law and of the regulations has been followed in prohibiting the next heir from taking charge of a minor, regarding whom he may be presumed to have an adverse interest. The distinction between the guardianship of the person and the management of the property is also known to the regulations, and the rules now proposed for the appointment of guardians and managers are generally conformable to the practice of
our older provinces, except that there is no specification regarding minors who may be proprietors in joint undivided estates."

8.—The guardians and managers are responsible for ordinary care and diligence in the performance of their duties. They cannot ordinarily bind their wards by contracts, nor can they exercise ownership over the property. But where they have so acted under manifest necessity, as for the support of the minor, the liquidation of debts, the preservation of the property, or the payment of taxes, the ward, when he comes of age, is bound by their acts.

According to the Civil law the guardian was not only responsible for the loss incurred by his maladministration, but for the gain not acquired and that might have been won.—(Phillismore's Roman Private Law, p. 272.) So he was bound to use such care and diligence as he employed in his own business. It was his duty to sell perishable things, and not to suffer loss by unnecessary delay: to collect debts, and to discharge those, even if due to himself, which bore graviores usuras. The guardian was not allowed to make gifts for his ward unless they were of such a character (e.g. the support of a mother or sister, or the remuneration of a master,) as no one could with propriety dispute "cum tutor non rebus duntaxat sed etiam moribus pupilli proponatur, in primis mercedes preceptoriibus non quas minimas poterit sed pro facultate patrimonii pro dignitate natalium constituet, alimenta servis libertisque nonnumquam etiam exterus si hoc pupillo expediet prestabil, solennia munera parentibus cognatisque millet."

---(Private Law, pp. 299, 300.)

In Chuttarsal Singh v. The Government, the Calcutta Court ruled that, even assuming certain debts when paid by the guardian were affected by limitation, still, in the absence of any proof that the debts alleged to have been discharged were fictitious debts, and in the face of proof that they had been actually discharged, it was not a ground for retrenchment that the guardian thought proper to pay the debts honestly*.—(3. W. Reporter, Civil Rulings, p. 57.) In this case the Court, in the very spirit of the extract from the Digest just given, allowed the guardian credit for poojah and charity expenses, and subsistence allowance to servants

---See too 1. W. Reporter, Miscellaneous Appeals, p. 16.
deputed on business to places distant from the family residence, &c., as being expenses warranted by the minor's social rank and income.

A guardian can recover damages for a personal injury to ward.

A father as guardian of his minor son can sue to recover damages for personal injuries received by the son.—Madhu Sudan v. Kain Ullah Biswas.—(9. W. Reporter, Civil Rulings, p. 327.)

A guardian can sue to set aside an alienation of joint family property by the managing member.

A suit by the guardian of minors to set aside an alienation made by the adult member of a joint Hindu family in collusion with the purchaser, and without the assent of his wards, will lie, and ought not to be considered premature.—Sheo Pershad Jha v. Gunga Ram Jha.—(5. W. Reporter, Civil Rulings, p. 221.)

In setting aside an agreement entered into by a guardian on behalf of his ward, by which he had relinquished a moiety of an estate to which the latter was heir at law, in consideration of being put in immediate possession of the other half, the Calcutta Court ruled that "the acts of a guardian as regards minors must shew the strictest good faith, and must be based on considerations of actual necessity and advantage, not on calculations of possible benefit.—Budh Mull v. Gouri Shankur.—(6. W. Reporter, Civil Rulings, p. 16.) See also on this point 2. Bengal Law Reports, Civil Appeals, p. 126, where the two Judges differed as to the degree in which an act must be for the benefit of the ward in order that a guardian's alienation of his property may be upheld.

The leading case with reference to the powers of a Hindu guardian to alienate or burden his ward's estate is that of Hanumun Parshad Pundi. Here a lady, the guardian of, or rather manager for, her minor son, mortgaged ancestral lands which had descended on her husband's death to the son as heir. The Privy Council held that the Rani's describing herself in the mortgage deed as proprietor, instead of guardian or manager, did not in itself vitiate the transaction, as it was conceded that she never claimed adversely to her son, and that it was apparent therefore that the term was a mere misdescription [Erores scribentis nocere non debut]. Secondly, their Lordships laid it down that, under Hindu law, the right of a bona fide incumbrancer, who has taken from a de facto manager a charge on lands created honestly for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a de facto and de jure manager) affected by the want of union of the de facto with the de jure title. Lastly, they thus defined the powers of the manager—"The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only
be exercised rightly in case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the bona fide lender is not affected by the previous mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arise, or have arisen, from any misconduct to which the lender is, or has been, a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir grounded on necessity which his own wrong has helped to cause. Therefore the lender in this case, unless he be shewn to have acted malafide, will not be affected, though it be shewn that with better management the estate might have been kept free from debt. Their lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the manager is acting in the particular instance for the benefit of the estate.* But they think that if he do so enquire and act honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge: and they do not think that under such circumstances he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security; and that therefore the mere creation of a charge securing a proper debt cannot be viewed as improvident management: the purposes for which a loan is wanted are often future as regards the actual application; and a lender can rarely have, unless he enter on the management, the means of controlling and rightly directing the actual application. Their lordships do not think that a bona fide creditor should suffer when he acted honestly and with due caution but is himself deceived.”—(6. Moore’s Indian Appeals, p. 393, and Appendix to Macpherson on Mortgages.) See Sutherland’s Civil Rulings, for March 1864, p. 143; and for April, p. 166; 1. W. Reporter, p. 285; Vol. 2. Civil Rulings, p. 156; Vol. 5. Civil Rulings, p. 103;—where an alienation was set aside, since, although no fraud or collusion was brought home to the purchaser, the Court found that if he in fact believed there was a legal necessity for the sale which the guardian was making, he had not exercised due

* It does not follow, however, because in such cases the creditor has to discharge this extraordinary burden of proof that the ordinary rule which requires the party who alleges subsequent repayment to prove such payment should be inverted in favor of the opposite party, or that the debt should be assumed to be satisfied unless the contrary be shewn by the creditor. —Candy Vemula Narayanaoppah v. Collector of Masulipatnam.—(10. W. Reporter, Privy Council Cases, p. 27.)
case and attention in arriving at that belief, inasmuch as though the money was raised ostensibly for the marriage expenses it was not really so applied, and there were more-over ample funds belonging to the estate from which the marriage outlay might and ought to have been met;—Vol. 6. Civil Rulings, p. 30, where on the authority of Twyne’s case (1. Smith’s Leading Cases p. 1,) it was ruled that “inadequacy of consideration can in no case be said, as a proposition of law, conclusively to establish mala fides”;—Vol 8. Civil Rulings, p. 364, where it is laid down that while the onus of proving the validity of the sale rests with the alienee, it was not needful that he should establish that the alleged necessity actually existed, but only that before completing his purchase he had made all reasonable enquiry as to the existence of that necessity, and that the result of his investigation was to satisfy him as an honest man of the necessity being real and not pretended;—Vol. 9. Civil Rulings, p. 287, where the Court observed that when a person on attaining majority questions a sale made by his guardian “the burden lies on the person who upholds the purchase not only to show that, under the circumstances of the case, either that the guardian had the power to sell, or that the purchaser reasonably supposed that he had such power, but further that the whole transaction so far as regarded the purchaser’s part in it was bona fide. In cases where the guardian himself is under no personal disqualification, and the purchaser is a stranger to the property, probably this bona fides should, in the absence of evidence to the contrary be presumed as soon as the legal propriety of a sale is made out. But it is otherwise, when either the person who sells labors under disqualification, or the purchaser stands in a fiduciary relation to the owner of the property.”* In this case the personal disqualification consisted in the guardian being a purdah lady, one of a class who are entitled to the protection which in England the Court of Chancery always extends to the weak, ignorant and infirm, and to those who for any other reason are specially likely to be imposed upon by the exertion of undue influence over them, which undue influence will be presumed to have been exerted unless the contrary be shown—Vol. 9. Civil Rulings, pp. 316 and 501; Vol. 10. Civil Rulings, p. 8, where it was decided that the mere fact of the guardian having been able to make some more advantageous arrangement for the estate of the minor would not nullify a sale to bona fide purchasers for value. According to Roman law it was needful in order that a sale by the guardian of his ward’s property might stand, that the seller should have acted bona fide, “nam tutor in re pupilli tunc domini loco habetur cum tutelam administrat non cum pupillum spoliat”; but in a Hindu case the good or bad faith of the

* See too 1. Reid’s Bombay High Courts Reports, p. 361.
guardian would apparently be only so far of importance as it might possibly throw light on that of the buyer; and Vol. 10. Civil Rulings, p. 106, where alienation having been made by the de facto manager of a joint family was held not to be vitiated by the fact of his father, the de jure manager, being alive at the time. On the principle here laid down, the Madras Court, in Tandavaraya Mudali v. Valli Anmal held that though a debt incurred by the head of a Hindu family residing together would ordinarily be presumed to be a family debt, yet when one of the members of that family happens to be a minor it is then incumbent on the creditor to adduce some proof that the debt was contracted bonâ fide and for the benefit of the family.—(1. Stokes' Madras Reports, p. 398.)

A mere recital in a bond is no sufficient proof of the object for which the money was needed by the guardian.—Ruhmanjuri Chowdhuri v. Ram Lal Sircar.—(1. W. Reporter, p. 145.) Nor, on the other hand, is the absence of any recital of the alleged necessity in the deed an obstacle to its being shewn aliunde, since it is immaterial in what manner the necessity is proved.—Womesh Chandra Sircar v. Digumbari Dassi.—(3. W. Reporter, Civil Rulings, p. 154.)

Where the ward after attaining his majority virtually recognizes the title of a person who had bought property from his guardian, acting, apparently of his own free will and with a knowledge of the true state of affairs, he is prevented from subsequently turning round and claiming the property on the score that what his guardian had done was unwarranted, and therefore not binding on him.—Kebul Krish Dass v. Ram Kumar Shah.—(9. W. Reporter, Civil Rulings, p. 571.) If too the plaintiff deny the authority of another to act as his guardian and repudiate the act done by him in that capacity, he will be precluded from taking advantage of those acts so far as they are beneficial to him.—(7. W. Reporter, Civil Rulings, p. 76.)

The marriage of a Hindu minor is a legitimate cause of expense in regard to which his guardian has power to bind him, unless it be shewn that the amount of the loan was extravagant for the purpose considering the social and pecuniary circumstances of the minor.—Juggessur Sircar v. Nilumbar Biswas.—(3. W. Reporter, Civil Rulings, p. 217.)

The Courts will not readily interfere to set aside a farm of the minor's estate effected by the guardian, if the latter appear to have acted bonâ fide and with the view of benefitting the estate.—Hiro Mohun Mookerjee v. Kalinath Mookerjee.—(2. W. Reporter, Civil Rulings, p. 270.)
Since, according to the Mithila school, the alienation of joint undivided property is invalid without the assent of all the sharers, even as regards the alienor's own share, the head of a Hindu family cannot alienate such property during the minority of any brother or son, unless the alienation have been made from necessity, or for the manifest benefit of all interested; as for the support of the family, for the payment of a fine inflicted on the father by a Criminal Court, for the services of religion, or for the payment of Government revenue. But money advanced to a guardian to enable him to carry on excessive or unjust litigation will be considered to have been obtained by the guardian on his own personal responsibility. — (Macpherson on Mortgages, pp. 21—23, and Macpherson on Contracts, p. 19.) So in Gunga Parshad v. Phul Singh, a sale of a portion of the family estate made by a member for himself and as de facto manager and guardian for his minor brothers in order to raise money to prosecute a suit beneficial to the whole estate, was upheld and declared binding on the minors.—(10. W. Reporter, Civil Rulings, p. 106.) So in Ram Kishor Acharji v. Lakhi Debi, the Calcutta Court ruled that where a suit had been instituted in perfect good faith by the manager for the benefit of the property, the Judge was competent to pass an order making the estate liable for the costs, although the decree-holder might have been content to take out execution against the manager.—(1. W. Reporter, Miscellaneous Appeals, p. 1.)

In Ramnarayan Poramanick v. Srimati Dassi the High Court set aside an arbitration award assented to by the guardian of certain minors, by which, in accordance it was said with wishes expressed by their father in his life-time, the minors received a less share in the family property than their elder brothers, the other parties to the compact, the Court holding that the arrangement was prejudicial to the interest of the wards, and to the extent to which it was injurious, it ought to be set aside.—(1. W. Reporter, p. 281.) But where a partition* of family property had been made by a Hindu mother as guardian of, and on behalf of her minor son, and there was nothing to indicate fraud, or that any undue advantage had been taken of the plaintiff's minority or of the sex of his mother, the Madras Court upheld the transaction as binding on the ward.—Nallapa Reddi v. Balammal.—(2. Madras High Court Reports, p. 182.)

Where a former guardian had borrowed money for the benefit of the minor, and applied the loan to his use, the

* So in a case given in 2. Madras High Court Reports, p. 47, the Court held that a guardian might bind his ward by referring to a punctahyat of their caste a question of partition, the act being one which the minor, if of age, might reasonably and prudently have done for himself.—Teennakal v. Subbammal.
Powers of Guardians.

Guardian at the time of the suit would be liable to pay the debt to the extent to which he might hold funds belonging to the minor.—(3. W. Reporter, Civil Rulings, p. 137.)

Where a person prosecutes a suit as guardian or manager for a minor plaintiff without having any such legal status, the defect will be fatal to the suit; even though the same party may have maintained a former suit in the same capacity to which the defendant was also a party and in which no objection had been taken to his locus standi.—Sital Prasad v. Birj Mohun Dass (1. North West High Court Reports, p. 25.)

Conversely, a decree obtained against a minor and his property represented by an individual as guardian, who had no legal right to the post, may be set aside by a lawful guardian without imputation of fraud or collusion, since such a decree cannot bind the minor or his estate.—(1. North West High Court Reports, p. 175.) See also Section 3 Act XI of 1858, and the notes there.

In a suit affecting Mahammadans the Calcutta Court ruled that a manager of property for a minor has no authority to grant leases for a longer period than his own incumbency.—Boonyo Chandra Bose v. Rohim Ullah.—(1. W. Reporter, p. 211.) See too for the English law on the subject Smith’s Law of Landlord and Tenant, p. 46.

On a reference from the Jessore Small Cause Court, the Calcutta Court laid it down that where a lease made by the joint owners of an estate was set aside, so far as the share of one of them, who was a minor at the time the lease was granted, was concerned, the lessee is not entitled to recover the portion of the purchase-money represented by the minor’s share in the absence of any proof of fraud.—Durga Charan Bhultacharjee v. Shoshee Bhoosun Mittra—(5. W. Reporter, Small Cause Court References, p. 23.)

According to Mahammadan law a guardian is not at liberty to sell the immovable property of his ward, except under one of seven circumstances; viz, first, where he can obtain double its value; secondly, where the minor has no other property, and the sale of it is absolutely necessary for his maintenance; thirdly, where the late incumbent died in debt, which cannot be liquidated but by the sale of such property; fourthly, where there are some general provisions in the will, which cannot be carried into effect without such sale; fifthly, where the produce of the property is not sufficient to defray the expenses of keeping it; sixthly, where the property may be in danger of being destroyed; seventhly, where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.—(Mackaghten’s Principles of Hindu and Mahammadan Law, p. 222.)
Education expenses are recoverable from the ward's estate.

Contract effects by the near guardians are binding.

Necessary debts contracted by any guardian for the education as well as the support of the minor must be discharged by the latter on his coming of age. Every contract, indeed, according to strict Mahommadan law, entered into by a "near guardian," that is to say, by the father, the paternal grand-fathers, their executors, and the executors of such executors, on behalf of, and for the benefit of the minor, and every contract entered into by a minor with the advice and consent of such "near guardian," as far as regards his personal property is valid and binding upon him, provided there be no circumvention or fraud on the face of it.—(Macnaghten's Principles, pp. 222–223.) But this is not the case with contracts made by the remote guardians, among whom are included the minor's brothers.—(4. North West High Court Reports, p. 21.)

A minor when he comes of age is not prevented from suing in his own name for anything that his guardian, either through ignorance or negligence, may have neglected to claim for him.—Kylash Chandra Sircar v. Guru Charan Sircar.—(3. W. Reporter, Civil Rulings, p. 43.)

9.—A minor is not competent, sui juris, to enter into any engagement or transaction not manifestly for his benefit, except with consent of his guardian.

See Clause 2 Section XII of the Code and remarks there under the head of "Tender age."

10.—A father or guardian is legally entitled to the guardianship of a child or ward, in the fullest sense of the word, that is, to the superintendence, not only of its physical nurture, but also of its mental and moral training. Any child or ward in state of pupilage who may desert its home, or refuse to obey the reasonable commands of its parent or guardian, can be compelled by order of the Court, to return and to yield obedience. But such order will be withheld by the Court, if it should appear that the child had been subjected to any cruelty or gross maltreatment. So also if the child may have taken up its abode with, or have been detained by,
any party, the parent or guardian may bring a suit against that party for the custody of the child, provided that it shall be competent for the defendant to show, if he can, valid cause why the child should not be committed to its natural protector.

In Muchu v. Arzun Sahu the Calcutta Court held that as Act XXI of 1850 provides that no law or usage shall inflict on any person who changes his or her religion any forfeiture of "right or property," a Hindu father who embraced Christianity did not by his change of religion forfeit his right to the custody of his children, as against his wife who retained her former creed.—(5. W. Reporter, Civil Rulings, p. 235.)

11.—The "state of pupilage" mentioned in the preceding clause, will ordinarily extend to the period of minority, that is to the eighteenth year. But if it shall appear to the Court, that the child, although a legal minor, is nevertheless of mature and competent understanding, and a free moral agent, then he or she is at liberty to make an election with regard to place of abode, mode of life, or religious persuasion, notwithstanding opposition on the part of the parent or guardian. And the Court will disallow the claim of such parent or guardian to custody, provided always that the course contemplated by the child is not contrary to morality, policy or law. But nothing in this clause can apply to girls who may have been married. The Courts will be cautious in allowing females, under any circumstances, to exercise the liberty herein granted, inasmuch as such liberty is liable to abuse.

"In Clause 11 it is proposed to set aside the authority, usually exercised by parents, in cases where a child of sound moral understanding has been tyrannically prevented from adopting any persuasion or doctrine which may offend the prejudices of the relations. In an age when education of
all kinds is being diffused, such cases may occur, and it is
expedient that some provision should be made for them.
With this exception, parental authority, an influence much
venerated and prized by the natives of all classes, has been
strictly maintained."—(Commentary on the Punjab Civil Code.)

It should be observed that this Clause, which from the
foregoing extract from the Commentary appears clearly to be
enacted with reference to the case of minors embracing
Christianity or Mahammadism against the wishes of their
parents or guardians, places these cases within this province
on a widely different footing from what they would have
occupied had no such provisions been enacted. In that case
the Courts must have been guided by the law as laid down
in the case of Alicia Race (Reg. v. Clarke) in which the
mother, a Roman Catholic, obtained a writ of Habeas Corpus
for the restitution of her daughter, who had been placed by
the Commissioners of the Royal Patriotic Fund with the
mother’s consent at the time at a Protestant school. Lord
Campbell held that, as the child was only ten and a half, and
guardianship for nurture continues till the child is fourteen,
she was to be made over to her mother, simply on the score
of her age, without being examined by the Court; since a
guardian for nurture has a legal right to the custody of the
ward, irrespective of the wishes of the latter, unless it be
shewn that the custody is sought for improper objects, or
that the application is not bonâ fide, or that the guardian is
grossly immoral. In the Punjab Courts, however, it would
plainly be incumbent on the Judge to examine the minor;
his age only so far entering into the consideration, as it may
aid the Court in distinguishing maturity of will and judg-
ment from mere intellectual procosity.*

12.—A child under legal age may acquire
property independently of the parents or guardians,
over which they have no control, further than that
which reasonably pertains to the office of protector.
On the other hand, the control of the child will be
limited by the legal incompetency which attaches
to minors.

* I would strongly recommend a small pamphlet published by the
Baptist Mission Press, Calcutta, entitled "Statement concerning Sir M.
Welles’ Judgment in the case of Hema Nath Rose," as giving a useful
abstract of the cases respecting claims to the guardianship of minor converts
to Christianity, which have come before the three Presidency Courts.
13.—Parental authority, whether in regard to the person or property of the child, ceases after the term of legal minority. Any authority of this nature which may be found in the Hindu or Mahammadan law, must be regarded as a moral or religious precept, but not as a legal obligation.

14.—By the Hindu and Mahammadan law the duty of maintenance, protection and support is mutually absolute between parent and child, and will be enforced by the Court.

In Sirdar Futah Singh v. Sher Singh, where the plaintiff claimed maintenance of his father, who was a gentleman of rank though a poor one, the Chief Court, in upholding a decree for Rs. 50 per annum, remarked that—“The Hindu law is said to confer an inchoate interest in ancestral property upon a son from the very earliest period of his life; and although this may be understood to receive effect as regards the father’s power of alienation, it appears also to have been held to require the father to support the son where the son is in want and the father possesses ancestral property. The Court finds that in a case abstracted in Morley’s Digest, title Maintenance, decided in the Sudder Court of Madras in 1821, the son was declared entitled to maintenance under circumstances analogous to the present. The rule laid down in the work referred to, as abstracted from the judgment in the case of Sri Chitalia Anunya Deo v. Parasram Deo is that maintenance cannot be withheld from a son by his father merely on the ground of separation or disobedience, if he (the son) have no other means of subsistence. But the Court held that where there is no adequate cause for the separation, the principles of equity require that the separate allowance should be reduced to the lowest scale: it should scarcely exceed what is barely necessary for the support of the party claiming it.”—(3. Punjab Record, Case No. 84.)

But among Hindus, a daughter living apart from her father without any sufficient cause cannot sue him for maintenance.—Iluta Shavatri v. Iluta Narayan Nambridiri.—(1. Stokes’ Madras Reports, p. 372.)

For the obligation of a Hindu to maintain the widow of a deceased son, see above under Clause 15, Section IV of this Code, at p. 168.
By Mahammadan law, the maintenance of a child after it has been weaned may be taken out of its property, when it has any: and if no property be available, the father may be ordered to maintain him, reserving his recourse against the property: but if it be needful the father may sell the whole of his child's property for his maintenance. A British Court would, however, I should think, very narrowly scrutinize any such proceeding on the father's part. When the father is poor, and the paternal grand-father is rich, the latter may be compelled to maintain the child; the amount so expended being a debt recoverable from the father, who, in turn may reimburse himself by having recourse to the child's property, if there be any. If however the mother be rich, and the father poor, she is the first of the kindred liable to the burden of maintenance: she too has a right of recourse against the father. If the father be poor and have a rich brother, the latter may be ordered to maintain the child, with a right of recourse against the former.—(Baillie's Digest of Mahammadan Law, p. 457.)

A father may require his sons to work for their maintenance when strong enough, unless they belong to the higher classes. A father is not obliged to maintain adult male children unless disabled by infirmity or disease: he must however maintain his female children, if they have no property of their own, till their marriage. He is also liable to maintain his daughter-in-law when his son is young, poor or infirm; but on this point there is a diversity of opinion.—(Baillie's Digest, p. 458.)

Male and female children in easy circumstances are jointly liable to maintain their poor parents though the latter may be able to earn something for themselves. If a father be poor and have young children who are in want, and an adult son who is in easy circumstances, the latter may be compelled to maintain both. When a child is poor and able to maintain one only of his parents, the mother has the first claim. Grand-parents on both sides are also entitled to maintenance when poor.—(Baillie's Digest, p. 462.)

All persons not themselves poor are obliged to maintain their relatives within the prohibited degrees, in proportion to the shares they would take in the inheritance in the event of such relatives dying and leaving property; provided that the relative so claiming maintenance be, if a male, a child and poor, or else infirm or blind and poor; or if a female, provided that she be poor whether a child or adult.—(Baillie's Digest, pp. 463—466.)

Whilst the claims of children to support from their father can be decided before a Magistrate, under the provisions of the Criminal Procedure Code, parents can only sue their children for maintenance in the Civil Courts.
For the right of bastard children and their mother to adequate maintenance from the father, see Clause 17 of this Section.

It should be borne in mind that this Clause relates only to cases governed by Hindu or Mahammadan law, since by the English Common Law a father is not bound to pay for the maintenance of his children, either legitimate or illegitimate, except he have entered into some contract to do so. "It is a clear principle of law," observed Parke B. in Mortimore v. Wright, "that a father is not under any legal obligation to pay his sons' debts; except indeed by proceedings under the 43. Eliz., by which he may, under certain circumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose any legal liability." The undertaking, however, the future maintenance of a child would be a sufficient consideration for a promise.—(1. Smith’s Leading Cases, p. 141.)

The Roman law took, however, a view more in accordance with natural feeling. Parents and children through every direct degree in the ascending and descending lines were bound pro modo facultatum in case of necessity reciprocally to support each other. The crime of the descendant might, indeed, exonerate the ascendant from this obligation, "Trebatio denique Marius rescriptum est merito patrem eumolle alere qui eum detulerat." The mother was bound to support illegitimate children. The obligation did not extend to brothers and sisters.—(Phillimore’s Roman Private Law, p. 318.)

15.—In the Mahammadan law there is a strong disinclination to bastardize issue. By the Mahammadan law affiliation, on the part of the putative father, is sufficient to legitimatize, and a marriage between the parents of such offspring is presumed, whenever a valid ground can be found for such presumption. The Courts therefore should be cautious in admitting proof of illegitimacy, where the parents may appear to have acted bona fide, and where no fraud or immorality may be suspected.

In a celebrated case which arose in the family of the Nawab of the Carnatic, the Privy Council expressly recognized the position that, according to Mahammadan Law, the
legitimacy or legitimation of a child of Mahammadan parents may properly be presumed or inferred from circumstances, without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation. (Sutherland's Privy Council Judgments, p. 400.) Again, in Shamsunnissa Khanum v. Rai Jau Khanum, the same Court recognized as legitimate a child born to a Mahammadan zamindar by a concubine, who with her offspring continued permanently to reside in the house of the father; such continued residence being looked upon by the Court as tantamount to an express acknowledgment of the child. (Sutherland's Privy Council Judgments, pp. 157-160.) And in a later Mahammadan case their Lordships observe that an ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate, if acknowledged he acquires the status of legitimacy. When therefore a child really illegitimate by birth becomes legitimate, it is by force of an acknowledgment, express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy in making any presumptions of facts which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds and cannot be permitted to over-ride over-balancing proofs, whether direct or presumptive. - Ashrafuddowlah Ahmed Hossein v. Haider Hossein Khan. (Sutherland's Privy Council Judgments, p. 659.) In accordance with these decisions the Calcutta Court, in Ashraffunnissa v. Musammat Azeman, inferred legitimacy without any evidence of the celebration of a marriage, on proof that the mother lived with the father as a married woman does with her husband, and that the child lived with its father and mother as a legitimate child would with its parents. (1. W. Reporter p. 17.) See too 2. W. Reporter, Civil Rulings, p. 55; Vol. 3. Civil Rulings, p. 187, where it was held to be "an established maxim of Mahammadan law, that a public acknowledgment of paternity will, of itself, raise the presumption of marriage between the acknowledger and the mother of the child, without the father specifically connecting his paternity with any particular woman; and that to rebut this presumption, the absolute impossibility of this marriage will have to be proved"; — Vol. 5. Civil Rulings, p. 5, where the child of a Musalman gentleman by a woman who entered his establishment as a slave girl, was decided to be legitimate on proof that the mother had lived in the
family for more than twenty years until her death, that the son she bore was acknowledged by the father, and that the mother’s status as wife had been freely admitted by the members of the family, while that as no period was fixed during which a temporary marriage between the father and mother was to endure, the marriage which was to be inferred must be deemed a permanent and not a temporary one; and Vol. 10. Civil Rulings, p. 46, where the fact of a man acknowledging another to be his son was held to make him his legitimate son and heir, whether the mother was, or was not, lawfully married to the father; lastly, in Vol. 10. Civil Rulings, p. 469, the Court laid it down when a Mahammadan acknowledges a person to be his child he must be taken to mean his legitimate child unless the contrary appear.

But when there was no acknowledgment by the alleged father that the child was his son; and there was no proof as to who the mother was, when she was married, when the child was born, and whether any notice was given of the birth, as of the alleged father’s son, the Calcutta Court refused to acknowledge the paternity as proved on the bare statements of certain witnesses that the plaintiff was the son of the alleged father.—Farzand Ali v. Mussumat Ashrafunnissa Begum.—(1 W. Reporter, p. 303.)

The son of a slave girl who has been acknowledged by the woman’s master as his son takes by Mahammadan law the same share as a son by a lawful wife.—Sayid Wali Ullah v. Miran Sahib.—(2 Reid’s Bombay High Court Reports, p. 301.)

16.—A similar tendency is to be found in the original Hindu law. Of the eight forms of marriage, several are lax and vague. On failure of direct issue vicarious and subsidiary sons were allowed of twelve or even more descriptions, irrespectively of sons formally adopted. Male Brahmins were permitted to intermarry with any of the inferior castes, except the Sudras; [provided that no female Brahmin should accept a husband from a tribe lower than her own. Among the Sudras cohabitation between the parents, without formal marriage, was sufficient to legalize the issue, for all practical intents and purposes. But during the present age, this laxity
has in a great measure, disappeared, at least among the higher castes. The looser forms of marriage have fallen into desuetude, and the more regular forms are adhered to. There are now only two kinds of sons recognized by the Hindu law, the "aurasa" or son lawfully begotten, and the "data" or son lawfully adopted. Brahmins may not intermarry with other tribes. But among the lower castes the original laxity still prevails, both as regards the solemnization of marriage, and the admission of the children to all the rights and privileges pertaining to legitimate issue. Among the higher castes, therefore, questions of illegitimacy may reasonably arise, and will be entertained by the Courts. Among the lower castes they can hardly be raised, especially if local custom should concur with the law in admitting bastards to inheritance.

In a dispute as to the succession to the estate of a deceased Rajah of Ramnagar, the Privy Council held that the Rajah, as a Rajput, belonged to the second of the twice born classes, and not to the Sudras, and that consequently as the claimant could not prove the marriage of his mother to the deceased Rajah he must be taken to be illegitimate, and as such could not succeed to his father's inheritance, though entitled to maintenance from the paternal estate.—Chuoturya Run Murdun Syn v. Sahub Purluhad Syn.—(Sutherland's Privy Council Judgments, p. 313.) See also 2. Bengal Law Reports, Privy Council Cases, p. 15, as to the right of illegitimate sons of Hindus to maintenance; also 1. Bombay High Court Reports, p. 191.

"The Hindu law does not, like the English law, consider an illegitimate person quasi nullius filius. It recognizes his relationship to his father and family and secures him substantial rights. Under the ancient law it seems that at one time in the case of the three superior or regenerate tribes, sons not born in lawful marriage had rights of inheritance subsidiary to the "aurasa," or son by a lawful wife, and could perform obsequies.—(Manu, Chapter 9, Clauses 159,
ILLEGitimacy AMOnG HuNDuS.

160, 180; Mitakshara, Chapter 1, Section 11; 2. Strange’s Hindu Law, pp. 194—211); and although this as a general law applicable to those tribes has, in respect of inheritance, become obsolete, yet it is clear law at the present day that by birth, and without any form of legitimation, illegitimate children of those tribes are recognized as members of their father’s family and have a right to maintenance. It is also equally clear that in the case of Sudras the law has been, and still is, that illegitimate children succeed their father by right of inheritance.—(Mitakshara, Chapter 1, Section 12; 1. Strange’s Hindu Law, p. 191.) While such is the law as to family status and rights, it would be anomalous and inconsistent that illegitimacy should be declared to be a taint and disqualification for the membership of the caste in the individual and his family”—per Scotland C. J. in Pandaiya Telaver v. Puli Telaver—(1. Stokes’ Madras Reports, p. 478.)

So in Mayna Bai v. Uttaram, where the Madras Court held that heritable blood existed between the bastard children of a Brahmin wife living in adultery with a European, and their mother, the children having been brought up as Hindus, the learned Judges strengthened their decision by the authority of pre-Christian Roman law: Gaius writes—\("Hac parte proconsul, naturali aequitate motus omnibus cognatis permittit bonorum possessionem, quos sanguinis ratio vocat ad hereditatem licet jure civilis deficiant. Haque etiam vulgo questii liberi matris et mater talium liberorum, item ipsi fratres inter se ex hac parte bonorum possessionem petere possunt, quia sunt invicem sibi cognati")—(Dig. Tit, VIII. 2.) So Ulpian points out that as agnation and consanguinity are the offspring of a marriage by the jus civile, no spurious son can have them; but he is related to his own mother and to his brother by that mother.—(2. Stokes’ Madras Reports, p. 196.)

17.—Whenever illegitimacy is declared proved, or admitted in a legal and practical sense, the bastard may acquire, but may not inherit property. Such issue, however, though debarred from sharing in the patrimony, are, together with the mother, entitled to adequate maintenance from the father, which may be awarded by the Civil Court, unless it should have been already fixed by the criminal authorities.

18.—The provisions laid down in Clauses 10 and 11 of this Section, will be equally applicable
to illegitimate as to legitimate children. By the Hindu and Mahammadan law, a wife can have control over the children only with the sanction of the husband, and has no authority whatever in opposition to him; but the mother of illegitimate children, and her relatives in succession to her, are frequently considered to have a preferential claim, over the father, to their management and education. There is, however, room for doubt, whether this principle is supported by the fundamental laws of either sect, and at all events it will not be carried out to its full consequences by the Courts.

19.—If the father do not claim the guardianship of the illegitimate child, then it may be committed to the charge of the mother. But if he do claim the guardianship, and if the Court have reason to consider that the physical welfare, the moral education, and social prospects of the child can be best cared for by the father, or his relations, then the guardianship will be entrusted to the father and his relatives in preference to the mother and her relatives. In no case will the Courts consign such offspring to the inferior keeping of the mother, when the father is both anxious and able to make better arrangements.

"The only debateable point is the question whether the father or the mother should primarily be entitled to the guardianship and education of an illegitimate child. It has been stated in Clause 18 that this right is generally supposed to pertain to the mother and her relations in preference to the father and his relatives; although there is reason to believe that neither the Hindu nor Mahammadan law contains any specific rule on the matter. Enquiry does not show that the natives of this province have any decided opinion or feeling either way: for the most part they are quite as ready to acquiesce in the father’s right as the
mother's. The English law on the point is well known, and need not be further alluded to. On the whole it would seem that in the event of a dispute between the parents the course prescribed for a Court should be that which natural justice and propriety may dictate.

"In the case supposed, the Court is called upon to determine the party by whom a certain child shall be trained and nurtured. Now it is surely just and right that this decision should be formed with a regard to the temporal, moral, and, if possible, even the religious welfare of the child. If this be so, then it would follow that the Court ought to decide in favour of that party who might appear best qualified for the charge. It cannot be said that in all cases the father would be better qualified than the mother, but in the great majority of cases he certainly would. In many cases it would happen that while the father was exceedingly well qualified, the mother would be eminently disqualified. The latter might be in a wretched position (in all circumstances she must be more or less degraded) while the former might be a person of wealth and education. In these cases there is little room to doubt on which side the best interests of the unfortunate child really lie. That the child ought to be consigned to inferior keeping, or to something worse, when the father is not only willing but anxious to supply a better education, is a principle which it would be difficult to defend on the ground either of abstract morality or practical expediency. The mother can have no well founded right to abstract the child from the better keeping of the father, to bring it up in at least an inferior sphere, and perhaps, to teach it to follow her own example."—(Commentary on the Punjap Civil Code.)

20.—A parent has no power or right under any circumstances to effect a sale or any bargain of that nature, directly or indirectly, with regard to a child whether legitimate or illegitimate; and the Courts cannot give any support or recognition to claims connected with such transactions or proceedings.
CHAPTER IX.

PUNJAB CIVIL CODE.

SECTION IX.

Partitions and disposition of Property.

1.—Dispositions of property in their various forms, such as partitions, gifts, wills, sales, will be treated of in the following sections. The power of making these dispositions is under some circumstances more or less restricted. The extent to which these general restrictions are to be maintained by the Courts, both for Hindus and Mahamadans, will now be stated at the outset. The special restrictions regarding pre-emption will be described in the section on Sales.

2.—In the Mahammadan law, there are no restrictions on dispositions of property other than testamentary. But the power of a proprietor to act in this respect, regardless of his family, will be limited by any local custom which may be proved or known to prevail. It is probable that capricious alienations, in favor of one heir to the prejudice of the rest, or in favor of a stranger to the exclusion of relatives, will not be approved of by public opinion in any locality.

On this subject see Clause 3, Section X of the Code, and the remarks there.

3.—Hindu property admits of a two-fold classification, ancestral and acquired, personal and real. It is on all hands admitted that the distribute has more power over acquired, than ancestral,
property, and over personal than real. It is, however, certain that he must distribute real ancestral property according to the rules of inheritance; whether he have any option with regard to ancestral personal property is doubtful. Again, it is certain that he may distribute, or dispose of, acquired personal property as he pleases; whether he have the same option with regard to real acquired property, is questionable. At the same time the Hindu law permits the proprietor, under the pressure of necessity, such as the liquidation of urgent debts and the preservation of the family credit, to transfer his property of whatever description.

When a father purchases property in the name of a child, the presumption of English law is that the father intended the purchase to be an advancement of the child; and, therefore, in the absence of proof to the contrary, the latter will be deemed to be the owner, and not a mere trustee, of the property. But the inchoate rights of the children in the family property are so fully recognized by Hindu law, that it has been laid by the Privy Council in Gopekrst Gosain v. Gungsprasad Gosain, that where a Hindu father purchases property in the name of one who at the time even may be his only son, the legal presumption is that it is a beanni transaction not for the benefit of that son alone, but for that of the whole family.—(Norton's Topics of Jurisprudence, pp. 333—339, where a long extract is given from the Privy Council judgment, which will well repay perusal.) See this principle followed in Sutherland's Civil Rulings, for January 1864, p. 11; and the Civil Rulings, for February 1864, p. 103. Among Mahammadans, however, when a father buys property in the name of a son, there is no such presumption as among Hindus, although the son's title may be defeated by proof that the father retained the property in his own possession and treated it as his own.—Ghulam Makdam v. Hafizunnissa.—(7. W. Reporter, Civil Rulings, p. 489.) See too Vol. 10. Civil Rulings, p. 277. In Kishen Kumar Moitra v. Stephenson, the Calcutta Court expressly ruled also that the English doctrine of advancement was applicable to the transactions of persons of English extraction, although the property purchased may have been situated in the Mofussil.—(2. W. Reporter, Civil Rulings, p. 142.)
In Shudanund Mohapattra v. Bonomali Dass Mohapattra, a majority of a Divisional Bench of the Calcutta Court held that among classes governed by Mitakshara law, property acquired by the father from the proceeds of ancestral property becomes itself ancestral property, and as such the sons are rendered co-owners in it.—(6. W. Reporter, Civil Rulings, p. 256.) See too Vol. 8, Civil Rulings, p. 458, and the Full Bench Ruling at p. 15 of those Reports.

Until partition have taken place a Hindu father has no definite share in ancestral property which he is competent to alienate.—Nowbat Ram v. Darbari Singh.—(2. North West High Court Reports, p. 145.) But proprietary right among Hindus is created by birth, and not by conception. A child in the womb takes no estate; hence the right which a son or grandson may possess of vetoing a donation or sale of inherited property by his unseparated father cannot be exercised by any one in favor of an unborn son.—Mussumati Goura Chowdhry v. Chumman Chowdhry.—(Sutherland's Civil Rulings, for July 1864, p. 340.) See too 9. W. Reporter, Civil Rulings, p. 469.

By reason of the inchoate right which a son has, under Mitakshara law, in the family estate, the Calcutta Court ruled that a son, whose father was insane and was consequently represented in certain litigation affecting his estate by the Court of Wards, was not prevented from being heard in the appeal in which he had regularly been made a respondent, although the plaintiff and the Court of Wards had agreed to compromise the question.—Brojo Bhokum Lall v. Mean Jahan Kunwar.—(6. W. Reporter, Civil Rulings, p. 115.)

In Gur Saran Dass v. Ram Saran Bhakat, the Calcutta Court decided that sons have from the first a vested interest in ancestral property, and that such interest is salable at any time in satisfaction of claims against them according to the Mitakshara system of law.—(5. W. Reporter, Civil Rulings, p. 54.) As however the reasoning of the Court seemed greatly based on the Mitakshara doctrine that a son can compel his father whether willing or not to partition the family estate, a right expressly denied by Clause 7 of this Section, it may be doubted whether this precedent would be generally applicable in this part of India. But the vested interest of a member of a joint family may be attached and sold under process of execution, whether the decree be based on tort or not; and the purchaser will be entitled to the share which if a partition had taken place the co-parcener himself would have received.—(1. Stokes' Madras Reports, p. 471.)
In a suit brought by a son to set aside a sale in execution of a decree against the father, on the ground that such sale was void under Mithila law, the Calcutta High Court, following a precedent of the Sudder Court, ruled that sales in execution can only be set aside on proof that the debt was contracted for an immoral purpose. Proof of mere extravagance will not enable the son to succeed. The immorality must be clearly proved, and it must be immorality repugnant to good morals in the Hindu sense of the term."—Bir Prasad v. Durga Prasad.—(Sutherland's Civil Rulings for June 1864, p. 310.) See also 5. W. Reporter, Civil Rulings, p. 221.

Although under Mitakshara law the father and son are joint owners in ancestral property, a son's power of interdiction to prevent alienations by the father of the ancestral estate extends only to acts of dissipation or waste of the property, and not to alienations for the payment of joint family debts and for the maintenance of the family.—Bishamber Naik v. Sudashib Mohapatra.—(1. W. Reporter, p. 96.) So in Bir Kishor Sahai Singh v. Har Balub Narayan Singh, another Mitakshara law case, it was held that any alienation by the father made after the birth of the son without the consent of the son, unless for a purpose justified by the Hindu law as a legal necessity, would not bind the latter. Therefore the father during the minority of the son alienated the properties in fraud of his creditors, such fraud would not bind the son who was neither a party nor privy to the fraud. —(7. W. Reporter, Civil Rulings, p. 502.) See too the Full Bench ruling in Lakshman Prasad v. Ram Tewari, where it was held that the cause of action to a son seeking to set aside the alienation as invalid arose when possession was taken by the purchaser, and that a new cause of action did not accrue, upon the subsequent birth of a younger brother either to the elder brother alone, or to him and his brother jointly, nor apparently had the subsequently born son any separate right of suit.—(8. W. Reporter, Civil Rulings, p. 16.)

The sale by a father of ancestral immoveable property without the concurrence of his sons is not necessarily void, though it may be avoided unless the purchaser can shew that it was made during a season of distress for the sake of the family or for pious purposes. [In the absence of evidence to the contrary, it must be assumed that the price received by the father became a part of the assets of the joint family]: therefore if the son seeks the aid of the Court to set the purchase aside, he must do equity, and offer to repay the purchase money, unless he can shew that no part of such purchase money or the produce of it has ever come to his hands."—Muddum Gopal Thakur v. Ram Baksh Pandi.—(6. W. Reporter, Civil Rulings, p. 71.) In the same
case, on remand, the plaintiffs having refused to amend their
plaint by offering to refund the purchase-money on failing
to prove that it, or its value, had not come into their hands
by being applied for family purposes, and having resolved to
take their stand on the allegation that their father had
wasted the sale proceeds in debauchery, and that they were
therefore entitled to an unconditional restitution of the
estate, the Court held that as they had failed to establish
their contention they could obtain no assistance whatever.—
(Vol. 6, Civil Rulings, p. 74.) In a subsequentsuit, however,
this point was brought before a Full Bench, when Peacock C. J.
in delivering the judgment of the Court remarked “ that if
it be proved to the satisfaction of the Court that the purchase-
money was carried to the assets of the joint estate, and that
the son had the benefit of his share of it, he could not reco-
ver his share of the estate without refunding his share of
the purchase-money. So if it should be proved that the
sale was effected for the purpose of paying off a valid incum-
brance on the estate, which was binding on the son, and the
purchase-money was applied in freeing the estate from the
incumbrance, the purchaser would be entitled to stand in
the place of the incumbrancer, notwithstanding the incum-
brance might be such that the incumbrancer could not have
compelled the immediate discharge of it: and the decree for
the recovery by the son of the ancestral property, or of his
share of it as the case might be, would be good, but should
be subject to the right of the purchaser to stand in the place
of the incumbrancer. It appears to me however,” continued
the learned Judge, “ that the onus lies upon the defendant
to shew that the purchase-money was so applied. I do not
concur with the decision from 6. W. Reporter, p. 73, in which
it is said that, “ in the absence of evidence to the contrary,
it must be assumed that the price received by the father
became a part of the assets of the joint family.” If the
father were not entitled to raise the money by the sale of the
estate, and the son is entitled to set aside that sale, the onus
lies on the person who contends that the son is bound to
refund the purchase-money before he can recover the estate,
to show that the son had the benefit of his share of that
purchase-money. If it should appear that he consented to
take the benefit of the purchase-money with a knowledge of
the facts, it would be evidence of his acquiescence in the
sale.”—Madhu Dyal Singh v. Golbur Singh.—(9. W. Re-
porter, Civil Rulings, p. 511.) See also 8. W. Reporter, Civil
Rulings, p. 231.

This right of sons to set aside sales made after their
birth by the father of ancestral moveable estate is governed
generally by the canons laid down for the analogous case of
alienations by guardians in the Privy Council Judgment in

Doctrine laid down in Hunuman Pur-
shad Pundi's case applies generally to
alienations by a father of a joint family.

Hunuman Parshad Pandi’s case.* See also 8. W. Reporter, Civil Rulings, p. 75, where it was also held that the rule that when a larger amount of family property is sold than is absolutely necessary to meet the necessity, the purchaser must shew that the money needed to pay off the claim could not be raised otherwise, does not apply where the excess is comparatively small;—Vol. 2. Civil Rulings, p. 292, where the due performance of marriage and funeral expenses were held to be a “pressing need,” the proof of which by the purchaser would support the sale—Vol. 6. Civil Rulings, pp. 149, 193. See also Sutherland’s Civil Rulings for February 1864, p. 96, where the fact of the sons having for many years by their silence virtually acquiesced in the alienations was deemed reason sufficient for not throwing on the purchasers the whole onus of proving necessity on the authority of the leading case in which their Lordships remarked “that the question on whom does the onus of proof lie in such suits as the present one is not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by, and be dependant on them.” But even a sale in execution of decree can be set aside if the purchaser fail to shew that there was a justifiable necessity for it, or that he acted with such care and caution as to bring himself under the rule which protects bona fide purchasers.—Brojo Kishor Mahapattar v. Hari Kishen Dass.—(10. W. Reporter, Civil Rulings, p. 57.)

In what form of action a suit for trying the validity of an alienation should be brought.

Those who dispute an alienation of family estate can do so only by bringing a suit to have it declared illegal and void, on the ground of the property being ancestral: and a suit brought by the sons for possession as proprietors on account of illegal alienation by their father will not be entertained, as a son’s proprietary right in ancestral property does not arise until after the death of his father, unless the father have expressly relinquished his rights.—(Macpherson on Mortgages, p. 26.) Whatever right of action, however, the son may have during his father’s life-time, he may sue within twelve years from the devolution of the inheritance by the father’s death to recover possession of the estate as having been improperly alienated.—(Sutherland’s Civil Rulings for February 1864, p. 96.)

In a suit by the son to annul a sale of ancestral property improperly made by the father, a Full Bench of the Agra Court held that the plaintiff if successful was entitled to a decree declaring the sale cancelled, and not merely to one declaring the property to be ancestral, and that it will pass on the father’s death to the heirs. A decree in these terms in effect declares that the alienation by sale is invalid,

* See before, p. 232 of this Volume.
SALE OF SELF-ACQUIRED PROPERTY.

and cannot have force to confer a title by purchase. But it does not interfere with or disturb the actual possession which the alleged purchaser may have obtained, and if the buyer have acted in good faith he is entitled at the least to whatever portion of the property the father may ultimately by partition be able to confer on him, and, as against the father he has a right to retain possession until this portion have been secured to him.—Babu Ram v. Gujadhur Singh.—(Full Bench Ruling of the North West High Court, of March 25th 1867.)

Although the law of Benares, of which the Mitakshara is the great authority, prevails generally in this part of India (See Punjab Record for March 1867, Case No. 22), suits by sons to set aside sales made by the father as being at variance with their inchoate interest in the estate, are I believe infrequent, if not unknown, and it may possibly be the case that this restriction has become obsolete in the case of a father alienating his estate for value in his life-time. Since the first part of this paragraph was written, the case of Raghuwath v. Rahim Baksh and others has been reported, (4. Punjab Record, Case No. 53), which was a suit by a Hindu to exempt ancestral property belonging to his father from being attached and sold in satisfaction of a decree against the latter. The Chief Court held that the defendant S, the judgment-debtor, had an interest in the property which was saleable in execution of decree; that by Hindu law the plaintiff R, the defendant S's son, had inchoate rights distinct from those of his father in the property in question, and that the rights of the son, the plaintiff R, were not saleable in execution of a decree against his father, unless the debts for which the decree was made, in execution of which the property had been attached, were incurred for necessary purposes, such as are sufficient to justify alienation by a father without the consent of a son by Hindu law. And as the decree-holders were unable to prove that the debts had been incurred for a legal necessity, the Court finally directed the rights and interest of the defendant S in the property attached, as distinct from those of his son, the plaintiff, should alone be sold in execution of the decree against him.

In Muddun Gopal Thakur v. Ram Baksh Pandi the Calcutta Court ruled that a comparison of the texts and authorities on Mitakshara law shewed that a father is not incompetent to sell immovable property acquired by himself; but landed property acquired by a grand-father and distributed by him amongst his sons, does not by such gift become the self-acquired property of the sons so as to enable them to dispose of it by gift or sale without the consent, and to the prejudice, of the grand-sons.—(6. W. Reporter, Civil Rulings, p. 71.)

Applicability of this law to the Punjab.

A father may sell all self-acquired estate.
SALE OF PROPERTY.

Again, in Baton Misser v. Bishen Prokash Narayan Singh, the High Court decided that while a son under the Mitakshara law has a right by birth in the ancestral estate, the father has a predominant interest in the estate acquired by himself, and the son must acquiesce in the father's disposal of his own property. In this case the acquired property which the father had willed away from his son, and the validity of which act the Court upheld, was immovable estate. The precedent applies therefore *ex abundanti* to acquired moveable property.—(10. W. Reporter, Civil Rulings, p. 287.) See too Vol. 6, Civil Rulings, p. 77. But see on the contrary Macnaghten's Principles of Hindu and Mahammadan Law, p. 46, quoted under Clause 9 of this Section.

In Narayan and Heera v. Dhunna it appeared that the plaintiff's father, when called on to contribute to the marriage expenses of a younger brother, in the same way that the brothers had contributed for his, refused to do so, and in lieu thereof executed a release abandoning all claim on his part to the family inheritance. The Chief Court held that as the marriage expenses were important to the family credit, and it did not appear certain that the plaintiff's father had the means to meet them, without at any rate materially injuring his business, he was warranted in alienating his expectancy in the family property, and his heirs were bound thereby.—(1. Punjab Record, Case No. 63.)

By Hindu law, the managing member of an undivided family is regarded as a trustee for the whole family, hence a mortgage by him for family purposes binds the family.—(Norton's Topics of Jurisprudence, pp. 327 and 480.) It may be added that in consequence of this position, a return to the head member of jewels deposited by other members of the family was, in a Madras case, held to be a good defence in an action by them against the pawnee.—(Topics of Jurisprudence, p. 327.)

4.—In ordinary cases, then, the Courts will bear in mind the several degrees of restriction noted in the preceding clause. But alienations, even of ancestral property, without reference to the heirs, if made for really cogent reasons, will be recognized, while unreasonable alienations will not be maintained, if objected to, by the aggrieved parties within the legal period.

"It is desired that transfers, which may take place for really good reasons, and which may facilitate the investment of capital, should be maintained. But it is not proposed to
abrogate the limitation, imposed by law and custom, on dis
positions resulting from caprice, prejudice, or enmity. These
restrictions, whether they square or not with political econo
my, are yet intertwined as it were, with the framework of societ,
as at present constituted. In a country where polygamy prevails,
and village communities flourish, they have some positive advan
tages. To annul, or even to ma
terially relax them, would be a task, which it is not proposed
to undertake."—(Commentary on the Punjab Civil Code.) See
too the remarks under the previous Clause of this section.

5.—By both Hindu and Mahommadan law, the
regular partition of joint undivided property is recog
ized, and each co-partner has a right to de
mand that his legal share be divided off to him;
the Courts will enforce this principle; and unless
special reason should be shewn, no individual sharer
can resist the partition, nor can the majority object
to the claim of an individual sharer to division.

"In the fifth Clause of this Section it has been thought
expedient to affirm the absolute right of each sharer to par
tition, because, in our older provinces the exercise of this
right in opposition to the wishes of the other sharers has
sometimes been disputed."—(Commentary on the Punjab Civil
Code.) It should be observed however that this power does
not extend to sharers with inchoate rights only, as sons in
the life-time of their father; see Clause 7. Neither can a
suit be brought on behalf of a minor to obtain possession
of his share in the undivided family property, unless there
be evidence of such malversation as to place the minor's
interests in risk, if his share be not separately secured to
him.—Vamiyar Pillai v. Chokkalingam Pillai—(1. Stokes'
Madras Reports, p. 105, and Vol. 3, p. 94.) Further, a co
sharer cannot, without the consent of the other sharers
obtain division of one particular part of a joint undivided
estate.—Mittu Lall v. Ghulam Nasiruddin.—(4. North West
High Court Reports, p. 276.)

In Srinath Datt v. Nand Kishor Bose the Court remarked
that "unless the Judge find that the acts of the plaintiff, or
of those from whom he claims, have been such as to lead
the other members of the family into a reasonable and well
grounded supposition that there has been a separation on
the part of the plaintiff, and an acceptance of a defined
portion of the property instead of his family share, and such
as to induce them to make arrangements on the strength
of it, he ought not to hold the plaintiff barred from the right
which every member of a Hindu family, who is sui juris,
possesses of requiring a partition of the family property."—
(3. W. Reporter, Civil Rulings, p. 61.)

In a suit for partition of the family property in which the defendant pleads that partition has already taken place, the onus of proving this alleged partition rests upon him (5. W. Reporter, Civil Rulings, p. 121), since the original status of all Hindu families is joint and undivided, and those who wish to put forward claims upon the basis of separation and self acquisition must most clearly prove these allegations.—(Sutherland's Civil Rulings for January 1864, p. 1.) See too 6. W. Reporter, p. 70; 1. North West High Court Reports, p. 255.

On partition "every shareholder, however, will be entitled to retain, as a part of his share, all those lands he may have separately held upon which he may have erected buildings or planted fruit trees, or at his own expense dug a tank, or which in course of his separate possession he may have substantially improved. But those who by this mode of division may be found to hold more than would belong rightly to their legal shares, shall make up the difference to those who thus hold less, from their shares in other lands held jointly, or by paying compensation in money, or by giving over other lands, or agreeing to pay rents for their thus larger shares." "Co-partners may also on partition be allowed to retain possession each of such joint lands as they may have taken separate possession of, with the express or implied consent of all, or at least a majority of the co-partners." Srinath Datt v. Nand Kishar Bose.—(5. W. Reporter, Civil Rulings, p. 208.)

Where disputes regarding the estate had been settled by a deed of compromise drawn up by the members of the family, in which it was recited that their differences had been adjusted, and that for the future the family was to continue joint as to the ancestral estate, which was to be managed according to certain rules laid down in the deed, a subsequent partition was held not to render the deed of compromise so inoperative as to revive matters intended and understood to have been finally adjusted by it.—Chandra Kant Rai v. Kali Kant Rai.—(3. W. Reporter, Civil Rulings, p. 135.)

Under the Hindu law places of worship and sacrifice are not divisible. The parties can enjoy their turn of worship, unless they can agree to a joint worship; and any infringement of the right to a turn in the worship can be redressed by a suit.—Anand Mayi Chowdhrai v. Boykanti—
nath Roy.—(3. W. Reporter, Civil Rulings, p. 193.)

For a consideration of what are sufficient indications of a partition having taken place, see below under Clause 11.
Macnaghten gives the following rules regarding partition among Musalmans:—"Where two persons claim partition of an estate which has devolved on them by inheritance, it should be granted: and so also where one heir claims it, provided the property admit of separation without detriment to its utility. But where the property cannot be separated without detriment to its several parts, the consent of all the co-heirs is requisite: so also where the estate consists of articles of different species."—(Macnaghten's Principles of Hindu and Mahammadan Law, p. 187.)

In an Umballah case, Talewund Khan v. Mussumat Khanzadi, the Chief Court held that by the custom of the country, Mahammadan law notwithstanding, widows of Mahammadan landowners are entitled only to a life-rent, without the power of alienation except for legal necessity; and that as this Clause 5 relates to proprietors with absolute rights it does not apply to the case of such widows, who can only claim partition when their demand is recognized by local custom.—(3. Punjab Record, Case No. 5.) In regard to the difference between the widow's estate as recognized in this case, and in that of Mussumat Rani v. Ghulam Ghous (see before p. 156), it will be found that Mahammadan law, especially in the matter of the rights of female heirs, is far more superseded by local custom among the village communities than it is in large towns or cities, where the influence of Moulvies and other educated Musalmans keeps alive a greater respect for the general law of Islam.

6.—By the Mahammadan law, the proprietor may distribute in any manner he pleases. But the distribution will be subject to any restriction imposed by local custom, as already prescribed.

In a suit brought by a Mahammadan against his father for putting a son by a wife of an inferior family on an equal footing with himself, the Chief Court decided that the son could not force his father during his life-time to divide the estate, nor was such a suit as this the legitimate way for him to object to the latter's distribution of his property.—Phuli Khan v. Fazl Khan.—(2. Punjab Record, Case No. 1.)

7.—Among Hindus, it is not unusual for the father, or other incumbent, to distribute his property, during his own life-time, among his heirs, and such distributions stand in the place of testamentary dispositions. But he cannot be compelled to distribute against his will. In the event, however, of his wishing to make a distribution he is
Partition may be compelled by the sons when their father embrace monastic life.

Partition may be compelled by the sons when their father embraces a monastic life.

But the sons may insist on partition under such circumstances as would altogether divest the father of his proprietary rights, such, for instance, as his adoption of a religious life.—(Macnaghten’s Principles of Hindu and Muhammadan Law, p. 45.) The learned writer also instances degradation as a cause divesting the father of his proprietary rights, but this is not the case in the Punjab, see Clause 7, Section III of the Punjab Civil Code, at p. 129 of this work.

8.—In the first place, he ought to refrain from distributing, as long as there is any prospect of future children being born to him; and if, after distribution, there should be any more children born, he must either provide for them out of the shares he may have reserved for himself, or if necessary, he may cancel the first distribution, and re-distribute in such a manner that no heir shall be excluded.

Rights of a son born after partition.

Macnaghten (Principles of Hindu and Muhammadan Law, pp. 50, 58) observes that in the event of a son being born after partition has taken place, he will be the sole heir of the share, or two shares retained by the father; and if no property have been retained by him, the other sons are bound to contribute a share out of their portions.

9.—According to the custom of inheritance, the distribution will be primarily made in favor of the sons. But the father may reserve two or more shares for himself. As the widow can demand to share with her sons, after the husband’s death, so it may be presumed, that she can claim a share, if the distribution should take place during his lifetime. But if she be possessed of stridhan, from which an income is derivable, the amount of such property may be deducted from her share. A small portion might also be assigned, as a matter of favor rather than of right, to the unmarried daughters. But the father may provide for his wives and daughters, out of the shares reserved to himself, and in such case he need not make any specific allotment to them.
According to the law of Bengal the father may make an unequal division of property acquired by himself exclusively as well as of immoveable ancestral property, and of property of whatever description recovered by himself, even to the total exclusion, without just cause, of some of his sons: but ancestral immovable property and estate, to the acquisition of which his sons may have contributed, must be divided equally among the sons, the father indeed being entitled to a double share. The law of Benares, however, prohibits an unequal distribution by the father of ancestral property of whatever description and of immoveable property acquired by himself. [But see for a contrary authority two precedents quoted at p. 257 of this Chapter] Of a distribution even of his own personal acquisition he cannot reserve more than two shares for himself.—(Macnaghten's Principles of Hindu and Mahommedan Law, pp. 46—50.)

Although there are wide differences of opinion on the subject among Hindu writers, it would seem that both in the Bengal and other schools it is only wives who are destitute of male issue who are entitled to shares; and that where the father reserves a larger portion than a son's share for himself, the wives must be supported out of the portion so reserved, and no shares need be assigned them.—(Macnaghten's Principles, pp. 50—52.)

A widow, whose husband was a member of a joint family and who had died before his father, is not entitled to demand that the share which would have devolved on her husband, had he survived his father, should be partitioned off for her on the death of the head of the family.—Bindai Bashini Dassi v. Anand Chandra Pul.—(2. W. Reporter, Civil Rulings, p. 180.)

With reference to the widow's right, when partition takes place after the father's death, see also Clause 15 Section IV Punjab Civil Code. In such cases of partition, each widow, who is a mother, is entitled to a son's share, and the childless wives to sufficient maintenance, but according to the Mitakshara they also are to be assigned shares.—(Macnaghten's Principles of Hindu and Mahommedan Law, p. 53.)

Nephews, whose fathers are dead, are entitled, as far as the fourth in descent, to participate equally with the brethren taking per stirpes.—(Macnaghten's Principles, p. 53.)

Although the portion of an unmarried daughter has been fixed at a fourth of what would have been the share of a son born in her stead, yet where either the estate is too small to admit of this being given without inconvenience, or too large to render the gift of such a portion necessary to
Improvements to Joint Estate.

In Ratan Singh and Gurdit Singh v. Mussummat Chandan it appeared that the appellant's jagir was charged with an annual payment of Rs. 40 to Mussummat Rajan, their father's widow, for her maintenance; and that at the time this allowance was awarded to Rajan, her daughter, Mussummat Chandan, a discarded wife, with her daughter, Kishnee, were living with her, and that this was taken into consideration by the Commissioner in fixing the allowance. On Rajan's death the appellants contended that the charge on their jagir was at an end, while the respondent demanded that two-thirds of it should continue. The Chief Court held that, although married sisters are regarded as provided for, yet in the absence of any evidence as to why Mussummat Chandan returned to her blood relations, and considering that widowed sisters not otherwise provided for are entitled to be maintained (1. Strange, Chapter VIII), it must be assumed that the Commissioner, on the facts, found that Chandan was in the same position as a widowed sister, being old and infirm. The appeal was consequently rejected. —(1. Punjab Record, Case No. 80.)

10.—If one of the partners effect an improvement in the joint undivided property, or make an acquisition by means of the common stock, he must share it with the other partners, but the acquirer or improver is entitled to a double share.

If the managing member of an undivided Hindu family subject to the Mitakshara law, invest the proceeds of the joint ancestral estate in the purchase of other estates, he does so for the benefit of the joint family; and without the consent of all the members, or a legal necessity, or a declaration and acts amounting to a division, he cannot alienate it, so as to bind even his own share. The Court further expressed a strong doubt whether if such managing member had invested only his own share of the proceeds in the purchase of an estate, he could have alienated that estate, without the consent of the co-sharers, the proceeds not having been brought into the common purse.—Bona Koeri v. Babu Boolee Singh.—(8. W. Reporter, Civil Rulings, p. 182.)

As a general rule no doubt where undivided property is being enjoyed in common by the members of a Hindu family, money expended in the improvement or repair of the property is considered as spent on behalf, and for the
advantage, of all the members alike, and all have the benefit of the outlay when a division takes place. But there is no rule of law that we are aware of which precludes one member of an undivided Hindu family, though living together, from entering into agreement with his coparceners in respect of the expenditure upon the family property and repayment of self-acquired funds: such an agreement is rendered more reasonable and probable, where portions of the family property are occupied and enjoyed by each of the members living separately."—Multuswami Gaundan v. Subbiramania Gaundan.—(1. Stokes' Madras Reports, p. 309.)

The mere conversion of joint funds into land by the managing member of the family is not an acquisition within the meaning of Hindu law so as to entitle the purchaser to an extra share.—(9. W. Reporter, Civil Rulings, p. 64.) See also 4. Madras High Court Reports, p. 5. Neither does this provision of the double share apply to cases where the property has not passed from the family to strangers holding adversely to it, but is only recovered from one who held it by virtue of claiming, though without good reason, to be a member of the family. Recovery too, if not made with the privity of the co-heirs, must at least have been made bona fide, and not in fraud of their title, and by anticipating them in their intention to recover.—Bissessur Chuckerbutty v. Seetal Chandra Chuckerbutty (9. W. Reporter, Civil Rulings, p. 69.)

"It may seem an anomaly that if through the energy and enterprise of one or more out of several sharers, a joint patrimony should have been vastly improved or rendered the means of extensive acquisitions, the idle brethren should share together with the industrious. But Sir W. Macnaghten, in his preface to Hindu law, has shewn this custom to be an equitable one under the existing constitution of Hindu society, whereby some brethren stay at home to guard the house and family while the others go forth to seek their fortunes in the world."—(Commentary on the Punjab Civil Code.)

Presents received at nuptials as well as the acquisitions of learning and valour are generally speaking not claimable by the brethren on partition.—(Macnaghten's Principles of Hindu and Mahammadan Law, p. 56.) The Madras Court however have interpreted the latter part of this rule as referring probably to gains obtained by some extraordinary exhibition of learning or valour, since the ordinary gains of learning or science which had been imparted at the family expense and acquired while the student was receiving a joint family maintenance are certainly not exempted from partition. —Chalakunda Alawami v. Chalakunda Kutnachalam.—(2. Madras High Court Reports, p. 56.)

Property which is exempted from being shared with others on partition.
PARTITION HOW PROVED. [ PUNJAB CIVIL CODE, sec. IX., clauses 10, 11.

Additions made to the joint estate by the managing member of a Mahammadan family will be presumed in the absence of proof to have been made from the joint estate; for although the technical rules of Hindu law are not applicable to Mahammadans, yet the same presumptions must arise from facts of a similar kind, and the same principles must be equally held to govern cases of family partnership among Mahammadans as among Hindus.—Vellai Mira Ravattan v. Mira Moiddin Ravattan.—(2. Madras High Court Reports, p. 414.)

11.—No certain criterion can be given by which joint may be distinguished from separate property; the Court can discriminate in each case, but when relatives live together, community of property may be presumed, unless reason be shown to the contrary.

"Partition," writes Macnaghten, "may be made without having recourse to writing or other formality, and in the event of its being disputed at any subsequent period the fact may be ascertained by circumstantial evidence.* It cannot always be inferred from the manner in which the brethren live, † as they may reside apparently in a state of union, and yet, in matters of property, each may be separate; while, on the other hand, they may reside apart, and yet may be in a state of union with respect to property: though it undoubtedly is one among the presumptive proofs to which recourse may be had in a case of uncertainty to determine whether a family be united or single in regard to acquisi-

* The evidence of members of the family as to whether the parties were joint or separate is the best proof in such questions.—Jaga Koer v. Bughunandan Lall Sahu.—(10. W. Reporter, Civil Rulings, p. 148.)

† "If brothers be found to be living together as a family they must be presumed to be joint in property until the contrary be proved," but this presumption of joint property may be rebutted to a certain extent by clear proof of the non-existence of ancestral property.—Dhurm Chand Chalea v. Raj Mohari Debi,—(5. W. Reporter, Civil Rulings, p. 145.) See too Vol. 1. p. 107. But separation in dwelling and food, though not conclusive evidence of a separation in estate, would give rise in Hindu law to a presumption of separation in estate.—(10. W. Reporter, Civil Rulings, p. 148.) In an earlier case however where the brethren occupied separate houses or rooms in a common enclosure, and messed in their respective compartments of the mansion, the Court was not prepared to say as a mere presumption of law, that it must not assume the estate to be joint, till it was proved to be separate. Hameshur Mukerjee v. Nabhe Khishur Banerjee. (Vol. 5, Civil Rulings, p. 251.) And in Madhab Mukerjee v. Bhogobatty Choon Banerjee, "mere separation in mess was held not sufficient to rebut the presumption of joint ownership which arises when there is a nucleus of joint property either admitted by the party pleading solo acquisition, or proved against him by his opponents."—(Vol. 8. Civil Rulings, p. 270.)
The only criterion seems to consist in their entering into distinct contracts, in their becoming sureties one for the other, or in their separate performance of other similar acts, which tend to show that they have no dependance or connection with each other. In case of an undivided Hindu family the Court of Sadr Diwani Adalat were of opinion that their acquisitions should be presumed to have been joint till proved otherwise, the onus probandi resting with the party claiming exclusive right:* and in another case a member of a Hindu family, among whom there had been no formal articles of separation, but who, as well as his father, messed separately from the rest, and had no share of their profit and loss in trade, though he had occasionally been employed by them, and had received supplies for his private expenses, was presumed to be separate, and not allowed a share of the acquisitions made by others of the family.”—(Macnaghten’s Principles of Hindu and Mahamadan Law, p. 57.)

“A separation may at any time take place at the will of any member of the joint family, and any act or declaration, shewing an unequivocal intention on the part of any shareholder to hold or enjoy his own share separately, and to renounce all rights upon the shares of his co-parceners, constitutes a complete severance or partition. In the Vyuvharee Muyooku, translated by Borradaile, p. 52, it is said that even where there is no property, a partition may be made by a mere declaration—‘I am separate from thee.’—Bultakli Lall v. Musummat Indrapati Kour.—(3. W. Reporter, Civil Rulings, p. 41.) See also 3. Madras High Court Reports, p. 40, where the intention to divide was deemed sufficient to cause the succession law of divided property to apply, though circumstances had prevented the estate from being actually partitioned off at the time of the death of one of the brethren.

In a recent leading case, Appooover v. Ramasubba Aiyan and others, the Privy Council held that an actual division by metes and bounds is not necessary to render a division of joint family property complete: but when the members of an undivided family agree among themselves, with regard to particular property, that its net produce shall be yearly divided into a fixed number of distinct shares to be enjoyed by the members of the family, instead of being brought, as is the case with joint property, into the common chest, then the character of undivided property and joint enjoyment is

* In the case of a Hindu family succeeding to ancestral property, its members will be presumed to have remained joint until a separation has been shown; and until separate acquisition be shown all the property will be assumed to be held in co-parcenary.—Goodeve’s Law of Evidence, p. 553. See also Norton on Evidence, Sections 600 and 705; 19. W. Reporter, Civil Rulings, p. 28.
PARTITION HOW PROVED.

In accordance with this decision, the Calcutta Court held that a petition presented in Court by a member of a joint family, setting forth his intention to become from that day separate in estate, did amount to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds, since the acts and declarations of the petitioner showed an unmistakable intention to hold and enjoy his own estate separately and to renounce all rights upon the shares of his co-parceners, only thereby putting an end to that community of interest and unity of possession which are the very essence of a joint Hindu family.—Mussumat Vato Koer v. Roshan Singh.—(8. W. Reporter, Civil Rulings, p. 82.)

So too, in Kulponath Dass v. Mevoh Lall, a taksimnamah, setting forth that the brethren had arranged to separate and had taken certain specified shares, was considered to constitute of itself a valid separation.—(8. W. Reporter, Civil Rulings, p. 302.) See also 3. Madras High Court Reports, p. 289.

In Indranath Tewari v. Sheodyal Tewari two things were held to be requisite to constitute partition: first, the shares must be defined, and secondly, there must be distinct and independent enjoyment of those shares.—(9. W. Reporter, Civil Rulings, p. 63.)

When it is found that the collections and management are separate, and that ownership is exercised over the property in certain defined shares it is clear that the joint tenancy has been severed, though it may not have been immediately followed by a de facto actual division of the subject matter.—Mussumat Mahru Kuari v. Gnsu Kuari.—(8. W. Reporter, Civil Rulings, p. 385.) So, in Jasoda Kunwar v. Gouri Baijnath Sahai Singh, the Court, after a careful consideration of the authorities, held that there was nothing in the text books which are usually followed on the subject of Hindu law, to warrant the position that "by the Mitakshara law no partition can be effected save by the actual partition of lands into parcels and allotment of those parcels to the different sharers to be held by them in severalty." But the Court considered "that a legal partition is proved, if it be found that the parties have separated in food and residence, that there has been a distinct separation in estate indicated by separate enjoyment and separate liabilities, that they have dealt with their respective shares separately and in a manner inconsistent with the idea of their being still
joint: if, in short, looking at all the circumstances, it is clear
that the parties really did intend to hold, and did in fact
hold their shares respectively, each freed from any interest
therein of any other sharer, and if the separate enjoyment was
not merely a matter of arrangement for the private conve-
nience of the family."—6. W. Reporter, Civil Rulings, p. 139.
See too Vol. 7. Civil Rulings, p. 488; and Vol. 5. Civil Rul-
ings, p. 78; 4. Reid's Bombay High Court Reports, Original
Jurisdiction, p. 164.

Again, in Mussumat Deo Bansi Kour v. Dwarkanath, the
Court held that the fact of a moiety of the estate having
been held, for a minor member of the family, by a curator
or the Collector under the provisions of Sections 10 or 12 of
Act XL of 1858, was a proof that the joint estate had been
determined, since in an estate so taken charge of the Act
requires the management and improvement to be carried out
solely in the minor's interest (see Sections 11, 16, and 18
of the Act); and therefore the receipts and disbursements
of the minor's portion had nothing to do with those of the
other members of the family, nor did the profits made or
losses incurred on this moiety benefit or injure the owners
of the other.—(10. W. Reporter, Civil Rulings, p. 273.)

Where a party admits that the family had been joint in
estate, but alleges that a partition was effected at a
particular place and time, he takes upon himself the burden
of proving the partition.—Privy Council Ruling in the
Shivagungah case.—(Sutherland's Privy Council Judgments,
p. 520.) See too 1. W. Reporter, p. 316; Vol. 2. Civil Rul-
ings, p. 288; Vol. 3. Civil Rulings, pp. 22, 31; Vol. 5.
Civil Rulings, p. 214.

Where the attribute of joint proprietorship is denied
however on the ground of long standing non-enjoyment, the
onus of proof is thus laid down by the Agra Court in
Devi Sahai v. Shiv Dass Rai. "The admission that certain
property," the Court observed, "is joint and ancestral
throws upon the sharer, refusing to admit other heirs to a
share, the burden of proving his exclusive and adverse
possession for a term beyond the statutable limit. The
denial of the right of the other heirs must be open and
decided, and the possession of the sharers must be clearly
established to be adverse to them for a period beyond the
time for the admission of a suit."—(1. North West High Court
Reports, p. 285.)

"The mere fact of property standing in the name of any
brother does not prove that it is that one brother's separate
and self acquired property"—Man Mohini Debi v. Sudam-
ani Debi, also (3. W. Reporter, Civil Rulings, p. 31); also
Vol. 7. Civil Rulings, p. 120; nor indeed is any presumption
at all to be drawn from this fact in favor of the property being separate estate.—(1 W. Reporter, p. 38.) But the assumption of the property being joint will be rebutted, if it be shewn that the “party purchased for himself in his own name, from his own funds, on the title to that effect to himself alone, and not as manager or trustee;” and it will then be for the opposite party to establish that what appears to be an exclusive and separate title is in reality only the case of a single name used for convenience for joint names.—(1 W. Reporter, p. 107.) Nor is the fact of one brother being allowed to carry on alone litigation respecting an estate bought and registered in his sole name any satisfactory proof by itself that the brethren had no share in the estate in question.—Dila Singh v. Toofani Singh.—(1 W. Reporter, p. 307.) Similarly, in Velochun Rai v. Raj Kishen Rai, the mere fact of one of a body of co-sharers alienating his share of the property was considered to be no proof of separation in estate.—(5 W. Reporter, Civil Rulings, p. 214.) “Neither is the existence of a separate possession any evidence to separate acquisitions, unless it be shewn that the shareholder, exercising his possession separately, was permitted by the consent of the other sharers to open and keep a separate account of his own, and not to carry his earnings to the common stock.”—Bahari Lal v. Modho Parshad.—(6 W. Reporter, Civil Rulings, p. 70.)

Presumption with regard to acquired estate when the existence of a competent joint estate is proved.

In Jai Narayan Mookerjee v. Tara Charan Mookerjee, it was ruled that where the existence of joint family property was admitted, the presumption was that all acquired property belonged to the family, and therefore when one of the members set up the plea of self-acquisition, the onus lay upon him of proving that the joint estate was so small, that after providing for the maintenance of the family, nothing remained to form a fund for the purchase of other properties for the benefit of the joint family.—(8 W. Reporter, Civil Rulings, p. 226.) Similarly, in Rai Kishen Chund v. Bisheshur Singh, in which the plaintiff claimed the sole ownership of a Kuttra, denying that his brother had any interest in it, the Chief Court observed that it was clear that in regard to a jagir which they had inherited the brothers were joint, and although there is no distinct proof as to whether the Kuttra was treated as joint property or not, the presumption is that as between two Hindu brothers joint in estate for some purposes, all the property in the possession of either of them is joint: and the burden of proof is on him who claims a portion of it as separate to show that it is so.—(2 Punjab Record, Case No. 85.) These decisions are in accordance with the law as laid down in Dhurm Dass Pandi v. Shama Sundari Debi.—(Sutherland’s Privy Council Judgments, p. 147.) See too 1 W. Reporter, p. 334; Vol. 6. Civil Rulings, p. 58; and Vol. 7. Civil Rulings, p. 449. But when the joint
family property is found not to be sufficiently large, after supporting the members of the family to leave any surplus funds from which the disputed property could have been acquired, and the defendants had been pursuing lucrative employments, while the plaintiff himself was a minor, there is no room for the presumption in favor of the acquisitions being joint. And the mere fact of the defendant having received his education from the family estate does not entitle the other members to participate in every property which the defendant acquires by the aid of that education.

—Dhumukhdharı Lall v. Gunpat Lall.—(10. W. Reporter, Civil Rulings, p. 122.)

"The single fact too of a family living joint, or in commensality, is not enough to raise a presumption in law that property acquired by one individual member of that family is joint property. To render it joint property the consideration for its purchase must have proceeded either out of ancestral funds, or have been produced out of the joint property, or by joint labor. But neither of these alternatives is matter of legal presumption."—Shin Golam Sing v. Baran Singh.—(1. Bengal Law Reports, Civil Appeals, p. 165.) See also 10. W. Reporter, Civil Rulings, pp. 328, 333* and 3. Bengal Law Reports, Civil Appeals, p. 124.

And in cases in which members of the family are proved in some instances to have acquired separate property, there no longer remains any presumption in favor of joint rather than of separate acquisition, nor does the usual presumption in favor of joint acquisitions apply when the plaintiff waits several years after the family had separated before coming forward to claim a share in acquired property, which since the partition had remained with the defendant as his exclusively acquired estate, no cause being shewn for the long delay in suing.—Badul Singh v. Chatterdhari Singh.—(9. W. Reporter, Civil Rulings, p. 558.) See too, 3. W. Reporter, Civil Rulings, p. 158. See also, with reference to claims to a share in joint property, Clause 13 Section 1 Act XIV of 1859, which enacts that suits to enforce a share in a joint family estate must be brought within 12 years of possession or enjoyment, which enactment throws on the plaintiff the onus of proving a joint enjoyment of the property claimed.—Umbika Charan Shet v. Bhuggobutty Charan Shet.—(3. W. Reporter, Civil Rulings, p. 173.)

* In this latter case, the Court pointed out that before the plaintiff could cast on the defendant the onus of proving that he had acquired the property from separate funds, he must start his own case by showing, in addition to the fact that the defendant was living in commensality when he made the acquisition, "that there was some joint source from which funds were available for the purchase of this property for the family."
The burden of proof in cases of alleged separate acquisition by a member of an undivided family possessed of joint estate is, as we have seen above, on the person who advances such a claim. [See too 10. W. Reporter, Civil Rulings, p. 393]; but he may be held to have discharged himself of it by evidence falling far short of showing at what time and by what means he acquired private funds, and that it was not of those very funds he acquired the disputed property. Acts of ownership, indeed, openly exercised by or in behalf of an individual member within the knowledge of the other members may be equivocal, or the acts may be of a nature to be beneficial to the joint estate or necessary for its protection. But when these acts of ownership amount to assertions of sole ownership, in exclusion of all joint rights and interests in others, and are of a kind beneficial to the individual members alone, the acquiescence of the other members, unless clearly explained, is a strong admission in support of the separate and exclusive right, whether it may arise from purchase or partition. An important criterion is to consider from what source the money comes with which the purchase was made: but there is no rule as to any particular mode of proof in such cases. If $A$, being a member of a joint family be shewn to have a separate employment yielding him a given income, and he buy land in his own name at a price not wholly out of proportion to the sum which his own separate earnings may fairly be supposed to place at his command, the deed being registered, and the land held openly by him as his own exclusive property, and the proceeds applied to his own use without the interference of other members of the joint family, it might be fairly deduced from these facts that the land was $A$'s separately acquired estate, although no proof be forthcoming that the very money separately acquired was that which was afterwards paid to the vendor.—Bipro Parshad Myti v. Kena Dayi.—(5. W. Reporter, Civil Rulings, p. 82.) See also another case at p. 278 of these Reports, and Vol. 8. Civil Rulings, p. 271, where too it was ruled that as the property had been acquired very many years before the time of suit, the specific source from which the acquisitions were made could not reasonably be expected to be proved.—(9. W. Reporter, Civil Rulings, p. 169.)

Where a father obtained leave to continue as heir to his son a suit the latter was prosecuting on a bond in his own name at the time of his death, it was held that the father's thus acting in the name and capacity of heir did not preclude him from proving that the bond was joint family property, although it did defeat the ordinary presumption in favor of its being such, and threw the full burden of proof on the father.—Nowbut Ram Bhakat v. Shakti Dayi.—(5. W. Reporter, Civil Rulings, p. 34.)
When an estate which has escheated to Government is re-granted to another member of the family the fact of the grantee being a kinsman of the former proprietor does not make the estate any the less his self-acquired property.—Kattama Nanceear v. Rajah of Shivangungah.—(Sutherland's Privy Council Judgments, p. 520.)

The presumptions of Hindu law as to joint property are not applicable to a case where property is claimed through a son-in-law, who appears only to have lived in the house of his father-in-law, and not to have been of joint family and funds in any legal sense of the term.—Dassi Mani Dass v. Ram Chand Mohur.—(7. W. Reporter, Civil Rulings, p. 249.)

"According to the more correct opinion, where there is an undivided residue it is not subject to the ordinary rules of partition of joint property: in other words, if at a general partition any part of the property were left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother."—(Macnaghten's Principles of Hindu and Mahammadan Law, p. 56.) See this doctrine followed in 2. Stokes' Madras Reports, p. 325.

After a general separation in food and a partition of estate when the brethren have begun living separately, if one of them come into Court alleging that a particular portion of property originally joint continues so, the onus properly lies on him.—Ram Gobind Koond v. Syud Hossein Ali.—(7. W. Reporter, Civil Rulings, p. 90.)

Mere living together in one residence, or joint trade, does not constitute a reunion after partition, but there must further be a junction of estate. Reunion can properly only take place with the father, brothers and paternal uncles.—Gopal Chandra Daghoria, v. Kenaram Daghoria.—(7. W. Reporter, Civil Rulings, p. 35,) and Macnaghten's Principles of Hindu and Mahammadan Law, p. 31.) So in Kuta Bully Viraya v. Kuta Chudappavuthamalu, the Madras Court pointed out that the fact that a minor son lived with his father after a partition had taken place, was not conclusive proof that a reunion had been effected, although such a state of things might be evidence of a reunion.—(2. Stokes' Madras Reports, p. 235.) In a case given in 3. Reid's Reports, p. 69, the Bombay Court held that the reunion must be effected by the parties, or some of them, who made the separation. If any of their descendants think fit to unite they may do so; but such a union is not a reunion in the sense of Hindu law and does not affect the inheritance. See also 4. Reid's Bombay Reports, Original Jurisdiction, p. 165.
PARTITION HOW TO BE EFFECTED.

A claim to sole ownership if persisted in and made out is fatal to the plaintiff's case.

In Lakhan Singh v. Nafar Singh, Peacock C.J. held that a plaintiff who had sued to establish his sole title to certain property, and, dissatisfied with the defendant's admission that he was in joint possession, had pressed his suit in order to get a decree establishing his sole possession and title, was not entitled, on failing to prove the case he had set up, to a decree founded on joint possession.—(6. W. Reporter, Civil Rulings, p. 311.) See too Vol. 5. Civil Rulings, p. 197.

12.— If the property to be divided be not land, the Court may effect the partition through its own officers, or through an officer specially appointed for the purpose. But if it be land, the partition should be referred, by precept, to the revenue authorities, who, having effected the partition according to the rules of the fiscal department, will report the same to the Court. If, however, any of the parties be dissatisfied with the distribution, he must represent his objections to the revenue officer, and not to the Court, as the Judge will not be competent to interfere or set aside the partition. And if, after hearing all objections, or after the expiry of the term, within which they can be made, the Revenue Officer shall decide on up-holding the partition, it will be accepted as final by the Court.

The following rules for making a partition among Muhammadan sharers are taken from the Principles of Hindu and Muhammadan Law, p. 187.

"On the occasion of a partition, property (where it does not consist of money) should be distributed into several distinct shares corresponding with the portions of the co-heirs: each share should be appraised, and then recourse should be had to drawing of lots.

"Another common mode of partition is by usufruct, where each heir enjoys the use, or the profits of the property by rotation: but this method is subordinate to actual partition; and where one co-heir demands separation, and the other a division of the usufruct only, the former claim is entitled to preference in all practicable cases."
The rules for the partition of land are contained in Financial Book Circular No. XLVIII of 1860. The following extract will serve to shew how entirely non-judicial the proceeding is, and consequently the questions which may have to be referred for solution to the Civil Courts.

"It should be remembered that partition is an administrative operation with no judicial character. It is presumed that the extent of the shares of each party is known and admitted. If not known, owing to an omission or mistake in the record, the record must, with the sanction of the Commissioner, be corrected: if the extent of the shares be not admitted, or be contested, the case must be struck off the partition file, and the parties referred to a regular suit. Great injustice is caused by a summary decision of rights in land, irregularly started and imperfectly investigated as a subsidiary point of a case of partition.

"When the shares are known, admitted, or decided by a competent Court, the officer to whom the file is entrusted should, after examining the administration paper of the village, rule the mode of carrying out the measures, record a vernacular proceeding, inform all the parties concerned; and then pause for one week to allow objections or appeals to be offered. As far as possible, cultivation should not be disturbed, the village site is never to be divided, shares in wells should be considered, it is not sufficient to divide the area fairly if the agricultural conveniences be not at the fair disposal of both parties.

"A majority may object to the measure, or individuals may approve of the measure but dispute the extent of shares, or demur to the modus operandi. It is of no use wasting the time of the Government officer until these points have been decided. As it is now, after a tedious operation the whole procedure is vitiated by an "in limine" objection which the appellate Court cannot pass over. If the majority of the shareholders do not agree to the partition it cannot go on: if the shares be not admitted, the case must be struck off: if the modus operandi be objected to, the objector must appeal within eight days, and notify that he has done so, otherwise, the proceeding will not be stayed: if an appeal be lodged, the case will be stayed for thirty days, and unless an order of the appellate Court be received will then be proceeded with.

"The actual partition can be conducted by the village accountant, by arbitrators, by the parties themselves: or in the way which appears most convenient. There is never any occasion for additional agency."
PARTITION OF LAND.

The result must be distinctly recorded, so as to leave no room for ambiguity or future litigation; the parties must be informed, opportunity given for appeal, and then, the fact should be recorded in the village accountant's diary, who will modify the next annual papers. If the constitution of the village be altered, the sanction of the Commissioner must be solicited.

"When that sanction has been received, the settlement record will be amended by an explanatory proceeding; possibly new headmen will be required, and anyhow instructions should be given to the village accountant as to the mode of preparing the next year's papers. Where the constitution of the village is altered, effect should be given to the partition only at the close of an agricultural year."

In Nidhan Singh v. Attar Singh, which was a suit brought by a party to obtain possession of a certain plot which had fallen to his share on a partition of the shamilat land of his village under the orders of the Revenue authorities, the Chief Court held that the suit would not lie, but that the plaintiff should apply to the Revenue authorities who made the partition to put him in possession. "Had the partition been made by order of this Court, the Court might have been responsible to some extent for the fairness of the partition, and it would have caused possession to be given under it. But the Civil Courts cannot become the instruments of compelling the defendant to surrender possession under a partition with which they have had nothing to do, which was made by the Revenue Courts, to the correctness of which the defendant never assented, and on which possession never followed:—in a word, the Revenue Courts are the media of executing the decrees of the Civil Courts regarding land, and not vice versa."—(4. Punjab Record, Case No. 54.)

In Edu Khan v. Sarafraz Khan and others the Chief Court set aside a partition of land which had been made as far back as 1853, and remanded the ejectment suit for trial on its merits, on the ground that the partition procedure had been irregular, and not in accordance with the rules of the fiscal department so as to be accepted as final by the Court under this clause of the Code.—(1. Punjab Record, Case No. 53.)

It may be convenient to add here a few precedents illustrating some of the features of joint family rights among Hindus.

"According to the true notion of an undivided family in Hindu law, no individual member of that family whilst it remains undivided can predicate of the joint and undivided
property, that he, that particular member, has a certain definite share. No individual of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or bailiff of the rents a certain definite share. The proceeds of undivided property must be brought according to the theory of an undivided family to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with."—Apoovier v. Ramasubba Aiyan.—(Sutherland's Privy Council Judgments, p. 657.)

Similarly, certain sharers cannot in a suit for possession brought against another shareholder for a particular portion of the joint estate held separately under an existing arrangement, which had been acquiesced in by themselves, and agreed to by the other co-sharers, disturb the possession of a person holding under a title as a joint proprietor of the estate. If they be dissatisfied with the existing state of things they should apply for a partition; when all the shareholders would be brought before the Court, and their respective rights and interests would be dealt with and protected.—Nil Kanth Parshad Singh v. Ahlad Singh.—(5. W. Reporter, Civil Rulings, p. 287.)

A co-sharer in landed property has no right to do anything which alters the condition of the joint property without the consent of his co-sharers. If he think his interest in the property might be improved by works of a particular character, he can effect a partition and improve his particular share. Where therefore the plaintiff had from the first objected when the defendant began to build on their common estate, the Court compelled the removal of the materials of the building and of the building itself so far as it had gone.—Guru Dass Dhar v. Bijaya Gobinda Baral.—(1. Bengal Law Reports, Civil Appeals, p. 108.)

In the case of joint families, debts bonâ fide contracted for the legitimate purposes of a joint family are, by whatsoever member contracted, binding on the whole family; and some authorities go to the extent of declaring that such debts, contracted even by a servant or dependant of the family, are binding.—(7. W. Reporter, Civil Rulings, p. 492.)

In a suit in which one member of the family sought an order to compel the managing member to account to him for and in respect of the family estate during the time they

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Without partition one sharer cannot deprive another of a particular portion of the property which he had occupied by the consent of the other members.

A co-sharer cannot build on common land without the assent, express or implied, of the other joint owners.

A debt for family purposes contracted by one member is a family and not a personal debt merely.

Responsibility of the managing member, how far he is bound to account.
had been living jointly, the Court held that the managing member (Karta) is not altogether in the position of an agent towards the adult members of the joint family. The members are, as regards the enjoyment of the joint property, so to speak a single entity, not possessing individually any several proprietary right other than the right to call for partition. For proprietary purposes they exist as a whole, somewhat in the character of a corporation. They manage the property together, the Karta being but the mouthpiece of the body chosen, and capable of being changed by themselves.* No doubt, in practice, the members of the family often do leave nearly everything in the hands of the Karta, and under his control, but when this takes place, it is a willing abdication of personal care and supervision. It is not a distinct agency or delegation of a separate authority: each member may still at all times interfere, if he think good. Unless, therefore, something be shewn to the contrary, every adult member of an undivided joint family living in commensality with the Karta, must be taken as between himself and the Karta to be a participator in, and authorizer of, all that is from time to time done in the management of the joint property to this extent, that he cannot without further cause call the Karta to account for it. Of course a state of things may easily be imagined under which he had become the trustee of the property relative to adult coparceners, or in which by reason of his fraud or other behaviour, they, or one of them had acquired an equity to call upon him for an account. In the case of minor members, however, since they are disqualified from taking any part in the management, the Karta would be in the position of a trustee for them of the joint property to the extent to which they are entitled to share in it. But if such members desire an account, they should demand it within a reasonable period of attaining their majority. Since, if on becoming of age they enter upon joint enjoyment of the property, with access to all the books and papers, and continue for years without asserting that they hold the past accounts as still open between them and the manager, they cannot after the lapse of several years be allowed without new cause to revive their right to demand an account.†—Chuckur Lall Singh v. Puran Chandra Singh.—(9. W. Reporter, Civil Rulings, p. 483.) It follows from this theory of the managing member's position, that he cannot charge for his services as such unless he can show that his coparceners

* See too on this subject.—3. W. Reporter, Civil Rulings, p. 41.
† In the case quoted in the next paragraph Markby J., while upholding the doctrine that a managing member of a joint family is not liable to render the rest of the family an account of his management, expressed great doubt whether under ordinary circumstances a manager stood in the relation of trustee even towards the infant members of the family.—Ranganmani Dasri v. Kasinath Datt.—(3. Bengal Law Reports, Original Jurisdiction, p. 1.)
Where however the ordinary relations of a joint Hindu family had been somewhat modified by an arrangement that the profits of their business, when realized should be divided among the individual members in certain proportions, and that the other profits of the family property and the expenses of each member should be credited and charged in like manner in the name of each, the Calcutta Court directed an account to be taken from the managing member on the ground that this arrangement was on the footing of a partnership.—Ranganmani Dassi v. Kasinath Datt.—(3. Bengal Law Reports, Original Jurisdiction, p. 1.)

The manager of a joint estate, who receives the rents for his co-sharers, has no power as such to sell the interest and rights in it of an adult member of the family.—Kailaseshar Bose v. Srimati Narayani Dassi.—(10. W. Reporter, Civil Rulings, p. 303.)

A majority of a Full Bench of the Calcutta Court ruled, in Kunwar Bijoy Keshub Rai v. Shama Sundari Dassi, that a purchaser, at an execution sale, of a judgment-debtor's share in a house and lands was entitled to the share he had purchased both in the lands and also in the house; that in execution of the decree he had obtained for possession against the members of the family a surveyor should divide joint property upon the same principle as that on which butwaras are made, possession of a portion of the dwelling-house equivalent to the purchased share being made over to the plaintiff, the apportionment to be made however in such a way as to cause the least possible inconvenience to the defendants.—(2. W. Reporter, Miscellaneous Appeals, p. 30.)

This decision was followed in Eshan Chandra Banerjee v. Nand Kumar Banerjee.—(8. W. Reporter, Civil Rulings, p. 239.) See also Vol. 6. Miscellaneous Rulings, p. 75. But in a more recent case, in which the last two rulings do not appear to have been urged, Peacock C. J., in delivering the judgment of a Divisional Bench, held that the plaintiff was not entitled, in execution of the decree he had obtained for a certain share of an undivided estate, to be put in possession of specific lands; since the specific lands which constituted his share could be ascertained only by partition, and not in execution of the decree as it stood. The Court, however, in this case censured the lower Court for the vagueness with which the relief it intended to afford was set forth in the decree.—Ram Lochan Dass v. Mansur Ali.—(10. W. Reporter, Civil Rulings, p. 96.)
A stranger who buys the interest of one of the members of a family is not bound by a family agreement not to partition a dwelling house.

Where the members of a Hindu family had entered into an agreement not to partition their property, which consisted of a joint dwelling house, except with the mutual consent of all the contracting parties, the Calcutta Court held this covenant not to sue out partition would not prevent one member alienating his interest in the estate, or bind a stranger who by purchase had become a tenant in common from partitioning his estate, since the arrangement was a purely family one, intended to render the joint occupation of the family dwelling as agreeable as possible, and utterly inapplicable, therefore, to the case of a stranger substituted as owner for one of the parties to the agreement.—Anand Chandra Ghose v. Prankisto Datt.—(3. Bengal Law Reports, Original Jurisdiction, p. 14.)

Co-sharers who continue to occupy the whole of a house which is joint property so as to exclude another co-sharer, after notice from the latter that he would charge them rent for the portion of the property which represented his share are just as much liable as they would be for rents of any other species of property.—Chandra Kanth Rai v. Gopimi Debi.—(6. W. Reporter Civil Rulings, p. 17.)

If one member of an undivided family be authorized by the other members to purchase an estate, and if he subsequently, without authority from them, cancel the sale and take back the purchase money, the other members are not estopped by his last act from suing to obtain the possession of the purchase, since a man's agent for the purchase of an estate is not necessarily his agent to re-convey it, nor would the fact that the proceedings to effect and secure the purchase had been taken in the name of one member only of a joint family constitute him the agent of the family, so that a sale by him would bind the other members.—Bhujnonud Myti v. Radha Charan Myti.—(7. W. Reporter, Civil Rulings, p. 335.) See too, p. 298 of the same Volume.

The fact of the plaintiffs delaying for a long period to sue to set aside a sale by their elder brothers of joint property, is no reason why possession should not be awarded them as soon as their contention that the property was joint had been established and the defendant's sole plea that it was the self-acquired estate of the vendors had been overruled.—Dhan Kristo Rai v. Huro Chandra Rai.—(5. W. Reporter, Civil Rulings, p. 197.)

The alienation by one member of a family of any part of the joint property* is by Mitakshara law invalid without consent of all the members of the family; and the

Under Mitakshara Law one share cannot alienate his interest without the assent of the co-parceners.

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* Where however the different members of the family hold specific and ascertained shares in a joint property, each co-parcener is entitled to alienate his ascertained and separate share.—Gopal Singh v. Devi Singh.—(4. North West High Court Reports, p. 22; see also p. 32.)
North West Sudder Court (Agra S. D. Reports for 1864, p. 299), has held that such alienation is invalid even to the extent of the alienor's own share. Since therefore a joint tenant has no power to raise money by alienating his own share even of the joint estate during life, it follows that that share cannot be burdened with the payment of his personal liabilities after his death; the co-sharers having a vested right in the share and being entitled to receive it free and unencumbered of everything except debts incurred for the benefit of the partners.—Cosserat v. Sadabart Prasad Sahai.—(3. W. Reporter, Civil Rulings, p. 210.) This doctrine of the Mitakshara law will however I believe in this province be found to be almost obsolete.

Where an estate had stood in the name of a single member of a Hindu family, and had been sold by him to a stranger, who, on being sued by the other members of the family, set up as an answer on equitable grounds that he had been deceived by the plaintiff's allowing the vendor to hold himself forth to the world as the sole owner, and had bought bonâ fide, the Calcutta Court directed the following two points to be enquired into—

"First. Whether the purchaser was induced by the fact that the estate was recorded in the name of the vendor only to believe that it was his separate property, or whether he had notice at the time that the estate was the joint property of the vendor and others?

"Secondly. Was the purchaser at the time of the purchase aware of any circumstances which would have led a prudent man to enquire whether the estate was the sole property of the vendor, or whether other persons were jointly interested with him therein?"—Gour Chandra Biswas v. Grish Chandra Biswas.—(7. W. Reporter, Civil Rulings, p. 120.)
CHAPTER X.

PUNJAB CIVIL CODE.

SECTION X.

Gifts.

1.—By the Mahammadan law, a gift must not be conditional, nor implied, nor indefinite, and must, as a general rule, be accompanied by delivery of possession. This strictness is not alien to the Hindu law, and the above rules, regarding the defined nature of a gift, will be enforced by the Courts in all cases of gift whatever. A gift may be either verbal or written.

By Mahammadan law it is requisite that the donor be an adult and sane, and also the owner of the thing given, which must be in existence at the time of the gift.—(Baillie's Digest of Mahammadan Law, p. 508; and Macnaghten's Principles of Hindu and Mahammadan Law, p. 208.)

With reference to the doctrine of delivery, the gift of a thing which is separated from and emptied of the rights of the donor is legal—(Baillie's Digest, pp. 512, 519, 520); so also is the gift of a músháá, or undivided part of a thing which does not admit of partition,* or is of such a nature that some kind of benefit or advantage that can be derived from it while whole and undivided would be lost by partition; as a small house or small bath. But the gift of a músháá in a thing that admits of partition consistently with the preservation of all the uses that could be made of it before partition is not lawful.†—(Baillie's Digest, pp. 512 and 515.) The gift of músháá, if valid at all, is equally so, whether made to a partner or to a stranger.—(p. 515.) When a gift is made of músháá in property which does not admit of par-

* See on this point some remarks in Sutherland's Civil Rulings, for March, 1864, p. 125.
† Baillie takes objection to Macnaghten's statement, at p. 209 of the Principles of Hindu and Mahammadan Law, that such a gift of músháá is "null and void;" for a gift which is invalid only avails to the establishment of property by possession.—(Baillie's Digest, p. 515 note 2; and p. 516, and notes 1 and 2.)
A gift is annulled by the subsequent establishment of a right in a part of it. A gift is rendered void by a right being subsequently established in a part: thus if a man give a mansion with its effects and deliver both, and a right be subsequently established to the effects, the gift of the mansion would be valid, but if the right be established in part of the mansion, the gift of the remainder of it would be void.—(Baillie's Digest, p. 520.)

A good definition of delivery, though based on the Civil law, is the following from Phillimore's Roman Private Law, p. 141. "To make a valid delivery, the person delivering must have the right and will to transfer the property; the person receiving it must have the power and intention to receive." He adds in a note "neque impedit translationem dissensus rantis et accipientis circa causam dandi et accipienda dummodo obligationem certa processerit in tradente." The latter part however of the definition requires modification in the case of gifts to infants and insane persons. The donor must signify his intention by the entire relinquishment of the thing given, the gift being null and void when he continues to exercise any act of ownership over it. The case of a house given to a husband by a wife, and property given by a father to his minor child form however exceptions to this rule, Macnaghten's Principles of Hindu and Mahommedan Law, p. 209; and Sutherland's Civil Rulings, for March 1864, p. 123; 1. North West High Court Reports, p. 238. The seisin of the Mahommedan law was held by the Bombay Court, in Amina Bibi v. Khadijah Bibi, (1. Bombay High Court Reports, p. 157), to be analogous to the livery of seisin of the English lawyers, and to have been effected much in the same way, as by delivery of a sod or twig or the ring or hasp of a door in the name of seisin. When therefore a husband executed the gift of a house to his wife, and delivered it to her along with the keys of the house, which he then quitte, leaving her in possession, in the presence of witnesses, the Court held the delivery to be valid and complete, although the donor shortly returned, and resided in the house with his wife, the donee, until his death, and also received the rents. But where a man after executing and registering a deed of gift of his land to one of his sons assembled many of his friends and the tenants of the land and gave his pugri to that son in their presence by way of testifying publicly his appointment of him as his sole

* But where a man conveyed his share in certain property by a hibah-namah, a mere mis-statement as to the amount of his share was held not to defeat the donor's clear intention to convey by the deed whatever his share was.—Kamedunissa v. Mohammed Ali.—(3. W. Reporter, Civil Rulings, p. 104.)
heir, but died shortly after before he had had time to make over possession of the property, the Chief Court held the gift void for want of possession by the donee.—_Futah Khan v. Alayar Khan._—(3. Punjab Record, Case No. 107.) In _Nawab Amjad Ali Khan v. Mahamdi Begum_ the Privy Council upheld a gift of company-paper by a father to his son, where the donor had reserved the interest to himself for his life; on the ground that, according to Mahammadan law (_Hedya, Vol. 3_), a real transfer by a donor in his life-time without the reservation of any dominion, or share in the dominion over the corpus of the property, but simply stipulating for and obtaining a right to the recurring produce during his life, was a valid and complete gift.—(10. _W. Reporter, Privy Council Cases_, p. 25.) Formal delivery and seisin however are not necessary in the case of a gift to a trustee having the custody of the article given, nor in the case of a gift to a minor, in which latter case the acceptance of the guardian is sufficient.—(_Macnaghten’s Principles_, p. 209.) If the donee be forbidden after the gift to take possession, and do so notwithstanding, the possession is not valid.—(_Baillie’s Digest_, p. 513.) Analogous to the waiver of delivery when the donee is already in possession as trustee, fresh delivery is not required when the donee, at the time of the gift, is holding the article given in the capacity of a tenant or hirer, or pledgee, or if he hold it as a loan, or altogether wrongfully by mere usurpation.—(p. 514.) Although a gift made by a father to his infant child is, as we have seen, valid without delivery, yet it is essential that the thing given should be in the father’s hand, or in deposit for him, since if it be in the hands of a usurper, or of a pledgee, or of a tenant who has hired it, the gift is not lawful, for want of possession.—(p. 529.) For the applicability of the doctrine of advancement to the case of Mahammadans, see before under Chapter IX of this Volume.

In the case of a gift to two or more donees, the interest of each donee must be defined, either at the time of making the gift, or on delivery.—(_Macnaghten’s Principles_, p. 209.)

Gifts to two or more donees.

It is necessary that seisin should take place immediately on the gift being made, or if at a subsequent period, by desire of the donor—(_Macnaghten’s Principles_ p. 208); and in a case reported at p. 185 Sutherland’s _Civil Rulings, for April, 1864_, the Calcutta Court held, on the authority of the Hedya, Vol. 3., pp. 130 and 300, that a deed of gift which stipulated that the donor was to remain in possession during her life was invalid, since a gift which is not to take effect till the death of the donor is null and void. See too 5. _W. Reporter, Civil Rulings_, p. 19. So in a Bombay case, _Jeswant Singh Jee and others v. Jet Singh Jee_, the Privy Council decided that a deed by a Mahammadan in which he
DELIVERY, GIFT OF DEBT.

Absence of seisin is not always fatal to gifts among Hindus.

In the Maharajah Maheshar Baksh Singh v. Mussummat Ganun Kimwar the Calcutta Court laid it down that among Hindus an alleged absence of seisin need not be deemed fatal to the gift as the donor's possession could be regarded as that of a trustee for the donee, who in the case before the Court were the illegitimate sons of the former.—(Sutherland's Privy Council Judgments, p. 150.)

The gift of a debt to the principal debtor is complete without the latter's acceptance, though it is reversed by his rejection; but when the debt is given to the surety his acceptance is necessary to complete the act. When a debt is given to any third person the gift is lawful when the donee is directed to take possession of it. A man who is in debt dies before payment and the creditor makes a gift of the debt to the heir, the gift is valid, and if it be to some of the heirs it accrues to the benefit of all. One of the heirs of a creditor gives his share in the debt to the debtor before partition, and in the deceased's estate there are both money and goods, the gift is good on a liberal construction. When a debt is due to two persons, and one of them gives his share to the debtor, the gift is valid.—(Baillie's Digest, pp. 522 and 523.)

The donee when competent to take possession has the right to take it. But if he be a minor or insane the right to take possession for him belongs to his guardian; who is, first, his father, then his father's executor, then his grandfather, then his executor, and next the Judge or person appointed by him. If the father or paternal grandfather or their executors, as the case may be, be absent at a preceding distance, possession may be taken for the minor by any person in whose family he may be living. Besides the proper guardians, other near relatives have on a favorable construction the power to take possession of a gift for
a minor when he is in their family: so too have the executors of these relatives when the minor is in their family, provided however in all these cases that the father be dead or at a precluding distance, for if he be present and possession be taken by any of the fore-named classes, it would not be valid. A stranger who nourishes and protects a childless orphan may lawfully take possession of a gift on his behalf on a favorable construction. It is immaterial if the minor have understanding to know what taking possession is or not. When a young girl is living under her husband’s protection, possession taken by him on her behalf is valid; but if she be not under his power and protection, her guardian should take possession of the gift. If a youth take possession himself of the gift, it is lawful if he have understanding, though his father be alive; otherwise not.—(Baillie’s Digest, pp. 530 and 531.) Where the guardian of a minor donee is himself the donor and in possession of the property given no formal delivery and seisin is required.—(Sutherland’s Civil Rulings, for March 1864, p. 122.)

In Mussumat Husaini Khanum v. Mirza Mahammad Beg the plaintiff claimed certain house property on behalf of her daughter, who was a lunatic, living apart from her husband under her mother’s care. It appeared that this property had been purchased nominally by the lunatic, that is to say the conveyance ran in her name, but it was averred that the purchase money had been supplied by an uncle of the plaintiff, who after the purchase continued in possession and managed the property. The Chief Court considered this proceeding disclosed a valid gift by the deceased to his niece: that the contention that by Mahammadan law a gift cannot be made to a person of unsound mind was untenable [see in support of this ruling the provisions made by that law for acceptance in such cases, extracted from Mr. Baillie’s work, in the foregoing paragraph of these remarks, and a case reported in 7. W. Reporter, Civil Rulings, p. 6,] and that although the donor had remained in possession, and delivery is necessary to the completion of a gift, yet formal delivery is not necessary in the case of a minor* (See Macnaghten’s Principles of Hindu and Mahammadan Law, p. 209], and the donee was in the position of a minor.—(2. Punjab Record, Case No. 74.)

In Khuda Dad v. Bakshan the plaintiffs sued to set aside a deed of gift made by the defendant of his landed property in favor of his sister’s son. The Chief Court up—

* It should be observed however that the full passage in Macnaghten runs—
"Formal delivery and seisin are not necessary * * in the case of a gift to a minor. The seisin of the guardian in the latter case is sufficient." The donor however appears to have been regarded by the Court as a de facto guardian of his niece, the donee.
Validity of gifts by Mahommedan females.

In Musummat Latifunnissa Bibi v. Rajaur Rahman and others the Calcutta Court held that there was no prohibition against a Musalmani widow, or any other such woman, holding property in her own right, giving it away during her life-time to whom she pleased; unless indeed she should defer the gift till her death bed, when the gift would be looked on as a will and inoperative beyond a certain limit.—(8. W. Reporter, Civil Rulings, p. 84.) See too Vol. 1 of those Reports, p. 79, and the Shia case of Mussummat Mehr-udissa v. Wazir Ali, reported in 3. Punjab Record, Case No. 75. In this part of India however the agricultural and lower class Mahommedans have so largely adopted Hindu notions with regard to the inability of female holders of real property to alienate the same, that before applying the general law to cases occurring among these classes, the existence or otherwise of a disturbing local custom will need to be carefully enquired into.

Requisites to a complete gift under English law.

By English law a gift must be by deed, or accompanied by actual delivery of possession. "When once made, however, it is not in the donor's power to retract it, unless it be prejudicial to creditors or the donor were under any legal incapacity, or drawn in, circumvented, or imposed on by false pretences, ebriety, or surprise."—(Phillimore's Principles and Maxims of Jurisprudence, p. 205.) When therefore a father made an oral gift of some colts to his son, but retained them in his possession till the day of his death, it was held that the right of property in the colts was not altered, and that consequently the son could not claim them from his father's executors. A constructive delivery is, however, sufficient to complete a gift of chattels inter vivos. (Addison on Contracts, p. 45.) If a mere voluntary gift or donation, founded upon no precedent consideration, debt, or duty, be given to a third party for remittance to the donee, the authority may be revoked at any time before the money is actually paid over by the remittee.—(Addison on Contracts, p. 352.)

If a man put a robe or other garment on his servant to use, this is a gift in law." "If an adulterer clothe the woman, the baron may take his wife and the apparel, and justify both."—(Phillimore's Principles and Maxims, p. 61.) In Fortescue v. Barnett it was held that the delivery by the grantor of a voluntary deed assigning a policy was a complete
In the reign of Elizabeth two famous statutes were passed against fraudulent conveyances to the prejudice of creditors and purchasers for value, which are thus described in Norton’s Topics of Jurisprudence, p. 280—“By the 27th Eliz. every voluntary conveyance is rendered void by a subsequent purchase for valuable consideration; whilst under the 13th Eliz. a voluntary conveyance by one not indebted at the time (more especially if for a child of the grantor) if no particular evidence or badge of fraud appear, will be good as against subsequent creditors.” The principles laid down in these statutes, apparently as being based on equity and good conscience, will be found to have been followed in several Indian cases. In Shaikh Inayat Ali v. Mussumat Rampreah Kunwar the Calcutta High Court upheld a voluntary gift by a Mahammadan husband to his wife, as it appeared that at the time he made the gift, the husband, though he owed some debts, possessed far more than enough to liquidate them, and that the wife was in possession under the gift. In that case also the plaintiff became a creditor of the husband long after the date of the gift.—(1. W. Reporter, p. 21.) Again, in Soodkeeena Choudhraw v. Gopi Mahan Sen, the same Court, following an English precedent, Beavan v. Earl of Oxford, ruled that a hibahnamah made in good faith cannot be defeated by a subsequent judgment-creditor.—(1. W. Reporter, p. 41.)

Where a husband by deed of gift put it in the power of the wife to sell, and the wife sold to a bonâ fide purchaser, exercising all due care and diligence in receiving the title-deeds and registering the sale; a subsequent purchaser from the husband has no title that can stand against the first vendee.—Abdul Ganai v. Niamat Ullah.—(6. W. Reporter, Civil Rulings, p. 50.) See the first para of the remarks under the next clause.

By the English law a minor is capable of taking an estate by descent or by purchase and of receiving possession of it; and moveable property may be presented to him. In these cases the donor is bound by his own act, and cannot revoke it. But any gift to a minor may be waived by him when he comes of age, because it may be more advantageous for him to be without the property, since the incumbrances on land given to him, or the rent reserved on a lease, may be more than the value; and his heirs may reject the grant, if he have not lived to agree to it. If a minor continue in possession, after his full age, of land leased to him during his infancy, he affirms the lease and becomes liable to the arrears of rent incurred before.—(Macpherson on Contracts, p. 15.)
The heirs of a grantee under a conditional and personal grant, who had died before taking possession, cannot, even in the case of Hindus, claim under the grant.—Anand Pangraki v. Nottobor Pangraki.—(1 W. Reporter, p. 83.)

No right of pre-emption attaches to transfers of property by way of gift; and hence no pre-emption rights will accrue even when the deed of conveyance is written in the form of a deed of sale if no money consideration or anything in the form of a money consideration have passed, but the transfer was in reality made without any valuable consideration at all.—Sayyid Amir Ali v. Bibi Pearun.—(Sutherland's Civil Rulings, for May 1864, p. 239.)

2.—By the Mahammadan law, the donor can revoke the gift under all circumstances, except those which would render revocation almost impossible. But by the Hindu law, a gift is only revocable under circumstances which would neutralize any contract whatever. Laxity of revocation will not be sanctioned by the Courts. A gift properly made, and followed by delivery, cannot be recalled. But it may be invalidated by those causes which would render any contract or transaction voidable, or by the failure of the conditions mentioned in the preceding clause.

"The revocation of a gift is," according to Mahammadan lawyers, "abominable under any circumstances, but it is valid nevertheless." After delivery, a gift is, however, irrevocable under the following circumstances: first, when the thing given has been lost: secondly, when it has passed from the possession of the donee by sale, gift, or the like [see the case of Abdul Ganni v. Niamat Ullah above at p. 287], or by his death, for what is established to an heir is different from what is established to an ancestor; if however the donee himself part with the article by gift, and then resume his gift, and the article return to his possession by this revocation, the first donor may, in such a case, revoke his gift as if the thing given had never ceased to be the property of the first donee: thirdly; when the donor himself has died: fourthly, where there has been an increase to the thing given of such a nature as to be united to it; and it makes no difference whether the increase be in consequence of the act of the donee, or without such act, and
whether it have issued from the thing itself, or be an accession to it: but it must be incorporated with the body of the gift and be an addition to its value, such as dyeing, sewing, carrying or the like, but mere transfer from place to place is not sufficient to prevent revocation unless it add to the value of the thing. A separate increase does not prevent revocation, nor does damage or loss sustained by the subject of gift, though the donee is not responsible for the loss. A mere alteration in the use to which the thing given is applied does not prevent revocation; so too if the increase itself perish, leaving the gift as it was originally, revocation is permissible: 

fifthly, a change in the subject of the gift, as grinding when it is wheat, or baking in the case of flour, prevents revocation: 
sixthly, so also there can be none where an exchange has been received for the gift: 
seventhly, a gift made by a husband to his wife, or by the wife to her husband is irrevocable, even should the marriage be subsequently dissolved: and 
eighthly, a gift is irrevocable when made to a blood relation within the forbidden degrees, but this rule does not extend to relations who are prohibited by fosterage or affinity.—(Baillie's Digest, pp. 524—526.) So too when a man gives a debt to his debtor, the act is irrevocable (p. 527). If the right of revocation be compounded for something, the composition is valid, and the thing becomes an exchange which causes the right of revocation to drop.—(p. 528.)

When property is given as a charitable gift (sudukah) no revocation can take place, when the recipient has been put in possession; and this is equally the case whether the donee be rich or poor.—(Baillie's Digest, pp. 545—547.)

"Eight gifts according to Katyāyana are not subject to revocation or retraction: what has been given as wages, as the price of an entertainment, as the price of goods sold, as a nuptial gift to a bride, or her family, as an acknowledgment to a benefactor, as a present to a worthy man, from natural affection, or from friendship. Harita declares—a promise legally made in words, but not performed in deed is a debt of conscience both in this world and the next; but where a promise has been made, or a thing given to a person whom the law declares incapable of receiving, or where it has been given for a consideration unperformed, the law permits the non-performance of the promise in the one case and the revocation in the other."—(Macnaghten's Principles, p. 140.) But "even where a gift is voidable on the ground of fraud, accident, or mistake, it is always a question for the discretion of the Court whether cancellation and delivery ought to be ordered," and in cases where the donor simply alters his mind he ought not to be relieved from the consequences of his act.—Abhachari v. Ramachendra.—(1. Stokes' Madras Reports, p. 398.)
Roman law anent revocation.

The Code of Justinian allowed the revocation of gifts inter vivos in certain cases; as, for instance, when the person benefited seriously injured, or attempted to injure, the person or property of the donor, or failed to fulfil the conditions of the gift. Revocation was however personal to the donor and the receiver, and could not be exacted by the heirs of the one, or against the heirs of the other (Sandar's Institutes of Justinian, p. 231.) But there was no action to recover money given in consideration of past services, even though such services had not been rendered. "Damus ob causam aut ob rem; ob causam præteritam veluti cum ideo do quod aliquid a te consequus sum, vel quia aliquid a te factum est, ut etiamsi falsa causa est, repetitio ejus pecuniae non sit." (Dig., II, 12-6-52.) By English law, as we have seen, a gift once delivered cannot usually be retracted.

In Mussamat Biba v. Chaajhu it appeared that the plaintiff, a Hindu widow, sought to set aside a gift she had made to the defendants. The Chief Court concurred with the lower Court in holding that as the deeds of gift had never been carried into effect, and the plaintiff was still in possession, she was entitled to exercise the right she claimed of revoking her gifts.—(1. Punjab Record, Case No. 87.)

In Karm Singh v. Deva Singh, the plaintiff sued the defendant, who was his son, for a parcel of land which had been in the possession of the latter for upwards of twelve years. The Chief Court ruled that, as it appeared that the father gave his son the land, and that the gift had been followed by possession, it could not now be revoked. The lapse of twelve years added to the strength of the defendant's title, but if there had been no precedent gift, it would not have sufficed in itself to create one, since owing to the relationship between the parties, the occupation of the son would otherwise have been regarded as merely continuing by the permission of the father, and not as being independent of, and in opposition to, the latter's rights.—(2. Punjab Record, Case No. 50.)

When money is paid over as a free and voluntary gift, under no undue influence or mistake of fact, to a trustee for him to distribute among a certain definite class of persons, and the trustee has already taken steps for discharging the trust and disbursed a portion of the sum made over to him to the destined recipients of it, it is not in the power of the donor to revoke a trust thus completely created for definite objects of bounty and already acted upon.—Sardar Partap Singh v. The Deputy Commissioner of Umrtsur.—(2. Punjab Record, Case No. 43.) Had the revocation, however, taken place before the trustee had begun to distribute the money
among the appointed recipients, the donor could, it would appear, have recalled the gift; See Addison on Contracts, p. 952.

3.—By the Hindu law, there exist the same restrictions on the power of making gifts as with regard to all other dispositions of property. But no restriction exists in the Mahammadan law as regards gifts, unless the gift be made on a death bed, in which case it is treated as a legacy, and is then subject to the usual testamentary limitations. For instance, a man cannot, by Mahammadan law, will away from his heirs more than one-third of his property, but he can, in his life-time, give away his entire property, or as much of it as he pleases, to a stranger, or to one heir in preference to the others. But it will be remembered that a deed of such gift must be accompanied by possession. If the deed be produced after the donor's death it will not be held valid, unless there should have been delivery during his life-time. Such gifts are also subject to the conditions already described in Sec. IX, Clause 2.

In *Mussumat Kishen Devi v. Mussumat Gunga Devi*, the plaintiff, who was a childless wife of one Brahmo Sunt deceased, claimed her late husband's estate by virtue of an alleged deed of gift made by him to her before his marriage to the defendant, who was his second wife. This second wife bore him three sons, and until his death, twenty-three years after the execution of the deed of gift, the Sunt continued to act as if he were the owner of the property, which he never allowed to pass out of his hands. The Chief Court, on the issues whether the gift were valid, and whether it were not affected by the birth of children to the Sunt by his subsequent marriage, held that no local custom had been made out to justify a disposition of the property of a Hindu in contravention of the law of Benares, which prevails in this part of the country. The opinion of the Court of original
jurisdiction that the disposition effected by the deed of gift was in accordance with the law was founded upon an old decision of the Sudder Dewani Adalut of Bengal. But the law of Bengal does not obtain in this Province. After quoting the opening words of the present Clause, the Court referred also to Macnaghten's Principles of Hindu Law, where the learned writer observes that "the law of Benares prohibits any unequal distribution by the father of ancestral property of whatever description, as well as of immovable property acquired by himself. At a distribution of his own personal acquisitions even, he cannot, according to the same law, reserve more than two shares for himself, and as the maxim of fac tum valet does not apply in that school, any unequal distribution of real property must be considered as not only sinful but illegal." And towards the close of the same chapter it is laid down that "the law is particularly careful of the rights of those born subsequent to a partition made by the father. There is another provision also which forms an effectual safeguard against the destitution of children born subsequent to a partition which consists in the father's right of resumption in case of necessity of the property which he may have distributed among his sons." In this case the father virtually resumed the gift, at least he took care to guard the rights of the children who were the issue of the second marriage. Accordingly the Court set aside the deed of gift as invalid.

A Hindu, who had no nearer heir than a daughter, having made a gift of his entire ancestral and acquired estate a few days before his death to a stranger on condition that he should be responsible for the maintenance and marriage of his daughter, the Lahore Court held that the gift was undoubtedly good according to Hindu law, and, as no local custom to the contrary had been made out, it must be supported.—Mussumat Lado v. Surja.—(3. Punjab Record, Case No. 71.) See to other remarks under clause 1 of the next Section. But in a case, which however came from Cattack, the Calcutta Court set aside a gift of property made by a widow, at the instance of the daughters, on the ground that a gift of ancestral property is not valid without the consent of all the heirs.—(1. W. Reporter, p. 60.)

In establishing, however, the validity of a deed of gift taken from a person stricken with a mortal disease and in expectation of death, the same strictness at least should be required as in the proof of a testamentary disposition, proof, that is, that he really knew what he was about and intended to make this disposition of his property.—Mussumat Thakur Dahi v. Rai Balack Ram.—(10. W. Reporter,
Privy Council Decisions, p. 3.) See too Vol. 3. Civil Rul-
ings, p. 166.

Where a Hindu widow executed a deed of gift convey-
ing her whole property to her physician, but shortly after,
and before acting upon it, repented of what she had done
and repudiated the deed, the Calcutta Court held that as
it appeared that she had executed the deed at a time when
she had not a single friend or adviser of her own near her,
but was surrounded by those of the donee, and that there
was nothing to show that the consequences of her act were
ever placed before her mind or considered by her, the gift,
if not obtained by undue influence, was still one which
under the circumstances could not be upheld by any Court
of Equity. "Our Courts," observed Seton Kurr J., "are
Courts of Equity, and in this character, they look with par-
ticular jealousy on any proceedings, however plausible, by
which persons incapable of judging of their own interests,
or of acting for themselves, such as widows and minors, are
deprived of the management and enjoyment of their pro-

By Mahommedan law, if a father while in health give
the whole of his property to one child it is lawful, though he
would be sinful in so doing.—(Baillie's Digest, p. 529.) The
Courts would have, however, before upholding such a trans-
action, to satisfy themselves that the donor's legal right had
not been controlled or affected by local custom. In Ghazi
v. Hajj and Shadi, the Chief Court upheld a gift by a Ma-
hammadan in his life-time of his whole property, as there
appeared to be no local custom in opposition to the law laid
down in this clause of the Code (1. Punjab Record, Case
No. 102.); while in Doulat Bibi v. Brahun a deed of gift of
her estate by a Musalmami widow in favor of a daughter and
son-in-law was set aside on proof that the lex loci was ad-
verse to such alienations.—(2. Punjab Record, Case No. 93.)
In another case, Miran Baksh v. Peru, which occurred
among the Mahommedan Rajputs of the Jalandhar district,
a deed of gift of his land by a father to his daughter, which
had been accompanied by seizin, was maintained in opposi-
tion to the brother and nephews of the donor, since as no
genuine local custom for or against the right exercised by
the father had been proved to exist, the law was of course in its
favor.—(3. Punjab Record, Case No. 29.)

Although the Code lays down that gifts made by a
Mahommedan on his death bed are treated as legacies, they
differ from legacies in one important particular; viz. that it
is essential that possession be taken of them, so that if the

Gifts by persons specially liable to be imposed on or undu-
ly influenced will be narrowly scrutinized by the Courts.

Gifts made by a Mahommedan in health are valid if
accompanied by possession provided the lex loci be not op-
posed to them.

Possession must be given by the donor of death bed gifts.
DEATH BED GIFTS.

A death bed gift to an heir requires the consent of the other heirs.

Definition of a "death-illness."

The most correct definition of death illness is, that it is one which it is highly probable will issue fatally; whether in the case of a man, it disable him from getting up for necessary avocations out of his house or not, such as, for instance, when he is a fakeeh or lawyer from going to the musjid, or when he is a merchant from going to his shop, and whether in the case of a woman, it do, or do not disable her from necessary avocations within doors."—Baillie's Digest, p. 543. In Miran Baksh v. Peru certain Jalundhar Moulvis defined a death disease, as not necessarily meaning the disease of which a man dies, but one which is generally looked upon as fatal, as cholera. A gift therefore made by a man, who was only suffering from leprosy, while in the possession of his senses, and not in the daily expectation of his death, would not come under the head of a death bed gift, since leprosy is not deemed in general a deadly disease. —(3. Punjab Record, Case No. 29.) In Ashrufunnissa v. Aziman, however, the Calcutta Court refused to give effect to a tamliknamah except as a will, on proof that the donor "executed it at a time when she was laboring under that sickness from which she never recovered,—when suffering from her last and fatal illness."—(1. W. Reporter, p. 17.) See a like view expressed in Sutherland's Civil Rulings, for May 1864, p. 221.

Gift of dower to the husband by his wife when sick.

If a woman who is sick gives her dower to her husband, the gift is valid if she recover; so it would be also if she were to die of the sickness, provided it had not been what is technically regarded as a "death illness," but if it were a death illness, the gift would not be valid without the sanction of the heirs.—(Baillie's Digest, p. 543.) For the validity of gifts made by a woman in labor, see Baillie's Digest, p. 544.

In determining whether a deed be a will or a hibahnamah the subsequent acts of the parties may be looked at. An instrument purporting by its language to be a will, may be proved by the subsequent acts of the parties concerned to have been in reality a deed of gift.—Hurosundari Dassi v. Chandra Mohani Dassi.—(3. W. Reporter, Civil Rulings, p. 200.)
It will be observed that by the Mahommadan law a power is allowed with regard to gifts, which is not extended to wills, and is not permitted by the Hindu law. This power however is liable to be modified by custom: and it will be borne in mind that a mere deed of gift without possession is void."—(Commentary on the Punjab Civil Code.)

For the law regarding gifts made in contemplation of death by persons governed by the provisions of the Indian Succession Act, see Section 178 of that Act.
CHAPTER XI.

PUNJAB CIVIL CODE.

SECTION XI.

Wills and Legacies [under Native Law.]

1.—Wills or testaments, and legacies, in the legal sense of the terms, are unknown to the Hindu law. Such dispositions of property either take the shape of partition with, or gift to, one or more of the heirs, during the life-time of the father or the incumbent, and are treated of in their appropriate Sections. If, however, a deed, purporting to be a will, shall have been executed by any Hindu, it may be permitted to take effect, provided that it do not militate against the rules of inheritance, and do not transgress the general limits imposed on the disposition of property.

"Notwithstanding that it is laid down in the text books that a Hindu cannot make a will, the advance of society has already to a very considerable extent introduced wills among the natives of India: and doubtless such documents will more and more prevail, as it becomes necessary to remove the restrictions upon alienations of property. See Naga-latchme Amal v. Gopu Nadaraja Chetty (6. Moore's Ind. Appeals, p. 309), where a will by a Hindu, without male issue, kinsman or coparcener, after providing for the maintenance of his widow, daughters, and female relations, devised ancestral as well as other real and personal estate to trustees upon certain charitable trusts. The will was impeached by reason, first, that the testator had authorized his widow in an event which happened to adopt a son, which act would have rendered him incompetent to exercise a testamentary power; secondly, that at the time of the execution of the will, the testator was not of sufficient mental capacity to make a testamentary disposition; and thirdly, that the testator being a Hindu, had no power by law of devising ancestral estate by will. Upon appeal it was held, affirming the decree of the Saddar Court in India, first, that although in the absence of male issue of the deceased there was a strong presumption,
arising from religious considerations, in favor of a delegation by the deceased to his widow of authority to adopt a son for him; yet that the evidence entirely failed to prove that fact; secondly, that the evidence established his mental capacity at the time of executing the will; and thirdly, by the Hindu law prevailing at Madras, a Hindu in possession without issue, male kinsman or co-parcener, had power to make a will disposing of ancestral, as well as acquired estate."—(Norton's *Law of Evidence, Note on Sec. 636.*) Although this is a Madras case, yet since the *Mitakshara* is the leading authority in that Presidency, as it is also in most parts of the Punjab, the precedent now quoted would be of weight in this Province. See too 3. *Reid's Bombay High Court Reports, Civil Appeals, p. 6.*

The capacity of a Hindu of these Provinces to make a will was considered in much fulness in a case in the Lahore District Court—*Raguth v. Shibnath.* "A will or testamentary disposition of property," observed the Judge, "is unknown to the Hindu law (Para 1 Section XI Punjab Civil Code). But there is no doubt that by the decisions of the Courts of Justice the testamentary power of disposition by Hindus has been established in the Presidency of Bengal, and indeed over India generally (See the case of *Bhoobun Mayi Debi v. Ram Krishor Acharji, Sutherland's Privy Council Judgments, p. 574;* See also pp. XIII and XIV of the preface to Stokes' edition of the Indian Succession Act). It is now settled that a Hindu's testamentary power is co-extensive with his independent right of alienation *inter vivos,* and this I think must be taken to be the real meaning of the rule in the Punjab Civil Code, where it is laid down that "if a deed purporting to be a will shall have been executed by any Hindu, it may be permitted to take effect; provided that it do not militate against the rules of inheritance, and do not transgress the general limits imposed on the disposition of property." The literal interpretation of this passage leads to the absurd conclusion that a will is only to be allowed to operate when the disposition which it makes coincides with the manner in which the property would descend according to the Law of Inheritance. If this be the intention of the Punjab Civil Code, then a will is of no use whatever: for if the distribution of the property made by it be contrary to the provisions of the Law of Inheritance, it would be invalid; if in conformity with them, it would be unnecessary. But I do not think that the rule in the Punjab Civil Code should be interpreted literally. Indeed it must always be remembered in interpreting the rules of that Code that they have not been drawn up with the strictness or precision of diction which one expects to meet in a statute or an Act of the Legislature. No greater mistake could be

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*See 1. *Stokes' Madras Reports, p. 328, and the Appendix to that Volume.*
made than to adhere strictly to the literal interpretation of the Code: and we must always rather seek to discover the broad general principle which the compiler of the Code had in view when framing the rule. Now it is clear from the Commentary to Section XI of the Code, that the Hindu law was but little consulted when Section XI was drawn up. Indeed, the compiler admits that whatever provisions on the subject of Hindu wills he admitted into Section XI, he drew not from Hindu but from Mahammadan law. The evident intention of the rule above quoted (and indeed if the rule is to have a meaning at all it is the only consistent interpretation which can be put upon it) appears to me to be (as it is the law in every other part of India) that a Hindu will is to be allowed to have effect if it do not trangress the general limits imposed on the disposition of property; in other words, as stated above, that a Hindu's testamentary power is co-extensive with his independent right of alienation inter vivos."—(1. Selected Papers of the Punjab Law Society, p. 130.) Of course in any case in which effect might be sought to be given to a Hindu's will, the Court would have to ascertain further whether any well defined "custom" could be proved to prevail at variance with the right claimed.

In a recent case, Sudanund v. Mussumat Surjo Mani Debi, the Calcutta Court laid it down that no formalities* need be gone through in order to constitute a valid native will: all that is required being that the intention of the testator should be ascertained, in whatever way it may be ascertained, whether by word of mouth or in writing clearly and unmistakeably.—(8. W. Reporter, Civil Rulings, p. 455.) So in Tara Chand Bose v. Nobin Chandra Miller, a paper drawn up when the testator though very ill was in the full possession of his senses, and containing in columns a statement of the testator's real and personal property with a recital of debts due to him, and providing for the manner in which his estate was to be disposed of, was held to be sufficient as a will on proof by the subscribing witnesses that it was drawn according to the instructions of the testator, and that he signified in their presence his assent thereto.—(3. W. Reporter, Civil Rulings, p. 138.)

Where a will disinherits the testator's near kindred, the Court should not rest satisfied simply with proof of the execution and registration of the document by the testator, but should ascertain whether the document propounded did come home to the mind of the testator, and was the expression of his intent and will, especially when the person who

* So in Srinasasammal v. Vijayammal the Madras Court held that a Hindu may make a nuncupative will of property, whether moveable or immoveable; indeed no transaction of Hindu law absolutely requires to be embodied in writing.—(2. Madras High Court Reports, p. 37.)

No formalities requisite in a Hindu will.

This power may be controlled by local custom.

Proof to be demanded when the will disinherits the testator's near kindred.
took a prominent part in procuring the execution of the alleged will was one likely to possess great influence over the testator, and one who did himself benefit materially by the document.—*Kista Chayan Majumdar v. Dwarkanath Biswas*, (10. W. Reporter, Civil Rulings, p. 33.) But where the evidence is sufficient for the proof of an ordinary will, and there is no inherent improbability as to the will or its provisions, the fact of the scope of the document being at variance with the law the Court presumes the testator to have lived under will furnish no sound argument for weakening adequate evidence as to the factum of the deed.—*Surendra Nath Boy v. Hiramani Barman.—* (1. Bengal Law Reports, Privy Council Cases, p. 26.)

In *Suryimani Dassi v. Denobundu Mallick*, the Privy Council observed that "in determining the construction of a will, what we must look to is the intention* of the testator. The Hindu law no less than the English law points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made, and its dispositions are to be carried out. If that law have attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator in the dispositions which he has made had regard to that meaning or to that effect, unless the language, the will, or the surrounding circumstances displace that assumption." And further on in the same judgment—"If we are to impute to this testator any intention different from that which is to be collected from the words of his will, it must be upon the ground that there are extrinsic circumstances which disprove the expressed intention, and prove the different intention. The expressed intention ought, as we conceive, to prevail unless

*It would be improper and very unsafe in construing Hindu wills to follow decisions of the English Courts upon the construction of English wills, which are founded upon the peculiar effect ascribed to technical words and terms ordinarily used by conveyancers with reference to the Real property law of England. The effect of adopting as a rule of construction that a bequest by a Hindu to A and his descendants, children, or issue, must operate to vest an absolute estate in the first taker would be very frequently to defeat the real intention of the Hindu testator."—*Arumugam Mudali v. Ammiammal.—* (1. Sikes' Madras Reports, p. 400.) See too, 4 Reid's Bombay High Court Reports, p. 1.
the different intention be clearly demonstrated. We may doubt whether the testator really intended what his words import, but a Court of construction must found its conclusions upon just reasoning, and not upon mere speculative doubts."—(Sutherland’s Privy Council Judgments, p. 29.) See also the judgment in Bhoobun Mayl Debi v. Ram Kishor Acharji, at p. 576 of the same Reports.

In Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb, the Calcutta Court held that, putting out of the question the case of religious endowments, grants inter vivos, or gifts by will, in perpetuity are quite contrary to the whole scope and intention of Hindu law, and there are no means by which under that law such gifts or grants can be effected, since Hindu jurisprudence contains nothing at all analogous to the trusts of the English, or the fidei commissa of the Roman law.—(2. Bengal Law Reports. Orig. Jurisdn., p. 11.) The whole report should be carefully studied.

If the language of a Hindu testator’s will sufficiently indicate the person who is to be the object of his bounty, the person so indicated will not be prevented from taking the bequest because the testator conceived him to possess a character, as for instance that of his adopted son, which in law could not be sustained.—Jivani Bhai v. Jivu Bhai, (2. Madras High Court Reports, p. 462.)

As to the limits within which a Hindu in the Punjab can in law exercise his powers of testamentary disposition, it was laid down by the Calcutta Court that where the Mitakshara law prevails a man may dispose of his acquired estate, moveable or immovable, at his pleasure, even to the disinherison of his own sons.—Bawa Misser v. Rajak Bishen Prokash Narayan Singh.—(10. W. Reporter, Civil Rulings, p. 287.) A like conclusion was arrived at by the Lahore District Court in the case of Rognath v. Shionath.—(1. Selected Papers of the Punjab Law Society, p. 121.)

In a Privy Council case, Mussumat Thakur Dalit v. Rai Baluck Ram, their Lordships held that under Mitakshara law a Hindu widow may dispose of moveable property inherited from her husband; but she has no power of alienation over immovable property inherited from him whether such immovable property had been self-acquired by the husband or was ancestral estate.—(10. W. Reporter, Privy Council Decisions, p. 3.)

The doctrine of Hindu law that a widow succeeding as heir to her husband cannot recover property not in the possession of her husband does not apply to property in which the husband had a vested interest under a will or deed, but the actual enjoyment whereof had been postponed during
the life-time of a third party who chanced to survive the ultimate legatee.—**Rewan Parshad v. Mussunrat Radha Bibi.**

**Powers of the executor of a will under Hindu law.**

In *Srmati Deeno Mayi Dassi v. Tarachandra Coondoo Chowdhry*, the Calcutta Court held that an executor has not by Hindu law the same power over the moveable and immoveable estate of the testator which an executor would have over lease-hold estate according to English law. On the contrary, an attorney or executor under a will appears to have no greater power over immoveable estate than a manager, which, according to the Privy Council decision in *Hanuman Parshad Pandi's case* (see above, p. 232), is a limited and qualified power; and further the general power of a manager under a will may be restricted by the will, and he is bound to act according to the directions in the will.—(3. *W. Reporter, Miscellaneous Appeals*, p. 7.) See too 2. *Bengal Law Reports, Original Jurisdiction*, p. 1, where on the authority of this case, a party who had received *bona fide* but without due enquiry Government paper from the executor of a forged Hindu will, and after obtaining a renewal of the same had endorsed it back to the executor, who made away with it, was held liable to account for its value to the representatives of the deceased, as for assets of the estate come into his hands.

Where the testator’s property is amply sufficient to pay all demands upon it, and no power of alienation is given in the will to the executors, or anything said there from which it can be implied, no power to sell can arise by implication, where the only necessity for a sale is caused by the mismanagement of the executor himself.—(*Nilkant Chatterjee v. Pyari Mohun Dass.* And in appeal from this case *Peacock C. J.*, in delivering the judgment of the Court, observed:

> “Although the payment of debts is said to be a charge on the property of the deceased, that charge is not a charge on any specific portion of the estate, any more than the charge for payment of debts is a charge on any specific portion of the goods and chattels in the hands of an executor, or of real estate in the hands of an heir-at-law, when the debt is a charge on the heir and on the assets which he takes by inheritance. If an executor were to mortgage or pledge a portion of the assets of an estate, or an heir-at-law were to mortgage any portion of the real estate which came to him by inheritance, a creditor, who should purchase under an execution against the general assets, either real or personal, would take only subject to the charge made by the executors in the one case, or of the heir in the other.”

—(3. *Bengal Law Reports, Original Jurisdiction*, p. 7.)
2.—By Mahammadan law, a proprietor may bequeath one-third of his property, but not more, except with the consent of the heirs; legacies up to this amount are payable after the debts of the estate, but they precede the distribution of inherited shares. A legacy cannot be left to one of the heirs without the consent of the rest. Gifts, made on a death-bed, are treated as legacies, and are subjected to the same restrictions. No legal preference is shown to written over nuncupative wills, but verbal bequeathments give rise to unsatisfactory litigation, and the practice should be discouraged by the Courts.

A will which diverts the whole property from the next heirs is illegal under Mahammadan law.—Jaminuddin Ahmad v. Mir Hasan Ali.—(2. W. Reporter, Miscellaneous Appeals, p. 49.) As stated in the text a testator by Mahammadan law can only divert a third of his property from the legal heirs unless their consent be obtained, which consent must be given after the death of the testator. —See 2. Stokes’ Madras Reports, p. 350. In the absence of any heirs, however, a will will convey the whole estate.—Mismat Ekin Bibi v. Mir Ashraf Ali.—(1. W. Reporter, Civil Rulings, p. 152.)

The following rules regarding Mahammadan wills are taken for the most part from Baillie’s Digest of Mahamadan Law:

I. Any person who is sane can make a will, whether male or female, married or single. A bequest however by a youth under puberty is invalid, even if he die after reaching puberty.—(Digest, p. 617.)

II. While an heir enters upon the possession of inherited property without acceptance, in the case of a legatee there must be acceptance, either expressly or by implication, on his part after the death of the testator. Hence the death of the legatee before that of the testator occasions a lapse of the legacy. If however the legatee die after the testator, but before he have rejected or accepted the legacy, his death becomes an acceptance, and his heirs inherit the legacy.—(p. 664.)
Bequests requiring the assent of the heirs.

III. A bequest to a person who slays the testator, either intentionally or by accident, is not lawful; whether the bequest were made before the death wound or after it, unless the heirs assent to the bequest. If however the slayer be a youth under puberty or insane, the bequest is valid without the assent of the heirs.—(p. 616.)

IV. A bequest to one who holds the position of an heir at the time of the testator's death is void unless assented to by the other heirs, which assent must be given after the testator's death, since a permission given in his life-time may be retracted. If however the legatee be an heir at the time of the execution of the will, but have ceased to be one at the time of the testator's death, the legacy is valid without the consent of the heirs.—(p. 615.) See too, 2. W. Reporter, Civil Rulings, p. 181.

Effect of the assent in ratifying the bequest.

V. In the case of a legacy to an heir, if the assenting heir, being of mature age, be sick but afterwards recover, the assent given by him is valid; but if he die of the illness, his assent is to be treated in the same way as if it were a bequest, so that if the original legatee be an heir of the assenting heir, the assent is not lawful unless concurred in by the other heirs of the sick person; but if the original legatee be in the position of a stranger to the sick person the assent is lawful to the extent of a third of his estate.—(p. 615.)

V. After the heirs have once assented to a legacy in access of a third of the estate, or in favor of an heir of the testator, or of his slayer, they cannot refuse to deliver the subject of bequest. When however the consent of the heirs is required, it is lawful only when the heir is capable of assenting; viz. when he is of mature age, and sane mind.—(pp. 616 and 615.) If an heir sign the will as an assenting party, without undue influence being used, the will is fully established and valid as against him.—(4. W. Reporter, Civil Rulings, p. 36.)

Bequests to a child in the womb.

VII. A bequest to a child in the womb is valid, if it be born alive within six months from the date of the bequest, and if the child die after its birth, the legacy goes to its heirs. If the child be still-born, the legacy lapses. If twins be born, one dead and one alive, the latter takes the whole bequest; but if both twins be born alive, and one of them die subsequently, the legacy is divided into moieties, one for the living child, and the other for the heirs of the dead one.—(p. 617.)

Bequest of wuluf on a death bed.

VIII. An appropriation of property by way of wuluf, when made on a death-bed, is only lawful when within the third of the estate, or when the appropriation is allowed by the heirs.—(p. 601.) See too, 10. W. Reporter, Civil Rulings, p. 375.
IX. A testator may revoke his bequest expressly or by implication. Every act, which if done on the property of another has the effect of cutting off the proprietor's right in it, has, when done by a testator on the subject of his bequest, the effect of revoking it: again, every act which occasions an addition to the subject of the bequest of such a nature that it cannot be delivered without the addition has the effect, when done by the testator, of revoking the bequest: and lastly, every act of disposal by him, which occasions an extinction of his right in the subject of the bequest has also that effect. If therefore a man sell a specific thing which he had bequeathed, and then re-purchase it, or make a present of it and then revoke the gift, the bequest is void. So if a man bequeath a piece of cloth, and afterwards cut it up and sew it, the bequest is revoked.*—(p. 618.)

X. A bequest is also revoked by a subsequent bequest of the same thing to another person, unless the terms used imply that the first and second legatees are to enjoy it in partnership. If however the second legatee be dead at the time the bequest was made to him, the first bequest would then continue valid; but if he be then alive and die subsequently before the testator, the legacy would not take effect in favor of either of the legatees.—(p. 620.)

XI. When the bequest is specific, or of some particular kind of property, as when a man bequeaths the third of his flocks, and they all perish before his death, the legacy is void; insomuch that if he should afterwards become possessed of other flocks, or of another specific thing of the same kind, the right of the legatee would not attach to the subsequent acquisition: yet if he had no flocks at the date of the bequest, but subsequently acquired them and then died, it would seem that the bequest is valid.—(p. 635.)

XII. An increase that arises out of the subject of a bequest before the death of the testator belongs to the estate: but an increase that occurs between the death of the testator and the partition or distribution of his estate belongs to the legatee. The increase, however, with the original legacy, comes within the rule of the third.—(pp. 637, 638.)

XIII. When a person has bequeathed property belonging to another who allows the gift it is lawful; but the owner may retract his consent at any time until delivery has been made of the bequest.—(p. 621.)

* Although there is a difference of opinion, the approved view is that, if a man bequeath a price of silver and then fashion it into a ring or the like, the bequest is not revoked.—(Digest, p. 619.) This however seems at variance with the general rule, and with the illustrations of it given at p. 618.
XIV. When a man makes a bequest to a stranger and to his heir, the stranger takes half the bequest, and the remainder is void.—(p. 636.)

XV. If a legacy be left to two persons indiscriminately, and one of them die before the legacy is payable, the whole will go to the survivor: but if a half were left to each of them, the survivor would only take his half and the remainder would lapse to the heirs.—(Macnaghten's Principles of Hindu and Mahomedan Law, p. 213.)

XVI. When a person bequeaths a share, as for instance a sixth, to a legatee and afterwards a larger share, as a third, the legatee will take only the third, as the sixth is included in it. So if the testator bequeath a sixth, and again a sixth to the same person, the legatee will take only the sixth, unless there be evidence that two separate bequests were intended.—(p. 630.)

XVII. When a man bequeath a third of his property to the sons of A, who has no sons at the time of the bequest, but who has sons born to him subsequently and prior to the death of the testator, these sons are entitled to the third. And even if A had sons at the time of the execution of the will, yet except such sons alone were clearly indicated by the terms used, the bequest would go to the sons existing at the time of the testator's death.—(pp. 634 and 635.)

XVIII. When the legacy is uncertain, as when a man bequeaths a beast, or a garment, the heirs may give any beast or garment they please.—(p. 63.)

XIX. When there is a bequest to the heirs (wurusut) of such an one, it is to them in the proportion of a double share to males over females.—(p. 643.)

XX. If the testator bequeath a legacy "to the two sons of such an one" when in reality there is only one son, he has but a half of the legacy: while if he name them, saying "to the two sons of such an one, Zeid and Amr," when there is only one son, he takes the whole.—(p. 643.)

Book X, Chapter V, of Baillie's Digest contains a long list of definitions of names of legatees; as however they are either words little used in this province, or else not likely to prevent difficulty, I shall merely give the references to the passages where they are explained. Akurrib (p. 644): "a person of his kindred" (Zee kwababin) or "a person of his relatives" (Zee ruhmi) p. 645: kurabib (p. 645): Abl-i-baiz (p. 645): Nubub or husub (p. 646): Jins or dâ (p. 646): Abl (p. 646): Hushum (p. 646): Koom (p. 647): Basie (p. 647): Neighbours (p. 649): Shab, Kuhl, Shaiikh, Ghulm, Ukb (p. 650): Ashar (p. 650): Akhlan (p. 650): Aowlod of the Prophet (p. 650): Abl ul ilm (p. 651.)
XXI. A bequest to the husbands of one's daughters includes the husband of every daughter that is a wife at the time of the testator's death, or keeping an iddut for a revocable divorce, but not one who has been divorced absolutely. — (p. 649.)

XXII. A bequest to the blind or infirm, or debtors, prisoners, &c., if they can be numbered, is for the rich and poor of them: and if they cannot be numbered * for the poor among the specified class.— (p. 650.)

XXIII. When the occupancy of a house is bequeathed, the legatee has no right to let the house to hire; when such a bequest is made without limit of time, the legatee is entitled to occupy the house as long as he lives.— (p. 654.) The rule is similar with respect to the bequest of the produce of a garden or land; but, by an apparently arbitrary distinction, a bequest of the fruit of a garden includes only existing fruit, if there be any on the day of the testator's death, unless the words 'for ever' be used, in which case the legatee is entitled to the existing fruit and all that there may be thereafter; if however there be no fruit on the day of the testator's death, the legatee is allowed all the fruit which may be produced subsequent to the death of the testator up to that of the legatee.— (pp. 654 and 655.)

XXIV. If a testator bequeath his house to A and its occupancy to B; or a palm tree to A and its fruit to B, each legatee takes what is assigned to him, whether the bequests be connected together, or single. But if a beginning be made in these cases with the accessory and the principal is then bequeathed, as the occupancy of the house to B, and then the house itself to A, it is only when the bequests are made connectively that each legatee is entitled to what has been named for him specially; for if they be mentioned separately, the legatee of the principal is exclusively entitled to the principal, and the accessory belongs to them both in halves. And if a mansion be bequeathed to one person, and a particular apartment in it to another, the apartment is to both in shares. So also if a thousand dirhems be bequeathed to one person, and a hundred out of them to another, the legatee of the thousand is entitled to nine hundred exclusively and the remaining hundred is to be divided among them equally.†— (p. 657.)

* "The definition or meaning of "cannot be numbered," according to Aboo Yoonisf, is when the persons cannot be computed without the aid of a written account: but according to Moomund it is when they are more than a hundred. Others however have said that the matter should be left to the discretion of the Judge, and the futwa is to that effect."— (p. 649.)

† This monstrous rule of interpretation would certainly justify Colton's famous apothegm that law and equity are two things which God has joined together and man has put asunder.
XXV. In Mussumat Ahmutunnissa Bibi v. Mussumat Arifunnissa Bibi, a Mahammadan lady executed a will, leaving her estate to her nephew “nashîn bad nasîn, butnûn bad butnûn.” The nephew having died before the testatrix, his heirs claimed under the devise. The Calcutta High Court held the devise was to the nephew absolutely, and that the words quoted simply gave him full power over the estate, and did not extend the devise to his sons in case of his death, for had he lived and acquired the estate he could have alienated it entirely from his children.—(4. Sutherland’s W. Reporter, Civil Rulings, p. 66.) On this subject, see Baillie’s Digest, note at foot of p. 584.

XXVI. The general validity of a will is not affected by its containing illegal provisions, but it will be carried into execution as far it may be consistent with law.—(Macnaghten's Principles, p. 212.)

XXVII. Where a testator bequeaths more than he legally can to several legatees, and the heirs refuse to confirm his disposition, a proportionate abatement must be made in all the legacies.—(Macnaghten's Principles, p. 212.)

XXVIII. An acknowledgment of debt in favor of an heir on a death-bed resembles a legacy inasmuch as it does not avail for more than a third of the estate.—(Macnaghten’s Principles, p. 212.)

XXIX. An executor may be appointed by implication—(Digest, p. 622) as well as directly. It is in his option to accept or refuse the duty, but when he has once accepted, either by word or deed, he cannot again refuse, except his refusal be made in the life-time and to the knowledge of the testator.—(p. 666.) The fact of an executor taking out probate of a will, which by Mahammadan law is clearly invalid, will not estop his heirs from subsequently disputing the validity of the will.—Mahammad Madan v. Khadezunnissa.—(2. W. Reporter, Civil Rulings, p. 181.)

XXX. A profligate executor, from whom danger may be apprehended to the property, should be removed by the Judge and another be appointed in his stead: but the acts of the executor in administering the estate are not invalidated by his being thus subsequently displaced.—(p. 667.)

XXXI. The appointment of a minor or of an insane person with lucid intervals to be executor is unlawful; but a woman, or a blind person, may be appointed. A minor, if appointed, should be removed by the Judge, and it is the prevailing opinion that the acts of such a minor executor in administering the estate before his removal are not operative.—(p. 669.) In Jahan Khan v. Mandy, it was decided that the appointment of an infidel executor does not
invalidate a will, and that all the acts of such an executor and his dealing with the property under the will until he be removed and superseded by the Civil Court, are good and valid.—(10. W. Reporter, Civil Rulings, p. 185.)

XXXII. When a man has appointed two executors, the acts done by either of them singly are not operative, without the sanction of the other, except in certain special matters; unless indeed each be specially appointed a complete executor (vūsee tamm in Arabic). These special matters in which one executor can act separately are—(a) the washing and shrouding of the corpse, and its removal to the grave; (b) the payment of debts out of assets of the same kind as the debts; (c) the delivery of specific bequests; (d) the restoration of deposits, or of things usurped by the deceased; (e) the general preservation of the property; (f) accepting a gift for a minor, or sanctioning his acts; (g) making partition of things weighable or measurable; and (h) selling what is liable to spoil.—(p. 670.)

XXXIII. If one of two joint executors die, there is a difference of opinion if the survivor can act as sole executor of himself; the better opinion being that he should lay the matter before the Judge, who, if he see proper, may constitute him sole executor; and this whether the executor die before or after the testator. If however the executor who dies first appoint his co-executor his own executor, then this latter can undoubtedly administer the estate of the original testator alone, without reference to the authorities.—(p. 671.)

XXXIV. An executor on the approach of death may appoint a successor though not specially authorized to do so.—(p. 672.)

XXXV. In administering the estate, the funeral expenses of washing, shrouding and interring the body in a manner suitable to the condition of the deceased are the first charge, to which all the property is liable, save only that which is subject to some special charge, as a pledge. Then debts are to be paid. Next the legacies are to be paid out a third of what remains after the payment of the funeral expenses and debts, unless the heirs allow them beyond a third. This preference of a legatee to the heirs is only when the legacy is of something specific, for if it be a confused legacy, as the bequest of a third or a fourth, it has no right to preference; nay the legatee in this kind of legacy is a partner with the heirs, and his interest rises or falls with any increase or diminution of the testator’s estate.—(pp. 683 and 684.)
For the duties of executor in administering the estate see Baillie's Digest, pp. 673 to 681.

Powers of an executor to sell a portion of the estate although the deceased may have died in debt.

The heir, when an executor, may sell a portion of the estate of the deceased, if such sale be necessary for the purpose of paying debts, or legacies or otherwise in the course of a due administration of the estate. Hence a creditor of the deceased cannot set aside alienations made by the executor, if the alienee paid full consideration and was in no way in collusion with the heir, and did not know nor have reason to believe, that the money paid by him would not be duly appropriated to the purposes of the estate. Saiyad Shah Inayat Hossein v. Saiyad Ramzan Ali.—(1. Bengal Law Reports, Civil Appeals, p. 172.) See Baillie's Digest, p. 677.

In Mussunmat Rami v. Ghulam Ghous, the Chief Court held that, in the absence of complete proof of the existence of a local custom at variance with Mahammadan law, a widow who succeeds to real property, either as legatee or heir, takes it in full ownership and not merely as a tenant for life.—(2. Punjab Record, Case No. 3.)

For gifts made on a death bed see remarks on Punjab Civil Code Section X, clause 3, (pp. 294—297 of this work.). The whole of Book X of Baillie's Digest should be carefully studied on this subject.
CHAPTER XII.

PUNJAB CIVIL CODE.

SECTION XII.

Contracts.

1.—Contracts are invalid, if they militate against positive law, morality, or public policy.

See above under Clause 3 Section I, of this Code pp. 19—26.

2.—If either party should have been incapable of exercising his judgment, or his will, from lunacy, insanity, drunkenness, tender age, force, fraud, error, intimidation, duresse, or sickness; or wherever it may be proved that one of the contracting parties has acted malafide.

Lunacy and Insanity.

"If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement: if such derangement be proved or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers: and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and demonstrative of such fact as where the object of the proof is to establish derangement."—(Attorney General v. Parnher, quoted in Norton's Law of Evidence, p. 398.)

The term insanity by Hindu law [and probably also it is so used in the present passage] comprehends not only idiots, but also all those who labour under any species of fatuity, and who are naturally destitute of power to discriminate what may and may not be done."—(Macnaghten's Principles of Hindu and Muhammadan Law, p. 135.)
Case of completed contracts in which the status quo ante cannot be returned to.

In Moulani v. Comroux it was laid down that "when a person apparently of sound mind and not known to be otherwise enters into a contract, which is fair and bonâ fide, and which is executed and completed, and the property, the subject matter of the contract, cannot be restored so as to put the parties in status quo, such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him."—(Norton's Law of Evidence, p. 357.) See too the next clause of this Section.

Case of a party becoming insane after a reference to arbitration.

If a man who is then in a condition to manage his affairs refer a dispute to arbitration, and continue in that state till the time when the proceedings before the arbitrators are substantially concluded, the award will not necessarily be invalidated because of his becoming insane before it is finally published.—Gouri Nath v. The Collector of Moughyr.—(7. W. Reporter, Civil Rulings, p. 5.)

Powers of the managing member of a Hindu family when the other co-parceners are insane.

In the case last quoted the Court also held that a manager of a joint estate acquires by the incapacity from lunacy or other causes of his co-parceners a power of alienation of the family estate in certain cases of necessity, such as the liquidation of ancestral debts. [In such cases however it would clearly be safer for proceedings to be taken under Act XXXV of 1858.]

Drunkenness.

In Gore v. Gibson, the Court, distinguishing between expressed contracts and those implied by force of law, laid it down that while drunkenness would be fatal to an express contract requiring the consent of both parties, it need not necessarily be so in the other class of contracts, instancing the case of a tradesman who supplies a drunken man with necessaries, and who may recover the price of them, if the party keep them when he becomes sober; although a count for goods bargained and sold would fail by reason of the defendant's intoxication at the time of contracting.—(Broom's Commentaries on the Common Law, pp. 599, 600.)

Tender Age.

The age of majority for all persons in this province is eighteen years.—(Clause I Section VIII of this Code, p. 225.) A principal cannot however rely upon any personal incapacity on the part of his agent to contract as a defence against an action brought by those who have dealt with such agent, for the party who has employed and accredited the agent, cannot impugn his own act in the choice he has made.—(Addison on Contracts, p. 609.) For the law regarding minor partners, see under Section XVII of this Code.
If a minor buy and pay for articles which are not necessaries, and after using them bring an action, he cannot recover the price; neither is he allowed any more than an adult to retain benefits which he has derived through the fraud, imposition or undue influence of others.—(Macpherson on Contracts, p. 18.)

If a minor live with his parents who take proper care for him and he order things which would otherwise be necessaries, the seller can only recover the price, by shewing that the minor was a virtual agent of the parent; and if the latter should have disapproved of the proceeding and returned the articles, the supplier will have no claim against any one for them.—(Addison on Contracts, p. 938.) See the next Clause of this Code.

An infant cannot be compelled to complete the purchase of an estate, but if he have paid a deposit under such a contract he cannot recover it merely because he declines to complete the purchase.—(Addison on Contracts, p. 938.)

Infancy is a personal privilege of which no one can take advantage but the infant himself, and therefore though the contract of the infant be voidable, it shall bind the person of full age.—(Addison on Contracts, p. 937.) Such a contract is in nowise ipso facto invalid.—(3. W. Reporter, Civil Rulings, p. 10.)

The appearance of the individual should be taken into consideration in disposing of such a question as that of minority; but the decision must rest mainly upon positive evidence, which the party pleading minority is bound to produce.—Khetar Mohun Ghose v. Ramessar Ghose.—(Sutherland’s Civil Rulings, for June 1864, p. 304.)

Fraud.

The following extract from Lord Brougham’s judgment in Attwood v. Small shews succinctly what is necessary to invalidate a contract for fraud. "Three circumstances must combine: it must appear, first, that the representation was contrary to fact; secondly, that the party making it knew it to be contrary to the fact; and thirdly, and chiefly, that it was the false representation which gave rise to the contracting of the other party, there must be dolus dans locum contractus, i. e., not merely a fraudulent attempt at over-reaching, but an attempt so far successful as to have operated as an inducement to the other party to contract."—(Norton’s Topics of Jurisprudence, p. 233.)
Under this head Broom's remarks (Commentaries on the Common Law, p. 336) are worthy of attention—"I would however observe that a distinction undeniably exists between moral and legal fraud; that there are many kinds of moral fraud which could not be made available either as ground of action or by way of defence in a Court of Law. Thus a vendor is entitled to sell for the best price he can get, and is not in any way liable at law for a simple commendation of his own goods, however worthless they may be, provided he have not made any false statement as to their quality and condition, nor asserted anything respecting them which may amount to a warranty* in legal contemplation. In a recent case (Hill v. Ball) it was held that the sale of a glanced horse, by a person knowing it to be so, gives no right of action to a buyer ignorant of the defect, and in consequence of it sustaining damage. Here, remarked Bramwell B., the buyer knows of the possible existence of the defect or he does not. In the former assumption he has no right to complain if he choose to purchase without a warranty: on the latter assumption he ought not to be the better off for his ignorance."—Of course this doctrine does not apply to sales of articles where a warranty is implied by law or custom of the trade: and conversely there may be legal fraud without proof of any morally fraudulent motive for the particular act from which it is inferred; and we may observe generally, that it is fraud in law if a party make representations which he knows to be false, and from which injury ensues, although the motive from which the representations proceeded may not have been bad; and that the person making them will nevertheless be responsible for the consequences. Fraud may moreover consist as well as in the suppressio veri, the suppression of what is true, as in the suggestio falsi, the representation or suggestion of what is false."—(Broom's Legal Maxims, p. 759.)

In every transaction and under all circumstances the person against whom fraud could be proved was held by the civilians to be responsible to the sufferer, nor could he be exonerated from his liability by express contract: *Ille null pactione efficit potest ne dolus praeestur.—(Phillimore's Roman Private Law, p. 106.) See this doctrine also laid down in Broom's Legal Maxims, p. 668.

If an article be sold "with all faults" this provision though it put the purchaser on his guard will not throw the burden of examining the article so entirely on him as to avail the vendor if he have used any artifice to disguise the

* The general terms of commendation which vendors are apt to apply to their own property do not vitiate a contract, though they may not be strictly true, as purchasers do not in general pay much attention to such expressions.—(Macpherson on Contracts, p. 6.)
defects of the thing sold, or have been guilty of wilful and intentional misrepresentation in a matter of any importance to the contract.—( Macpherson on Contracts, p. 8.)

From fear of undue influence Courts of Equity narrowly watch transactions between guardian and ward, for here the party in loco parentis may obtain a parent's influence without feeling a parent's affection, and the time to which this relationship extends is construed to continue not only to the ward's coming of age but until all the accounts are settled and the estate is entirely out of the guardian's control. Thus a purchase made by a guardian of his ward's estate immediately on his coming of age may be avoided, and if he buy up incumbrances on his ward's estate he shall be but a trustee, and if he have purchased at an undervalue can only charge him what he has actually paid.—(Norton's Topics of Jurisprudence, p. 272.) The whole context of this passage should be carefully studied.

Macpherson writes—"The Courts ought not to admit readily the suggestion of fraud; but it is difficult to resist that plea, where a man has purchased from those to whom he stood in any fiduciary relation, as where a manager buys the estate for which he is agent, or if a guardian enter into any transaction with his ward who has only just come of age; in such cases very clear proof indeed is requisite that the transaction was fair and beneficial to the principal or the ward."—( Macpherson on Contracts, p. 10.)

So in a recent case, Fazialn Bibi v. Undah Bibi, the Calcutta Court, after quoting from Story's Equity Jurisprudence, Sec. 310, the passage regarding the relationship of client and attorney, given below in the note,* held that the same remarks apply with equal force to the relationship of wakil and client, and that it is equally important that the

* "It is obvious that this relationship must give rise to great confidence between the parties, and to very strong influence over the actions and rights and interests of the client. The situation of an attorney or solicitor puts it in his power to avail himself not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void, which between other parties would be held unobjectionable. It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief (which may be brought about by means secret and inaccessible to judicial scrutiny) from the dangerous influences arising from the confidential relation of the parties. By establishing the principle that while the relation of client and attorney subsists in its full vigour, the latter shall derive no benefit to himself from the contracts, or bounty or other negotiations of the former, it supersedes the necessity of any enquiry into the particular means, extent and exertion of influence in a given case, a task often difficult and ill-supported by evidence, which can be drawn from any satisfactory source."
Courts should take care not to be blinded by allowing transactions of this nature between pleaders and their clients to be enforced in the name of a third party put forward as the real purchaser.—(10. W. Reporter, Civil Rulings, p. 469.)

"But a contract cannot be avoided by reason of a fraudulent representation regarding some matter altogether collateral to the contract; where, therefore, an agreement was entered into for the letting and hiring of certain apartments, on the strength of a fraudulent representation by the hirer that he wanted them for the purpose of carrying on therein the business of a perfumer, and as soon as the agreement was executed and he had obtained possession he used the premises as a common bawdy house, whereupon the landlord gave him notice to quit, and on his refusal to go out turned him out, it was held that the landlord had no right to avoid the contract and treat the tenant as a trespasser. Here there was no proof that at the time the agreement was executed the hirer had determined to appropriate the premises to an immoral purpose. The hirer of the apartments might then have had no intention of using them otherwise than in accordance with his representation; and if so, there was a valid demise; the estate in the land passed and became vested in the hirer, and could not be divested by a mere change in the intention of the hirer as to the use to be subsequently made of them."—(Addison on Contracts, p. 906.)

"A party cannot plead his own fraud, and the party who makes that allegation must fail. If the plaintiff allege that the deed is bona fide, and the defendant plead that it is a fraud to which he was a party, the plea cannot be heard, and the plaintiff must have a decree. If the plaintiff allege that he and the defendant were equally parties to the fraud, he cannot be heard, his suit must be at once dismissed. The heirs of the fraudulent parties representing them are equally bound with the original parties."—Lakhi Narayan Chuckerbutty v. Tara Mani Dassi.—(3. W. Reporter, Civil Rulings, p. 92.) But see above, at p. 94.

The burden of proving the fraud rests upon the party making the allegation.—(10. W. Reporter, Civil Rulings, pp. 173 and 321.) See too Vol. 2. Civil Rulings, p. 2. In cases of alleged deceit the Court should satisfy itself, as an important point in determining the question of fraud or no fraud, whether something worth the trouble and obvious expenses likely to be incurred was to be secured by the fraud.—(6. W. Reporter, Civil Rulings, p. 235.) In Haro Mani Dassi v. Unakul Chandra Mookerjee, where a charge of fraud had been put on the record solely with the intent to prejudice the Court against the opposite side, and without a
thought of making the words good, the High Court of Calcutta declared that "a Court of Justice will not tolerate that the pleadings before it should be made the vehicle of reckless defamation; and if a party to a suit choose to clothe with fraud that conduct of the other side on which he bases his claim, he must understand that he risks his success with the charge which he makes."—(8. W. Reporter, Civil Rulings, p. 461.)

Where a party declares that he has been induced to enter into a contract by the fraudulent misrepresentation of the other party, he may be entitled perhaps to avoid the contract altogether, but if he elect to abide by it, he is not warrantied in seeking to have the terms of the contract remodelled by the Civil Courts.—Nil Muni Singh Deo Bubadar v. Issar Chandra Ghosal.—(9. W. Reporter, Civil Rulings, p. 92.)

Where a contract is voidable on the ground of fraud, the party deceived must make his election to abide by or annul the contract within a reasonable time: he cannot, after discovering the fraud, continue to deal with the article as his own and then subsequently annul the bargain, nor does there seem any authority for saying the party must know all the incidents of the fraud before he deprives himself of the right of rescinding: the proper and safe course is to repudiate the whole transaction at the time of discovering the fraud.—(Broom's Legal Maxims, p. 714.)

Error.

Ignorance (which includes error) is either ignorance of fact or ignorance of law. The rule of the Civil law, which is followed in the main by that of England, is thus expressed by Paulus: Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere; and Neratus gives the reason for this rule as follows "in omni parte error in jure non eodem loco quo facti ignorantia haberii debebit, cum jus finitum et posit esse et debat; facti interpretationi etiam prudentiissimos fallit." How far mistake of fact was an excuse by Roman law depended on the fact whether with due care it could have been avoided or not, although allowance was made for weakness of memory. Sed facti ignorantia ut demum cuique non nocet, si non ei summa negligentia obiciatur; quid enim si omnes in civistate scient quod ille solus ignorat, et recte Sabeo debiti scientiam neque curiosissimi neque negligentissimi hominis accipieram, verum ejus qui eam rem diligenter inquirendo notam habere possit.—(Dig. II, 23, 1. 2.—Philipimore's Roman Private Law, p. 96.)

Addison writes (Work on Contracts, p. 27)—"If an action have been commenced to enforce a claim put forward,
by the plaintiff, and the defendant settle the action and pay
the money in satisfaction and discharge of such claim, and
then discover there was no cause of action, he cannot
recover back the money on the ground that it was paid by
mistake; for there would be no end to litigation if that were
to be permitted and disputed questions and transactions so
settled and adjusted were to be opened afresh. It is other-
wise however if the party making the claim know it to be
unfounded and wrongfully makes use of the process of law
for purposes of oppression and extortion." Broom (Legal
Maxims, pp. 324—327, ) also supports this doctrine as
determined in the case of Marriott v. Hampton, just referred
on the principle interest reipublicae ut sit finis litium. It is
however severely attacked by Phillimore (Principles and
Maxims of Jurisprudence, p. 103 ) for the grievous injustice
which the rule sometimes must work; and surely it is equally
true that interest reipublicae ut sit justitia, and if a party
can refute the strong prima facie presumption in his
antagonist's favor caused by the previous adjustment on his
side, clearly there should be some stronger reason for
refusing justice than the avoidance of a double trial. The
language of the Civil Procedure Code (Reviews of Judy-
ment ) seems to shew that Anglo-Indian law does not
slavishly follow the English doctrine on this point: a full
exposition of that law, however, will be found in 2. Smith's

The following are cases in which money has been
recovered which had been paid by mistake: Goods sold at a
price to be calculated according to the weight where by a
mistake in weighing a higher price was paid than was due:
silver sold in bars at a price to be calculated according to
the number of ounces of pure silver in each bar, when owing
to the mistake of the assay master, the bars were paid for as
containing more silver than was the case: rent which had
been paid to the defendant, who it afterward turned out was
not entitled to receive it, the title to the land not coming in
question. So also where two men reckon together and
money is passed on account, if one overpay the other by
mistake or false reckoning the surplus is recoverable.—(Ad-
dison on Contracts, p. 28.)

After discussing certain cases in which relief had been
afforded for what seemed to be mistakes of law, Mr. Broom
concludes that some of the cases "may be supported upon
the ground that the circumstances disclosed an ignorance of
fact as well as of law, and in others there will be found to
have existed either actual misrepresentation, undue influence,
mental imbecility, or that sort of surprise which equity re-
gards as a just foundation for relief. It is, indeed, laid
down broadly that, if a party acting in ignorance of a plain
and settled principle in law, be induced to give up a portion of his property to another, under the name of a compromise, a Court of Equity will grant relief; and this proposition may be illustrated by the case of an heir-at-law, who, knowing that he is the eldest son, nevertheless agrees, through ignorance of the law, to divide undivided fee-simple estates of his ancestor with a younger brother, such an agreement being one which would be held invalid by a Court of Equity. Even in so simple a case, however, there may be important ingredients, independent of the mere ignorance of law, and this very ignorance may well give rise to a presumption of imposition, weakness, or abuse of confidence, which will give a title to relief; at all events in cases similar to the above, it seems clear that the mistake of law is not, per se, the foundation of relief; but is only the medium of proof by which some other ground of relief may be established, and on the whole it may be safely affirmed that a mere naked mistake of law unattended by special circumstances, will furnish no ground for the interposition of a Court of Equity, and that the present disposition of such a Court is rather to narrow than to enlarge the operation of exceptions to the above rule.”—(Legal Maxims, p. 263.)

In contracts for the manufacture of or preparation of articles, if a mutual misunderstanding have arisen without any fault or want of good faith on either side, and the workman has mistaken his employer’s meaning and made one thing when another was ordered, the contract is void, as no valid and effectual consent to bind the parties has ever been given.—(Addison on Contracts, p. 397.)

**Intimidation, Duress.**

The following are some of the instances given in the Books in which money had been paid under coercion, and the Courts have interfered to direct a refund. Where a man having a lien to a certain amount on goods in his possession refused to give them up without being paid for so doing, and the owner, in order to get the goods, was obliged to satisfy the extortionate demand; when the carrier made excessive charges for the carriage of goods, and the consignee in order to get possession of them had to pay the amount so claimed: where a creditor exacted usurious and illegal payments from a distressed debtor, or obtained money under the coercion of threatened penal proceedings: where more than the sum due was exacted under a threat of the exercise of a power of sale: where a toll collector exacted an illegal and unauthorized toll. Also in all cases in which persons extort money for doing what they are bound by law to do without charge.—(Addison on Contracts, pp. 29, 31.) See Broom’s Legal Maxims, pp. 270—274, where the facts of the cases alluded to above are given fully.
If a party who has a charge on property, in order to prevent its sale under an order of Court which would prove mischievous and prejudicial to his rights, pay into Court under protest the sum necessary to stop the sale, the transaction will be regarded as made under coercion, and an action will lie to recover the money, nor will this right be lost by the plaintiff having consented to the money being paid over to the decree-holder instead of remaining in deposit.—Fatimah Khatoon v. Muhammad Jan Chowdhry.—(1. Bengal Law Reports, Privy Council Cases, p. 21.) But where the plaintiff had purchased the estate of one B, and then to prevent the sale of the estate in satisfaction of a decree against D the uncle of B paid the amount due on the decree into Court, and sued B and the two sons of D to recover the amount, the Calcutta Court held that the payment was a voluntary one, for as D had left two sons who must have been his representatives, there was nothing to shew why B was in any way liable for his uncle’s debts, and as to the co-defendants the plaintiff had not purchased their rights, was a stranger to them, and was in no wise connected with the payment of any sum they might be compelled to pay.—The Collector of Shukabed v. Ram Badan Singh.—(10. W. Reporter, Civil Rulings, p. 400.) See also p. 446.

Rent paid to a landlord with a defeasible title is recoverable when the tenant has had to pay a second time.

Rent paid to a man having purchased an estate collected the rents while in possession under his purchase from the ryots, they paying him “under the pressure of that moral and legal force which a de facto proprietor always has it in his power under the revenue laws to employ against his ryots.” The purchase was however subsequently annulled, and the former proprietor being restored to possession made the ryots pay their rents over again to him, whereupon they were held entitled to recover the rents first paid to the purchaser.—(Macpherson on Contracts, p. 108.)

“Intimidation such as was required to set aside an act was more than could be caused by mere suspicion or persuasion, or reverence for authority domestic or external; “metus accipiendus non quilibet timor sed majoris malitialis.” It must be such as the person urging it (age, sex and character considered) might rationally entertain. Violence might be condoned, and there were cases in which intimidation was legitimate, “veluti si a magistratu metus ordine juris injectus est iure licito.” It mattered not who was the author of the violence if the person against whom the action was brought was a gainer by it. “In hac actione non quaevis uxor in quis convenitur an alius metum fecerit, sufficit enim hoc dicere metum sibi illatum vel vim et ex hac re eum qui convenitur eis crimine caret lucrum tamen sensisse.”—(Phillimore’s Roman Private Law, p. 97.)
Where a party to a contract seeks to get released from its obligations, on the ground that for some reason or other he is entitled to repudiate it, he must assert this right to repudiate as soon after becoming aware of it as he reason-ably can."—Ishan Chandra Mookerjee v. Srikant Nath.—(9 W. Reporter, Civil Rulings, p. 110.) So in Muhammad Mohidin v. Ottayil Ummache the Madras Court held that a person seeking to disaffirm a contract entered into by mistake must do so within a reasonable time, and will not be allowed to do it unless both parties can be replaced in their original position.—(1. Stokes' Madras Reports, p. 390.)

3.—But when contracts have been entered into, bona fide, with infants, lunatics or others, suffering from natural infirmity, for the necessaries of life, they may be held valid, if it shall appear that no unfair advantage has been taken of the infirmity, under which one of the parties labored. Under such circumstances, contracts, entered into by minors or infants, for necessaries of life may be binding on the parents. And similar contracts, entered into by aged persons, widows, and females, whose maintenance is, by law, chargeable to some male relative, may be obligatory on such relative. Or if made by a guardian on behalf of his ward, they are dischargeable by the minor when he comes of age.

The following have been decided to be necessaries for a minor, food, raiment, lodging (including necessary repairs for his dwelling house (Addison on Contracts, p. 938) and the like; also education, instruction in a business, or attendance may be necessaries. The subject matter of the supplies must be considered with reference to the receiver’s state and condition in life. His clothes may be coarse or fine according to his rank, his education should vary with the post he may reasonably aspire to fill, and the medicines supplied him should depend on the sickness with which he was afflic—
ted and his probable means when of age. Articles of mere luxury are always excluded, though luxurious articles of utility are sometimes allowed. Contracts for charitable assistance to others are not binding, as they do not relate to

A contract should be repudiated as soon as the party seeking relief becomes aware of his right to re-nounce it.

What are neces-saries for a minor.
CONTRACTS WITH MARRIED WOMEN.

the minor's own personal advantage. — (Broome's Commentaries on the Common Law, pp. 578—580.) If however, instead of furnishing the supplies, a person lend the minor himself money to purchase them, such money is not by English Law recoverable, as the minor may misapply the money and the law will not trust him; but if the money be laid out by another person in the purchase of necessaries, such money can be recovered from the minor. — (Addison on Contracts, p. 938.)

4.—Contracts made by married women require the consent of the husband, and they are not valid, unless it should appear that the consent could not possibly have been obtained, or if sought, could not have been reasonably withheld. If the husband be labouring under any physical or civil disability; or if he should have delegated to the wife the management of his affairs; or if he should have authorized her to conduct any transaction, or to carry on any business, or if he should have deserted her, or have separated from her; or if the subject matter of the contract be for necessary articles of maintenance, such contracts may be valid. But as regards property, which is, in a legal sense, her peculium, a wife may engage in transactions independently of her husband.

"The Hindu Law," writes Macnaghten, "recognizes the absolute dominion of a married woman over her separate and particular property, except land given to her by her husband. He has nevertheless power to use and consume it in case of distress, and she is subject to his control even in regard to her separate property. It is a general rule that coverture incapacitates a woman from all contracts, but those contracts are valid and binding which are made by wives the livelihood of whose husbands chiefly depends on their labour; so also are those made for the support of the family during the absence or disability, mental or corporeal, of the husband." — (Macnaghten's Principles of Hindu and Mahomedan Law, p. 136.)

With reference to contracts made by European and Eurasian women under coverture, see above at pp. 38—42.
The principle which determines the liability of a husband, a European, for the debts of his wife is that the relation between the husband and wife is that of principal and agent. In the particular case referred, the Judge must ascertain the following issues of fact:

I. Was the principal in this case avowedly or by implication consenting to the proceedings of his agent?

II. Had the tradesman received warning not to trust the agent?

III. Had any proceedings of the principal subsequent to the date of the warning been calculated to qualify or retract the warning, so as to revive the liability of the principal for the acts of his agent?"—(Judicial Commissioner's Ruling; No. 15, Thornton's Small Cause Court Manual, p. 164.)

5.—If a contract be partly valid and partly invalid, the valid portion may be enforced. And if the nature of the contract admits of an apportionment of consideration between the parties, then a part performance on one side will warrant a proportionable amount of performance on the other side.

As an instance of this rule may be instanced the case of Price v. Green, where the defendant had covenanted that he would not during his life carry on the trade of a perfumer "within the cities of London and Westminster, or within the distance of 600 miles from the same respectively," the Court held that the covenant was divisible, and was good so far as related to the cities of London and Westminster, though void as to the residue as being in undue restraint of trade.—(Broom's Legal Maxims, p. 712.) When however there are legal and illegal considerations for the same entire contract or promise, the whole contract is void, and conversely where one sum is to be paid for doing a legal and an illegal act, the whole contract is void; and if an engagement be founded upon a legal and illegal consideration, and the illegal consideration cannot be separated from the legal consideration and rejected, the illegality of the part vitiates the whole. In Scott v. Gillmore therefore, where a bill of exchange had been given to secure a debt, part of which consisted of money lawfully advanced, and the rest of money due upon an illegal sale, the whole contract was held to be illegal and void. So too every secret bargain in fraud of creditors is void, and cannot be enforced even against a fraudulent party; and when a part is fraudulent, the bargain being entire is altogether frau-
dulent and void. If upon a contract for the hiring and service of a house-keeper at certain agreed wages it be proved to have been stipulated in the contract that the house-keeper should cohabit with her master, the whole agreement will be void and the wages irrecoverable.—(Addison on Contracts, pp. 904—906.)

In Sandys v. Sital Mandal the plaintiff had agreed to withdraw an enhancement suit he had filed against the defendant on condition of the latter giving a kabuliyat for a slightly increased rent, and undertaking to cultivate indigo for which he received advances. As the ryot failed however to give the kabuliyat the enhancement suit was not withdrawn and the present action was instituted in order to recover damages for the breach of the agreement to sow indigo. The High Court held that though the contract for sowing indigo was entered into in part performance of the agreement of compromise in the enhancement suit, the non-completion of that agreement did not exonerate the defendant from performing his part of the contract for sowing indigo which was entered into in pursuance of the compromise, the plaintiff having performed his portion of that contract by giving the stipulated advances.—(10. W. Reporter, Civil Rulings, p. 420.)

6.—The validity of contracts entered into, bona fide, will not be affected by the adequacy, or otherwise, of the consideration. Nevertheless, this circumstance may greatly affect the credibility or otherwise of a disputed contract; and if the genuineness of such contract be doubted, the consideration and reasons for making it must be enquired into.

The meaning of the present clause appears to be involved in some obscurity owing to the unscientific nature of the language employed. But as I believe it has not been interpreted to support the enforcement of mere nude pacts it will be desirable to place before the reader some definitions of a consideration in the eye of the law, as taken from approved English Authorities. Mr. Smith in his work on Contracts, p. 88, writes—"Any benefit accruing to him who makes the promise, or any loss, trouble or disadvantage undergone by, or charge imposed upon him to whom it is made is sufficient consideration in the eye of the law to sustain an action." Broom (Legal Maxims, p. 718), quoting from the judgment in Doe d. Ottry v. Manning, says—"Any act of the plaintiff
from which the defendant derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration if such act be performed or such inconvenience suffered by the plaintiff with the consent either express or implied of the defendant.” And again, “consideration means something which is of some value in the eye of the law moving from the plaintiff. It may be some benefit to the defendant or some detriment to the plaintiff, but at all events it must be moving from the plaintiff.” “Whenever,” said Lord Campbell in Hall v. Dyson, “a man may do an act without the breach of any legal or moral obligation, that act may be a valid consideration for a promise to pay money to him.” So where the brother (not the heir) of a deceased debtor wrote to the creditor asking for time, and stating that the creditor need be under no anxiety about his money, “as we shall repay you,” and the creditor accordingly waited without pressing his claim for some months longer, the Calcutta Court held that the writer was bound under the circumstances to pay the defendant.—Lall Shaka v. Wamesh Chandra Mazumdar.—(9. W. Reporter, Civil Rulings, p. 140.)

Provided there be some benefit, loss, trouble or disadvantage to the parties, the Courts are not willing to enter into the question of whether the consideration be adequate in value to the thing promised in exchange for it, as this would be to tyrannize over the transactions of parties, who are free to value their own labour, inconvenience or possessions as they please. It must however, be established that the consideration is not merely illusory. Where therefore, the consideration for defendant’s promise was stated to be the release and conveyance by plaintiff of his interest in certain premises at the defendant’s request, but the declaration did not show that plaintiff had any interest in them save a lien, which was expressly reserved by him, the declaration was held bad, as disclosing no legal consideration for the promise. Again, where A being indebted to the plaintiff in a certain amount, and B to A in another amount, the defendant in consideration of being permitted by A to sue B in his name promised to pay A’s debt to the plaintiff, and A gave such permission, whereupon the defendant recovered from B: judgment was arrested on the ground that the plaintiff was a mere stranger to the consideration for defendant’s promise, having done nothing of trouble to himself or benefit to the defendant.—(Broom’s Commentaries on the Common Law, pp. 318, 319.) Warren gives another instance of an attempt to fabricate a consideration by straining the terms of its definition. A father held the promissory note of his son, who had teased him with complaints of not having been so well provided for by him as
his other children were; it was alleged that the father had agreed that if his son would cease for ever to make such complaints he should be absolved from payment of the note. The father died, and the executor finding the security among his papers sued the son on it; whereupon the son's counsel endeavoured to meet the objection of want of consideration for the release pleaded, by alleging that the son had a right to make the complaints averred, and had subjected himself to a detriment, by not being able to continue his well founded complaints. The Court contemptuously dismissed the plea. "Is an agreement" asked Parke, B. "by a father in consideration that his son will not bore him a binding contract?" "By the argument," said the Lord Chief Baron, "a principle is pressed to an absurdity as a bubble is blown till it bursts. Looking at the words merely, there is some foundation for the argument, and following the words only the conclusion may be arrived at. In reality there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he pleased; and the son's abstaining from what he had no right to do can be no consideration."—(Warren's Law Studies, pp. 767, 768.)

The performance of an act which the party is legally bound to do does not constitute a good consideration for a promise. If a debtor being bound to deliver up the title deeds of an estate to a purchaser, pursuant to a decree of sale, enter into an agreement with the purchaser to deliver them on payment of a sum of money, such sum can not only not be recovered by suit; but if paid, the receiver can be compelled to refund. So when a debt is discharged, the giving up a deed or collateral security originally deposited with the creditor to secure its payment is no consideration for a promise. Similarly a promise to pay money to a witness, regularly subpoenaed to give evidence at a trial, cannot be enforced from want of a legal consideration to support it. The abandonment of a suit too, when the plaintiff knows and has admitted that he has no cause of action, is not a valid consideration.—(Addison on Contracts, pp. 5, 6 and 12.)

Bygone transactions do not constitute a good consideration for a promise, unless the acts have been performed pursuant to a previous request of the party making the promise, in which case the promise is coupled in the eye of the law to the consideration by the request. Also when the defendant has received and retains the benefit of the consideration, the law will imply a request for the purpose of enforcing a meritorious claim.—(Addison on Contracts, p. 7.) For further information, see 1. Smith's Leading Cases, p. 139, under Lampsleigh v. Brathwait.
A consideration may be *good* or it may be *valuable*. A good consideration is such as that of blood, or of natural love or affection: a valuable consideration such as money, marriage or the like, which the law esteems as an equivalent for the grant.—(2. Blackstone’s Commentaries, p. 297.)

The validity of a contract is not affected because the consideration is not expressed on the face of it.—(Macpherson on Contracts, p. 27.)

The following are instances of promises without consideration, or *nude pacts* as they are called. A promise by one man to pay a debt *already incurred* by another: a promise to pay money to a person not entitled to receive it: a promise by a widow (under English law) to pay her late husband’s debts: a promise to pay a woman on abandoning an immoral connection with her a sum of money or annuity in consideration of her henceforth leading a good and virtuous life: a promise to pay an additional sum for goods or services beyond that previously agreed on without any new consideration: Promises to pay money to a crew as an incitement to exertion during a storm are nude pacts, as the sailor is bound to do his utmost to save the ship: engagements to work for a person for a certain time when unaccompanied by any promises by the opposite party to give work, wages &c.—(Addison on Contracts, pp. 4—8.)

So unless there be a special agreement to pay additional wages (which is a question of fact), a servant has no claim on his master for additional wages on the ground that he has performed additional work.—(Judicial Commissioner’s Ruling, No. 7, Thornton’s Small Cause Court Manual, Addenda, p. 160.)

It is for the plaintiff to prove the amount of the debt for which he sues: this in the case of a bond is done sufficiently in the first instance by proof of the execution of the bond: it is then for the defendant, if he can, to shew that the amount was less than the sum claimed, and in the absence of any such proof, the plaintiff is entitled to judgment.—Sivaramaiyar v. Sann Aiyar.—(1. Stokes’ Madras Reports, p. 447.) See above at p. 89 in regard to the admissibility of oral evidence to prove that the consideration set forth as paid in a deed had in reality not been so paid.

7.—A contract may be drawn up in any form, that is, with or without seal, *stamp*, attestation, *registration*, or any other formality. It may even be verbal. The Court will enquire into the reality of the contract and the intention of the parties;
but the credibility of the transaction may be affected by the form of the contract. If there should be any doubt as to the intention, then evidence, parole or documentary, may be taken in explanation thereof; and if the contract relate to trade, or to any other special class of transactions, it may be interpreted according to the usage of similar cases.

Since the Code was published the extension to the Punjab of the Stamp Acts and the present Registration Act have modified this clause in regard to some kinds of written contracts.

In accordance with the spirit of this clause the Privy Council, in *Ram Gopal Mookerjee v. Kenny*, held that they ought not to apply to a Mofussil contract the nice technicalities of English law, but must look at the agreement with a view to see what the real intention of the parties was, and must enquire whether it appears upon the evidence that there has been any failure in the substantial performance of the contract; and if there have been any default, to whom such default is attributable.—(2. W. Reporter, Privy Council Decisions, p. 43.)

So where an application for a lease prayed in general terms that it might be granted on the same terms as others had been obtained, but the letter of reply stated that the lease would be given on such and such specified conditions; these conditions determined the contract, and the only contract between the parties, to the exclusion consequently of evidence as to the nature and terms of the other leases.—*Rattonjee Edujhee Shet v. The Collector of Tanna.*—(10. W. Reporter, Privy Council Decisions, p. 13.)

Under the head of ascertaining the intention of the parties the Court may have to consider in the case of breaches of contract whether some stipulation as to damages should be awarded according to the letter of the agreement, or whether the plaintiff is entitled only to compensation according to his actual loss. "When the agreement imports that he who shall fail in executing it shall pay a certain sum by way of compensation, and the Court considers that the intention of the parties was only to ascertain the damages and not to constitute a penal obligation, there can be allowed to the other party neither a greater nor a less sum than the sum so fixed, which is commonly called *liquidated damages*. A penal obligation is created where a person merely in
order to assure the performance of an agreement binds himself to something in case of non-performance. Where upon an attentive consideration of the contract, the Court is of opinion that the object of the parties is really only to fix an amount by way of penalty, as a security for performance of the principal obligation, in such cases the Courts of this country, as well as those of other countries, hold that as the penalty is designed as a mere security, if the party obtain his money or his damages, he gets all that he expected, and all that in justice he is entitled to. In reason, in conscience, and in natural equity, there is no ground to say, because a man stipulated for a penalty, in case of his omission to do a particular act (the real object of the parties being the performance of that act,) that if he omit to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party. If it be argued that it is his own folly to have made such a stipulation, it may be replied that the "folly of one man cannot authorize oppression on the other side. In all such cases, the Courts use an equitable discretion, and award damages in proportion to the injury really caused by the breach."—(Macpherson on Contracts, pp. 59—61.)

The following deductions are given from the case of Reynolds v. Bridge in the Jurist (3. Jurist, New Series, Part I. p. 116,) for distinguishing between liquidated damages and penalties:

"1. In deciding whether a sum to be paid in the event of a breach of contract, is to be considered as in the nature of a penalty or as liquidated damages, the real intention of the parties is to be ascertained, and that from the words in the contract itself. Other rules upon this subject are only to assist the Courts in ascertaining such intention.

"2. The fact that the sum is large, and exaggerated in amount, does not of itself show that it is to be considered as a penalty.

"3. The fact that more than one thing is to be done or forborne does not determine the question.

"4. If the covenant relate to matters which are not of an uncertain nature and amount, e. g. for payment of a smaller sum and the damages named in the deed are a much larger sum, it is to be regarded as a penalty.

"5. And it seems that if some of the stipulations are of a certain nature and amount, and some are of uncertain nature and amount, as the sum cannot be treated as liquidated damages in respect of one or more of the stipulations, it ought not to be so treated in respect of the others.—(Per Coleridge, J.)
"6. If the parties intended that there should be a penalty recoverable over and over again for every breach of the covenant; and not that, in case of a single breach, the entire contract should be at an end, and the sum paid for the loss of the whole matter, it will in general be a penalty. — (Per Crompton, J.)

"7. If there be a contract containing stipulations, the breach of which cannot be measured in damages, the parties must be taken to have meant that the sum agreed on for its non-performance was to be liquidated damages."

The reader is referred for further information on this subject to Addison on Contracts, pp. 1070-1078; —Norton's Topics of Jurisprudence, pp. 139—148; and an interesting judgment of Holloway, J. given in 2. Madras High Court Reports, p. 450. For the question of damages generally see the next clause.

Where the full sum specified in a bond was admitted to be due, but it appeared that the plaintiff on condition of being paid a half by a certain day had undertaken to remit the remainder of his demand, the Madras Court held that this agreement in no wise interfered with his just right to recover the whole sum due, when the defendant failed to fulfil his part of the condition about payment.— Vengappaiyan v, Rajapaiyan.—(1. Stokes Madras Reports, p. 208.)

Questions occasionally arise as to new contracts made by the parties before breach of the former engagement granting easier terms to the obligor. The new Indian Contract Law Bill proposes to innovate considerably from English law in regard to such contracts, and to enact that a person who is entitled to claim performance of an engagement may dispense with or remit such performance wholly or in part, or may extend the time for it, or may accept instead if it any satisfaction he think fit. While the English doctrine on the point is doubtless logically correct, such lighter conditions being strictly without consideration and therefore void, a Court which is warranted in looking at the intentions of the parties may hesitate in refusing to give effect to these modified terms when satisfied they were really made. The English rule on the point seems very clearly expressed in the statement of objects and reasons prefixed to the Indian Contract Law Bill: "By the English law, a promise by a creditor to give time for the payment of an existing debt, or the acceptance by him, in full satisfaction of his demand of a smaller sum than that which is due to him, is not binding on him unless there have been some new consideration given for it, such as an undertaking to give an additional or different security, or to pay the debt in a manner or a time more advantageous to the creditor than
that originally agreed upon, unless the creditor’s engage-
ment to take less than his due, or to give time, be contained,
in a composition deed or agreement entered into by the
debtor with his creditors generally; but a slight variation
of the terms of the contract will satisfy these conditions.”

8.—The fact of a breach of a contract having,
been already punished in a Criminal Court, under
the provisions of Regulation VII of 1819, will not
bar any civil action which may be brought relative
to that same contract.

Regulation No. VII of 1819 has been repealed.

It may be useful to give here the rules for assessing
damages in some of the more common cases of breach of
contract.

Non performance of contract of sale by the vendor. The
measure of damages is the difference between the price
agreed on, and the marketable value of the goods at the
time and place when and where they ought to have been
delivered to the purchaser. See the case of Kimhya Lall v.
Ganda.—(2. Punjab Record, Case No. 15.) Addison adds
that “the purchaser cannot recover as special damage the
loss of anticipated profits, but if he have sold the goods at
a profit, he is entitled to recover such profit.”* It is.
presumed however that this is only on the assumption that,
the price agreed on at the resale fairly represents the
market value of the goods, and that if it appeared that the
plaintiff by his adroitness or otherwise had secured a price
above the general market value he would not be entitled to
recover the excess on the score of remoteness unless the
first vendor had been made acquainted with the fact at the
time he sold. Thus in Chapman v. Sarmuck Singh, which
was an action for the non-delivery of railway sleepers which
the vendee had obtained a contract to resell at an enhanced
rate, the Chief Court held that as it appeared that the
defendant was aware, both when he made his contract, and
also when he refused to complete delivery, that the plaintiff
by his contract with a third party was in a condition to
make seven annas profit on the sleepers agreed by the.

* If the purchaser resell the goods before the time of delivery, he will
not be able to recover the amount of the claim, if any, enforceable against
him by his sub-vendee for breach of contract; as immediately on receiving
notice of his vendor’s breach of contract he should have supplied himself
with the article in question in order to be able to deliver it in fulfilment of
his own engagement with his buyer.—(Broom’s Commentaries on the Com-
mon Law, p. 822.)
defendant to be delivered, this loss was reasonably in the contemplation of both parties as the result which would follow non-fulfilment of the contract,—(3. Punjab Record, Case No. 59); while in a similar case given in 2. Punjab Record, Case No. 103, where the vendor had not express notice, and was not shewn to have known of the contract of resale, the Court held that the measure of damages under those circumstances was not the loss of profit, which might in fact have resulted to the vendee under his contract with a third party; and that although that third party might be the only buyer in the market, yet the selling value should be considered to be not the price which such person might be willing to give, but rather the rate at which the article could be replaced by other like material. See too the case of Hadley v. Baxendale.—(2. Smith’s Leading Cases, p. 470.) “In the case of a contract for the sale and purchase of shares when the vendor holds in his hands the money of the purchaser and thereby prevents him from using it and buying other shares therewith, the proper measure of damages would seem to be the highest price for which the same number of shares might be purchased in the market either on the day the contract was broken, or at any time between that day and the day of trial, if the action have been brought without any unreasonable or improper delay.” [See too Broom’s Commentaries on the Common Law, p. 624.] Where a bill has been given for the price of the goods and dishonored before delivery, only nominal damages are recoverable from the vendor for non-delivery.—(Addison on Contracts, pp. 1058, 1059.)

**Damages on breach of warranty.**

The measure of damages or loss caused by a breach of warranty is, when the goods are not returned to the vendor, the difference between their marketable value to the purchaser in the defective state at the time of delivery, and the value they would have possessed had they answered the warranty; and if they have been resold by the purchaser without delay, and before any considerable fluctuations in the market have taken place, the difference between the price realized on the resale, after deducting its costs and

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*In Anderson v. Fitzgerald Lord Cranworth observed that there is a great distinction between that which is called a warranty and that which is merely a representation inducing a party to enter into a contract. Thus, if a person effecting a policy of insurance say—"I warrant such and such things which are here stated” and that is part of the contract, then whether they be material or not is quite unimportant, the party must adhere to his warranty whether material or immaterial.—(Broom’s Legal Maxims, p. 757.) The use of the word warrant is not essential to the establishing a warranty.—(Macpherson on Contracts, p. 121,) as every affirmation at the time of the sale of property is a warranty if it be so intended.—(Norton’s Topics of Jurisprudence, p. 235.) If parties, for example, are dealing for a horse, and the seller say you may depend upon it that the horse is perfectly free from vice, that is a very sufficient warranty though the word be not used.—(Addison on Contracts, p. 231.)*
expenses, and the price they would have fetched if they had answered the warranty. If however, the goods have been refused or returned by the buyer, the measure of loss is the marketable value which the goods would have possessed in the hands of the purchaser at the time of delivery had they answered to the warranty given.—(Addison on Contracts, p. 1059.)

Where the vendor of a warranted article sues for the price, it is competent to the purchaser to prove the breach of warranty in reduction of damages, and the sum to be recovered for the price of the article will be reduced by so much as the article was diminished in value by the non-compliance with the warranty.”—(1. Punjab Record, Case No. 62.) For the rule regarding implied warranty in all chattel sales in this province see the Punjab Civil Code, Section XIII, Clause 8.

Where goods had been purchased with a warranty in England to be exported and resold in China, and the goods on their arrival at Canton were found not to answer the warranty, the measure of damages was held to be not the difference between the agreed price and that realized in China, but that between the last named price and what they would have sold for in the Chinese market had they corresponded with the warranty.—(Addison on Contracts, p. 1060.)

If special damage be sustained by the breach of the warranty it is recoverable. Thus where plaintiff having bought a horse warranted sound resold it with a like warranty, and was sued for a breach thereof by the second purchaser, and the plaintiff then gave the defendant notice of the action, and offered him the option of defending it, but received no answer, and the plaintiff failed in the action, and had to pay damages and costs, it was held that he was entitled to recover these costs in addition to the damages he had to pay to his immediate purchaser. So in the case of a sale of a picture warranted to be a Claude, the first purchaser was held entitled to recover the costs and damages he had to pay to the second purchaser, to whom he resold with a like warranty, as well as his costs in defending the suit. But if the plaintiff have made a rash and improvident defence, if he had an opportunity of testing the thing purchased, and might have ascertained whether it corresponded to the warranty, and have neglected to do so, running his chance of an action, he will not be permitted to recover the costs of his defence.—(Addison on Contracts, p. 1061.)

Actions for delivery of goods of inferior quality. The measure of the damages is the difference between the value of the goods contracted for at the time of delivery, and the value of those then actually delivered, or their value ascertained by reselling them within a reasonable time.—(Broom's Commentaries on the Common Law, p. 625.) But where the
goods sold are delivered in batches and there is a separate delivery and settlement of price in respect of each batch, the purchaser cannot make a deduction from the last batch for inferior quality in the previous ones in respect of which the transaction had been already closed. And if the purchaser have long previously taken the articles whose price is now claimed, and worked them up so that their actual state at the time of delivery cannot be ascertained, he may put it out of the power of the Court to ascertain the true measure of reduction to which he is entitled, viz., the actual value of the goods according to market rates for such work as was actually delivered, and a decree for the full price agreed on will in that case have to pass against him.—Bertola v. Pir Baksh.—(4. Punjab Record, Case No. 45.)

For damages in breaches of contract for sale or demise of real property, see Chapter XXIII of this work.

Non-performance of a contract of sale by the vendee. If the purchaser have taken the goods, but not paid for them, the measure of damages is manifestly the price agreed on, or if no price have been fixed on, then the usual and customary price for such goods. Such too is the measure of damages even if the goods have not been delivered, if the ownership have been transferred to the buyer. But if the right of property have not been diverted from the seller, the measure of damages is the difference between the agreed price and the marketable value of the goods at the time fixed for delivery, or if no time have been fixed, at the time of the breach of the contract.—See Shadi Ram Shitdial v. Hargopal and Tota Ram. (1. Punjab Record, Case No. 51.) If however, goods be not delivered or accepted according to contract, time and trouble and expense may be required either in getting other similar goods or finding another purchaser, and the damages ought to indemnify both for such time, trouble and expense, and for the difference between the market price and the price contracted for.—(Broom's Commentaries on the Common Law, p. 623.)

Damages in actions against carriers. When goods are delivered to a carrier to be taken to a market, and the carrier fails to deliver them in the ordinary course, and in the interval the price falls, the measure of damages is the difference between the market rate at the time they would have been sold had they been carried according to contract and the rate prevailing at the earliest time they could have been brought to market after their delivery to the consignee. If the goods be lost altogether and their marketable value be greater at the place of destination than at that of consignment, the consignee is entitled to recover that difference as being a loss likely to arise in the ordinary course of trade. If there be great delay, and the marketable value of
the articles of merchandize entrusted for carriage be seriously diminished thereby, such deterioration is recoverable from the carrier, as being a loss which might naturally be expected to result from great delay in the delivery of such articles. But the plaintiff is not entitled to recover loss of wages of workmen kept unemployed by reason of the non arrival of the goods, or for loss of profit which might have been made had the goods been delivered in due course. And if the carrier held the goods at the time of their loss in the character of a warehouseman, he cannot, in general, be made responsible for more than their actual value. If the consignor make a declaration of the value of the property below the true mark in order to get it conveyed at a lower rate of charge, he is bound by his valuation. See too, the provisions of Sec. 3 Act III of 1865, with reference to this subject.—(Addison on Contracts, p. 1066.)

Breach of warranty of authority by agents. An agent having professed to be authorized by a specified firm to buy a ship on their behalf, and it subsequently appearing that he was not so authorized, in consequence of which the ship-owner was compelled to resell, which he did at a loss of £250: this sum was held to be the measure of the damage caused by the breach of the implied engagement that the agent really possessed the powers he had exercised. So in Collin v. Wright, the plaintiff recovered the costs of a Chancery suit which he had brought against a third person, whose agent the defendant had professed himself to be, which suit had been dismissed because the so-called agent had not the authority he represented himself as enjoying.—(Norton's Topics of Jurisprudence, p. 126.) Again, if a man entrust another with money to purchase goods, and the agent neglect to do so, the proper measure of damages will be the value of the goods to the employer, and not the value of the money merely.—(Addison on Contracts, p. 1061.)

Damages for non-payment of cheques by bankers. If a banker dishonor a trader's cheque when he has sufficient assets in his hands belonging to the drawer to meet the demand when the cheque was presented for payment, the plaintiff will be entitled to substantial damages without proof of actual loss, since the dishonoring of cheques is likely to be very injurious to persons in business.—(Addison on Contracts, p. 1067.)

Breach of contract of hiring and service by wrongful dismissal. The measure of damages in such cases is obtained by considering what is the usual rate of wages for the service contracted for, and what time would be lost before another situation could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place; that the
usual rate of wages for such employment can be proved; and that when a promise for continuing employment is broken by the master it is the duty of the servant to use diligence in finding another situation. If indeed the particular employment could not be again readily obtained, and the wages stipulated for in the broken contract were higher than usual, these considerations would enhance the damages, but no allowance is to be made in the nature of prelittum affectioinis, or pain caused to the plaintiff's feelings by reason of his dismissal. If again the plaintiff have obtained or be likely to obtain another employment, the damages ought to be proportionately less, or even nominal, regard being had to the real loss sustained.*—(Broom's Commentaries on the Common Law, pp. 628, 629.) If the servant have been engaged for a fixed period at a monthly salary and be wrongfully dismissed before the conclusion of the period covenanted for, the plaintiff may or may not wait until the termination of the period before suing for damages, but when he does bring his action he must sue for the whole benefit lost to him by the breach of contract, and he cannot after his dismissal bring monthly suits to recover the salary when it would have fallen due had the service continued.—Fenwick v. Harsukh Rai.—(3. Punjab Record, Case No. 36.)

In actions for breach of contract the intention of the party charged with the breach cannot be enquired into: the only questions being, what was the contract? Was it broken by the defendant? And what amount of damages is in consequence to be awarded? Actions for breach of promise seem to be an exception to this rule, as damages are often given in this class of cases to an amount to punish the defendant, as well as to compensate the plaintiff. The rule is different too in actions on tort, where the animus of the

* When a servant leaves his employ after giving due notice, he is entitled to receive at once all arrears of pay due to him, notwithstanding any custom of his master or employer of deferring the payment of the month's wages to a later date.—(2 North West High Court Reports, Miscellaneous Appeals, p. 1.) The contract of hiring cannot be terminated during the period of service without lawful cause, which must not depend upon whim or caprice. Moral misconduct, habitual neglect or deliberate and therefore wilful disobedience render the servant however liable to immediate dismissal without any wages at all, if such dismissal occur during a current quarter [Int. month]. for the servant's misconduct alone has prevented his continuing in the service long enough to earn the wages due at only stated periods: in legal language an entire contract cannot under these circumstances, be apportioned, and in favor of the wrong doer.—(Warren's Blackstone, p. 388.) If it be part of the agreement between master and servant that the latter is to pay out of his wages the value of his master's goods lost by his negligence, the wages due are payable only after making such deductions.—(Horton's Topics, p. 138.) But "unless there be a special agreement between master and servant regarding fines, the law will not recognize a power in the former to impose such."—(Judicial Commissioner's Ruling No. 72, Thornton's Small Cause Court Manual, Addenda, p. 180.) But are not reasonable and moderate fines supported by the custom of the country?
tort-feasor is considered in assessing the damages.—
(Broom's Commentaries on the Common Law, p. 613.)

Where the wrong-doer deprives the opposite party of the
means of proving the extent of his loss the Court will adopt
that presumption which is most favourable to the plaintiff.
—Omina prasumuntur contra spoliatorum. Thus in Armory
v. Delamirie the plaintiff having found a jewel took it to a
goldsmith's shop to inquire its value. The jeweller took out
the stones, and on the plaintiff refusing a small price for
them returned him the empty socket; and the jury were
directed if the defendant did not produce the stones, to
assess the damages on the value of the best stones, which
would fit the sockets.—(Norton's Law of Evidence, p. 709.)
But "presumptions even in odium spoliatoris have known
reasonable limits. They must not be conjectures, nor
grounded on data which the evidence itself shews to be in-
exact."—Makhan Lall v. Sri Krishna Singh.—(2 Bengal
Law Reports, Privy Council Cases, p. 44.)

If one of the parties tempt or inveigle the other into a
breach of the contract, he cannot be allowed to take advan-
tage of the breach thus caused by his own wrongful conduct.
Nullus commodum capere potest de injuria sua propria.—(Mac-
pherson on Contracts, p. 51.)

The question whether the damages claimed be not too
remote to be recovered is often one of great difficulty. The
rule is thus laid down by Alderson B. in Hadley v. Baxendale.
"When two parties have made a contract which one of them
has broken, the damages which the other party ought to
receive in respect of such breach of contract should be such
as may fairly and reasonably be considered either arising
naturally, i.e., according to the usual course of things, from
such breach of contract itself, or such as may reasonably be
supposed to have been in the contemplation of both parties
at the time they made the contract as the probable result of
the breach of it. Now if the special circumstances under
which the contract was actually made were communicated
by the plaintiffs to the defendants, and thus known to both
parties, the damages resulting from the breach of such a
contract which they would reasonably contemplate would be
the amount of injury which would ordinarily follow from a
breach of contract under these special circumstances so
known and communicated. But on the other hand, if these
special circumstances were wholly unknown to the party
breaking the contract, he at the most could only be supposed
to have had in his contemplation the amount of injury which
would arise generally, and in the great multitude of cases
not affected by any special circumstances, from such a breach
of contract. For had the special circumstances been known
the parties might have specially provided for the breach of

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Damages where
the defendant him-
self conceals the
amount of the loss.

A party who has
been the real cause
of the breach can-
not sue on it.

Question of remo-
teness of damages.
contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."
—(1. Smith's Leading Cases, Notes on Vicars v. Wilcocks, p. 471.) The reader who desires to investigate the question further is referred to the whole of this article, to Norton's Topics of Jurisprudence, pp. 128—136; Broom's Commentaries on the Common Law, pp. 93, 94, also pp. 632, 638; Addison on Contracts, pp. 1049—1052, also p. 1066.

The defaulting contractor is no doubt liable," says Macpherson, "in case of fraud for all the damages which the other has suffered in consequence of his fraud: not only for those which he may have suffered in respect of the thing which is the object of the contract, but for all damages, in respect of anything rising out of it, without reference to any question, whether the party could be presumed to have intentionally subjected himself to them or not. For a person who commits a fraud obliges himself, whether he will or not, to the reparation of all the injury it may occasion. For instance, if a man sell a cow to a farmer, which he knows to be infected with a contagious but hidden distemper, and purposely conceals the fact from the purchaser, such concealment is a fraud on his part, which renders him responsible for the damage, which the other may suffer, ont only in respect of that particular cow, which is the object of his original obligation, but also, in respect of the purchaser's other cattle, to which the distemper is communicated, for it is a fraud of the seller which occasions this damage. But it is difficult to appreciate the exact importance of every circumstance in a long chain of events, and the Court would probably decline to pursue the subject, and to make the defaulter pay for all the possible consequences to a farmer of the loss of his cattle, which might involve perhaps, his utter ruin."—(Macpherson on Contracts, p. 58.)

Covenants to pay money out of a particular fund do not of necessity imply that the payment is not to be made unless the fund be raised, and therefore, in case of non-payment an action for damages will lie unless there were an express limitation of the liability.—(Addison on Contracts, p. 1039.) For the case of a contract to take goods to be brought in a particular ship not binding the purchaser to take goods procured elsewhere, see 2. Bengal Law Reports, Original Jurisdiction, p. 154.

If in contracts for the sale of goods and chattels, the agreed price have been reduced by evidence shewing that the goods were not of the proper quality and description, the purchaser is not by reason of his having given such evidence and obtained in consequence a reduction in the price in the action brought by the vendor precluded from bringing his cross action to recover compensation for any special
damage he may subsequently sustain by reason of the breach of the contract.—(Addison on Contracts, p. 203.)

In the case of Taylor v. The Jallandhar Contracting Association, it appeared that the defendants had contracted to deliver certain ballast on the Delhi Railway in two and a half years, and in case of failing to perform all the work in accordance with the agreement they were to forfeit the sum of Rs. 5,000. It was further stipulated that plaintiff was to have the power of terminating the contract by giving two months' notice should the ballast be delivered in an unsatisfactory manner, or should the rate of progress be such as to create an opinion that it would not be delivered within the agreed time. The plaintiff after repeatedly remonstrating with defendants for the manner in which they were doing their work, in the beginning of December, about five months after the contract had been entered into, gave defendants the two months notice; and ultimately sued *inter alia* for the sum it would cost him to complete the work contracted for by the defendants. The Chief Court, while concurring with the lower Courts that the plaintiff had acquired the right of terminating the contract, by virtue of the special agreement, owing to the deliveries having been conducted in an unsatisfactory manner, and the rate of progress being such as to justify an opinion that it would not be fully delivered within the set time, held that, as it had not been established that the defendants had committed a breach of the contract, and as further it did not appear impossible but that they might have fully completed it within the two and a half years if allowed to continue, the plaintiff was not entitled to recover compensation for loss caused by the noncompletion of the contract.—(2. Punjab Record, Case No. 78.)

When a party to a contract has refused to perform, or disabled himself from performing his engagement in its entirety, the opposite party may look on the contract as broken and sue *at once* for damages. "The man who wrongfully renounces a contract"* it was observed in Hochster v. De La Tour, "into which he has deliberately entered cannot complain if he be immediately sued for a compensation in damages by the man he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of the option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer.

* But the fact of the obligor denying the execution of a bond and of the receipt of the consideration under it in the course of a criminal case, does not give the obligee a right of action on the bond before the day when the debt is conditioned to fall due.—Sujitram, Singh v. Bansi Singh.—(10. W. Reporter, Civil Ruling, p. 551.)
If a party disqualifies himself from fulfilling his engagement, he thereby dispenses with the performance of any antecedent conditions by the opposite party.

Prospective loss is recoverable as damages.

"If a man bind himself," says Lord Alvanley in Touting v. Hubbard to do certain acts, which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent to the act which he has so rendered himself unable to perform."

Prospective loss, which may result from the breach of contract, is recoverable in an action for damages, such loss being calculated as accurately as may be, although from the nature of things there must be some degree of vagueness, some want of precision in all estimates of loss, especially when the estimates concern what is to happen in the future; and the finding of damage, whether past or future, will not be bad in law merely because it cannot be justified by the evidence with perfect logical accuracy, and a Court sitting in special appeal ought not therefore to interfere unless it see that there is no evidence upon which the estimate could have been formed at all, or that the estimate is clearly excessive.—Kumari Dassi v. Rama Sundari Dassi.—(10. W. Reporter, Civil Rulings, p. 202.)

9.—Contracts are ordinarily governed by the local law or custom of the place where they were executed; and the lex loci contractus will aid the Court in disoeerning the probable intent of the contracting parties.
CHAPTER XIII.
PUNJAB CIVIL CODE.

SECTION XIII.

Sale.

1.—Written contracts of sale will be treated in the same manner as all other contracts. Negotiations for sale may be conducted by letter; either party may recede at any time before acceptance shall have been given; but there can be no retraction after the time when the letter of acceptance shall have been posted.

If the proposal made by the one party be accepted conditionally on the terms of the contract being arranged and drawn up for signature, the contract will not bind either party till this has been done. So where the defendant proposed to sell goods at a fixed price, but gave the plaintiff at his request a certain time to make up his mind, and within the stipulated period the plaintiff having determined to buy at the price named, intimated this to the defendant and offered to pay, but the latter then receded from his offer and refused to take the money or deliver the goods, it was held that there was no complete contract of sale, that as the plaintiff was not bound by the original contract to buy, there was no consideration to bind the defendant to sell: that the engagement was all on one side, and therefore a nudum pactum.—Cooke v. Oxley.—(Addison on Contracts, pp. 15, 16.)

Biddings at an auction are mere offers, which may be retracted at any time before the assent of the opposite side has been signified by the fall of the hammer.—(Addison on Contracts, p. 17.)

* It may be convenient to give here the following rules regarding auction sales:

(a.) The owner of the property sold may employ one person to bid on his behalf to prevent his property being sold at an undervalue; but if he employ more than one such bidder the sale is voidable for fraud.—(Addison on Contracts, p. 67.)

(b.) If however the sale be advertized as "without reserve," the meaning is that no one will be employed to bid on the owner's part; and if any one be so employed the sale is voidable.

(c.) The auctioneer cannot purchase for himself.—(Norton's Topics of Jurisprudence, p. 258.)
Where there is reason to believe that the highest bids at an auction are sham bids by men of straw put forward with the intention of rendering the sale proceedings illusory and vain, the officer conducting the sale is warranted in rejecting them and in knocking down the property to the highest bona fide bidder.—Rajah Mohesh Narayan Singh v. Kishram Kund Misser.—(Sutherland's Privy Council Judgments, p. 488.)

It is lawful by Mahammadan law to stipulate for an option of dissolving the contract of sale, but the term stipulated should not exceed three days. If such option have been demanded by the purchaser and the property be injured or destroyed in his possession he is responsible for the price agreed on, but where the stipulation was on the part of the seller, the purchaser is responsible for the value only. The condition of option is annulled by the purchaser’s exercising any act of ownership, such as taking the property out of the status quo.—(Macnaghten’s Principles of Hindu and Mahammadan Law, pp. 200, 201.)

Although the letter of acceptance may miscarry, the contract is binding.

If the offer of sale be accepted by a letter which miscarry, and never reaches its destination, the contract is nevertheless complete.—(Addison on Contracts, p. 16.)

"Barter," writes Macpherson, "is a contract by which the parties mutually give one thing for another, and it is effected by consent only in the same manner as a sale. If one of the exchanging parties have already received the thing agreed to be given him in barter, and if it afterwards prove that the contractor is not the proprietor of such thing, the former cannot be compelled to deliver that which he had promised to deliver but only to restore that which he has received. All the other rules prescribed for the contract of sale apply also to barter."—(Macpherson on Contracts, p. 124.)

2.—A merely verbal contract of sale, not followed by any act, writing, or proceeding, cannot be enforced by the Courts. But it may be enforced, if any act of ratification shall have ensued, such as

(d) If the buyer induce other persons not to bid, the sale is not binding on the vendor.—(Addison on Contracts, p. 68.)

(e) The printed conditions put up in a conspicuous place in the auction room are binding on the purchaser, though it cannot be proved that he saw them. These written or printed conditions cannot be contradicted, added to or altered by verbal statements made by the auctioneer at the time of sale. In Swainland v. Dearley the evidence of the auctioneer was admitted as to what took place at the sale, but that was not a case in which the evidence went to vary the conditions of sale.—(Addison on Contracts, p. 69, and Norton on Evidence, Section 629.)
delivery of the goods, in whole or in part, payment of the price, in whole or in part, the setting of the goods apart, the payment of an earnest, or an acceptance of any kind. After such partial ratification, neither party can recede nor can the seller re-sell the goods.

Where any specific chattel is ordered to be made or manufactured, the right of property is not in general vested in the party who gives the order: nor the right to the price in the vendor, until the thing ordered be completed and made ready for delivery, and have been approved by the purchaser or some one on his behalf. The builder is not therefore bound to deliver to the purchaser the identical chattel which is in progress, although the price may have been paid in advance, but may, if he please, dispose of it elsewhere, and deliver the vendee another chattel provided it answer to the specification contained in the contract.—(Addison on Contracts, pp. 184, 185.)

It follows from this that if the contract be an entire and indivisible contract for the sale of a chattel when complete, or by analogy for the performance of a specific work, e.g. the building of a house, if the chattel or edifice be destroyed by fire, lightning or tempest during the progress of the work, the seller or contractor, as the case may be, must stand the loss and be at the expense of repairing the damage. But if the contract price be payable by instalments payable on the completion of certain specified portions of the work, and the materials be destroyed in the course of construction, the employer would have to pay the instalments then due, the rest of the loss falling on the opposite party.*—(Addison on Contracts, p. 412.)

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* It may be added here, though not strictly coming under the head of sale, that where there is an entire and indivisible contract for the manufacture out of materials furnished by the employer of a particular chattel for a specific sum to be paid on the completion and delivery of the chattel to the employer, and the article be destroyed by inevitable accident whilst it remains unfinished in the hands of the workman, the employer must stand to the loss of his materials and the workman the loss and value of his labour. But if the work be of such a nature that the workman has only to affix certain accessory materials to a chattel belonging to his employer, as in the case of a shipwright employed to repair a ship, the materials become the property of the employer as soon as attached to the article on the principle omne accessorius sequitur sum principal; and therefore, if the completion of the work be not made by agreement or custom a condition precedent to payment, and it be accidentally destroyed, the loss of the accessory materials attached at the time as well as the value of the work and labour employed on them is the loss of the employer.—(Addison on Contracts, pp. 412, 413.)
A sale is not complete when something has still to be done as between the parties for the ascertainment of the price.

Where anything as between the buyer and seller remains to be done to the goods for the purpose of ascertaining the amount of the price, as where corn is sold at so much a bushel but has not yet been measured, the right of property and risk of loss are not altered. But a distinction exists between a sale by measure or weight requiring the measuring or weighing to be accomplished for the purpose of determining and fixing the price, and a sale of specific goods in the lump at an ascertained price accompanied with a representation or warranty of the weight or quality. Thus if the whole of a commodity be sold and the quantity be known and the price ascertained and settled and the weighing or measuring be necessary only for the purpose of satisfying the purchaser that he has got the quantity bargained for, and not for the purpose of determining what is to be paid for it, there is a perfect and complete sale, and the right of property is transferred to the purchaser as soon as the bargain has been concluded. The mention of the quantity has no further effect in this case than to oblige the vendor to make good to the purchaser any deficiency which may be found to exist.—(Addison on Contracts, p. 186.)

So if the goods sold be not ascertained at the time of making the agreement, as where A agrees to sell twenty tons of oil out of a larger quantity in his cisterns, no ownership in the property passes, until the goods be specifically ascertained.—(Addison on Contracts, p. 183.)

But even where delivery has taken place, if the goods have been obtained by means of a fraudulent purchase, the vendor has a right to disaffirm the contract so as to re vest the property in himself; and this will be the case even if the property passed to the vendee with the consent of the vendor. So where the vendee purchases with a pre-conceived design of not paying for the goods, the sale does not pass the property.—(Darson Lal Pandi v. Indra Chandra Babu. —(6. W. Reporter, Civil Rulings, p. 81.)

Successive sales of the same article by the same vendor.

If a man have contracted with two persons in succession to sell and deliver to each of them one and the same chattel, the one who has been actually put in possession is preferred and becomes proprietor of the article, although the contract with him was subsequent to that with the other. If however, he knew of the prior contract of sale, his possession would be malō fide and ineffectual to pass the ownership to him.

3. — Until either the price shall have been paid, or delivery made of the goods, an absolute transfer of the property has not been effected; and, conse-
quently, any loss or injury of the property, which may occur, will be at the cost of the seller. After the price has been paid, or delivery made, any loss or injury which may occur will be at the buyer's responsibility. If after the sale has been completed and the price paid, the property should be left with the seller, even then the buyer is responsible for loss or injury.

Hence where shares in a Company have been sold, the buyer must indemnify the seller in respect of all calls which may lawfully be made on the shares while they remain untransferred in the books of the Company.—(Addison on Contracts, p. 133.) See remarks under the previous clause.

4.—Delivery may be either actual or constructive. Actual delivery to the buyer does not need further specification. All other deliveries will be considered constructive. Delivery to an agent of the buyer is valid, but not if made to an agent of the seller. So also delivery to a common carrier, or to a boatman, or to any other carrier at the buyer's request; consignment to any person; or location in any place by the buyer's direction, is tantamount to delivery. So also the delivery of the key of a godown, or any symbolical act of that nature, may be construed as delivery of the goods. In all cases of constructive delivery, the seller is responsible for ordinary care and diligence in the procuring of good carriage, and in effecting good arrangements.

"If a person write to a tradesman to send goods, and the tradesman send them by the ordinary means of conveyance of the country, in the absence of all complaint of non-receipt, the law will presume delivery, and the contract will be considered as completed; and a cause of action will arise giving jurisdiction to the Court of the district in which the
Where the defendants had requested the plaintiffs to deliver so many thousand maunds of coal at one Railway Station at so much per maund, and at another at so much, proof that the plaintiffs had put the coals on the Railway at the Station where their coal-depot was, for transmission, was held insufficient to charge the defendants, in the absence of full legal proof of the amount of coal delivered at the stations named by them, and of any notice of the despatch of the coal having been made to the consignee.—Hanlon v. The Bengal Coal Company.—(3, W. Reporter, Civil Rulings, p. 163.)

5.—The seller has a lien on the goods, (if they should not have been delivered,) until the full price have been paid, unless some particular date for payment shall have been fixed: in which case the seller will be considered to have waived his lien. The lien also exists up to the date of delivery, and even if the goods, having passed out of the seller's hands by delivery, should be in transit to the buyer, still the seller may stop them if the price should not be paid, or if there should be reason to believe that, from the insolvency of the buyer, or other cause, it will not be paid. But this right of stoppage and seizure ceases from the moment that the goods come into the possession of the buyer, and from that time the seller's lien is extinct.

The stoppage of goods in transit may be effected either by the vendor or by his authorized agent, but not by a mere volunteer, and a subsequent ratification of the act on the part of the vendor will not cure the original want of authority. As the right is strictly confined to the unpaid vendor of goods, it does not extend to persons who have forwarded goods to a creditor by way of payment or in satisfaction and discharge of a debt due to the consignee.—(Addison on Contracts, p. 210.)
Stoppage of a part of the goods sold under one entire contract of sale does not have the effect of revesting in the vendor that portion of them which has already reached the bankrupt purchaser; and a delivery of part will not have the effect of destroying the vendor's right of stoppage of the portion remaining undelivered. The Court of Exchequer also, in Wentworth v. Outhwaite, inclined to the opinion that the vendor may retain the part stopped in transit until he be paid the price of the whole.—(Addison on Contracts, p. 214.)

The Agra Court has ruled that where the vendor has been paid by bills accepted by the buyer he may, in the event of the insolvency of the latter, stop the goods in transit, notwithstanding that he have negotiated the bills which are still outstanding and have not arrived at maturity.—Bhola Nath v. Baij Nath.—(2. North West High Court Reports, p. 11.)

"Goods delivered to a carrier to be conveyed from a vendor to a purchaser are held to be in transit; although they may have been consigned to a carrier specially appointed by the purchaser to receive them, or may be under the charge of a general forwarding agent of the purchaser, or in the hands of a packer or wharfinger, or inn-keeper, or any other middle-man forming a mere link in the chain of communication or transmission from the buyer to the seller; and the transitus continues, into whatever hands they may happen to fall, until they have reached their destination, or have been actually delivered to the consignee, or his agent for custody, although the goods may have been shipped and the prior carriage and wharfage dues paid by the general shipping agent of the purchaser. But goods are not in transit when they are journeying in the purchaser's own cart or carriage, under the custody or care of his own servant or agent. If, for example, the purchaser sent his own servant with a horse or cart to receive the goods, the delivery to the servant is a delivery to the master, and the possession of the servant is the master's own possession, and the goods cannot consequently be retaken by the vendor. But if the purchaser hire the cart or carriage and servant of some third party for the mere purpose of transporting the goods, they are in a state of transitus, and may be stopped by the unpaid vendor at any time before they reach the hands of the purchaser."—(Addison on Contracts, p. 210.)

If the consignor and original owner of the goods endorse and deliver the bill of lading to the consignee, who, while the goods are in transit, assigns the bill of lading to a second buyer in good faith for valuable consideration, the right of stoppage is put an end to according to English mercantile law.—(Broom's Legal Maxims, p. 456.)
6.—If the price should have been fixed or agreed upon in writing, then that amount will be decreed. But if the agreement shall have been only verbal, then, upon such proof, an exorbitant price will not be decreed. The Court will, in its discretion, cause a reasonable price to be fixed.

It seems somewhat difficult to understand the scope of this clause. If the price be agreed on in writing, then it is to be decreed without regard to its exorbitance, but if it have not been so recorded, then, although it may be "proved" by credible and competent witnesses that the parties mutually agreed on a certain price, the Court is to set the evidence at defiance, and invent a fresh price, if it deem the proven one exorbitant. The rule cannot be based on the assumption that exorbitance is an indication of fraud or coercion on the seller's part, for then, not to speak of the fact that the Court is not authorized to relieve against such contracts when expressed in writing, the whole contract would be invalid by paras 1 and 2 of Section XII of the Code. Perhaps, however, the rule was devised with reference to the untrustworthiness of most kucherry evidence; but surely where the plaintiff sets forth a sale at any agreed price, so long as a written memorandum is not required to make such a sale valid, he is in common equity entitled to demand that the Court shall decide secundum allegata et probata if he establish the facts laid in the plaint, and if he do not, the legal result should be the dismissal of his suit, and not the making of a new contract by the Court.

7.—If property be purchased "in market overt," that is, in a bazaar, open shop, frequented place, public sale or auction, then a defective ownership in the seller will not affect or invalidate the title of a bona fide purchaser who had paid the full price. The original owner cannot recover from the purchaser, though he may have his remedy against the seller. But if the property should have been purchased by private sale, not in market overt, then the purchaser cannot acquire a valid title from a seller who had not ownership; and the rightful owner can recover such property from
the purchaser, who may then obtain what redress he can from the vendor.

"C purchased a cow in market overt for full value, and after retaining it for fifteen months sold it to B, who again sold it to A. Subsequently it transpired that at a period antecedent to C's purchase, the cow had been stolen, and by order of the Magistrate the cow was forcibly taken from the possession of A, and made over to the original owner. A being thus deprived of his property, turns round and sues B for the price. B pleads that he has completed his contract, and is guilty of no fraud, or legal offence. The question referred is, will A's action lie against B? Held that it will not. 'Stolen property' is defined in Section 410 of the Indian Penal Code, and there is this proviso that 'if such property subsequently come into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.' 'Legal possession' is defined in para 7 Section XIII Punjab Civil Code—'If property be purchased in market overt, then a defective ownership in the seller will not affect or invalidate the title of a bonâ fide purchaser, who had paid the full price.' Thus it follows that C had a good title, inasmuch as he bought in market overt, for full price, and he conveyed a good title to B, and through him to A, who has therefore no right of action against B, for B has committed no breach of contract. The cow should not have been taken by the Magistrate from A and made over to the original owner. The original owner has his remedy against the thief and those who hold by an illegal title from him. But directly that a legal title can be set up, the property has passed away from the original owner, who must look to the thief for compensation under Section 44 of the Code of Criminal Procedure."

—(Judicial Commissioner's Ruling No. 27, Thornton's Small Cause Court Manual, Addenda, p. 169.)

"By the Civil Law," observes Blackstone, "an implied warranty was annexed to every sale in respect of the title of the vendor; and so too in our law a purchaser of goods and chattels may have a satisfaction from the seller, if he sell them as his own, and the title prove deficient, without any express warranty for that purpose. Such is the case in the Roman law, the French law, the Scotch law, and all the various systems of jurisprudence founded on the Roman Code; and this too is the case in the American law, founded on the principles of our own common law. It has been held by the Court of Exchequer that the law does not imply from the mere fact of the sale of a specific chattel any undertaking or warranty from the vendor that he is the owner of, or has a good title to the thing he sells. But the Court of
Queen's Bench has held that whenever a man sells goods generally, and not in any particular character or capacity, such as auctioneer, agent, sheriff, or pawnbroker, pledgee, &c. he must be taken to sell as owner."—(Addison on Contracts, p. 225.)

8.—A warranty of freedom from concealed defect and blemish is implied in every private contract of sale, where the purchaser may not have specially agreed to take the article with all its faults. If after the purchase, the purchaser should discover such defect, he may, within twenty-four hours, return the article and claim a refund of the purchase money, provided that he shall not, in any way, have injured it, or made beneficial use of it. The term of twenty-four hours mentioned above, may, at the Court's discretion, be extended to a further period, not exceeding one week. But nothing in this clause will apply to purchases made at public sales or auctions. Such purchases cannot be annulled on subsequent discovery of defect.

"The rule [of caveat emptor] finds no place in either the Hindu or Mahammadan Codes, and is not followed in Indian practice. It has, therefore, been thought expedient to maintain the responsibility of the vendor for fair dealing, and to give the vendee an opportunity of procuring, within a reasonable time, a reversal of the sale, if he should find himself to have been deceived, or if he should discover a defect previously concealed."—(Extract from the Commentary on the Punjab Civil Code.)

This provision of the Code enables the Courts to dispense with any enquiry as to whether moveable property in this province were sold with a warranty or not, at least in all cases in which the vendee actually or constructively * returns the defective article without delay.—Chiragh Shah v. Muhammad Sultan.—(1. Punjab Record, Case No. 62.)

* In this case the buyer sought on the day following his purchase to return a horse which had proved to be lame, but at the seller's request allowed it to remain until it should be resold in his stable, where it was tended by the vendor's servant. The seller subsequently refused to take it back, and eventually the horse died. The Chief Court held that there had been a constructive return of the horse.
It would seem that although the right to return the defective article ceases at the utmost in a week from the time of sale, yet that the buyer may recover damages on the implied warranty at any time within the ordinary period of limitation.

Where a warranty is one implied by law, it is clearly admissible in evidence, albeit there may be a written contract, which is entirely silent on the subject, or even contains mention of a warranty of a special nature. Thus in Bigge v. Parkinson, where the defendant undertook to supply troops' stores "guaranteed to pass survey of the East India Company's officers," this express guarantee was held not to exclude the warranty implied by [English] law that the stores should be reasonably fit for the purpose for which they were intended.—(Broom's Legal Maxims, p. 634.)

9.—If property may have been recorded in the name of a relative of the real owner, by an agreement of the parties, this circumstance will not prevent the owner from disposing of it. So also proprietors cannot, by entering their property in the names of relatives and others, preserve it from liability for debt. On the proof of such collusion the property may be exposed for sale, or converted into any other means of discharging the owner's liabilities. But this clause is not intended, in any wise, to weaken the authority of the public records of landed property.

10.—In the sale of real or ancestral property, the restrictions mentioned in Sec. IX must be observed.

11.—The right of pre-emption is declared to exist in communities of land-holders, however constituted, under whatever tenure the estate may be held. Whenever any member of such community is desirous of selling or permanently transferring his share, he must offer it to the community at
large, or to individual co-partners. If there should be any hereditary cultivators on the estate, the right of pre-emption will appertain to them, next after the proprietary sharers. If the price be not agreed upon privately among the parties, it must be referred to the revenue authorities, who will cause it to be fixed by a valuation committee. If the community, or members thereof, be not willing to accept terms, thus determined, the intending seller may dispose of the property in any manner he pleases. But if he have effected a sale without offering an opportunity of pre-emption, then the community, or any member of it, may, within three months* from the date of the transaction, bring a suit for rescinding the sale. The same rules will pertain to the foreclosure of mortgages, and to sales in execution of decrees. If there should be contending claimants for the pre-emption, the Court will call upon the revenue authorities to determine the preference. The Court will not undertake the determination of the price, but will apply to the revenue authorities for that purpose. But the principle of pre-emption is not applicable to simple or collateral mortgages, hypothecation, pledge, leases or other temporary transfers. In villages and qusbahs, the site and ground, occupied by the sharer in the estate, will be subject to the right of pre-emption as above described; if the intending seller be a non-proprietary resident, the pre-emption pertains to the land-holding commu-

* Since January 1st, 1869, the period for enforcing a pre-emption claim is one year, computed from the time when the purchaser took possession under the sale impeached.—(Clause 1, Section 1, Act XIV of 1859).
In the last two cases also the price, and the priority between claimants, will be determined by the revenue authorities.

For facility of reference the whole subject of pre-emption will be treated under this clause.

Pre-emption may be claimed on one or more of three distinct grounds: (a) either by virtue of Mahammadan law; or (b) of a local custom having the force of law; or (c) of a special contract between the parties.

If it be found that pre-emptive rights obtain by general usage in any locality unfettered by any or accompanied by some only of the restrictions of the Mahammadan law, it is the duty of the Courts to give effect to the custom, without adding to it incidents not proved to form part of it. So where parties competent to contract enter into pre-emptive agreements they are at liberty to make the exercise of the right depend on the performance of certain conditions, which may or may not be identical with the requirements of Mahammadan law. — Brij Lal v. Rajah Gaur Sahai. — (Full Bench Ruling of the North West High Court, for July 29th, 1867.)

In the case given in the foregoing paragraph, a majority of the Full Bench held that the pre-emptive conditions found in the wajib-al-arz paper are to be regarded generally as resting on a distinct basis from that of the Haq Shufa of Mahammadan law, although of course cases may occur in which the pre-emptive clause may be so expressed as to indicate that the Mahammadan custom of pre-emption prevails; but where no such declaration is set forth, the Court must pass its decree with reference to whether the stipulations of the wajib-al-arz, and those alone, have, or have not, been performed; since if the administration paper be regarded as a contract, the same laws of interpretation are to be applied to it as to other contracts; and if, on the other hand, it be taken as a record of usage or custom, the custom (if the terms of the instrument be clear) may be assumed to be recorded with all the incidents which are admitted to attach to it, and no new incidents not mentioned in the record ought to be imported into it, unless it be the manifest intent of the parties that they should be.* Again, in Abdullah Khan v. Amiran the same Court ruled that if the condition in the wajib-al-arz had been that "Shufa shall prevail in this village," without any further specification, it might have been that all the conditions requisite under the Mahammadan law would have been incorporated by implication, but

* On the subject of the authority of the wajib-al-arz see above at pp. 81, 82, 129.
An owner may not possess pre-emption rights in the village.

The wajib-al-ars contains all the qualifications in the pre-emptor which the Court can consider.

The wajib-al-ars applies to sales of the confiscated property of a convict.

Pre-emption in usufructuary mortgages.

Fin. Circular No. 41 of 1856.

With reference to the existence of a right of pre-emption in the case of usufructuary mortgages, under the special law of this Province, there is, or has been, some slight obscurity. The Code, following in this respect the Mahammadan law, recognizes no such right in case of mortgages or other temporary transfers, but on August 6th 1856, the then Chief Commissioner authorized "the extension of the principle of pre-emption to all cases of usufructuary mortgages, in modification of para. 7 of the late Board's Circular No. 28 of the 3rd May 1852, which para. exempted mortgages and temporary transfers from the operation of the..."
ordinary rule. The object of that Circular was, the Chief Commissioner observed, to secure the integrity of village communities, and that with reference to the nature of those mortgages and their liability to be converted or merged into permanent transfers, and to the general circumstances of such transactions, it is necessary to apply the restriction to them also for the preservation of the village unity and integrity." This Circular has not however apparently the force of law under the Indian Council's Act, and has been silently over-ruled by the Chief Court in Gulab v. Wazira, where it was held that the right attached to permanent transfers only.—(2. Punjab Record, Case No. 87.) See too 3. Punjab Record, Case No. 98. But the right will be recognized in the case of mortgages, if it be so provided in the wajib-al-arz.—(4. Punjab Record, Case No. 4.)

In pre-emptive claims, effect must be given to the plain words of the wajib-al-arz, without reference to their real or supposed beneficial or detrimental effect in particular cases; hence if the pre-emptor be a proprietor of the village and as such entitled to the right claimed, his suit is not to be rejected because he may have made his way into the proprietary body by purchase, and may be of a different caste, and at bitter strife with the other members of the community. —Bansi Lall v. Bansi and others.—(4. Punjab Record, Case No. 4.)

If the property be offered in sale to a party and refused by him, the party so refusing cannot after it has been sold to some one else turn round and claim the right he had before declined.—Shiv Tahal Singh v. Mussumat Ram Kour. —(Sutherland's Civil Rulings, for June 1864, p. 311.)

When property is sold by public auction at a sale in execution of decree, and the neighbour or partner has an opportunity to bid for the property as other parties present in Court, the law of pre-emption cannot apply to such sales. —Abdul Jabel v. Khelat Chandra Ghose.—(1. Bengal Law Reports, Civil Appeals, p. 105.) A contradictory decision will be found in 5. W. Reporter, Civil Rulings, p. 170. That the former is however the sounder view is I think supported by the language of Section 14 Act XXIII of 1861, which when giving a right of pre-emption in cases in which a share of a Pattidari estate paying revenue to Government is knocked down to a stranger provides however that the claim is to be made on the day of sale.

"The right of pre-emption," writes Mr. Cust, "is an accessory right of property described in the Punjab Civil Code. Unless it appear among the conditions of the Settlement, a party whose claim to the right of pre-emption depends upon local custom must prove the custom to have been in force in
the particular village in which the disputed property is situated, not by vague assertions or mere presumptions, but by an enumeration of instances supported by evidence. The principle is not defended on any economic principles, but is maintained for social and political reasons.* The reason why it is so little heard of under native rule is that a stranger would have never dared to show his face in a strong co-parcenary village; it would have cost him his life."—(Cust's Revenue Manual, p. 28.)

Where a Mahammadan claims a right of pre-emption against a Hindu, there must be a distinct plea of custom recorded as a plea of fact.—Habibul Hossain v. Deokendanand.—(Sutherland's Civil Rulings, for February 1864, p. 74.) See also 6. W. Reporter, Civil Rulings, p. 250, where the parties were Hindus and Christians. Owing however to the comprehensive language of this clause of the Code, these precedents would not in the Punjab apply to pre-emption claims to village lands.

Conflicting decisions of the Local Courts cannot be held as establishing the existence of a pre-emption custom in any district, although a series of concurrent decisions of such Courts might if they had always taken but one view of the question.—(1. W. Reporter, p. 234.) So where the Lower Appellate Court had held the existence of the custom proved by two judicial decisions at an interval of ten years, the Calcutta Court declined to interfere on special appeal, remarking that "these proceedings are good evidence in a matter of public interest, such as the existence of a custom of this nature, and such a case forms a well known exception to the usual rule which excludes res inter alios acta (Taylor on Evidence, Section 1496), and had a large number of such instances been produced, there is no doubt whatever that the Judge would have been justified in his finding. That the instances are only two in number may be an objection to the weight of the evidence, but we cannot say they are no evidence at all, and the Judge's finding on this point must therefore be confirmed."—Madhub Chandra Nath Biswas v. Tomi Bewah.—(7. W. Reporter, Civil Rulings, p. 210.)

* "The conveyance of landed property is doubtless somewhat clogged by this rule, and it may be difficult on economic considerations to defend such restrictions, but the rule is an ancient one and endeared to the rustic population; and for social and political reasons, for the sake of preserving the integrity of village communities, it is thought fit to place in their hands a power of checking the intrusion of strangers. To prevent quarrels between neighbours, the same rule has been extended to cities where the custom of pre-emption may be known to prevail, and also to joint undivided properties, in order that strife may not be unnecessarily introduced into families. But the rule is only applicable to permanent transfers. In order that money may circulate freely, that capital may be invested easily in landed securities, and that land holders may procure loans, and keep running accounts with the bankers it is deemed advisable to leave temporary transfers unfettered."—(Commentary on the Punjab Civil Code.)
Where the right of pre-emption among Hindus is recognized on the ground of local custom, the rules and restrictions of the Mahammadan law are applicable to claims of that nature, as the rights originate in the Mahammadan law.—(S. D. A. Sel. Rep., 25th July, 1843.) This ruling seems however to require in order that it should be accurate the addition “unless the investigation shews that those rules and restrictions have been modified or ignored by the common usage.” See above, p. 358.

“The difference between the rules [in this Code] and those obtaining in the older Provinces is this, that in the latter there are no means of fixing an equitable price. The maxim of pre-emption is therefore easily frustrated by the seller imposing an exorbitant price, which even the proposed purchaser is not expected to give.”—(Commentary on the Punjab Civil Code.)

FINANCIAL BOOK CIRCULAR No. XXII of 1863.

To

ALL COMMISSIONERS AND SUPERINTENDENTS,

PUNJAB.

Dated Lahore, 29th July 1863.

“Cases having recently come under my review, in which bonâ fide prices offered for land have been over-ruled by award of a Panchayat, in favour of parties having the right of pre-emption, and lower prices fixed in lieu of them; I have the honor to direct your attention to the terms and spirit of the late Board’s Revenue Circular No. 28 of 1852, and, with the sanction of Government, to offer the following remarks thereon.

2.—It is by no means the intention of that Circular, to prevent proprietors of land from obtaining for it the legitimate value which may accrue to it from the ordinary operation of the laws of supply and demand, but merely to prevent transfers being effected to strangers, against the wishes of those having prior claims to purchase, by the fraudulent offer on the part of such stranger of a fictitious price, which is in excess of the real value of the land, and which he has himself no real intention of paying.

3.—The Circular in question directs that the “price, unless privately agreed upon, shall be fixed by the Revenue authorities”—and although it further directs that they shall be “aided by a valuation committee of three assessors,” yet it in no way restricts their discretion, and it must therefore be considered competent to the Revenue authorities, and in—
deed their obvious duty, to over-rule the opinion of such assessors, if considered by them opposed to the spirit and intention of the rules laid down; and to decide according to their own judgment. The expressions employed in Section XIII, Clause XI, of Part I of the Punjab Civil Code, which says that the Revenue authorities will cause the price to be “fixed by a valuation committee,” has direct reference to the Board’s Circular above quoted, and cannot in any way affect the position or powers of the presiding Revenue authority, as a member of the committee. Adopting this view, it seems clear that the most prudent and proper course must always be to consider first with the aid of the assessors, the price which is stated to have been offered; and if it be determined that the price in question is offered bonâ fide, and will without doubt be paid if the sale be completed, that price should on no account be set side.

4.—In the event of the officer presiding in the Revenue Court over-ruling the opinions of a majority of the assessors, on this or on any other point, it will of course be incumbent on him to record in full the grounds on which he has done so.

5.—If the District Officer see reason to doubt the good faith of an objector, claiming right of pre-emption, it will be optional with him to require that the amount of purchase which is deemed to be fair, be brought into Court before the sale to the first proposed purchaser is quashed.”

Alteration of stipulated price.

It would thus appear that the innovation introduced by the framers of the Punjab Code into the law and practice of pre-emption is, that where it appears that the price nominally fixed on by the buyer and seller is a fictitious one, means should be taken to ascertain an equitable selling price, but that the seller should under no circumstances be compelled to take less than the original purchaser would have paid had the sale not been interfered with. A different view however has unfortunately been taken by the Chief Court in *Mussumat Hamidunnissa v. Mahammad Akbar.* There, the Court remarks, “the general law of pre-emption, based on the Mahammadan law, requires that the pre-emptor should pay for the property bought the original price for which it was bonâ fide agreed to be sold before pre-emption was claimed. This is altered by the Punjab Civil Code, which in Section XIII, Clause 12, directs the Court to fix the price with the aid of a valuation committee composed of three arbitrators, two appointed by the parties (one by each) and one by the Court.”—(*3. Punjab Record, Case No. 83.*) Now, with much deference to the opinion of the learned Judges, I think it may be shewn that, apparently by an oversight, they have mistaken the *dogma of Maham-*
madan law* on the question, and consequently have misstated the change effected by the compilers of the Code. So far from Mahammadan law requiring the pre-emptor to pay only the original price "for which it was bona fide agreed to be sold," one of the legal devices by which the right of pre-emption may be defeated "where a man fears that his neighbour may advance such a claim" is thus stated by Macnaghten: "be [the seller] may in the first instance agree with the purchaser for some exorbitant nominal price, and afterwards commute that price for something of an inferior value; when, if a claimant by pre-emption appear, he must pay the price first stipulated without reference to the subsequently commutation."—(Macnaghten's Principles of Hindu and Mahammadan Law, p. 206.) See too, Baillie's Digest, pp. 503—506, where this and other like devices are given, such as a double gift. It is true that the Mahammadan doctors stigmatize these devices as abominable, but what is to the point is, that the valid doctrine is that the effect of the device is not cancelled. The true position is, therefore, it would seem, that the pre-emptor must pay according to Mahammadan law, any price however palpably fictitious which had been agreed, or let the purchase slip through his fingers; while the Code provides that when the price is shown to be a nominal one merely, he shall have the property on payment of a fair and equitable price.

The right of pre-emption is not lost by the claimant demurring to the price, if he have expressed his willingness to give a fair price.—Biria v. Barkat Ali.—(1. Punjab Record, Case No. 74.)

No consideration that possibly if the pre-emption claim be established, the sale may go off, must be allowed to relieve the Court of the duty of going into the question of the price, and for this purpose both the original parties to the sale must be impleaded; since "it may be that the party claiming pre-emption might be unwilling or unable to pay the fixed price; either event would be fatal to his claim; and the parties to the sale which is impeached have a right to

* It is true that in the Regulation Provinces, the Courts, shocked possibly by the puerility of the evasion devices of the Mahammadan law, have allowed pre-emptors to impugn the correctness of the price stated in the conveyance, and to shew that the property had been sold below the stated price.—(Sutherland's Civil Rulings, for June 1864, p. 304; T. W. Reporter, pp. 211, 486.) But with regard to the authorities quoted in T. W. Reporter, p. 211, it would seem that they relate to the price paid, and not to whether it were subsequently commuted, or the following clause in Macnaghten would be senseless. And the extract from the Commentary shews that the change from the practice of the older Provinces was thought to be one of procedure merely. I have met with no cases in the Regulation Courts in which a bona fide price however high was set aside; indeed, if from any cause the purchaser be willing to give a fancy price, it is a grievous addition to the "evils of pre-emption to deprive the seller of this chance."
have the price settled in this suit, that any default on the part of the plaintiff may be established."—Lekhraj v. Devi Chand.—(3 Punjab Record, Case No. 35.)

"The provisions of the Code requiring the price to be fixed through the instrumentality of a valuation committee must be followed with a reasonable degree of exactness." It will not therefore be sufficient to strike an average from the price of contiguous land, or to take an average of what witnesses state to be value of the land in dispute.—Mussumat Hamiunnissa v. Mahammad Akbar.—(3 Punjab Record, Case No. 83.)

The following canons of Mahammadan law regarding pre-emption may prove useful, it being borne in mind that the only cases in which they are applicable without further enquiry is in suits relating to property in non-agricultural communities among parties who are all Mahammadans (see above, p. 355) In claims based on local custom it is open to the litigants to deny that any particular rule is incorporated into the custom.

I. Pre-emption only takes place when there is a sale or barter of realty, and not in cases of gift (see Sutherland's Civil Rulings, for May 1864, p. 239,) even where the donor has received a consideration for his gift, if such consideration were not expressly stipulated for; nor in cases of inheritance or bequest.—(Baillie's Digest, pp. 471—478,) Neither does the right arise when the sale is fictitious or for a temporary purpose only.—(2 W. Reporter, Civil Rulings, p. 78.) So in a case before the Agra Court it was held that a gift was not necessarily converted into a hibba bil iwaz because the deed of gift set forth, not so much by way of consideration, as of motive for the gift, that the donee had been a dutiful son, and enabled his father to redeem some mortgaged property.—(4 North West High Court Reports, p. 237.)

II. Neither does it arise when the alienation is effected by a lease in perpetuity, however small the reserved rent may be.—Muruli Ram v. Hari Ram.—(8 W. Reporter, Civil Rulings, p. 106.)

III. The right of pre-emption does not accrue until there is a cessation of all right on the part of the seller.—(Baillie's Digest, p. 472.) Where therefore the bill of sale was actually written out and signed by the seller, but before the deed had left the vendor's hand or anything had been done by the vendee, to signify his acquiescence in the purchase, such as payment of the price, entry into possession, the sale was held to be incomplete, and the pre-emption claim was void, when at this stage the principals went back from their inchoate contract.—Mussumat Ojkiunnissa Begum v.
Shaikh Rastam Ali.-(Sutherland's Civil Rulings, for May 1864, p. 219.)

IV. Hence too the Calcutta Court has ruled that no right of pre-emption can arise on a mere conditional sale or mortgage, while any right of redemption remains in the mortgagor.—(2. W. Reporter, Civil Rulings, p. 215.) See too, Vol. 6. Civil Rulings, p. 116; Vol. 10. Civil Rulings, p. 246; and 4. North West High Court Reports, p. 251. A contrary and apparently less correct rule has been laid down by the late North West Saddar Court that one who has the right of pre-emption may assert it either at the time of making the mortgage, or when the conditional sale comes to be made absolute.—(Maopherson on Mortgages, p. 240.)

V. When either houses, or small holdings of land make parties in fact such near neighbours as to give a claim on the ground of convenience and mutual servience, the claim in right of pre-emption will lie. But this principle does not apply to large estates which are not in fact such that any real vicinage of the proprietors results.—(Ejnahsh Kuer v. Shaikh Amzud Ali.—(2. W. Reporter, Civil Rulings, p. 261.) See too, Vol. 8. Civil Rulings, p. 413. Again, in Abdul Azim v. Khondkar Hamed Ali, in which pre-emption was claimed in regard to a holding of about 90 beegahs, almost surrounded by the plaintiff's land, but which was a separate estate paying revenue to Government, the High Court recognized the principle, Lock J. observing that "it is probable that originally the right of pre-emption extended only to houses, gardens and small plots of land; and this view is supported by the illustrations of what may be the subjects of pre-emption as given by Baillie, but in looking at the Hidayat we find it stated, at p. 591 of volume 3, that shufa takes place with regard to all lands or houses. It had been stated in a previous part of the paragraph that, according to the doctrine of shufa, nothing is subject to shufa but what is capable of being divided, but the Prophet held differently; and, adds the writer, "besides, according to our tenets, the grand principle of shufa is the conjunction of property, and its object to prevent the vexation arising from a disagreeable neighbour, and this then is of equal force whether the thing be divisible or otherwise." The writer of the Hidayat then assigns the reason why the right is not applicable to moveables, because of the saying of the Prophet, "shufa affects only houses and gardens," and "also because the intention of shufa being to prevent the vexation arising from a bad neighbour it is needless to extend it to property of a moveable nature." Looking at the Chapter on Shufa in the Hidayat the right appears to be limited to parcels of land, houses, &c., and does not contemplate the right to purchase a separate estate, because a
part of it is conterminous with that of the shufee. It is true that a person may have a bad neighbour, as a zemindar, and so suffer as much vexation from him as from a bad neighbour next door, or holding the next field; but still it appears to me that the law was intended to prevent vexation to holders of small plots of land who might be annoyed by the introduction of a stranger among them."—(2. Bengal Law Reports, Civil Appeals, p. 63.) But where the manorial rights remained common, although the estates had been severed, the same Court held that the right of pre-emption remained to one who was still a partner in the immunities and appendages of the land.—(10. W. Reporter, Civil Rulings, p. 314.)

VI. The right of pre-emption appertains to the following classes in succession: first, to the shureek or partner in the substance of a thing; secondly, to the khuleet or partner in its rights; and thirdly, to the neighbour. What persons come under these classes are shewn in detail in Baillie's Digest, pp. 476—480. They are not given here, as it appears doubtful whether the distinctions have not become obliterated by local custom, or local ignorance rather, in this province. The passage is however alluded to as authoritative in a Calcutta case in 2. W. Reporter, p. 47, and Vol. 8. p. 3. And in Kung Bahuri Lall v. Girdhuri Lall the Calcutta Court held that a party who distinctly used in his claim the Mahammadan term showing that he claimed his right as a co-partner, ought not to be allowed to travel beyond his plaint and seek to obtain a decree by right of vicinage.—(10. Reporter, Civil Rulings, p. 189.)

VII. There must be ownership on the part of the shufee, or pre-emptor, at the time of the purchase, in the property on account of which he claims pre-emption in the property sold; so that he has no right, if he be only a tenant of the property, or have previously alienated it, or converted it into a mosque.—(Baillie's Digest, p. 473.) See also 8. W. Reporter, Civil Rulings, p. 437; Vol. 9. Civil Rulings, p. 455; 2. Agra Saddar Court Reports, p. 406.

VIII. It is not necessary that the persons by or against whom the right is claimed be Mahammadans.—(Baillie's Digest, p. 473.) But in such cases, see above p. 358.

IX. Respectability of character is not a condition of the right; a prostitute therefore can enforce a claim to pre-emption.—Mussumat Punna v. Jagannath.—(1. North West High Court Reports, p. 236.)

X. According to strict law a pre-emptor must make three demands to establish his right: viz., tulub moowa—thubut, or immediate demand; tulub ish,had or tulub tukreer,
or confirmatory demand; and tulub tumleek, or demand by litigation. By tulub moowathubut is meant that when a person who is entitled to pre-emption has heard of a sale, he ought to claim his right instantly, whether any one be by or not, and if he remain silent the right is lost. By Tulub ish, had is meant a person calling on witnesses to attest his immediate demand; this demand must be made in the presence of the purchaser or seller, or of the premises which are the subject of sale. If at the time of making the tulub moowathubut, the shufee were in the presence of the vendor or vendee or of the premises, and then called on witnesses to attest his immediate demand, it would suffice for both demands. Tulub tumleek is the bringing the claim before the Judge to be enforced by him.—(Baillie's Digest, pp. 483—485.) Although I believe these forms are almost, if not quite, obsolete in the Punjab, much stress is laid on proof of their performance in the Eastern Courts; see, inter alia, Sutherland's Civil Rulings, for March 1864, p. 117; Civil Rulings, for May 1864, p. 219, where it was held that the tulub ish, had may be made by an agent; 2. W. Reporter, Civil Rulings, p. 215, where a Full Bench ruled that the formal demands must be made after the vendor's right had ceased, and therefore if made when a conditional sale was first effected it was void; Vol. 5. Civil Rulings, p. 203; Vol. 6. Civil Rulings, p. 117, where the demand was held bad when the pre-emptor instead of making it when foreclosure was ordered waited to see the result of an appeal; Vol. 6. Civil Rulings, p. 173; Vol. 10. Civil Rulings, p. 119; 2. Bengal Law Reports, Civil Appeals, p. 12, where the tulub ish, had was held to be bad because there had been no express invocation of witnesses, although certain persons accompanying the plaintiff had been casual spectators of what took place. See too 1. North West High Court Reports, p. 184, where the Agra Court ruled that when all the parties are Mahammadans it is necessary that the three formal demands should be made. Perhaps in studying these apices juris of the Calcutta Court it will be thought that the learned Judges emulate the most acute doctors of Islam.

XI. There must be no acquiescence by the pre-emptor in the sale or its effect, either expressly or by implication, as by his being employed by the vendor to negotiate the sale.—(Baillie’s Digest, p. 473.)

XII. As a right of pre-emption cannot be claimed previous to actual sale (2. W. Reporter, Civil Rulings, p. 216, and S. D. A. Sel. Rep. 22nd April 1848), so the surrender of the right before the sale has place taken is not valid.—(Baillie’s Digest, p. 500.)

XIII. Where several houses are purchased by one contract the pre-emptor may take one of them without the...
rest, if his right apply to that alone, as if he be a neighbour
to one of the houses sold only; but not so, if his right
extend to all.—(Baillie's Digest, pp. 492, 493.) So in
Kazi Ali v. Shaikh Misutullah, where the plaintiff could
not show sufficient cause for taking the whole of the lands
sold, his claim to purchase only a portion of them was held
to be bad.—(2. W. Reporter, Civil Rulings, p. 285.) See

XIV. Where one house only is sold, the pre-emptor
must take the whole or none; he cannot, for instance,
demand that portion which abuts on his premises and
forego the rest; but when two persons together buy a house
in shares he may claim the share of one only.—(Baillie's
Digest, p. 492.)

XV. But where there are two sellers, the pre-emptor
cannot claim to take the share of one of them only.—(Bail-
lie's Digest, p. 492.) So in Abdul Ghafir v. Mussumad Nur
Baum, where some of the vendors were minors, the plaintiff
asserted her right to the whole purchase by demand and
suit, but on regular appeal, acting by the advice of the
Court, she withdrew her claim as to the shares of the
minors. The Calcutta Court, on special appeal, held that
this partial abandonment entirely invalidated the plaintiff's
claim, as if she chose to enforce her right of pre-emption she
was bound to take the bargain with all its advantages and
risks.—(1. Bengal Law Reports, Civil Appeals, p. 78.)

XVI. A party whose right of pre-emption is common
with others in the highest right under which he claims,
cannot take exclusively the whole bargain because he hap-
pens also to be entitled in another and inferior capacity;
thus, if A and B be both sharers in the rights appurtenant to
the property sold, and A be also a neighbour, he acquires
no exclusive right as against B by this fact, a sharer coming
before a neighbour, in the order of the pre-emptive classes.
—Roshan Muhammad v. Muhammad Kalim.—(7. W. Repor-
ter, Civil Rulings, p. 150.)

XVII. In Maharaj Singh v. Bhichak Lall the Calcutta
Court held, on the authority of the Hidaya (L 38, Chapter
I, p. 566), that where there is a plurality of persons entitled
to the privilege of shafa, the right of all is equal, and no
regard is paid to the extent of their several properties.—(3.
W. Reporter, Civil Rulings, p. 71.) See the same point
recognized in Vol. 7. Civil Rulings, p. 150.

XVIII. Where the purchaser is himself a coparcener,
no right of pre-emption as against him can exist, since the
right can only be exercised against strangers or third parties
and not against coparceners.—Maheshi Lall v. Christian.—
XIX. Although the law allows the pre-emptor to bring his suit at any time within a year from the time when possession was taken by the purchaser, there is nothing to prevent his action being brought before, if the sale have been completed and the vendor's right extinguished.—

Sutherland's Civil Rulings, for June 1864, p. 285.) So where the pre-emptor had learnt that the owner of certain property had contracted to sell it for a fixed price and the buyer had agreed to take it at that price, the Court held that the plaintiff might at once proceed to enforce his right of pre-emption, without waiting till the bill of sale had been delivered or registered or payment made.—Lakshmi Narayan v. Bhimal Dass.—(S. W. Reporter, Civil Rulings, p. 500.)

XX. All rights and privileges belonging to an ordinary purchaser appertain equally to a purchaser under the right of pre-emption.—(Maccaghten's Principles of Hindu and Muhammadan Law, p. 205.)

XXI. It is not incumbent on the pre-emptor to tender the price at the time of making his claim.—(Baillie's Digest p. 488, quoted in 10. W. Reporter, Civil Rulings, p. 211.) See also Vol. 2. Civil Rulings, p. 10. So in Mussumat Puana v. Jagannath, the Agra Court held that where there has been an offer of payment by the pre-emptor, it is not necessary that there should be a tender of the sum in money.—

1. North West High Court Reports, p. 236.) The first purchaser has however a vendor's lien on the property, viz. a right to retain the property until he have been paid the purchase money by the pre-emptor.—Dalbod Singh v. Mahadeo Datt.—(2. W. Reporter, Civil Rulings, p. 10.) Such purchaser is not liable to be charged rent or hire for the time that the property thus remains in his hands, and if he have sown the land the pre-emptor must wait for the ripening of the crops.—(Baillie's Digest, p. 496, quoted in 1. North West High Court Reports, Revenue Appeals, p. 30.)

XXII. A right of pre-emption once established and decreed cannot be annulled by non-payment of the purchase money within a time specified by the Court making the decree. The Court has no jurisdiction to make an order fixing a time within which payment is to be made by the pre-emptor, and thereby to annul the rule of Muhammadan law, by adding to it a proviso which might be incapable of execution. On the contrary, the decree-holder may enforce his claim to the bargain at any time within the period allowed by law for the execution of decrees.—Ahsan Ali v. Saboki Bibi.—(10. W. Reporter, Civil Rulings, p. 53.)
XXIII. Where the intermediate purchaser has made improvements to the property, the pre-emptor must either pay their value or cause them to be removed; where the property may have been deteriorated by the act of the intermediate purchaser, the claimant may insist on a proportionate abatement of the price, but if the deterioration have taken place without the instrumentality of the intermediate purchaser, the pre-emptor must either pay the whole price, or resign his claim altogether.—(Macnaghten’s Principles, p. 206.)

XXIV. Acts of disposal by the intermediate buyer, as for instance, the gift, or letting of the premises, converting of them into a mosque &c., are liable to be cancelled by the pre-emptor.—(Baillie’s Digest, p. 49.)

XXV. A pre-emptor having obtained possession and made improvements is not entitled to compensation, if it afterwards appear that the property belonged to a third person. He must then recover the price from the seller, and may remove his improvements.—(Macnaghten’s Principles, p. 206.)

The following rules, which are merely declaratory of pre-emption, are contained in letter No. 1238 of Secretary Government Punjab, dated 29th August 1860, to the address of the Financial Commissioner.

When the sale has been completed the seller cannot withdraw from the sale on a pre-emption claim being put forward, although he may do so otherwise.—(See above, Rule III.)

No person, who was a party to the sale, can turn round, withdraw his own property and claim the right of pre-emption of the remainder.—(See Rule XI.)

In Bahadur v. Moti Ram and Jiwan Ram, the plaintiff claimed pre-emption of a shop sold by Moti Ram to the co-defendant, and obtained a decree in the Court of first instance. On appeal to the Deputy Commissioner, the Judge, after inspecting the houses, held that, although the Lower Court had decided correctly, yet as the owner expressed a wish to retain the property, if not sold to the then appellant, Jiwan Ram, it was necessary to cancel the sale; and adds that it was so done in his presence and the purchase money restored to the purchaser. On appeal to the Chief Court, they observe—“The simple question for our determination in this case is, whether a pre-emptor who has established a right to the pre-emption of a house on the score of vicinage in a Court of law can force a sale to him although both the vendor and the vendee, the original parties to the contract, elect to recede from the bargain and
annul the sale. The Court is clearly of opinion that he cannot, but as the vendor forced him to come into Court to establish his right and contested it in Court, and he and the vendor (query vendee) did not determine on cancelling the sale, till after the case had gone against them, equity requires that he should obtain his costs.*—(2. Punjab Record, Case No. 39.)

In Hasan Khan v. Sultan Khan and others the Chief Court held that a mere notification by the owner of property of his intention to sell, without any statement of the sum which he wanted, is not sufficient to cause limitation to run against those who subsequently came forward as pre-emptors; a decision abundantly supported not only by the language of Act XIV of 1859, and the limitation rules then in force, but also, by the simple fact that the right of pre-emption does not arise until the sale is completed (see above, rule III). In the same case, the Court further ruled that those of the plaintiffs who, in a former suit in 1861, for pre-emption of this very land, had filed a deed withdrawing their suit, and stating that Sultan Khan might sell when

* With much respect to the Courts who have so decided, it may, perhaps, be urged that this decision is not supportable on legal grounds. In the first place, it appears a mere confusion of terms to speak of the transaction as a rescission from the bargain or a cancelling of the sale, as if it were nothing but a maintaining of the status quo; on the contrary, it is clear that a complete sale had taken place, that is, the seller's interest in the property had passed from him and accrued to the buyer, and therefore, the Court in reality sanctioned a sale back by the buyer to the seller, on occasion of which an inchoate right of pre-emption a second time accrued to the plaintiff. But even if this objection appear technical, it will be observed that the decision is flatly opposed to the ruling of the Punjab Government of 1860, quoted in the text, which, probably, by Section 25 Indian Council's Act has the force of law. The Mohammedan law too ignores such a means of nulling the pre-emptor, an argument of no little weight considering the devices for the purpose recognised by that system. Again, the period for preferring such a suit is now extended to one year from the purchaser's taking possession; if then a pre-emptor come forward after eleven months, will the seller have still such an interest in the premises which he had parted with nearly a year before, that he may demand them back, because he objects to the claimant, for that the first purchaser will object to him is certain to be the case. But it is obvious that a seller cannot have a stronger case against a pre-emptor who comes forward as soon as the sale is completed than he has against one who waits until the time allowed by law for preferring his claim has well nigh expired, unless the maxim vigilans liberatur non dormentibus jura subservient is to be reversed. The view contended for in this note is further supported by a decision of the Calcutta High Court, Bhry Ram v. Mussumut Lodum, in which that Court reversed the decision of the Lower Courts, and upset the claim for pre-emption, on the ground that the sale was not completed, and the vendor's right was not extinct, at the time the buyer and seller annulled the sale by a petition to the Registrar.—(8. W. Reporter, Civil Rulings, p. 255.) So too, Sutherland's Civil Rulings, for May 1864, p. 219, noted above; while in Patuaram v. Sham Lall Sahu the Calcutta Court expressly ruled that a resale, admittedly made subsequent to the suit brought by the plaintiff to enforce his right of pre-emption, cannot destroy the right of pre-emption of the plaintiff in the property.—(7. Jr. Reporter, Civil Rulings, p. 206.)
and to whom he liked, were barred by this former deed.*—
(2. Punjab Record, Case No. 60.)

12.—If a sharer in any joint undivided property, not land, be desirous of permanently transferring his share, the right of pre-emption will pertain to the co-sharers, and may be enforced by the Courts. If in any town, city or village, or in any mohula, ward, or sub-division thereof, the custom of pre-emption may be known to prevail, it may be enforced under the same rules as in the co-parcenary communities. The Court will fix the price with the aid of a valuation committee, composed of three arbitrators, two appointed by the parties (one by each) and one by the Court; the preferential right between contending claimants will be determined by the Court, with reference to vicinity, relationship, or the merits of the case.

See notes under the previous clause.

* This decision seems not only opposed to Mahommadan law (see above, Rule XII), but it appears equally at variance with the principles of English law, as there does not seem to have been any good consideration to support the agreement. So far as the pre-emptors in 1861 engaged not to oppose the then purchasers, their relinquishment of their alleged rights would support the dismissal of their suit, and as a res judicata would be binding against them, but when they proceed to abandon their claims against any possible purchaser, they were inserting surplusage entirely beyond the scope of the subject matter then before the Court, and which, therefore, the Court could not ratify. Of course, if it could be shown that Jumal Khan had purchased relying on this disclaimer, the decision would be in accordance with the doctrine laid down in Gregg v. Wells, and perhaps this fact appeared on the proceedings though not alluded to in the judgment.
CHAPTER XIV.

PUNJAB CIVIL CODE.

SECTION XIV.

Mortgages.

In the event of a simple mortgage, where the mortgagor enjoys the proceeds of the property in payment of a debt, the mortgagor is, ordinarily, at liberty to redeem the property, when the amount of the debt with interest shall have been liquidated, either by a cash payment, or by the usufructuary profits of the mortgage. But the mortgagee may continue to hold and enjoy the property until the obligation is discharged. The above rule, however, will only take effect in the event of the particular mortgage being unaccompanied by any special agreement between the parties, or in the event of transactions of this nature not being regulated by any local custom. If, for instance, the parties should have agreed that the usufruct is not to affect either the principal or the interest, or that it is to be regarded only as payment of interest; or if such should be the ordinary conditions of a mortgage by the known custom of that vicinity, then the Court will decide accordingly.

It may be convenient to call attention to the difference of nomenclature adopted in the Code, and that used in a very well known work, Macpherson on Mortgages. The "simple mortgage" of this clause is the "usufructuary mortgage" of Macpherson; the "collateral mortgage" of clause 2 is his "simple mortgage;" while the "mortgage by conditional sale" of clause 3 alone has the same name in both works.

Nomenclature adopted in the Code.
If by the terms of the simple mortgage, the mortgagor is to look to the usufruct of the land for the payment of both principal and interest, the mortgagor is not personally liable for the payment of either, in the absence of any special agreement that he should be so [or of any well known local custom to that effect]. If however the application of the profits be expressly limited to the liquidation of interest, there is little doubt but that the mortgagor is personally liable for the principal.—(Macpherson on Mortgages, p. 11.)

It is the duty of a mortgagor who has covenanted to put the mortgagee in possession to do so at once, and to secure his quiet enjoyment during the term agreed on. And a mortgagor who refuses or is unable to give, or secure, possession to an usufructuary mortgagee renders himself liable for an immediate action for the recovery of the money advanced, with interest; and this too in cases in which otherwise the debt would not have been recoverable until after the lapse of a specified period. If therefore the mortgagor wrongfully oust the mortgagee, the latter may sue for the mortgage debt, and is not restricted to a suit for possession, since the mortgagor having committed a breach of contract cannot enforce fulfilment from the mortgagee of what was to be performed on his part in regard to the breach.—(Macpherson on Mortgages, pp. 120—122.)

Where however it is the expressed intention of the parties that the land, and the land only, shall be the source from which the mortgagee is in any event to be paid, he must bring his suit for possession in the first instance. The terms of a mortgage deed were that the surplus proceeds of a certain takaful should be applied to the extinguishment of the mortgage debt, "and that in the event of the non-fulfilment of this condition the mortgagee might sue to obtain possession of the estate." It was held that the mortgagee could only avail himself of the relief expressly provided for him in the deed, and sue for possession. So in another case, the mortgagee, who was put in possession, was to keep a certain portion of the usufruct in lieu of interest, and this he was to continue to do until the mortgagors came forward, and paid off the principal in one sum. The mortgagee after being in possession for some years voluntarily gave it up, and brought a suit on his mortgage deed for principal and interest. The Court decided however that so long as he received the specified sum from the usufruct, he had no right to complain, or to ask for his principal until such time as the mortgagors chose to pay it off.—(Macpherson on Mortgages, pp. 123, 124, and 108.)
A usufructuary mortgage of lands was executed in 1846, but the mortgagee did not enter into possession; subsequently, however, he sued for entry, and the Court held he was entitled to mesne profits from the date he commenced litigation, as from that time he was kept out, not as before by his own laches, but by the mortgagor's wrongful act.—Lakshmi Narayan v. Ramappa Chakkira.—(1. Stokes' Madras Reports, p. 70.)

The Government revenue is a charge upon the land out of which it is payable, which takes precedence of all other claims, and consequently a mortgage does not pledge anything more than the receipts in excess of the revenue due in respect of the lands mortgaged. It is therefore prima facie the duty of the person in possession to pay the revenue, and unless this presumption be rebutted, any loss consequent on the non-payment must be borne by him. Hence a usufructuary mortgagee, who while in possession allowed the Government revenue to fall into arrears, in consequence of which the Collector farmed the estate for some time, was held responsible for the profits of the term during which the Collector was in possession. The mortgagee has however no personal claim against the mortgagor while he remains in possession for revenue so paid, although such claims will be credited to him in adjusting the accounts between them; neither can he recover them by a separate suit while he remains in possession.—(Macpherson on Mortgages, pp. 103, 257.) An immediate suit during the continuance of the mortgage would, however, it may be presumed, lie to recover such payments, when made in consequence of the mortgagor's neglect, if the contract expressly bound the latter to pay. Money so paid with the bona fide intent of protecting the property from sale will be recoverable even if the mortgage prove invalid, if they be sums which the mortgagor was legally bound to pay to Government and which he did not pay because it was recovered from the other party.—Badaum Kour v. Sital Prasad.—(5. W. Reporter, Civil Rulings, p. 126.)

When land is mortgaged as revenue-free, which during the mortgagee's possession is assessed with revenue, the mortgagee acquires a lien on the estate for the sums paid by him in discharge of this unforeseen due, in addition to the principal, which otherwise by the terms of the contract was all that would have been recoverable.—Narjun Sahu v. Shah Maziruddin.—(3, W. Reporter, Civil Rulings, p. 6.)

* "It is a denial of justice for the Judge to lay down that the mortgagee in paying the Government revenue to save the estate mortgaged to him has no claim on the mortgagor for his laches in not paying the revenue which under the mortgage deed he was bound to pay."—Gour Chand Shah v. Jamal Basa.—(Sutherland's Civil Rulings, for May 1864, p. 209.)
A mortgagee acquiring the mortgaged property in a sale for arrears of revenue intentionally caused by himself will be held to be a trustee for the mortgagor.

Although sales for non-payment of revenue are fortunately almost unknown in the Punjab, there seems little doubt but that when a mortgagee in possession allows the revenue to fall into arrears with a view to the land being put up for sale, and his becoming the purchaser of it, and he does so acquire it, that he ought to be regarded merely as a trustee for the mortgagor, as he has been held to be on more than one occasion by the late Calcutta Supreme Court.

"Upon such a purchase," observed that Court in Rajah Ujirram Khan v. Anshulush Dey and others, "a Court of Equity on general principles will fasten a trust, and hold that the mortgagee, subject to the repayment of the amount due on the mortgage and of his expenses properly incurred is a trustee for the mortgagor."—(Macpherson on Mortgages, p. 107.) See too the case of Sidhi Nazir Ali Khan v. Ujirimm Khan.—(Sutherland's Privy Council Judgments, p. 635.)

Interest realizable from the usufruct.

In a simple mortgage where no special rate of interest is stipulated for, the presumption is that the parties at the time of the mortgage intended the usufruct to cover the interest; and the fact that the profits may have turned out to be trifling will not in itself entitle the mortgagee to claim additional payments by way of interest.—(Macpherson on Mortgages, p. 39.) So, conversely, if the usufruct of the property be by the terms of the agreement to be enjoyed in lieu of interest, the mortgagee's having had possession will not in any way lead to an inference that any portion of the debt save the interest has been paid off from the usufruct.—(10. W. Reporter, Civil Rulings, p. 301.)

Where the conditions of a simple mortgage, executed 140 years ago, provided for the payment of interest by the mortgagor, the fact that the interest had not been asked or demanded during so long a period was deemed to justify the Courts in assuming a waiver of the right.—Sukhran v. Hulasa—(1. Punjab Record, Case No. 64.)

Any deviation by the mortgagee from the terms of his contract entitles the mortgagor to have it cancelled and to pay off his debt; thus, in a usufructuary mortgage, when the mortgagee during the continuance of his term took possession of certain lands which by the terms of the contract were to continue in the possession of the mortgagor, it was held that this was such a breach as to entitle the mortgagor at once, without waiting for the day of payment originally fixed, to cancel the mortgage, and recover possession of the whole mortgaged property, on paying into Court the full amount of the loan, notwithstanding this right had not been expressly given him by the mortgage deed.—(Macpherson on Mortgages, p. 125.) But where the mortgagee had made default in paying Rs. 39 only out of 84, the stipulated mort-
usufructuary mortgage.

The mortgagee in possession must see to the proper management of the estate, and will be held responsible for any waste or actual damage committed by him, and for any deficiency in receipts arising from negligence or misconduct on his part. He must, as a mere trustee for the mortgagor, manage the land according to the best of his ability, regulating the expenses carefully, and applying the profits to the satisfaction of his claim. He must take the same care of the estate as he would of his own, admitting no claim upon it until assured of the title of the claimant. His rights are subject to any title or lien existing prior to the date of his security.—(Macpherson on Mortgages, pp. 108, 99 and 100.)

A mortgagee who is entitled to possession has generally a right to have his name registered in the Collector’s books as mortgagee in the place of that of the mortgagor.—(Financial Book Circular No. XLVII of 1860, and Cust’s Revenue Manual, p. 188,) and he has a right to appear at a revenue settlement as an objector to the settlement then made, or sometimes as a claimant of the settlement; while if he succeed in having his name entered as owner on the ground that the period of redemption had passed, the revenue award will bind the mortgagor if not challenged by a regular suit within three years under Clause 6 Section I Act XIV of 1859.—Srichand Babu v. Mallick Chuhlín.—(9. W. Reporter, Civil Rulings, p. 564.) But if the settlement be made with him in the character of mortgagee, this will not render his possession hostile to that of the mortgagor or his representative.—Ramdial v. Shahbaz Khan.—(1. North West High Court Reports, p. 15.)

When the mortgagee by the terms of the contract is required to account to the mortgagor for the profits of the estate, he ought to keep regular and accurate accounts of all receipts and disbursements connected with the property; and if he fail to do so the Courts make it a rule to lean against him and resolve all doubtful points in favor of the mortgagor (Macpherson on Mortgages, p. 109, and 6. W. Reporter, Civil Rulings, p. 127,) but not to the extent of accepting all statements of the mortgagor against him as necessarily true. —(9. W. Reporter, Civil Rulings, p. 276.) “The account required from the mortgagee,” observed the Court in Golab
Chandra Datt v. Mohun Lall Sukal, "is one setting forth what he has realized—from what portions of the mortgaged property—in what terms or periods—with what loss and gain on the several assets—with what necessary deductions—and what remains then as the net profits which can be taken as actual realizations towards liquidating the sum due under the mortgage transaction. It is such an independent account as this, to be supported, and proved and vouched to such an extent as the mortgagor may think sufficient for his case, that the law seems to require."*—(5. W. Reporter, Civil Rulings, p. 271.) If the mortgagor refuses to produce his accounts he cannot prove deficient produce alibi.——(Norton's Topic of Jurisprudence, p. 480.) As the Usury Laws were never in force in the Punjab, it follows that where, as is frequently the case, it was agreed that the entire usufruct should be taken as interest, no accounts are requisite, as then the mortgagor takes the profit and loss of his bargain.

Where however, the mortgagor has to account for the profits, the Court, as a general rule, should give the mortgagor credit for every sum entered in the accounts rendered by the mortgagor as realized, and should not allow the latter to repudiate any such sum on the ground of its being an illegal cess or payment which could not have been enforced; but if such illegal payments be not admitted, the mortgagor should not be allowed to go into proof of them. If the mortgagor creates a middleman between the tenants and himself he must bear any consequent diminution in the gross receipts himself. He must answer for the rents appearing in the rent-roll, and not merely for his actual collections, unless he can shew good reason for not having realized the whole amount. Where a clause had been inserted in the contract to the effect that an allowance should be made to the mortgagor for losses it was held to apply only to losses beyond his control, and not to cover arrears which he wilfully or by negligence allowed to remain outstanding.—(Macpherson on Mortgages, pp. 253, 255.) See too, 2. W. Reporter, Civil Rulings, p. 150. In the case however, of property not having a rent-roll fixed by the Settlement Authorities, the rule of English law would probably be held to apply, that the mortgagor is not obliged to account according to the actual value of the estate, and is not bound by any proof that it is worth so much, unless it can be shewn that he might have made so much of it had it not been for his own wilful default. The general rule is that he is only accountable for what he receives, and is not bound to take any particular trouble to make the most of another man's property.—(Addison on Con-

* For a fuller and further exposition of the duty of the mortgagor in the matter of accounting, see Shah Mathan Lall v. Sri Krishna Singh.—(2. Bengal Law Reports, Privy Council Cases, p. 44.)
tracts, p. 260.) If the mortgagee in possession, instead of letting the land to ryots and realizing the rents in the usual way, cultivate it himself, he is not responsible "for the whole of the profits arising to him by farming the land, but only for such profits as he would have realized had he let it to a tenant, or as the mortgagor would have realized had he let it."—Raghunath Roy v. Baraik Giridhari Singh.—(7. W. Reporter, Civil Rulings, p. 244.) In ascertaining the sum due on the mortgage the proper mode is to ascertain the year's gross collections, from this sum to deduct the necessary payments on account of revenue, expense of collection, and to apply the balance to reduce either in whole or in part the interest, and if there be any sum over it is carried to reduce the principal.—(5. W. Reporter, Civil Rulings, p. 200.) See too Vol. 2. Civil Rulings, p. 289.

"Under the law as administered in this country," observed the Court in Jagendranath Mallick v. Raj Narayan Palai, "a mortgagee in possession is in the position of a trustee. The mortgagee must use the mortgaged premises as liable to become the property of the mortgagor, and must not do anything to diminish the security upon which the money was lent. In this case, the mortgaged property was a thatched house. To allow it to fall out of repair and to become uninhabitable would have been diminishing the value of the security on which the money was advanced, and preventing the mortgagor from paying off the debt from the usucfruct. It is the bounden duty of the mortgagee in possession to keep the premises in necessary repair, and he will be allowed to charge for the same with interest."—(9. W. Reporter, Civil Rulings, p. 488.) So in Story's Equity Jurisprudence, Section 1016, it is laid down that the mortgagee will be allowed compensation for all repairs necessary for the support of the property, but not for general improvements made without the acquiescence and consent of the mortgagor which enhance the value of the estate, especially if they be of such a nature as may cripple the right or power of redemption.

"The mortgagee has not a right to make it more expensive," remarked Lord Langdale in Landon v. Hooper (6. Beavan Rep. p. 246.) "for the mortgagor to redeem than may be required for the purpose of keeping the property in a good state of repair, and for protecting the title to the property." See too Addison on Contracts, p. 260. Similarly, in Amir Ullah v. Ram Dass, the Agra High Court ruled that though a mortgagee be not allowed without agreement to charge the mortgagor with all sums he may think fit to expend in the repair or the improvement of the property mortgaged, whether such expenditure be made by him voluntarily or in pursuance of some official order which he is not legally bound to comply with; yet, for necessary repairs he may charge the mortgagor, who will also be liable for any expen-
The mortgagee will also be allowed to charge, in the absence of any special agreement express or implied on the point, for all regular village cesses, which he, as a representative of the owner, has been compelled to disburse by the orders of Government, provided that such charges have been bonâ fide incurred. He is also entitled to reasonable costs of collection and management,* which the Agra Sudder Court fixed as a general rule at 5 per cent when the villages are settled or sub-let, and 10 per cent when they are not settled or sub-let. This per-centange should apparently be charged on the gross rental, and is considered to cover ordinary balances.—(Macpherson on Mortgages, pp. 255, 256.)

In a suit for redemption of a simple mortgage on the ground that the debt has been liquidated by the usufruct, the onus probandi does not lie on the mortgagor: that is to say, he is not bound to prove, independently of the accounts filed by the mortgagee † that the mortgage debt has been paid off. But if he fail eventually to prove that it has been satisfied, his suit will be dismissed with costs; and a conditional decree in his favor, allowing him to redeem on payment of the balance, ought not to be made.—Shah Kim-dus Lall v. Susla Kour.—(8. W. Reporter, Civil Rulings, p. 369.) As a general rule, the mortgagee may be called on by the mortgagor to account at any time, on the mortgagor's allegation that the whole sum due with interest has been received by him, and it has even been held that a special agreement that the mortgagee shall remain in possession until payment of the debt be made in one sum does not prevent the mortgage from being at an end, whenever the mortgagee has received both principal and interest.—(Macpherson on Mortgages, pp. 154, 155.) Thus in Dorappa v. Kandrikuri Malikarjunudu the Madras High Court held that, although parties may stipulate for the postponement of the payment of a mortgage debt, and of the right to redeem to a fixed future day; still as the debt is the principal matter, and the mortgage a collateral security for its payment merely, the intention, to prevent the mortgagee from redeeming whenever he is prepared to pay all that is due ought to appear very plainly.—(3. Madras High Court Reports.

* While English law also allows the mortgagee the necessary expenses attending the collection of rents, and the costs of a receiver, when a receiver is necessary, yet in French v. Baros it was held that a mortgagor cannot charge for his personal trouble, albeit there may be an express agreement that he shall be entitled to do so.—(Addison on Contracts, p. 260.)

† A fortiori, a mortgagee in possession suing for a balance of the debt as still due to him, is bound to prove that he has not realized the amount due under the terms of the mortgage from the usufruct.—(1. W. Reporter, p. 38.)
Whether however when the usufructuary mortgage takes the form of a lease for a term of years (sur-i-peshgi mortgage) the lessor and mortgagor can sue for possession and an account before the expiry of the term for which the lease was given seems doubtful.—(Murphee on Mortgages, pp. 155—158.) So the Bombay Court in Sakhardam Narasingha v. Vito Sakha Gonda ruled that by the principles both of English and Hindu law the right of the mortgagor to redeem does not, in the absence of any circumstances or language indicating a contrary intention arise any sooner than the right of the mortgagee to foreclose, and therefore the mortgagor cannot without the assent of the mortgagee redeem before the expiration of the period fixed for redemption.—(2. Reid's Bombay High Court Reports, p. 237.) Where a usufructuary mortgage had been granted by way of lease, two years being the term given for repayment, and it had been further stipulated that after the lapse of that time the mortgagee might hold on until his claim was satisfied; it was held that until the mortgage debt was paid, the mortgagee was entitled to possession, both before and after the expiry of the two years, even against a decree-holder.—(Macpherson on Mortgages, p. 119.)

If the mortgagee be wrongfully dispossessed by the mortgagor, and by suit obtain a decree for restoration to possession and mesne profits; the mesne profits so obtained were held by a Full Bench of the Calcutta Court in Wazerunnissa v. Bibi Suellun to be distinct from the usufruct, and the mortgagee need not account for it, since it was the mortgagor's own fault that he wrongfully turned the mortgagee out of possession, and the latter would be entitled to retain the damages, he recovered, solely on his own account. —(6. W. Reporter, Civil Rulings, p. 240.)

Where it appears that if there be a mortgage deed in existence it must be in the mortgagee's possession, and he has solemnly denied that there is such a document, the mortgagee may produce witnesses to speak to its contents, even if he have omitted the formality of calling on the defendant to produce, since such summons must be infructuous, because to comply with it would involve the defendant's own liability to a conviction for perjury.—Ajudhya Prasad v. Eshri Dial.—(10. W. Reporter, Civil Rulings, p. 219.)

If a decree for redemption be obtained but not executed, the mortgagee does not cease to be still a mortgagee, and therefore the mortgagor can bring a fresh suit for redemption, even if all right to execute the first decree have been lost by lapse of time.—Chaita v. Puram Sukh.—(2. North West High Court Reports, p. 256.)
2.—If the property shall not have been delivered to, or placed in, the possession of the mortgagee, but merely hypothecated as collateral security for the debt, the mortgagor may cancel the pledge by payment. But in the event of non-payment, the mortgagee may bring an action for recovery of the loan, and, having obtained a decree, may proceed against the property on which he has a lien.

Mr. Macpherson also describes a collateral usufructuary mortgage, or "simple mortgage usufructuary" as he styles it, in which though the property is only collaterally pledged, as in the case of the pure collateral mortgage, yet the mortgagee is permitted to have the usufruct of it, either simply by his being allowed to receive the rents or profits, or by his being given a lease for a limited period. In the case of a mortgage of this kind the mortgagor is personally liable as in a pure collateral mortgage.—(Macpherson on Mortgages, p. 14.)

As the possession of property without the means of shewing the right to such possession is of comparatively little value, and the mere holding of those means by another gives him a certain power over the land, and those to whom it belongs, a deposit of title deeds as security for a debt due puts the creditor in a position to prevent the effectual transfer of the estate without his debt being discharged. A deposit of this nature, known in English law as "an equitable mortgage," is treated as a valid collateral mortgage of the whole property to which the title deeds deposited refer, and is subject to the same rules as a regular mortgage.—(Macpherson on Mortgages, p. 32.) In Varden Seth Sam v. Lucknath Royji Lalla, where a Muhammadan created a lien on his estate in favor of the plaintiff, an Armenian, by contract and deposit of the title deeds, the Privy Council held that although English law was not of authoritative obligation on the Indian Mofussil Courts, yet that under the rule of justice, equity and good conscience, in the absence of any positive law forbidding effect to be given to the actual agreement of the parties to create such a lien, or rendering it imperfect by want of some necessary condition, it must be regarded as a valid lien, and binding on any subsequent purchaser from the pledgor, who cannot show that he purchased for value bona fide, and without notice of this charge, whether legal or equitable. "The law in India," observed their Lordships,
"has not enabled a purchaser of land to look only to the apparent title on the Collector's books, or the presumed title of the owner in possession."—(Sutherland's Privy Council Judgments, p. 483.)

The following observations on equitable mortgages are taken from Addison on Contracts, pp. 279—283: If a purchaser receive notice of the deposit of the title deeds before he have completed his purchase, the estate will be subjected in his hands to all the claims and charges which the depositary of the deeds may have acquired thereon. If, however, the subsequent purchaser or mortgagee have been deceived by false evidence of title, as by the production of counterfeit title deeds, and have been guilty of no laches in the course of his purchase, he will be entitled to hold the estate discharged of the lien: in such a case the equities of the parties being equal, the possession of the legal title must prevail. If too, the depositary part with the possession of the deeds, and they are then used, either with or without his priuity, as evidence of title to an intending purchaser, who consequently accepts a conveyance and pays his purchase-money, in ignorance of the deposit, the land will pass free from the charge. But the depositary will not from the mere circumstance of his having parted with the possession of the deeds, and without their having been made the instrument of fraud, lose his lien. In order, however, to constitute a charge of this description on the land there must be an actual deposit of the title deeds, an agreement merely to make the deposit being not sufficient. The deposit must be made by the person who has the ownership of, and power of disposition over, the property comprised in the deeds, in order that the estate may be charged, and then it is only charged to the extent of the depositor's own estate and interest therein. The depositary must have all the deeds that are essential to the establishment of the title, or he can found thereon no charge as against subsequent purchasers and mortgagees. The lien will extend to subsequent advances, if it appear to have been so intended by the parties. So where the deposit was accompanied by a written agreement securing a specific sum, it was held that the security might be extended to further advances by a subsequent oral contract. Such further liens founded on further advances, may be created in favour of third persons, but they ought to be evidenced by writing. In Pandurang Ballal Pandit v. Balkrisken Harbaji, the Privy Council held that it was not sufficient in order to enable a person to claim as equitable mortgagee, to shew that it was his hand which paid off the prior mortgage, but it must also be made out that it was his own money which was paid, and that he was to stand in the position of the original mortgagee.—(Sutherland's Privy Council Judgments, p. 88.)
Moveable property can be hypothecated.

Moveable property can be made the subject of hypothecation under Anglo Indian law, as for example, Court fees in deposit to the credit of the hypothecator, and the lien will not be void for indefiniteness the Court held, if it pledge the fees already due and those which the debtor would also receive.—Tilakdhar Lall v. Furlong.—(2. Bengal Law Reports, Civil Appeals, p. 230.)

The property hypothecated must be specific; hence future words such as “and whatsoever property I may hereafter acquire,” or merely general terms, such as “any other existing property” will not give any lien to the mortgagee, as against an intermediate bonâ fide purchaser. So too it has been decided that an agreement by a debtor to discharge a debt by instalments “and not to alienate any part of his property,” the property not being specified, “until the debt had been paid,” did not operate as a mortgage, or vitiate the title of a bonâ fide purchaser from the debtor, although it was doubtful whether after the debtor had broken his agreement the creditor was any longer bound by his promise to be paid by instalments, and might not at once demand payment in full.—(Macpherson on Mortgages pp. 41, 42.) See too 1. Punjab Record, Cases Nos. 17 and 20.

It is not necessary that a mortgage should be called a mortgage by name: therefore an agreement that “until the amount of the bond shall be paid, the debtor will not transfer certain property by sale, mortgage, or gift” will be held to be a collateral mortgage of the property mentioned. Similarly a money bond containing a stipulation that until the debt was paid, the defendant would not alienate his rights as zemindar in any other quarter was taken to be a bond in the nature of a collateral mortgage.—(Macpherson on Mortgages, p. 36, and 7. W. Reporter, Civil Rulings, p. 309.)

The mortgagor’s proprietary rights in land which he had previously mortgaged as a collateral security be disallowed at settlement, and a Malikanah allowance be assigned him in lieu thereof, the mortgagor’s lien will attach to the malikanah grant as representing the estate previously charged.—(Macpherson on Mortgages, p. 113.)
held, that although the plaintiff might perhaps be able to follow the property on which his lien was created, he had no lien on that which the defendant had bought.—


The mortgage is always regarded as a collateral security, except when the deed otherwise expressly provides; and therefore if it do not realize the amount due, the mortgagee may still pursue his remedy as an ordinary decree-holder against the mortgagor. On the other hand, because it is a collateral security, it expires on the satisfaction of the debt aliunde—Sublato principali tollitur accessorium.—(Norton's Topics, pp. 476, 477.)

Where a mortgage deed stipulated that if the money were not paid on a certain day the mortgagee was to be put into possession, and enjoy the property till the mortgagor should be able to pay off the debt, the Madras Court held that the condition was not of a compulsory nature binding the plaintiff to accept the land and to forego his right to recover the money, but that he might, if he pleased, sue to realize the debt.—Annaswami v. Narvanaiyan.—(1. Stokes' Madras Reports, p. 114.)

If the mortgagor be not heard of for six or seven years this will not warrant a person to whom he may have mortgaged his house in bringing a suit to enforce his lien against some one who may have taken possession of the mortgaged property; unless indeed he allege that the original mortgagor is dead, and that the defendant is in possession as his heir or representative.—(3. Punjab Record, Case No. 105.)

In the case of Ratn Chand v. Bhan Singh, the defendant having hypothecated certain property as security for a loan, and further covenanted in the mortgage deed to pay monthly interest on the debt, the Chief Court ruled that the plaintiff might sue for the interest or its arrears without suing for the principal debt, since the deed contained a separate agreement to pay the interest, and the contracts were not necessarily indivisible.—(1. Punjab Record, Civil Reference No. 16.)

There have been cases in which the Courts have held that, when the mortgagor had covenanted not to alienate the property hypothecated until he had discharged the debt, a subsequent conveyance of it by lease or otherwise being a violation of the express object of the stipulation was unlawful, and that the mortgagee was entitled to a distinct declaration of the invalidity of the subsequent conveyance without reference to its consequences on the property or its effect on the prior mortgage. "But," adds Macpherson,
"in many cases alienations contrary to express contract were more leniently, and perhaps more equitably dealt with, and considered only to be bad in so far as they interfered with the rights of those with whom the condition not to alienate was made." And—"The later decisions of the Calcutta Court distinctly lay it down that an express stipulation not to alienate property which is mortgaged until the debt with the interest and costs be paid off, does not, according to the true construction of the law, preclude the mortgagor from transferring his own proprietary right, or making a second mortgage, provided such transfer or mortgage be made subject to the first mortgage. An alienation contrary to express agreement cannot be pleaded of course by the alienor for the purpose of avoiding his own act."—(Macpherson on Mortgages, pp. 114—116.) And the Agra Court has recently ruled that a contract by a mortgagor not to alienate by sale or mortgage the pledged property cannot operate to annul a bonâ fide conveyance to a third person by the mortgagor for the purpose of paying off the original mortgage debt. At a subsequent point however the Court seem to narrow this position by recognizing a distinction as to whether the first mortgage was at the time redeemable or not. —Dukshoi Rai v. Hidayat Ullah.—(Full Bench Rulings, of the North West High Court, of August 4th. 1866.) In a Punjab case, Shankar Dass v. Prithu Dyal, after pointing out that the Agra Sadr Court has held that where there is an express stipulation in a mortgage deed not to alienate the property pledged, a subsequent conveyance of it by lease or otherwise involves a violation of its terms, by creating a lien which it was the express object of the stipulation to prevent; and that though the Calcutta Sadr Court in its later decisions has decided that such an express stipulation did not, according to the true construction of the law, preclude the mortgagor from transferring his own proprietary right or making a second mortgage, yet has attached to this ruling a proviso that such transfer or mortgage was made subject to the first mortgage, the Lahore Court proceeded to hold, on the authority of both the Sadr Courts, that a second mortgage, the parties to which both denied the existence of an alleged prior mortgage, would be invalid, if that first mortgage should be established.—(4. Punjab Record, Case No. 35.) But is not the doctrine of the Calcutta Court simply that as a matter of fact the second mortgagee takes "subject to the original mortgage" when made out, independently of the question whether the mortgagor himself admit the prior lien or its existence be established aliunde?

When a portion of the property has been alienated the mortgagor should first

When the mortgagor alienates a portion of the pledged property, the mortgagee is bound to satisfy his claims in the first place from the remainder of the property; and it is only when this proves insufficient to pay him in full that he
can proceed against the portion which had been transferred to the third party.—Mussumat Nawa Kunwar v. Abdul Rahim.—(Sutherland’s Civil Rulings, for July 1864, p. 374.) So if A have a mortgage upon two different estates for the same debt, and B have a mortgage upon only one of the estates for another debt, B has a right to throw A in the first instance for satisfaction upon the security which he, B, cannot touch, at least where it will not prejudice A’s rights or improperly control his remedies.—Bishounath Mookerjee v. Kisto Mohun Mookerjee.—(7. W. Reporter, Civil Rulings, p. 483.)

Where the mortgaged property has been sold by the mortgagor subsequently to the mortgage, and the purchaser is a party to the suit, the decree should reserve to such purchaser the right to save the property from sale by discharging the sum due to the mortgagee.—(Macpherson on Mortgages, p. 204.)

A mortgage made by way of security for money advanced remains a mortgage until the debt be satisfied, and the mortgagee creditor has the right to sue to obtain a decree and sell that which was held by him as security for his money without regard to the proceedings of any other subsequent mortgagee or purchaser.—Dhori Roy v. Buldeb Narayan Singh.—(Sutherland’s Civil Rulings for July 1864, p. 345.) And this is the case whatever be the nature of the mortgage; thus a purchaser under a sale in satisfaction of a collateral mortgage has a superior right to a mortgagee by conditional sale, when that sale took place subsequent to the collateral mortgage, but prior to the property being brought to sale under the decree.—(7. W. Reporter, Civil Rulings, p. 67.)

Where therefore the decree declares the mortgaged property liable for the mortgage debt, the purchaser buys the rights and interest of the judgment-debtor as they stood at the time of the hypothecation, and not as they stand at the time of sale, and consequently the auction purchaser is not bound by an incumbrance on the estate created subsequently to the mortgage.—Brojo Kishori Dassi v. Mahammad Salim.—(10. W. Reporter, Civil Rulings, p. 151.) See too p. 291 of the same Reports; Sutherland’s Civil Rulings, for July 1864, p. 359; and Macpherson on Mortgages, p. 113. But a mortgagor is not by creating a mortgage lien divested of, or restricted in, the management of the property, and so long as nothing takes place to impair the value or impede the operation of the mortgagee’s lien, the mortgagor in creating a temporary lease acts within his powers, and the purchaser has no legitimate cause of complaint.—Bani Prasad v. Rit Bhayan Singh.—(10. W. Reporter, Civil Rulings, p. 325.)
A party therefore suing to recover a debt secured by a collateral mortgage, and to have the pledged property sold in satisfaction thereof, need not include in his suit any claim to set aside alienations of a date subsequent to his own mortgage, as the liabilities of the land are not affected by after-transfers, nor is the validity of any such transfers in any way affected by the result of the mortgagee’s suit. So when A and B both obtained decrees on collateral mortgage deeds, pledging the same estate, and B attached and sold the lands in execution, it was held that A whose mortgage was anterior to B’s was not prejudiced by the sale, but was entitled to have the property resold in satisfaction of his decree free of all subsequent incumbrances, notwithstanding that he had not taken out process of attachment against the lands, or given any intimation of his mortgage at the time of B’s sale.—(Macpherson on Mortgages, p. 203.) See 2. W. Reporter, Miscellaneous Appeals, p. 21. Hence when land is sold subject to a prior lien, such previous incumbrance is not entitled to be paid out of the surplus sale proceeds, since it is not equitable that a buyer who purchased and paid for only the mortgagor’s remaining interest in the property should take it free of the first lien. The first mortgagee must therefore bring the property to sale afresh, though in the event of the sum realized being insufficient to pay off the debt due to him he can then proceed against the surplus assets of the other sale.—Mirza Fateh Ali v. Gregory.—(6. W. Reporter, Miscellaneous Rulings, p. 13.) But when the decree-holder who brings the property to sale has a priority of right over the other mortgagee, the balance, if any, of the sale proceeds will go in diminution of this mortgagee’s claim (Sutherland’s Civil Rulings, for June 1864, p. 298), provided that he can show at least that anything remains due to him by the mortgagor.—(1. W. Reporter, p. 270.) Where however the execution sale had been made without notice that the right title and interest of the execution debtor was that of a mortgagor, and there were no other unsatisfied decrees against him, the Madras Court held that the mortgagee might take the surplus of the sale proceeds after the decree-holder had been satisfied.—(4. Madras High Court Reports, p. 49.)

Conversely, a person buying either by private sale or in execution of decree property previously mortgaged to another under circumstances legally affecting the buyer with notice will only acquire the property subject to the prior incumbrances.*—Bulaki Lall v. Chowdhry Banshi Singh.—(7. W. Reporter, Civil Rulings, p. 309.)

* But notice of another party’s incumbrance, given at an execution sale, can only affect the purchaser’s title as such purchaser. Priority as between the party giving notice and the buyer, in respect of incumbrances already existing could not be affected by such notice.—Bharel Lall Bhogat v. Gopaleswar Lall Bhogat.—(3. Bengal Law Reports, Civil Appeals, p. 1.)
In Gopinath Singh v. Shiv Sahai Singh a Full Bench of the Calcutta Court held that "when a person, to whom property is pledged for a debt obtains a simple money decree against his debtor, he cannot execute that decree against the property pledged to the prejudice of a subsequent bona fide purchaser. He is simply in the position of an ordinary judgment-creditor in respect to his decree, and can only seize the rights and interests of his debtor. He may enforce his lien by separate action against the party in possession of the property pledged to him, but he is not entitled to execute the money decree against the property in the hands of the subsequent purchaser."—(1. W. Reporter, p. 315.) See 5. W. Reporter, Civil Rulings, p. 115; Vol. 6. Civil Rulings, p. 312; Vol. 9. Civil Rulings, p. 82; Vol. 10. Civil Rulings, p. 27; 2. Bengal Law Reports, Civil Appeals, p. 230.

In Radha Kumar Singh v. Lakshmi Chand Narovari the Calcutta Court held that, when the decree obtained by a mortgagee does not direct the sale of the property pledged, the decree-holder is not bound to go against the property pledged to him which happens to be still in the hands of the judgment-debtor, but may proceed against any property belonging to his debtor, but if he adopt this course, he will be deemed to have relinquished his lien on the mortgaged property.—(3. W. Reporter, Miscellaneous Appeals, p. 16.)

"It is not uncommon," observed the Court in Lakshman Sahai v. Gujray Jha, "to find persons mortgaging their property first to one party and then to another; and the second mortgagee takes the mortgage subject to the lien of the first. The first* is not bound to warn the second that he has a previous lien. It is the duty of the party seeking the loan and offering the property as security to give all information to the lender. It cannot be said if the first mortgagee stood by while the borrower was negotiating a loan with the second, and kept silence though he knew that the borrower had again pledged the property, that such silence could be construed into a waiving of his claim, or in any way affect his rights."—(4. W. Reporter, Civil Rulings, p. 45.) This is in accordance with the Civil Law, under which a creditor who knew that his debtor had alienated the land hypothecated for his debt was not supposed to waive his rights thereby over the thing alienated, because his claim follows the property, and cannot be taken from him without his express consent. "Non videtur autem consensisse creditor si sciente eo debitor rem vendi-

* But if the first mortgagee himself negotiate the second loan on the security of the same property and keep silence as to his own already existing lien, he will be deemed to have perpetrated a fraud, if he afterwards set it up to defeat the second mortgagee when proceeding against the property, and priority will therefore be awarded to this latter mortgagee.—Bhural Lal Bhagal v. Gopalchandra Lal Bhagal.—(3. Bengal Law Reports, Civil Appeals, p. 8.)
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derit cum ideo passus est venire quod scribat ubique pignus sibi durare."—(Phillimore's Principles and Maxims of Jurisprudence, p. 105.) It follows from this that the mortgagee's lien or right is in nowise affected by an auction sale of the mortgagor's right (1. North West High Court Reports, p. 111), and consequently that where a time has been fixed for the repayment of the loan, the mortgagee's right to call in his money is not accelerated because in the interim an auction sale of the debtor's property has taken place.—(Macpherson on Mortgages, p. 119.)

The purchaser at a sale in execution of a decree founded upon a bond which mortgaged the property sold has not a preferential title over a prior purchaser of the same property if the decree be a simple money decree, and do not declare the liability of the property under the mortgage.—Bromo Gopal Adhikari v. Bholanath Podda.—(10. W. Reporter, Civil Rulings, p. 309.) So in Knisummisa Bibi v. Hurmisisa Bibi the Court held that "if a mortgagee who holds a simple mortgage bond, wish to sell the property, so as to get the full benefit of his mortgage, he must get a distinct declaration from the Court of his rights over the property as mortgagee, as well as a decree for its sale. A mortgagee who sells the property without having obtained such a declaration cannot get the full benefit of his mortgage by setting up a plea of lien, if he have become the purchaser under his own decree, and have contrived to get himself put into actual possession."—(10. W. Reporter, Civil Rulings, p. 468.) A contradictory and apparently less sound decision will be found in Vol. 7. Civil Rulings, p. 232.)

For the effect of the Registration Law on these mortgages, see above, pp. 100, 105.

When the mortgagor wishes to redeem a pure collateral mortgage, he should tender the whole balance due for principal and interest, and demand that the mortgage deed be delivered up to him. This tender may be made at any time from the date on which the money advanced is in the agreement declared to be repayable up to the time of decree and sale. Since a deed of mortgage is of no effect after a legal tender has been made, and all its conditions and stipulations cease from that date, the mortgagee ought not to be allowed any interest after such tender has been made and rejected, and the costs of the redemption suit caused by the rejection of the offer should be thrown on him.—(Macpherson on Mortgages, pp. 161 and 131.)

3.—If the mortgage should have been a conditional sale, to be converted into an absolute sale if the debt should not be paid according to the
terms stipulated, the mortgagee may bring a suit for the foreclosure, but he is not allowed to treat the property as irrevocably transferred to him, until a reference has been made to the Court, in order that due notice may be given to the mortgagor, and to other parties who may have objections to offer, and the terms of grace, granted according to the rules of procedure, may be allowed.

In mortgages by conditional sale, the borrower not making himself personally liable for the repayment of the loan, covenants that in default of payment of the principal and interest on a certain date, the land pledged shall pass to the mortgagee. If the mortgagee by conditional sale enjoy the usufruct of the property, the position of the parties up to the time at which the loan is repayable is in all respects the same as in a pure simple mortgage, and from that period their position resembles what it would be in a pure conditional mortgage. A conditional mortgage may be effected by means of two documents, one being an absolute sale of the property, and the other an ikrarnama declaring the sale to be only conditional, and made in fact by way of mortgage. So too it has been decided that what are called "redeemable sales," where there is an absolute sale, and an engagement that if the vendor shall repay the purchase money and interest by a fixed day the purchaser will reconvey the estate, are in their nature identical with mortgages by conditional sale, and require therefore to be foreclosed in the same manner.—(Macpherson on Mortgages, pp. 13, 14, 35, 36.) "The Court of Chancery," writes Addison, "treats every contract as a pledge, which is, in principle and effect, a pledge, whatever the parties may choose to give to the transaction, and whatever may be the disguises resorted to for concealing the real nature of the contract."—(Addison on Contracts, p. 256.)

Although, as just stated, in mortgages of this class the mortgagor is not usually personally liable, yet if owing to his default the estate should be sold for arrears of revenue, which has the effect of entirely defeating the mortgagee's security, the mortgagee may recover from the mortgagor the balance due with interest.—(Macpherson on Mortgages, p. 103.)

Where there is a collateral mortgage and a subsequent mortgage by conditional sale, the mortgagee by conditional sale has a right to redeem the previous incumbrancer; and if owing to his neglecting to do so, the first mortgagee bring the estate to the hammer, it has been held that the second incumbrancer has no claim as against the purchaser at the sale, and cannot follow the estate in their hands.—(Macpher-
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son on Mortgages, p. 130.) See too 3. W. Reporter, Civil
Rulings, p. 110. But the Indian Courts appear to have held that a subsequent mortgagee was not entitled to redeem a prior mortgage by conditional sale. This doctrine is however attacked by Macpherson (Mortgages, p. 133), whose views are endorsed by the learned author of the Topics of Jurisprudence, p. 475, as being based on narrow views of the nature of the transaction, since the mortgage is merely a security for the debt, and collateral to it, and if therefore the debt be paid by one who has an equity over the land, the mortgagee has all he had a right to, or that it was ever intended he should have. And it may be doubted if the position here impugned would now be followed by the Courts. In Dukshore Rai v. Hidayat Ullah, a Full Bench of the Agra Court held that where the mortgagor of an estate effects a second loan on the security of his land, the transaction confers such an interest therein on the lender as to entitle him to occupy the mortgagor’s place for the purpose of redeeming the prior incumbrance; since to hold otherwise would in many cases lead to the infliction of grievous hardship on the mortgagor, for he may have been compelled to mortgage his estate when the rate of interest was high, and subsequently be able to obtain a lease on easier terms.—(Full Bench Rulings of the North West High Court, of August 4th, 1866.) And in equally general language the Calcutta Court ruled that if a subsequent mortgagee wished to preserve his lien on the estate he should have paid off the debt due on the prior mortgage.—(1. W. Reporter, p. 20.) See a like ruling of the Bombay High Court in 2. Reid’s Reports, p. 219. It may therefore I conceive be now taken as settled law that a mortgagee is entitled to pay off any prior mortgage on the same property, whatever be the character of the prior or subsequent mortgage. “A more remote creditor might oblige the senior creditor,” under the Civil Law, writes Phillimore, with his usual severity, “to give up his right on paying the principal and interest; but he could not worsen the condition of an intermediate creditor,* or violate the maxim qui prior est tempore potior est jure by a mean contrivance of chicane.”—(Phillimore’s Roman Private Law, p. 215.)

In mortgages by conditional sale after the period has elapsed at which the estate was to become the property of the mortgagee in default of payment by the mortgagor, the latter is still entitled, on the payment of principal and interest, to require that the mortgaged estate shall be re-conveyed to him. This right, or “equity of redemption” as it is termed, exists until a decree of foreclosure have been obtained, or

* As a recent decision of the Calcutta Court in 2. Bengal Law Reports, Appendix, p. 45, has laid it down that the English doctrine of “tacking,” to which Mr. Phillimore here alludes, has never been recognized or adopted in the decisions of the Courts of this country, the subject need not be pursued further in the present work.
until a reasonable time have elapsed from the date when the proprietary right accrued to the mortgagee. This time is in English practice twenty years; but under the provisions of Act XIV of 1859 in India is restricted to twelve.—(See 5. W. Reporter, Civil Rulings, p. 163.) This equity of redemption follows the same line of descent as the land itself would have done had it remained with the mortgagor. It may be itself granted, demised, or mortgaged, and a bona fide purchase by the mortgagee of it, if effected subsequently to the mortgage, will be recognized. But the Court will set aside as unduly oppressive to the debtor any agreement made contemporaneously with the mortgage, which attempts to deprive him of this right to redeem.—(Addison on Contracts, pp. 256, 257.) A third party claiming to have acquired the equity of redemption must prove how the right was acquired by him, as well as show that it is still in existence, unbarred by limitation, before he is entitled to a decree for redemption.—Fazlul Rahiman v. Ali Karim.—(5. W. Reporter, Civil Rulings, p. 163.) See too Vol. 2. Civil Rulings, p. 268; 2. Stokes’ Madras Reports, p. 421.

If however the mortgagor at the time appointed for redemption voluntarily carry into effect the stipulation for foreclosure, the Courts will not interfere to undo his act.—(Norton’s Topics, p. 478; and Macpherson on Mortgages, pp. 134 and 226.) And the sale may be made absolute by the mutual assent of the parties without proceedings being taken under the Regulation for foreclosure.—Gurdial v. Mussumat Hanskunwar.—(2. North West High Court Reports, p. 176.)

Where a transaction was in its inception a sale, but was converted into a mortgage temporarily for certain fraudulent purposes, and as between the parties to the fraud was subsequently voluntarily restored to its original bona fide state, there is no right of redemption, or necessity of foreclosure.—Kanhya Lall v. Mahadeo Singh.—(6. W. Reporter, Civil Rulings, p. 293.)

Where A mortgaged land to B, and the mortgage deed provided that B should be entitled to purchase the land if not redeemed in 1843; the fact of B accepting from A in 1845 a certain sum in part payment of the mortgage money was deemed to be a waiver of his right to purchase.—Venkatachali v. Anantachari.—(1. Stokes’ Madras Reports, p. 69.)

The law respecting the redemption and foreclosure of conditional mortgages is contained in certain Sections of Regulation I of 1798 and Regulation XVII of 1806, which are here given in extenso. The “rules of procedure” mentioned in the text refer to Section VI of the Second Part of the Punjab Procedure Code, but as the procedure therein prescribed is borrowed from the Regulations—(See Campbell’s Non Regulation Law, p. 32,) it seems better to quote the latter at once.
A Regulation to prevent fraud and injustice in conditional sales of land under deeds of Bye-bil-wufa or other deeds of the same nature.

I. It has been long a prevalent practice in the province of Behar to borrow money on the mortgage and conditional sale of landed property, under a stipulation that if the sum borrowed be not repaid (with or without interest) by a fixed period, the sale shall become absolute. This species of transfer has, in the above province, been usually denominated bye-bil-wufa; and the same transaction is common in Bengal, under an instrument termed kut-cubbaleh. It doubtless exists, also, under deeds of the above or similar denominations, in Orissa and Benares; and since the promulgation of the rules respecting interest contained in Regulation XV. 1793, it has become more prevalent; particularly in the province of Behar, wherein instances have occurred in which persons lending money on bye-bil-wufa, in order to render the sale absolute, and thereby possess themselves of the landed property of the borrower, have denied the tender, or evaded receiving payment of the money due to them within the period limited for the discharge of it. In such cases, the proof of the tender falls on the borrower; and if he fail in the proof of it for want of legal evidence, he is liable to lose his estate. It is necessary, therefore, for the security of the borrower, in such transactions, that he should have the means of establishing before a Court of Judicature his having tendered, or being ready to pay, within
the stipulated period, the amount due from him to the lender; who, if he mean to act fairly, will also derive a benefit from a clear rule being laid down, whereby it may be readily ascertained whether the borrower was willing to redeem his property by the payment of the money lent upon it within the period agreed upon between the parties, or whether, from his having omitted to perform the conditions of such redemption, the sale is become absolute, and the property included therein finally transferrcd to the lender. For the above purpose, and for the prevention of other abuses in the transactions referred to, the Governor-General in Council has passed the following rules, to be considered in force in the provinces of Bengal, Behar, Orissa, and Benares, from the date of the receipt of this Regulation by the several Courts respectively.

II. In all instances of the loan of money on bye-bil-wuffa, or on the conditional sale of landed property, as explained in the preamble to this Regulation, however denominated, the borrower, who may be desirous to redeem his land by the payment of the money lent upon it, with any interest due thereon, within the stipulated period, is at liberty, on or before the date stipulated, either to tender and pay to the lender the amount due to him, taking such precautions as he may think necessary to establish such tender and payment, if evaded or denied, or without any tender to the lender, to deposit the amount due to him, on or before the stipulated date, in the Dewanny Adawlut of the city or zillah in which the land may be situated; and the Judge...
receiving the same shall furnish the party with a written receipt for the amount, specifying on what date, and for what purpose such deposit may have been made. He shall also, at the same time, cause a written notice of such deposit to be delivered to the lender; and on the application of the latter, and his surrender of the conditional bill of sale, or showing satisfactory cause why it cannot be surrendered, shall pay him the amount deposited, and take his acknowledgment, to remain among the records of the Court. That there may be no doubt to what amount the deposit in question is to be made, it is required to be as follows. When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent, with the stipulated interest thereon, not exceeding the legal rate of twelve per cent. per annum; or if interest be payable and no rate has been stipulated, with interest at the established rate of twelve per cent.; but if the lender have held possession of the land, the principal sum borrowed only need be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. In either case, a deposit made as above required, shall be considered to preserve to the borrower his full right of redemption; and if the land be in the possession of the lender, shall entitle him to demand the immediate recovery thereof, subject to the adjustment of accounts specified in the following section. Provided, however, that if the borrower in any case shall deposit a less sum than above required, alleging that the sum so deposited is the total amount
due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed; and if the amount so deposited be admitted by the lender, or be established, on investigation, to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not however, in such cases, be entitled to the recovery of his lands, until it be admitted or established that he has paid the full amount due from him.

As the Usury laws have never been in force in this Province, the allusions to the legal rate of twelve per cent per annum in this Section are inapplicable: the corresponding sum being the stipulated interest when the rate has been fixed by the contracting parties, or the interest at the rate usual in such transactions in the locality, when no rate has been specially agreed on.

According to the decisions of the Agra Saddar Court in a redemption claim, whether brought before or after the time limited in the deed of mortgage, the mortgagor is not bound to deposit more than he deems to be still due, without any limit to the smallness of the amount, it may be nothing. Of course, he does this at his own risk, as if on investigation the mortgagee’s receipts together with the sum deposited are found not to cover the amount due, the suit must be dismissed, however small the deficiency may be, and a conditional decree ought not to be passed.—(Macpherson on Mortgages, pp. 169, 171, 172.)

The fact of the mortgagor by mistake or otherwise demanding more land then was comprised in the mortgage does not in any way warrant the mortgagee, after the deposit has been made, in keeping possession of land really comprised in it.—Mohun Lall v. Ali Afzul.—(Sutherland’s Civil Rulings, for May 1864, p. 219.)

IV. A teep for the repayment of money lent on the conditional sales referred to in this Regulation shall not be considered a legal tender, unless accepted as such by the lender; the proof of which
acceptance shall be the lender's giving up the bill of sale, or given a written acknowledgment that he has received back the money lent by him.

V. Nothing in this Regulation being intended to alter the terms of contract settled between the parties in the transactions to which it refers (illegal interest excepted), the several provisions in it are to be construed accordingly; and any question of right between the parties is to be regularly brought before and determined by the Courts of Civil Justice.

REGULATION No. XVII of 1806.

VII. In addition to the provisions made in the provinces of Bengal, Behar, Orissa, and Benares, by Regulation I. 1798, and in the ceded and conquered provinces by Regulation XXXIV. 1803, for the redemption of mortgages and conditional sales of land, under deeds of bye-bil-wuffa, kut-cubaleh, or any similar designation, it is hereby provided, that when the mortgagee may have obtained possession of the land, on execution of the mortgage-deed, or at any time before a final foreclosure of the mortgage, the payment or established tender of the sum lent under any such deed of mortgage and conditional sale, or of the balance due if any part of the principal amount shall have been discharged, or when the mortgagee may not have been put in possession of the mortgaged property, the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor and owner of
such property, or his legal representative, to the redemption of his property, before the mortgage is finally foreclosed in the manner provided for by the following section; that is to say, at any time within one year (Bengal, Fussily, or Willaity, according to the era current where the mortgage may take place) from and after the application of the mortgagor to the Zillah or City Court of Dewanny Adawlut for foreclosing the mortgage and rendering the sale conclusive, in conformity with Section VIII of this Regulation. Provided that such payment or tender be clearly proved to have been made to the lender and mortgagor or his legal representative; or that the amount due be deposited, within the time above specified, in the Dewanny Adawlut of the zillah or city in which the mortgaged property may be situated, as allowed for the security of the borrower and mortgagor, in such cases, by Section II. Regulation I. 1798, and Section XII. Regulation XXXIV. 1803, the whole of the provisions contained in which sections, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year, granted for an equitable right of redemption by this Regulation.

The mortgagor will preserve his equity of redemption by a payment or established tender in due time of the principal only, if the mortgagee have obtained a decree for entry on the property mortgaged against a third party who had disputed his right to entry, even if, through his own fault he may have neglected to execute his decree and enter upon the land.—Sakriman Dichut v. Dharm Nath Tewari.—( 3. Bengal Law Reports, Civil Appeals, p. 141.)

VIII. Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is

The mortgagee is only entitled to have the principal deposited when his being out of possession is the consequence of his own remissness.

How a mortgagee or holder of a deed of conditional sale is
to proceed, when desirous of foreclosing a mortgage or rendering a conditional sale conclusive.

To present a petition in person, or by an authorized vakeel, to the Judge of the Zillah Court.

How the Judge is to proceed on receiving such petition.

The forms prescribed in this eighth section for foreclosure must be very strictly complied with, as any failure in this respect will be fatal to the whole proceeding.——(Macpherson on Mortgages, p. 207.)

Although it is a fatal defect if the proceedings be not taken in the zillah in which the mortgaged property is; yet if the lands lie in different zillahs, a notice applicable to the whole lands but issued from one only of the Courts having jurisdiction is sufficient.—Rasmani Debi v. Pran Kishen Dass.—(Sutherland's Privy Council Judgments, p. 207.)

The Judge will act on the petition of one who professes to be the mortgagee of property within his jurisdiction, without making any inquiry as to the truth of its contents, or even of the existence of a mortgage at all. And the
production of the original deed of mortgage, prior to the issue of notice of foreclosure, is not necessary. But a Judge may, if he please, satisfy himself by requiring the production of the document that the applicant for foreclosure is the "receiver or holder of a deed of mortgage."—(Macpherson on Mortgages, p. 207.)

"I conceive the words 'the mortgagor's legal representative' in this Regulation," observed Phear J., in Kishen Ballabh Muhta v. Belasu Kumar, "designate that person who, either by law or by contract between the parties, succeeds the mortgagor, whether mediatelly or immediately, in the position which he holds relative to the mortgagee in respect of the property which is the subject of mortgage; and with this view I believe all the published decisions of this Court accord, as well as those of the late Sudder Court. Now, a succession of this kind may occur either by reason of the death of the mortgagor, or by assignment of the equity of redemption as a consequence of insolvency, execution of a decree of Court, or voluntary contract: only it should be observed that in the latter cases the assignment must not be inconsistent with the terms of the original mortgage, and must generally be assented to by the mortgagee, or, in other words, must be such as the mortgagee is bound to recognize. When the mortgagee desires to foreclose, there can never be the least practical difficulty in ascertaining whether the equity of redemption, as against the mortgagee, is in the hands of the original mortgagor himself, or in those of one of the substitutes for him just described; and in whomever of these it is found to be, to that one, in my judgment, the notice must be issued, in order to initiate the year of grace, whether it were by public or private sale or otherwise that the assignee in question obtained his right to the assignment.* But when once the time of grace is set running no subsequent assignment of his equity of redemption will stop it. If, therefore, in the case before us, the equity of redemption were duly and completely assigned in such a way as to bind the mortgagee before the notice of foreclosure, then the notice is not sufficient, which has not been issued to the assignee: but, if the assignment took place after the notice to the mortgagor, then no notice to the assignee is necessary, and the mortgagee ought to have the benefit of

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* A purchaser of a distinct and definite portion of the property is in the same position in regard to his right to a notice as a purchaser of the whole of the mortgaged estate would be.—With regard to the right of the assignee of the mortgagor to notice, the fact of the mortgagee assenting to the assignment is immaterial, except in cases in which an alienation of the mortgagor's interest has been prohibited by contract between him and the mortgagee.—Ganga Gobind Mandal v. Bani Ruchy Ghose.—(3. Bengal Law Reports, Civil Appeals, p. 172.)

Notice to the nominal mortgagor is sufficient, although there may be other persons in the background, who are the real mortgagors or sharers in the mortgage; and this to the knowledge of the applicant for foreclosure.—(Macpherson on Mortgages, p. 211.)

"After much argument it has been ruled that the procedure of the Courts does not require or admit of the issue of a notice of foreclosure to a second or other subsequent mortgagee: [most certainly this is the case where the first mortgagee had no cognizance of the second mortgage.—(4. W. Reporter, Civil Rulings, p. 7.)] And when a second, or later mortgagee intends to foreclose, it is sufficient if he give notice to the mortgagor or his legal representative, without serving or giving any intimation to a prior mortgagee, although such prior mortgagee be in possession. The soundness of these decisions may however, perhaps be questioned.”—(Macpherson on Mortgages, p. 213.)

Personal service of the notice on the mortgagor is not absolutely necessary, if due efforts have been made to serve it on him, and have proved ineffectual; and therefore "if the mortgagor or his representatives cannot be found and he is really bona fide absent, and ignorant of the issue of the notice, foreclosure can be completed in his absence, and without his being in the least aware of the proceedings which are being taken against him, if the mortgagee have done all that could be done to effect service.”—(Macpherson on Mortgages, pp. 215—219.) This doctrine will though perhaps require modification since the recent decision in Mahesh Chandra Sen v. Tarini, below. In Mussumut Kunjoj Kibbhaa v. Shiv Parsan Singh it was held also that the affixing the notice to the house of the mortgagor would be sufficient. "We may observe," remarked the Court in Yusuf Ali Khan v. Mussumut Azamunnissa, "that by this Section the notification is not merely a preliminary proceeding leading up to a judgment of foreclosure to be subsequently pronounced in Court. It not only fixes the date from which the period during which the mortgagor is to retain the right to redeem is to be computed, but it is of itself the operative act in the foreclosure proceeding. We think, therefore, that the service of the notice must be evidenced by the clearest proof, and must in all cases be, if not personal, at least such as to leave no doubt on the mind of the Court that the notice itself must have reached the hands, or come to the knowledge of, the mortgagor.”—(Sutherland’s Civil Rulings, for February 1864, p. 49.)
If after notice of foreclosure has been issued, the so-called mortgagor bring a suit to obtain a declaration that the mortgage is not genuine, the onus of proving that the transaction is valid and binding rather rests on the opposite party, since the plaintiff, after notice of foreclosure, was driven to act as he did, and can scarcely be said to have voluntarily undertaken the burden of proving the fabrication of the mortgage deed.—Gajadhara Mowar v. Zindah Mowar.—(6. W. Reporter, Civil Rulings, p. 69.)

In a recent case, Mahesh Chandra Sen v. Tarini, a Full Bench of the Calcutta Court over-ruled the previous practice of reckoning the year of grace from the date of the issue of the notification, and held that it ought to be reckoned from the date of the service of the notice. In the case before them the Court held it unnecessary to determine what would be the case if the mortgagor should keep out of the way to avoid service.—(1. Bengal Law Reports, Full Bench Rulings, p. 14.) The remarks of Peacock, C. J., in referring the question leave I think no doubt as to the soundness of this conclusion. The position therefore laid down in Macpherson on Mortgages, p. 210, and in 3. North West High Court Reports, p. 301, will probably be no longer considered to the law, or the modification of that position in 9. W. Reporter, Civil Rulings, p. 116. See too Vol. 3. Civil Rulings, p. 230.

If the last day of the year of grace, which is reckoned from, but exclusive of the day of issue [rather, service] of the notice happen to be a Sunday or other holiday, a deposit on the first ensuing business day will be sufficient.—(Macpherson on Mortgages, pp. 210, 222.) A more correct view seems however laid down in Kismola Kant Myti v. Srimati Narayani Dassi, where the Court held that if the deposit were made in Court it was necessary that it should be made strictly within the year, the mortgagor not being entitled to any authorized holidays which may occur when the year of grace expires.—(9. W. Reporter, Civil Rulings, p. 583.) There seems no doubt but that the principles laid down with regard to the filing plaints where limitation runs out during a regular or unauthorized holiday apply to this case.—(See Tremlett's Limitation Law, pp. 2, 3.)

The Judge has no discretion to extend the time allowed to the mortgagor under this Section, and therefore any order he may pass allowing further grace is an absolute nullity.—Muhammad Ghazi v. Abdul Muhammad Amiruddin.—(5. W. Reporter, Miscellaneous Appeals, p. 91.)

If the mortgagee through the Court grant an extension of the year of grace this does not necessitate proceedings being taken de novo or the issue of any fresh notice of fore-
If during the year the mortgagor come forward and make a deposit, he may of course deduct anything he considers due to him from the mortgagee; but he should be very sure of his ground before doing so, for if the sum tendered or deposited fall short, though it be only to the extent of one rupee, of the amount due, the mortgagor's right is, on the expiry of the year, of grace, wholly gone.—(Macpherson on Mortgages, pp. 221, 222.)

If the debt due to the mortgagee be paid by the Judge's order into the Collector's Treasury before the expiration of the year of grace, it is still held to be a deposit in Court entitling the borrower to redeem.—Abdul Haq v. Mussumat Myah.—(Sutherland's Civil Rulings, for April 1864, p. 184.)

When the deposit once made, the mortgagor's equity of redemption is saved, quite irrespective of whether the mortgagee have received notice of the deposit or not. Of course the mortgagor will not get back his mortgage deed until the mortgagee has taken the money out of Court; and it may be that if his delay in doing this be due to the negligence of the mortgagor in not doing his best towards ensuring prompt notice of the deposit being given to the mortgagee, the latter may be entitled, on the equity of the Regulation, to hold the deed against the accruing interest.—Hethan Singh v. Narku Singh.—(3. W. Reporter, Civil Rulings, p. 184.)
The mortgagee should only take the sum deposited if it cover the whole of his demand, as he cannot take it out in part payment, and continue his suit for foreclosure, or for payment of what remains due.—(Macpherson on Mortgages, p. 228.)

A mortgagee who has once filed a petition to be allowed to take away the mortgage money deposited by the mortgagee cannot afterwards turn round and sue for foreclosure on the ground that the deposit had been made after the expiry of the year of grace, and that he had applied for the money under wrong information from his agent.—Khondkar Nawaish Hassain v. Wasulnissa Bibi.—(6 W. Reporter, Civil Rulings, p. 249.)

"Under Regulation XVII of 1806 the Zillah Judge is judicially required to see that it is proved before him that the notice has been duly served, and to record a proceeding certifying that all that Regulation XVII of 1806 requires has been duly carried out, and also any elucidating facts necessary to be recorded as occurring within the year of grace."—Mir Abbas Ali v. Nand Kumar Ghose.—(7. W. Reporter, Civil Rulings, p. 123.)

A mortgagee may foreclose at any time.—(Norton's Topics, p. 478.)

Ever since 1813, it has been settled law, that the functions of the Judge under Regulation XVII of 1806, Section 8, are purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he be out of possession, or to obtain a declaration of his absolute title if he be in possession. In that suit the mortgagor may contest on any sufficient grounds the validity of the conditional sale or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may, also, allege and prove if he can, that nothing is due, or that the deposit (if any) which he has made is sufficient to cover what is due; but the issue, in so far as the right of redemption is concerned, will be whether anything at the end of the year of grace remained due to the mortgagee, and if so whether the necessary deposit had been then made. If that be found against the mortgagee the right of redemption is gone."—Forbes v. Amirunnissa Begum.—(Sutherland's Privy Council Judgments, p. 621.) See 10. W. Reporter, Civil Rulings, p. 478. for some remarks on the foregoing passage by Phear J. When such a suit is brought, even if it be tried ex parte, or if the defendant be present and omit to plead that there has been any irregularity, the plaintiff must establish that he has strictly complied
with all the forms laid down in the Regulation; and also that on the merits of his case he is entitled to the relief he asks for.—(Macpherson on Mortgages, p. 230.)

A bonâ fide mortgagee without notice who has foreclosed is not affected by any arrangement made between his mortgagor and another party, that the property should only be sold to this latter, but the mortgage must stand.—Ram Dulab Dry v. Mohanund Dall.—(2. W. Reporter, Civil Rulings, p. 64.)

Where property is held benami by B for the true owner A, and mortgaged by conditional sale by the nominal holder B in whose hands all the indicia of ownership had been placed, it has been held that foreclosure against B will be binding on A, and parties claiming through him, unless the true owner can show that the alienation was made without his acquiescence and that the purchaser took with knowledge of that fact.—Bhagwan Dass v. Upooch Singh.—(10. W. Reporter, Civil Rulings, p. 185.)

If the mortgagor omit to plead in the foreclosure proceedings that the whole of the consideration money had not been paid him, it will be too late for him to raise the question for the first time in answer to the subsequent suit for possession.—Afzul Khan v. Chytn Roy.—(Sutherland’s Civil Rulings, for May 1864, p. 206.)

Since the interest of the mortgagor ceases on the expiry of the year of grace, an auction purchaser of his rights after that date takes nothing as against the mortgagee who has foreclosed, and who will therefore be entitled to oust the auction purchaser, if he have obtained possession.—Madhub Anund Moitro v. Ganesh Prasad.—(1. W. Reporter, p. 92.)

But in the case of joint families the mortgagee is only entitled after foreclosure to so much of the property as belongs to the members with whom he has dealt.—Nilmami Bhuya v. Rajah Gunga Narayan Shahur Roy.—(1. W. Reporter, p. 334.) And generally, foreclosure proceedings give no title against any one not a party to the suit.—(1. W. Reporter, p. 175.) But where a large body, co-sharers in an estate, executed a conditional mortgage of it, in order to raise money to save the property from being sold by Government, which mortgage was for many years recognized by the whole body of sharers, it was held that the mortgagee might foreclose against the whole body of proprietors, although it appeared that four or five sharers were not in any wise parties to the original deed of mortgage.—(Macpherson on Mortgages, p. 200.)

One of several co-mortgagors cannot appeal against a foreclosure suit if he have parted with the equity of redemption before the institution of the suit.—Kottale Uppi v. Kaliyat Paneli Kunni Kitti.—(1. Stokes’ Madras Reports, p. 7.)
4.—The statute of limitations will not apply to mortgages, that is, the right of redemption or foreclosure, on the part of the original parties to the mortgage, their heirs or assigns, will not be barred by lapse of time.

The present limitation in suits by the mortgagor to recover the mortgaged property sixty years under Clause 15, Section 1, Act XIV of 1859. See Tremlett’s Law of Limitation, pp. 43, 45, 47, 53 and 54.

In calculating the date from which limitation begins to run, care must be taken not to confound the time at which the mortgage debt becomes recoverable with the time at which some collateral debt included in the deed becomes due. Thus where the mortgagor was to remain in possession at a monthly rent, and, in default of payment, the mortgagee was to take possession, the mortgagor having failed in his first and all other payments, it was held that the limitation as to the mortgage debt did not commence on those defaults. But when the mortgage debt is made repayable by instalments, on default of payment of any one of which, the whole becomes payable and the mortgagee may foreclose, limitation as regards a claim for possession runs from the date of the first default, and a suit for foreclosure must be brought within twelve years from that date. Each separate instalment is however recoverable within the proper period of limitation from the date on which it fell due. —(Macpherson on Mortgages, p. 180.)

The following remarks relate to all kinds of mortgages indiscriminately.

On the rights and duties of Mortgagors.

It is the duty of the mortgagor to take all legal means to protect his rights in the property mortgaged by him; and the mortgagee will be entitled to recover from him damages for any loss he may sustain through his neglect of this duty.—(p. 372.) And if he remain in possession of the mortgaged property, he ought to use it as liable to become the property of the mortgagee, or to be sold for his benefit and must not do anything which tends to injure or diminish the security on the strength of which he has received the money of his creditor.

The mortgagor may either transfer absolutely or mortgage his remaining interest in the lands, which he has already mortgaged, without first redeeming them. The
A mortgagor is entitled to retain possession till the whole debt is paid off.

Except the deed shows that the interests of the mortgagors are distinct.

In Mouli Raziuddin v. Jhubb Singh the Calcutta Court held that "if the plaintiff wished to gain possession of his share of the property mortgaged by him and others for security of a common debt, he was bound to show distinctly that the whole of that debt had been paid off; for a mortgagor is entitled to hold possession till every piece of the debt secured by the mortgage has been fully paid and satisfied, and no person representing the original mortgagor and claiming any fractional portion in the mortgaged property can sue to redeem his separate share, without proof of the satisfaction of the entire debt." — (Sutherland’s Civil Rulings, for February 1864, p. 75.) And this principle will apply equally, although a portion of the mortgaged property may have been sold by the District Officer for arrears of revenue. — (Civil Rulings, for May 1864, p. 217.) While even if the mortgagors have agreed to relinquish any portion of his mortgage, either on receiving a proportionate sum of what is due to him or otherwise, he cannot be compelled against his will to allow the remainder to be redeemed in portions. — (Sutherland’s Civil Rulings, for June 1864, p. 260.) This rule does not apply however where there is distinct notice on the face of the mortgage deed of the separate shares of the mortgagors. — Ram Kristo Munshi v. Amirunnissa Bibi. — (7. W. Reporter, Civil Rulings, p. 314.) See too Macpherson on Mortgages, pp. 135, 136; and Vol. 6. W. Reporter, Civil Rulings, p. 240, where a Full Bench of the Calcutta Court ruled that where two persons who together represented the original mortgagor each sued separately, but at the same time and in the same Court, to redeem the mortgage, the plaintiffs depositing the respective sums due to make up the full redemption money, the Court was entitled, as the whole mortgage money had in fact been brought into Court, to hear the two suits together, and to give each plaintiff the same relief which he would have been entitled to in a joint suit; but as neither plaintiff was entitled to redeem his portion of the estate upon payment of his proportion of the mortgage money, neither should be allowed his costs of suit, inasmuch as each of them claimed to redeem on payment of his portion, and on this ground, had his suit alone been filed, it must have failed. A contrary rule appears to be laid down in Clause 12 Section XVII of
the Punjab Civil Code, which however in the broad way in which it is there expressed seems quite indefensible on sound principles of legal reasoning.

One of several mortgagors may redeem by paying off the whole debt on the mortgage, and on his doing so the mortgagor must take the money and release the property, no matter what the share of the plaintiff in the property may be; or if one of several joint mortgagors can show that the whole debt has been liquidated, the entire mortgaged property must be given up, though all the joint mortgagors have not joined in the redemption suit.—Ali Raza v. Tara Sundari.—(2. W. Reporter, Civil Rulings, p. 150.) See too Vol. 7, Civil Rulings, p. 314. In Hardeo v. Ganeshi Lal the Agra Court ruled that any one of several co-mortgagors is entitled, if the mortgage debt have been discharged, to be put in possession of his own share of the estate, even if the other mortgagors refuse to come forward.—(1. North West High Court Reports, p. 36.) See also Macpherson on Mortgages, p. 137, where it is added that the redeeming co-mortgagor has a lien on the property redeemed against the other joint mortgagors who had not come forward, to the extent of their shares in the debt and of the expenses incurred in redeeming.

But when one co-mortgagor alone sues the mortgagee to recover his alleged share of excess profits, the other owners of the estate should be made co-plaintiffs under Section 73 Act VIII of 1859.—Chattar Dharti Singh v. Mir Khidmat Ali.—(2. W. Reporter, Civil Rulings, p. 255.)

A mortgagor wishing to redeem, or to prevent a foreclosure, should in general tender or deposit cash, and the lender is not bound to accept a bill or bond; but if he do so accept, he cannot afterwards repudiate his act. As a strict compliance with the terms of his agreement is all that is required of the mortgagor, a tender or deposit, not made in cash, is good if it were the intention of the parties, at the time of contracting, that such a payment or tender should be sufficient. So if it be covenanted that the mortgagor should be entitled to redeem on repaying the principal, a tender of the principal alone is sufficient, and any claim the mortgagee may have for interest, or for other matters arising out of the mortgage transaction must be enforced by him in a separate suit against the mortgagor. After a proper tender has been made, all the rights of the mortgagee are at an end, and he must answer to the mortgagor for any loss caused to the latter by his non-relinquishment of the pledge. —(Macpherson on Mortgages, pp. 148, 149.)

The party seeking to redeem has in general to pay the costs of the suit; but when the mortgage-debt, interest
and costs, have been tendered prior to the filing of the bill, and the mortgagee has put forward unjust and unfounded claims, and has refused to reconvey except on payment of money which he had no right to demand, the Court has thrown the burden of the costs upon him.—(Addison on Contracts, p. 261.) So in Dinonath Budobyal v. Wamacharn Roy the Calcutta Court remarked—"The plaintiff had full right to sue for redemption, and whether he had or had not tendered the money to the mortgagee before he sued are matters only affecting the right of the plaintiff to recover his costs. If the plaintiff succeed in establishing that he offered the money to the mortgagee out of Court, he is entitled to recover the property. If he had asked for this he might have been also entitled to recover, from the time of the offer, the proceeds in excess of the interest of 12 per cent, and costs of collection. In this case the plaintiff will be entitled to recover his costs. If he fail to establish the previous offer, he will still be entitled to obtain a decree for possession, and the decree may be executed by him on his depositing the money due within a certain time to be named in the decree, but he will not be entitled to recover the costs.—(8. W. Reporter, Civil Rulings, p. 128.) This however does not apply to mortgages by conditional sale apparently, see above, p. 403.

For the inadmissibility of oral evidence to prove that an instrument of out and out sale was intended to operate merely as a mortgage, see above in Chapter II, p. 88. And where a bonâ fide sale is accompanied with a power to repurchase, this will not make the transaction a mortgage, if such do not appear to have been the intention of the parties. The best general test of such intention is the existence or non-existence of a power in the original purchaser to recover the sum named as the price of such repurchase: if there be no such power there is no mortgage.—Edr's. note to Venkata Reddi v. Parvati Ammal.—(1. Stokes' Madras Reports, p. 465.)

In Mohar Singh v. Buldeo, it appeared that the owner of a house mortgaged it about forty years ago, to one Sukh Pal, who allowed the defendant to occupy a portion of the premises. When such occupation had lasted eleven years, the owner sold the house to the plaintiffs, and with a portion of the purchase money paid off Sukh Pal's mortgage, whereupon the plaintiffs brought an action to eject the defendant, and to recover the possession of the whole house. The Judicial Commissioner held on appeal, that as the mortgage had been paid off, the tenure of the mortgagee had expired, and with it, that of the defendant.—(1. Punjab Record, Case No. 18.)
See Clause 8 Section XVII of the Punjab Civil Code for the restrictions on the powers of partners in dealing separately with landed estate; and regarding mortgages of waqf estate, see Clause 6 Section XXII.

**On the rights and duties of Mortgagees.**

It is for the mortgagee to see that the mortgage deed be carefully and accurately drawn up, since when a deed is so loosely worded as to admit of more than one interpretation the Courts will always construe it in the sense most favorable to the mortgagor. So in a case where the mortgagee had not the usufruct of the property; and there was no stipulation about interest in the deed, the Court refused to allow any, on account of this silence, from the date of the deed up to the time when the money lent became repayable. — *(Macpherson on Mortgages, pp. 39 and 34.)*

For the amount of care and enquiry required from an intending mortgagee in dealing with a guardian as laid down in the famous case of *Hanuman Prasad Pandi*, see above at p. 232. For the analogous case of dealing with a Hindu widow regarding her late husband's estate, see p. 138. For that of dealings with a Hindu father with united sons where Mitakshara law prevails, see pp. 254—257: or with a co-parcener generally under that law, p. 280.

If the mortgagee make further advances to his debtor, it is only when it is expressly so agreed that these become additional charges on the mortgaged property. If the mortgagee advance various sums on the security of an estate, and ultimately take a fresh mortgage deed for the consolidated amount, the priority of his several liens will be computed from the dates at which the loans were made, and not from that of the consolidating deed:— *(Macpherson on Mortgages, pp. 63, 67.)* See too *Addison on Contracts*, p. 261.

In *Ganput Bajashet v. Khandu Chaugshet* the Bombay Court held that an unregistered mortgage unaccompanied with possession is not valid against a purchaser with possession. — *(4. Reid's Bombay High Court Reports, Civil Appeals, p. 69.)* See also *Sutherland's Civil Rulings, for May 1864, p. 225; 4. W. Reporter, Civil Rulings, p. 67.* In *Maheshar Baksh Singh Bahadar v. Bhikka* however, a majority of a Full Bench of the Calcutta Court held that a *bona fide* purchaser for value without notice is not entitled to priority over an unregistered mortgage executed anterior to the date of the sale, since by the Registration Law then in force in Bengal (and on this point the rule was the same in the Punjab), the mortgagee was not bound to register in order to retain priority over subsequent purchasers for value, and therefore there was no
A fraudulent mortgage is void against the mortgagor's creditors.

A prior mortgage is good against the official assignee.

A mortgage may be in abeyance.

A mortgagee may assign his rights, but he cannot bring the property to sale without the intervention of the Courts.

A prior mortgage when proved to have been made bonâ fide will stand good against a purchaser of the same property from the official assignee of the mortgagor, who had subsequently become bankrupt.—Nadirunnissa Bibi v. Tarachand Banerjee.—(1. W. Reporter, p. 137.)

A mortgage may be in abeyance for a time, without the interest of the mortgagee being ultimately affected, as when, for instance, in a usufructuary mortgage, the Collector comes in and farms the land for some cause not connected with the fault or mismanagement of the mortgagee.—(Macpherson on Mortgages, pp. 125, 126.)

A mortgage may transfer his rights and interests as mortgagee without reference to the mortgagor, but such transfer must be without prejudice to the rights of his debtor.—(Macpherson on Mortgages, p. 111.) The Calcutta Sadder Court has held that all conditions are null and void which would enable the mortgagee, on default made by the mortgagor, to sell the mortgaged property and repay himself, without applying to the Court or acting under its directions, considering that such a power was at variance with the spirit of the Regulations. In England such stipulations are constantly acted upon, and found in practice to be very useful, and the means of avoiding much expense and delay.—(Macpherson on Mortgages, pp. 42, 46 and 111.)

See also Macpherson on Contracts, p. 41, for further remarks on the same subject.
A mortgagee is not bound to receive payment of the sum due to him and to relinquish his lien on the land, without requiring proof that the person offering to redeem has a complete and legal right to do so.—(Macpherson on Mortgages, p. 128.)

A mortgagee by giving notice at a sale of his debtor’s property that he has a mortgage on it, is not bound in consequence to proceed against that particular estate alone if other property be also charged with his lien.—Raj Kumar Singh v. Birj Mohun Thakur.—(2. W. Reporter, Miscellaneous Appeals, p. 17.)

It has been ruled that when land is mortgaged to two persons jointly in security of a sum advanced by them in equal proportions, an action by one for his share of the loan will lie, although the co-mortgagee be not made a party to the suit.—(Macpherson on Mortgages, p. 200.) So too when it clearly appears on the face of the deed that the mortgagors have each separate and distinct shares in the mortgage, they have no claim on the mortgagee beyond the interests which they have themselves recorded: hence each mortgagor must redeem his own share, and there can be no success in a suit to redeem the whole property unless all the parties to the contract join in it.—(p. 139.)

Where one of two heirs of a deceased mortgagee brought a person claiming a right to redeem must prove his title to do so.

A mortgagee by notifying his lien does not bind himself to proceed solely against that particular property.

Separate mortgage advances must be recovered separately.

The mortgaged property is pledged for the whole debt.

A mortgage cannot be foreclosed in part.

The lessee of the mortgagee must account to him after redemption.

A creditor may pursue all his remedies at the same time.

"Where a debt is secured,” observes Addison, “by mortgage, covenant, and bond, the mortgagor may pursue all his remedies at the same time. If he obtain full payment on the bond or covenant, the mortgagor becomes entitled to the estate, but if he obtain part payment only, he may go on with a claim for foreclosure, and foreclose for
A decree against the person in the Small Cause Court does not prevent the mortgagee subsequently proceeding against the estate.

The mortgagee may purchase the mortgaged property when brought to sale.

References on the subject of mortgage.

If a creditor to whom real property is hypothecated as security for his debt pursue his remedy against the person of his debtor by suing in the Small Cause Court, he does not thereby lose his remedy against the thing hypothecated. The obligation of the debtor created a two-fold cause of action, and a two-fold remedy; one against the person and the other against the thing, which may be pursued concurrently or either separately.—Munni Reddi v. Venkata Reddi.—(3. Madras High Court Reports, p. 241.)

There does not seem to be any objection, writes Macpherson, to a mortgagee becoming himself the purchaser of the land, for the sale of which he has obtained an order, so long as no case of fraud or collusion is made out against him. In England, however, he can only become a purchaser by special leave of the Court.

Besides works expressly treating of mortgages, the reader may be referred to Norton's Topics of Jurisprudence, pp. 463 to 480, especially to an extract at p. 468 from the judgment in Cholmondeley v. Clinton, on the nature of the relation of the mortgagor and mortgagee; to Addison on Contracts, Ch. VIII; to Keech v. Hall, and Moss v. Gulliver and another in Smith's Leading Cases, Vol. I. It should, however, be borne in mind in consulting works of English law that the mortgage prevailing in England differs from those which are commonly met with in the Punjab. Note at p. 255 of Broom's Commentaries on the Common Law, 3rd edn., gives a lucid description of the usual English mortgage. See also Sandar's Institutes of Justinian, p. 215, and again L. III. Tit. XIV.
CHAPTER XV.

PUNJAB CIVIL CODE.

SECTION XV.

Agency.

1.—Agency may be general, or special.—In general agencies, the principal cannot give private instructions to the agent contrary to any public authority which he may have given to him, otherwise third parties would be defrauded. For instance, if an agent be publicly notified to have a general authority to sell certain kinds of effects with warrant, but have private instructions, in a particular case, not to warrant, and if in violation of those private instructions he do warrant, the principal is bound by that warranty. So again, if an agent be ostensibly deputed, without any special limitation, to trade in a certain line, and have private instructions limiting his transactions, then if he transgress the limits, still the principal will be responsible to the parties with whom the agent may have dealt.

"An agent may be tied down by very strict directions as between himself and the principal, whom he may notwithstanding have power to bind by contracts unauthorized by, and even in defiance of them. Cases of this sort occur, when a general agent, as he is called, exceeds his instructions. A general agent is a person whom a man puts in his place to transact all his business of a particular kind: thus, a man usually retains a factor to buy and sell all goods, and a broker to negotiate all contracts of a certain description, an attorney to transact all his legal business, a master to perform all things relating to the usual employment of his ship, and so in other instances. The authority of such an agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order.
or direction not known to the party dealing with him. But the rule is directly the reverse concerning a particular agent, that is, an agent employed specially in one single transaction; for it is the duty of the party dealing with such an one, to ascertain the extent of his authority: and if he do not he must abide the consequences."—(Smith's Mercantile Law, p. 186.)

In Ram Baksh Lall v. Kishori Mohan Shaha, it was laid down that the extent and nature of the powers vested in an agent are not so much matter of law as matter of fact, to be decided in each case in which a question of agency arises. Even if the agent have no written power of attorney under which he carries on his principal's business, yet if he be proved to have acted ordinarily for the principal in buying and selling other articles of merchandize, the fact of his not having been shewn to have previously purchased one particular kind of article will not necessarily operate against the seller's case that he purchased on account of his principal. If, however, the purchase of this particular article be the first transaction in the buying of merchandize entered into by the alleged agent, then, in the absence of proof that the principal actually received and paid for the article, it may be difficult to establish that he so acted that his principal should be bound.—(3. Bengal Law Reports, Civil Appeals, p. 273.)

"Servants entering into contracts on behalf of their masters in the usual course of their employment bind the latter by their contracts, although in the particular instance they may have had no authority to do the act in question. If a man send his servant with ready money to buy goods, and the servant buy on credit, the master is not chargeable. But if the servant usually buy for the master upon tick, and he buy some things without the master's order, yet if the master were trusted by the trader he is liable. "If goods," observes Lord Ellenborough, "be taken up by the master, and the money given afterwards to the servant to pay, I am inclined to think the master liable, if the servant have not paid over the money, for he has given the servant authority to take up goods upon credit. It is therefore, material to see when the money was given. If the servant were always in cash before-hand to pay for the goods, the master is not liable, as he never authorized him to pledge his credit; but if the servant were not so in cash, the master gave him a right to take up the goods on credit, and will be liable if the servant have not paid the plaintiff, though he may have received the money from the defendant his master." If the father of a family put his children under the protection of servants and live himself at a distance from them, the servants have an implied authority to procure necessary
advice in case of sudden illness or accident.”—(Addison on Contracts, p. 611.) See also Smith’s Mercantile Law, p. 136; and 6. W. Reporter, Civil Rulings, p. 309.

Hence tender of payment to a clerk or servant having a general authority to receive money for his employer is a good tender to the latter.—(Addison on Contracts, p. 1046.) But an agent employed to sell an estate has no implied authority to receive the purchase money (p. 605.) “And, writes Mr. Smith, “it is a general rule of law, that if a creditor employ an agent to receive money of a debtor, and the agent receive it, the debtor is discharged as against the principal: but if the agent, instead of receiving money, write off money due from him to the debtor, then the latter is not discharged.”—(Mercantile Law, p. 154.)

2.—In special agencies, for the performance of a particular business, the principal is responsible for those acts of the agent which may be connected with the “res gestae,” and with the execution of the duty, and for the accessory circumstances arising from the conduct of the transaction.

“It is an inflexible rule in the construction of powers of attorney that the special purpose for which the power of attorney was given is first to be regarded: and the most general words following the declaration of the special purpose will be construed to be merely all such powers as are needed for its effectuation.—Esdivele v. La Nauze is a very strong example of this rule. The largest powers were given to deal with the principal’s estates in Ireland, to bring actions for the recovery of rents, or any other debt, duty, matter, or thing due or coming to his principal for or in respect of the premises or in any other respect whatever.” These words, in themselves very wide, are followed by “and in my name to give, and further to do all lawful acts and things whatsoever concerning all my business and affairs of what nature or kind soever in the said United Kingdom, and generally to act for me, and on my behalf in all matters as fully and amply as I might or could do therein were I personally present, and had done the same.” The question was, whether the power of attorney gave power to endorse bills, and Alderson B. decided that it clearly did not. “The general words are not sufficient, for they must be construed with reference to the antecedent matter which states the purpose for which the letter of attorney was given.”—Sansone Ezekiel Judah v. Addi Raja Sueen Bibi.—(2. Madras High Court Reports, p. 177.) See also 6. W. Reporter, Civil Rul-
SPECIAL AGENCY.

A principal cannot both approbate and repudiate his agent's proceedings.

Where a power of attorney empowered an agent to bid for a particular estate to be put up for sale on a particular day, but in no way limited him as to the time of purchase, the Calcutta Court held that the intention of the parties in mentioning the date was only to designate the day on which the sale was fixed to take place by authority, and therefore when the sale was accidentally postponed, the power to purchase, not being limited to a particular date, was binding on the principal whether the sale were held on one date or another.—The Collector of Dacca v. Nand Lall Roy.—(3. W. Reporter, Civil Rulings, p. 54.)

"Supposing it to be the case that a man send an agent with direct authority and positive directions to bid at an auction and to purchase an estate, and the agent accordingly goes to the auction, and in the execution of that authority, he does bid and the estate is knocked down to him; but collaterally, and in a by-manner he enters into a distinct and separate contract with an individual that, in consequence of something to be done or to be forborne, he will pledge his principal to pay to that individual a certain sum, it is quite plain that upon every consideration of justice, the principal cannot be bound by this by-transaction on the part of the agent. If the agent make a contract on the part of the principal, having a definite authority, and he exceed that authority by inserting a term in the contract itself, it would not be competent to the principal to say—"I will repudiate the inserted term in the contract as being ultra vires, unauthorized, but I will obtain performance of the rest of the contract." In such a case, although the agent had no authority for the additional term, yet as it is an integral part of the contract itself, and the party selling was not aware of the want of authority, the principal could not enforce that contract without giving effect to the additional term. But in the other case, the act of the agent, if effect were given to it, would subject the principal not only to the contract which he authorized, and which he may be required by the vendor or lessor to fulfil, but also to an additional liability which he never contemplated."—Ishan Chandra Singh v. Shama Charan Bhatto.—(Sutherland's Privy Council Judgments, p. 649.)
The acts of Government officers within the scope of their ordinary authority, and apparently if not in fact duly authorized by the Government, together with their declared opinions touching the transaction, constitute valid evidence to show what the understanding was on which a party may have contracted with Government through their agency.—Sahib Singh v. The Secretary of State in Council of India.—(4. Punjab Record, p. 139.)

A principal is not bound by the act of an agent appointed for the general management and conduct of business who enters into an unusual contract not made according to the ordinary course of business, when it appears that the principal in no way ratified the transaction; even though the opposite party dealt with the agent in good faith, as it was for him to satisfy himself of the agent's authority.—Madari Lall v. Gilmore.—(4. North West High Court Reports, 17, 196.) See also 7. W. Reporter, Civil Rulings, p. 419; and Vol. 10. Civil Rulings, p. 376.

So in Coz v. The Midland Counties Railway Company it was held that the station master of a railway company could not bind the company by a contract for surgical attendance on an injured passenger without express authority for that purpose, for the employer of an agent for a particular purpose gives only the authority necessary for that agency under ordinary circumstances, or the powers usually exercised by similar agents, if there be any evidence to show a particular usage.—(Broom’s Commentaries on the Common Law, p. 529.)

A principal is not bound by an unusual and unauthorized act of the agent.

The agent must not mix up his private liabilities with those of his principal.

Statements fraudulently made by an agent for his own benefit are not binding on the principal on whose behalf they were ostensible made.—Jawahir Lall v. Tekeit Fukaram Singh.—(6. W. Reporter, Civil Rulings, p. 252.)

Mis-statements innocently made by an agent.

In Cornfoot v. Fowke a principal was held irresponsible for a mis-statement innocently made by his agent without authority from himself. The principal there sued for breach of

Statements fraudulently made by the agent for his own benefit do not bind the principal.
A person can only become the agent of another by his express or implied consent.

The general rule that no one can become the agent of another except by the will of that other, applies to lumberdars professing to represent the village body in boundary disputes: the will however of the principal may, it is to be remembered, be manifested in writing or orally, or simply by placing another in a situation in which according to ordinary rules and usages that other is understood to represent and act for the person who has so placed him, or by refraining from interposing, and acting in such a way as to lead to the belief that he authorized the alleged agent to represent him, provided that he was aware of his so acting.—Gunga Prasad v. Ram Prasad.—(Full Bench Ruling North West High Court, of August 21st, 1866.)

Oral evidence is admissible to charge an undisclosed principal.

Oral evidence is admissible to show that a person who was a party to a written contract in his own name was in reality an agent for another, provided that the object of such evidence be to charge the principal, and not to discharge the avowed contractor.—(Broom's Commentaries on the Common Law, p. 503.)

"It often happens that a broker purchases in his own name without disclosing that he has a principal: where this takes place, the broker is, of course, the person to whom the vendor gives credit; yet if he afterwards discover the principal, he may elect to abandon the responsibility of his broker, and charge him; and so he may if the broker, on making the purchase, stated himself to be an agent, but omitted to state the name of his principal, which is afterwards discovered; unless, in either of these cases, the seller have suffered the time for payment to elapse, and the principal to alter the state of his account with the broker in such a manner that he would be a loser if called on to pay to the seller; for then, indeed, sooner than that the principal should be injured, the seller will be taken to have selected the agent for his debtor. But if the time for payment have not elapsed, the principal cannot by prematurely settling with his agent deprive the seller of his election."—(Smith's Mercantile Law, p. 150.)
If however an agent receive money for his principal, he is liable as a principal in a suit for a refund, so long as he stands in his original situation, and there has been no change in circumstances by his having paid over the money to his principal, or done what is equivalent thereto, as by applying the money to settle conclusively a debt due to him by the principal, with the latter's approval.—(Addison on Contracts, p. 632.)

If a vendor preferring the credit of an agent to that of the principal agree with the former to accept him as his debtor instead of the latter; he cannot afterwards change his mind and charge the principal.—(Smith's Mercantile Law, p. 150.) But where the creditor in despair of obtaining a debt from the principal, whose property had been forfeited to the State, sued the agent, averring that he looked to him alone for payment, the Chief Court held that the fact of the creditor thus improperly electing to sue the agent did not release the principal from his liability to be sued by him.—Mahammad Mohkam v. Ramsani and Mahammad Shaft.—(3. Punjab Record, Case No. 10.)

The fact of the plaintiff having treated A as a principal in previous transactions, when he was not aware of all the circumstances of the case, does not prevent his subsequently suing B as such, if he have afterwards learnt that he really was the principal.—Koilash Chandra Pal Chowdhry v. Gonal Chandra Mookerjee.—(8. W. Reporter, Civil Rulings, p. 428.)

3.—While the principal is responsible to the public for his agent, the agent is responsible to his principal, for ordinary skill, care, and diligence. The agent may be responsible for commercial acts, done in good faith perhaps, but still in contravention of the notorious usage of trade.

A gratuitous agent is not bound to undertake the agency; but having done so, he is liable for any loss sustained by his principal through his gross negligence: what is gross negligence being a question of fact in each particular case.—Agnew v. Indian Carrying Company.—(2. Madras High Court Reports, p. 449: and the leading case of Coggs v. Bernard.—1. Smith's Leading Cases, p. 184.)

In a case in which the plaintiff had been employed by the defendant to urge certain claims which the latter had on the Government, the Chief Court observed that—"The possession of ability to transact certain business is a repre-
sentation that the requisite skill will be used. At the same time, it is rather in favour of the plaintiff than against him, that he is not a duly recognized practitioner in any Court of Law, if this fact, the business not being law business, affect the question at all. The rule is that if the employer voluntarily select an unauthorized practitioner, the latter is responsible only for a reasonable and bona fide exercise of such skill as he possesses."—Fenwick v. Mirza Ilahi Bakhsh.—(1 Punjab Record, Case No. 25.)

The right of the agent to be reimbursed by the principal in cases in which he has exceeded his instructions is thus set forth in the Institutes of Justinian:—"Is qui exequitur mandatum, non debet excedere finem mandati, ut ecce, si quis usque ad centum aureos mandaverit tibi ut fundum emeres, vel ut pro Titio sponderes, neque plures emere debo, neque in ampliorem pecuniâm fideiudere; alicuius non habebis cum eo mandati actionem, adeo quidem ut Sabino et Cassio placuerit etiam si neque ad centum aureos cum eo agere velis, inutiliter te acturum. Diuersae schola: auctores recte usque ad centum aureos te acturum existimant qua sententia sane benignior est quod si minoris emeris, habebis scilicet cum eo actionem quoniam qui mandat ut sibi centum aureorum fundum emeret, is utique mandasse intelligitur ut minoris, si possit, emeretur."—(Inst. III. 26. 8.)

Where a principal employs an agent, the former is bound to indemnify the latter in respect of all payments made by him in the due course of his employment, but he cannot resort to the principal for an indemnity against the consequences of his own wrongful acts or want of skill and caution in the execution of his commission.—(Addison on Contracts, p. 598.) Hence an agent who has been employed to break the law, as for instance to commit an assault, cannot sue his principal for indemnification in respect to the damages in which he may have been cast.—(Addison on Contracts, p. 889.)

4.—But if the acts of the agent should have been improper and unauthorized, still they may become binding on the principal, if he should, in any way, have ratified them subsequently.

On the principle Ommis ratihabitio retrotrahitur et mandato priori aequiparatur, which this clause clearly recognizes, it has been held that if A's goods be wrongfully taken and sold, the owner may elect to consider the wrong-doer as his agent, adopt the sale, and maintain an action for the price. The assignees of a bankrupt may adopt or reject a contract entered into by the latter: and if they determine to adopt
it, the bankruptcy has other effect whatever on the contract except to put the assignees in the place of the bankrupt.—

(Broom's Legal Maxims, p. 834.)

5.—In matters connected with the agency, any promises or agreements made with the agent, may be enforced by the principal. So also agreements may be enforced by the agent on behalf of the firm if he be entrusted with the requisite authority.

Where a party sued one who was his general agent to recover certain properties which the latter had acquired from the funds of the plaintiff over which he had control but of which the ostensible buyers were the agent's wives, the Calcutta Court held that the two facts that the defendant was the plaintiff's agent at the time that he made the purchases and that he had no means of his own to make them, were quite inadequate even to start the plaintiff's case, since it was incumbent in order to make out a case of constructive purchase that the plaintiff should prove not only that the defendant was his agent, but that at the time of the purchases he had in his hands funds of the plaintiff sufficient to meet them.—Mussumat Ruhminissa v. Saiyad Wafat Ali. —(3. W. Reporter, Civil Rulings, p. 232.)

6.—A married woman may be the agent of her husband.

7.—In commercial affairs the principal is bound not only to furnish his agent with efficient instructions, but also to make the agent's powers and position known as publicly as possible, and to notify the same to those with whom he habitually deals, especially when the agent is deputed to act at a distance, so that third parties may not be induced to trust the agent improperly, or to extend transactions with him to undue limits. On the other hand, the public are bound to ascertain the powers and position of agents, and to examine the credentials with which they are usually supplied.
Those who neglect these precautions may thereby subject themselves to liability.

8.—The usual powers of agents and gomashtas in mercantile houses will be more specifically described in Clauses 7 and 8, Section XVII, on Partnership.
CHAPTER XVI.

PUNJAB CIVIL CODE.

SECTION XVI.

Bailment.

In "Bailment" are included deposit, commission, borrowing, hiring, pledge, or pawn.

1.—The leading principle connected with this subject, relates to the custody of the property, and to the relative degrees of responsibility incurred by the parties to the several kinds of contract above enumerated.

Where the defendant denies altogether having received the property in trust from the plaintiff, the plaintiff must make out at least a prima facie trust, and as without being able to do this he had no right to come into Court at all, he is not entitled to recover simply because the defendant has failed to prove the case he put forward in answer to the plaint.—Khadjeaunnissa Bibi v. Afsur Hossein.—(2. W. Reporter, Civil Rulings, p. 58.)

In Musummat Dayawanti v. Navgopal and others the Chief Court, after observing that there was proof of the transmission of Rs. 65,000 by A from Lahore to B, who had gone to Benares, remarked that "upon the simple fact that one man has remitted money to another, the prima facie presumption is that the money belongs to him who remits: there is nothing from which to infer change of ownership, or rather the inference falls short of the result that the ownership is changed."—(3. Punjab Record, Case No. 2, p. 13.)

The English law regarding the amount of care to be exhibited by the various classes of bailees, which at present at any rate is law in this Province also, is fully laid down in the case of Coggs v. Bernard and the notes on the case as given in 1. Smith's Leading Cases.

2.—The consideration which governs questions arising out of these cases, is, whether the two parties receive mutual benefit from the transaction,
DEPOSITS.

or whether any one of them receives greater benefit than the other; and, according to the degree of benefit, is the degree of care and diligence demandable from the party, and the degree of negligence for which he is responsible. In some cases, the party in charge of the property is responsible for ordinary care, in others for more, and again, in others, for less than ordinary care.

3.—Thus in deposit, when property is deposited without consideration, for the sole benefit of the depositor, then the risk is chiefly incurred by him, and the depository will be liable only, when he may be convicted of fraud, or of gross neglect. But if the depository have officiously undertaken the charge, and induced the depositor to confide in him when perhaps better custody was obtainable, then he incurs a greater responsibility than in the last case.

**Actions on deposit.** In the case of actions to recover the value of property lost by a gratuitous bailee, the foundation for the action is the following principle, as settled in *Coggs v. Bernard*, that “the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.” The fact of the bailee having given no special undertaking to keep the goods safely does not exempt him from the consequences of gross negligence. When a man gratuitously undertakes to do a thing to the best of his skill, *when his situation or profession is such as to imply skill*, an omission of that skill is imputable to him as gross negligence, and generally an unpaid agent is bound to use such skill as he is shown to possess. A bailee of this class may be guilty of gross negligence although he has kept the property entrusted to him with as much care as he kept his own, since negligence of his own goods is no defence: proof however that the property of the bailee was lost along with that of the plaintiff may be adduced as *argument* against the existence of great negligence. A depository has no right to use the thing entrusted to him.—(1. Smith's Leading Cases, pp. 186—192.)
"The law however expects the depositor to exercise a reasonable amount of vigilance in the protection of his own interests, and if he will blindly deposit goods in the hands of a person of weak intellect, or a child, or a minor, without experience, or a notoriously idle and careless or drunken fellow, he cannot expect the same care from them as from a prudent housekeeper; and if the goods be injured or lost by the gross negligence of such depositaries, he must bear the consequences of his own rashness and folly and put up with the loss."—(Addison on Contracts, p. 31.)

4.—On the other hand, in borrowing without any consideration to the lender, and for the sole benefit of the borrower, then the latter becomes responsible even for slight neglect. He is bound to be more circumspect than a depositary, and must take more than ordinary care.

In Bringloe v. Morrice the loan of a horse to the defendant to ride was held not to warrant him in allowing his servant to ride it also, since the receiver of the loan must not on any account deviate from the conditions of the loan. But where a horse was for sale and A had it to try he was held justified in putting a competent person on it to try it, an authority to do so being implied.—(1. Smith's Leading Cases, p. 193.)

5.—When, however, the transaction is for the mutual benefit of the parties, as in hiring, and in commission, when goods are deposited on consideration, or are entrusted for carriage, or conveyance, or manufacture, then the party in charge is responsible for gross neglect. If he shall have used the article in a customary and reasonable manner, or if he shall have taken ordinary care in the conveyance, or in the manufacture, then the owner must bear any loss that may accrue.

Sir William Jones has shewn that the true meaning of the authority relied on by Lord Holt in defining the care to be demanded from a bailee for hire is that in such cases, not extreme but ordinary care should be exhibited.—(1. Smith's Leading Cases, p. 193.)
LIABILITY OF INNKEEPERS.

The bailor must keep the property entrusted to him to work on with ordinary diligence.

Where goods are entrusted by the bailor to the bailee to be safely kept, or to be carried, or to have some work done upon them, for hire to be paid to the bailee, the latter is bound not only to perform his contract with regard to the work to be done, but also to use ordinary diligence in the care and preservation of the property entrusted to him, and where a loss occurs, the onus is on the bailee to shew that it occurred through no want of ordinary care on his part.—(1. Smith's Leading Cases, p. 197.)

There are however two cases in which the liabilities of this class of bailees are much extended under English law, viz. in suits against common carriers, for which see under Act III of 1865 in the Appendix to this work; and secondly, in the case of innkeepers. As Mr. Broom observes that "the liability of an innkeeper for the loss of a guest's property while sojourning at his inn rests not on mere reason, but on custom growing out of a state of society no longer existing," and in England itself has been modified by recent legislation, it will, in the absence of any precedents in the Anglo Indian Courts shewing to what extent this law should be recognized in this country, suffice to refer to the following authorities, Calye's Case in 1. Smith's Leading Cases, p. 102 ; Broom's Commentaries on the Common Law, pp. 808—810; Norton's Topics, p. 441. The following passage from Justinian's Institutes may be given in extenso, as showing that the English doctrine is not merely the creation of an arbitrary custom: "Item exercitor navis aut cauponæ, aut stabuli de damno aut furto quod in navio aut cauponæ aut stabulo factum erit, quasi ex maleficio teneri videtur, si modo ipsius nullum est maleficium sed alicujus eorum quorum opera naves aut cauponæ aut stabulum exerceret, cum enim neque ex contractu sit adversus eum constituta hæc actio et aliquatenus culpa res est quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri videtur.—(Inst. L. IV. VI. 3.) For a Bombay case on the liability of a Parsi hotel keeper for a European traveller's property stolen from his premises, see 3. Reid's Reports, p. 137.

Whenever an article bailed or delivered to a hirer has sustained a partial injury, through an inherent defect, or by reason of some inevitable accident, which threatens its total and immediate destruction, and the effect of such injury may be obviated by repairs and remedies promptly provided, there is an implied authority from the owner to the hirer to incur all such expenses as a prudent man under the circumstances would incur for the preservation of his own property.—(Addison on Contracts, p. 425.)

6.—To a certain extent, the same principle applies to pawn and pledge, inasmuch as each
party receives benefit, the pawner credit, the pawnee security. The debt need not necessarily be extinguished in toto by the loss of the pledge, if the pawnee shall have guarded it with vigilance and precaution. On the other hand, the pawner, on the loss of the pledge, cannot ordinarily be compelled to pay a debt for which he had already given satisfaction. The pawnee will, in the first instance, be chargeable with the loss. The Court will, in its discretion, decide whether any portion of the loss should, under the circumstances of the case, be borne by the pawner. If there should not appear special considerations in favor of the pawnee, then the whole loss must be borne by him. And in order that fraud on the part of the pawnee may be prevented, it will be understood that when a pledge is stolen or otherwise lost from his custody, the onus probandi will rest with him to show that he had adopted every reasonable precaution. The pawnee cannot sell or dispose of the pledge for the satisfaction of the debt, or for any other purpose, without bringing a suit.

"On the head of pawn or pledge, a question arises as to the relative degree of loss and responsibility to be borne by the pawner or pawnee. If the article should be lost without any fault of his, then he is not responsible; the debt remains as it originally stood, and the pawner is held to have suffered "damnum absque injuria." On the other hand, by the Mahammadan law, the pawnee is responsible. It is held that omissio pignoris liberat debitorem; that the loss extinguishes the debt; and that, moreover, if the value of the lost pledge exceeded the amount of the debt, the pawnee must reimburse the pawner accordingly. This rule, Sir W. Jones stigmatizes as contrary to justice and reason, and to the prevailing tendency of other codes; but Sir W. Macnaghten strenuously defends it, in his preface to the Principles of Mahammadan law. The two main arguments are,
that the pawner is not in justice bound to pay a debt twice over, for which he had already given ample satisfaction; and on the other hand, that, in an engagement for their reciprocal advantage, each party should be saddled with corresponding liabilities. Sir W. Macnaghten's sentiments appear to be applicable to Indian society, and not destitute of justice. In India deposited goods are not unfrequently tampered with, and concealed, or made away with under a false pretence of theft; simulatedburglaries are not unfrequent; and notoriously the first question which obtrudes itself on a police authority, is not so much, who is the criminal, but, whether the crime were committed at all. Such cases may be rare in Europe, but in this country suspicion hangs over the loss of a pawn alleged to have happened without any fault of the pawnee. Special enquiry has been made as to the custom and feeling on this subject in the Punjab; without doubt the pawnee is considered responsible for the loss or injury of the pledge, whether he be in fault or not. It, therefore, proposed to maintain a responsibility, upon the faith of which the pawner pledges his property, and which the pawnee believes himself to have assumed in accepting the pledge. But the Court may well possess a discretionary power of mitigating the pawnee's loss, if there should appear special grounds of extenuation. If there should be doubt it will weigh rather against the pawnee than for him. And the onus probandi will rest with him to show that he has vigilantly guarded the pledge which has been lost, stolen or injured. By English law it is the duty of the pawner to show that the pawnee has been negligent or fraudulent; but in this country, for the reasons already given, it seems advisable that the burden of proof should be thrown on the pawnee."—(Extract from the Commentary on the Punjab Civil Code.)

If the pawn be such that it will be the worse for using, the pawnee cannot use it, as clothes &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them: but then she must do it at her peril; for whereas if she keep them locked up in her cabinet, if her cabinet should be broken open and the jewels taken from thence she would be excused; if she wear them abroad and be there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned to maintain it, as a horse, cow &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompence for the meat. per Lord Holt in Coggs v. Bernard.

By Mahammadan law, the pawnee is generally chargeable with the expense of providing for the custody, and the
pawner with that of providing for the support of the thing pledged.—(Macnaghten's Principles of Hindu and Mahomedan Law, p. 233.)

"If property were pledged by a stranger, with the consent of the owner, or if having been originally pledged without his knowledge, the owner afterwards assented to it, the pledge was valid. If he who pledged the property of another, the creditor, at the time of the pledge supposing it to belong to the debtor, afterwards acquired possession of the thing so mortgaged, the pledge was valid. So if the owner of the thing pledged by a stranger connived at the fraud, or consented tacitly to the pledge. If however, Titins pledges my property without my consent, and makes me his heir, I am not bound to ratify the pledge."—(Phillimore's Roman Private Law, p. 213.)

"One man cannot, as a general rule, convey to another a power or right over property which he does not himself possess. If a servant take his master's jewels and pledge them, the pledge cannot alter or affect the ownership of them or give the pledgee any right to detain* them as against the owner. But if a man obtain goods under colour of a contract intended to transfer the property in the goods to him, and then pledge them, the pledgee will have a lien upon the goods to the amount of his advances. If, for example, a man purchase and obtain possession of a specific chattel, and pay for it by a fictitious bill of exchange, or by a cheque on a banker where he has no funds, and then pledge the article with a party who advances money upon it without any knowledge of the fraud, the pledgee will have a lien for his advances against the vendor who has been defrauded, but if the article have been stolen or possession thereof have been obtained by false pretences, and it have been pledged, the pledgee will have no lien upon it, as against the owner."—(Addison on Contracts, p. 299.)

It is competent for a pawnee to set up the right of a third person to the thing pledged, subject of course to the burden of proof.—Cheeseman v. Exall.—(1. Smith's Leading Cases, p. 196.)

If however the pawnee refuse to give up possession of the article pledged, when the whole sum due has been tendered, and the pledge is subsequently lost, he will be answerable for its value at all events.—Coggs v. Bernard.

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*p So in Hoare v. Parker, where a quantity of plate had been settled on a widow for life, and she went and pawned it, it was held that after her death the pawnee had no right to retain the pledge as against the remainderman, albeit he had no notice of the widow's limited interest at the time he advanced the money.—(Addison on Contracts, p. 300.)
CHAPTER XVII.

PUNJAB CIVIL CODE.

SECTION XVII.

Partnership.

1. — A partnership may be formed by two or more persons, whether relatives or not, for any lawful purpose whatever.

2. — Partnership may be created by deed, by parole, or by tacit consent; and parties may make themselves liable, as partners, by their own declaration or by participation in the profits. Any person who participates, directly or indirectly, in the net profits, may be held liable as a partner, whether he be a recorded and ostensible partner or not. It is impossible to lay down any defined rules as to what constitutes participation in profits. If such a question should arise, the Court must decide it according to the circumstances of the case.

The law, so far as mere participation either directly or indirectly in the profits rendered a man a partner, has been modified by Act XV of 1866, given at the end of this Chapter.

3. — Partners may be of various kinds. There may be managing partners (gerant); recorded partners: dormant, and commandite partners, who furnish funds and capital for the purposes of the partnership, and receive a share in the profits, but who do not take any part in the management of its affairs. Managers and Gomashtas, who may not have contributed any stock or capital to the concern, and have no share in the partnership property,
may yet enjoy a share of the profit in consideration of their services, and can be made responsible in proportion to the amount they have received. The liability of all partners, of whatsoever class, is of the same nature, though it may be different in degree. Nothing in this clause can apply to those who have supplied capital to a partnership, as a loan on interest. If the lender shall only have received interest, and not a share in the profits, then he cannot be made liable as a partner.

In regard to the portions in italics, see for the present state of the law Sections 2 and 1 of Act XV of 1866. The true test now, I presume, as to whether a gomashah is answerable for the partnership debts is to discover whether or not he possess an influential voice in the general management of the concern; or more accurately, has the trade been carried on by persons acting on his behalf.—Cox v. Hickman. —(1. Law Reports, C. P., p. 86.)

"It is indeed not unusual in India for minor partners to take a part in the ordinary business of mercantile or banking firms under the guidance and direction of the managing heads, and to sign hoondees; and so far as he is to be regarded as the agent of adult partners, the minor's signature would be binding upon the firm. But he could not be made personally liable to make good the amount. And it has been decided that a minor who has ordinarily done thus much, is yet incompetent to agree to an adjustment of accounts."—(Macpherson on Contracts, p. 19.)

4.—Partners are free to limit their liability to each other, but they are not so free to limit their liability to the public. Their agreements are binding on them, in their relations with each other, in the adjustment of profit and loss, and in the management of the concern. But unless such agreements should have been notified for general information, and really made known, they will not necessarily bind the public, dealers, or others, in proceedings instituted against the firm or the individual mem.
bers of it. If such agreements should be contrary to what has been held out by the firm, or to what the public has had reason to understand to be the constitution of the partnership, they will be absolutely inoperative as regards those who may have dealt with the firm. Thus, if one out of two partners has been apparently a half sharer, and has allowed the public to suppose him to be such, while in reality his share was much less than a half, then he will be liable for a half share in the debts of the firm, and not for the smaller share; and those who have dealt with the firm may sue him accordingly, inasmuch as they are presumed to have trusted the firm on the supposition that he was a half-sharer.

5.—It is the positive duty of partners, to notify the general terms of their partnerships to the public at large, to those who deal with them, and to the Choudrees of their bazaar, or of their trade. It is necessary that they should keep their books in a regular and explicit form. By the neglect of such precautions they subject themselves to aggravated responsibility. On the other hand, it is the duty of dealers to make themselves informed of the constitution of the firms with which they deal. If a dealer trust a firm, on the supposition that each partner holds equal shares, although it has been publicly notified that the shares are unequal, then he cannot sue them on this understanding; he must sue them according to the recorded shares. Any loss he may suffer hereby would be the consequence of his own negligence.

6.—Partnership assets may consist of property, real or personal, ancestral or acquired; of paper
money; of unrealized debts and obligations. Such property is distinct from the private property of individual partners. But in many partnerships the partners are relatives, and reside together; or they draw on the general funds for their private expenses. In such cases it will be difficult to distinguish between common and private property, and the Court must take care that the distinction is not made use of for the purposes of fraud or collusion.

7.—The power of the managing partner, or of other individual partners, to bind the firm, may be limited, but such limitation must be made publicly known; otherwise the acts of the partners will be effective, as regards dealers and others, even as if there had been no limitation. As a general rule, each partner may act as an agent for the firm, in the transaction of that business for which the partnership was created, and his proceedings, in that capacity, will bind the whole firm. He may purchase or dispose of stock in trade for the reasonable ends of the partnership; he may enter into speculations; make bargains and contracts; draw, accept and endorse bills of exchange; pay the debts of the partnership; grant promissory notes; or dispose of the moveable property of the firm. With certain exceptions, he may do whatever might be done by the whole firm in their particular line of business. But if his acts exceed this limit, he becomes singly responsible. It is impossible to determine, beforehand, what acts do or do not fall within the province of the particular partnership, or belong to its legitimate business; or be reasonably supposed by the dealers and the public to be a partnership.
concern. The Court must, in its discretion, construe the ordinary authority of a partner.

When a husband and wife trade in partnership an authority from the husband to pay money to a particular person may be assumed to be binding on the wife.—*Kotu v. Ko Pay Yak.*—(6. W. Reporter, Civil Rulings, p. 254.)

Mr. Smith deduces the following rules regarding the powers of partners to draw negotiable instruments from the case of *Greenslade v. Dower.* "These negotiable instruments must have been circulated on behalf of the firm. Now it is clear that when the purposes of the firm do not require that its members should pass negotiable instruments, it is not very likely that such should be circulated in its behalf: in such cases, therefore, the implied authority of a partner fails, and the firm will not be bound by his negotiation. Hence, an attorney cannot bind his partner by a note, though given for the debt of the firm; and it has been decided, that partners in a farming or mining concern have no such authority. From the observations of the Judges in the case last cited, I think it may be collected:

"First, that partners in a trade, strictly mercantile, have an authority implied by law to bind each other by bills or notes.

"Secondly, that partners in some peculiar business, such as farming and mining, have *prima facie* no such authority.

"Thirdly, that this presumption against their authority may be rebutted, by showing, 1st, that the consultation and particular purposes of the firm are such as to render it in their individual cases necessary; or, 2ndly, that though not necessary, it is, in other similar cases, usual; for if it be necessary or usual, the law will imply it."—(*Norton's Topics, p. 422.*) See too 1. *Bengal Law Reports, Original Jurisdiction,* p. 14, where a Company formed for the purpose, *inter alia,* of carrying on the business of confectioners and provisioners were held competent as such to deal in negotiable instruments.

The following statement of the duty of a partner under the Civil law seems applicable on equitable grounds to Indian partners. "The socius was bound," writes Phillimore, "to exercise the same *diligentia* in the affairs of the society that he did in his own: *he was liable to pay interest on"

*The socius is not bound to render *exactissima diligentia,* he is not to be answerable for the perfect care of a *bonus paterfamilias,* but he is to be judged by the amount of care which he bestows on his own property. This may happen to be as great as a *bonus paterfamilias,* but it may also happen to be much less."—(*Sandar's Institutes of Justinian,* p. 467.)
money belonging to the partnership that he had employed for his own purposes. The share of loss arising from the insolvency of one socius was to be equally divided among his partners. No partner could claim a share in the illicit gains of another. The societas was ended by the expressed dissent of any one of its members, but that dissent must not be expressed under circumstances leading to the inference of bad faith. A *pactum ne abeat over a societas* was not binding, neither did an agreement *ne intra certum tempus abeat over confer any advantage on the partner, who would insist upon it."—(Roman Private Law, pp. 274 and 275.)

"An ordinary mercantile firm is responsible for frauds committed by one of its members, or by a gomashtah or other similar agent, while acting for and in the business of the firm; and innocent partners cannot divest themselves of responsibility on the ground that they never authorized the commission of the fraud. When such a person, acting within the scope of his authority as evidenced by the business of the firm, obtains money and misapplies it, the firm will be responsible."—Lacki Kant Bouk v. Ram Chandra Baisack.—(2 W. Reporter, Civil Rulings, p. 168.) As an illustration of this principle may be cited the case of Blair v. Bromley. Here the plaintiffs employed in the year 1829, A and B, a firm of solicitors, to procure an investment for certain assets, A wrote to the plaintiffs naming one S as a proposed mortgagee for a sum of £4,500 on the security of free-hold property, whereupon the plaintiffs forwarded to A a cheque for £4,500 to be so invested, and this cheque was paid into the Bank to the partnership account. The necessary mortgage deeds were prepared, but S afterwards declined to complete the transaction. In April 1830, A, however, wrote to the plaintiffs, giving a list of the securities upon which he alleged that their assets were invested, and amongst others stated, "S's mortgage, £4,500, 3rd October 1829." In 1834 A and B dissolved partnership, and the plaintiffs continued to employ A as their solicitor, who regularly paid interest on the £4,500, down to 1841. A became bankrupt in 1844, and the plaintiffs then first discovered that the mortgage to S had never been effected; on bill by the plaintiffs against B to recover the sum paid over as above stated, it was held that the fraudulent representation of A must be taken to be the act of the firm, and that the defendant, although morally innocent, was civilly liable for the fraud of his co-partner.—(Broom's Legal Maxims, p. 795.)

8.—But there are certain things which a partner may not do on behalf of the firm without express written authority. He may not purchase,
transfer or dispose of real property; he may not take a lease or farm of a landed estate, a ferry, a tax, or any public collection; he cannot institute, conduct, defend or compromise a civil suit; he cannot submit a question to arbitration. But he may do all these things if he produce a power of attorney on the part of the firm. If he act in these matters without such authority, the firm is not bound, though he will be bound personally. In such affairs the especial consent, by signature of all the partners, is required. The above rules, regarding the ordinary and special powers of individual partners, will generally apply to gomashtas or agents.

"A power of attorney is requisite to enable a single partner or agent to bind a firm, but there are certain exceptions, e.g., when one partner has absconded, when the heads of the firm reside in foreign territory, or in distant provinces."—(Judicial Commissioner's Ruling, No. 40, Thornton's Small Cause Court Manual, Addenda, p. 173.)

9.—If any firm or company should be subject to any special liabilities through its own acts, or be vested with any special privilege or corporate capacity by public authority, the Courts will give effect thereto. As a general rule each partner is responsible according to his share or interest in the firm. By the mercantile custom of this province partners are not jointly and severally responsible for the whole debts of the firm, except in the cases hereafter mentioned. They are ordinarily responsible for their full shares. But the Courts will freely exercise their discretion in compelling a rich partner to pay more than his actual share, if it shall appear that this share was not publicly notified,
and that the creditors had trusted the firm on the reasonable supposition that he owned a greater share. If there should have been a positive stipulation for joint responsibility, the firm are collectively and individually bound by that agreement. Also, if the partners be brothers or relatives residing together, and subsisting and trading on joint undivided property, whether inherited or acquired, then each and all may be made responsible for the debts of the whole firm. But if any one of the parties should have acquired, by his own means and exertions, property separate from the joint property, then this separate property will be governed by the ordinary rules of responsibility.

"The rules laid down in this Section closely follow the custom of trade, and have been prepared in consultation throughout with leading merchants. It has been well said to be "a maxim of the present age that the law, while it should take due precautions against fraud, ought to leave its subjects to form their own engagements, on such conditions and in such manner as their own experience teaches them to be for their own advantage. If then this Section be really in accordance with the mercantile practice of the Punjab, no objection need arise from its variance, in some material points, with the English law. Joint and several responsibility and obligation in solido, as known in England, are not usually elements in the commercial partnerships of this province. Each partner is ordinarily liable for his share, and no more, in the absence of an express agreement to the contrary, which indeed is rarely or never made. The doctrine of limited liability, therefore, is a prominent feature in the present section. The limitation is but just to those who engage in partnership on this universally implied condition. It certainly cannot be unjust to those who deal with, and give credit to, firms on this invariable understanding; it is also calculated to stimulate investment of capital. * * * But the limitation has been fenced in against abuse, by the injunction urged upon firms to notify the terms of the partnership, so that creditors may distinctly know whom they are dealing with; and by the caution to dealers to ascertain these particulars from Chowadrees of bazars, and to inspect books, which exhibit the details of partnership * * * No partner can escape from his just liabilities, by ostensibly taking a
large part in the operations of the firm, and then declaring, at the time of reckoning with the creditors, that by the deed of partnership he owned but a fractional share. For the principle has been borrowed from the English law, that the private agreements of parties do not necessarily limit their public liabilities. A partner indeed will be liable for his share. But his share will be that which he ostensibly assumed, and which the creditors had reason to suppose he possessed. The ultimate liability of dormant partners has also been explained in Clause 10. ** * * It will be seen that in Clause 9 there is one exception to the principle of limited liability in the case where co-partners, closely related, and trading on undivided ancestral property, are jointly and severally responsible. This rule is well understood by merchants, and is taken from the Hindu law as expounded in Chapter III, Volume II, of Colebrooke's Digest."—(Extract from the Commentary on the Punjab Civil Code.)

With reference to the latter part of the Clause, see above at pp. 270—273 of this work.

10.—If some of the partners should be managers and others dormant, then the creditors must sue the managing partners whom they trusted, for the whole debt; and not the unknown dormant partners who had never been trusted. But in such a case, the dormant would be responsible to the managing partners. If, however, the creditor having sued the managing partners, cannot recover from them, then he may sue the dormant partners. The same rules will apply to cases where gomashtas, who though not ostensible partners, may have enjoyed a share in the profits as remuneration for their services. The partner will be sued in the first instance; and if the creditor cannot recover from him, then the gomasha may be sued for the amount he received from the concern.

With reference to the portion of this Clause in italics see Section 2 Act XV of 1866, at the end of this Chapter.

It seems somewhat doubtful how far in all cases under English law, an unknown partner is answerable to parties who were perfectly unaware of his interest when they trusted. Extent of the responsibility of a secret partner by English law.
11.—If one partner bring a suit against another, the Court will order a general adjustment of accounts between the parties; suits for single items will not be heard, otherwise litigation would be protracted.

The terms of this Clause would probably be held not to prevent one partner suing another on particular transactions not connected with the general account of profit and loss, where they contracted on their private account, although the contracts may be made concerning the partnership business, and intended to promote the general prosperity of the partnership concern. If, for example, one partner receive money which properly belongs to his co-partner, and not to the partnership, and appropriate it by mistake to the use of the firm, he will be responsible to the partner whose separate money it is for the repayment to him of the amount. (Addison on Contracts, pp. 641, 646.)

In a note on the case of Golla Nagabushanam v. Kana-kala Gangayya, where the Madras Court had recognized the doctrine that a member of a common trading partnership, dissoluble at will, cannot under ordinary circumstances, seek an account without praying for a dissolution of partnership, the learned Editor of the reports gives the following exceptions to the general rule:

(a.) Where one partner has sought to withhold from his co-partner the profit arising from some secret transaction.
(b.) Where one partner has sought to exclude or expel his co-partner, to drive him to a dissolution.
(c.) Where the partnership has proved a failure, and a limited account will result in justice to all parties.
(d.) Where one co-partner in a mine has excluded another from his share of the profits.
(e.) Where, as in most joint-stock companies, the partners are so numerous that it is impossible to make them all parties.
(f.) Where the partnership is for a term of years which has not expired.
(g.) Where the Court's interference is needed to prevent the loss or destruction of partnership property. (2. Stokes' Madras Reports, p. 29.)
The fact of a partner suing a stranger jointly with a co-
partner for sums received by them in which the plaintiff
had been wrongfully deprived of his share, does not cause
such a suit to lie, and the plaintiff can only obtain redress
by suing for an account.—Sharat Chandra Kar v. Ram
Shankar Sarmah.—(10. W. Reporter, Civil Rulings, p. 214.)

"In a suit founded on partnership accounts, the defence
that the accounts have been taken and settled between the
parties is a good one; but it is still open to a partner to
show error in the accounts, though proof of the settlement
is enough to throw on him the burden of proving where
they are wrong."—Kokil Mall v. Shrikh Natha.—(1. Punjab
Record, Case No. 47.)

One partner may be authorized to act for another in
the final settlement of account preparatory to a dissolution
of partnership, although no written authorization may have
been drawn out. The Chief Court, however, while accept-
ing this conclusion of the Lower Courts, as supported by the
investigation in the case, pointed out that such an agency is
open to some suspicion, and if the accounts had been in no
way disclosed in the course of the case, the investigation
would not have been satisfactory.—Sodha Singh v. Chippal
and others.—(2. Punjab Record, Case No. 84.)

Where a plaintiff sues to recover his share in the trad-
ing assets and property of a firm, and the defendants assert
a previous dissolution of partnership, it rests on the latter
to adduce evidence to the winding up, and either to produce
the firm's books or satisfactorily to account for not doing so;
since if they neglect to produce the best proof in their power,
and merely establish that some members of the firm at some
time traded on their own sole and separate account, they
will be held not to have discharged the onus lying upon them,
and the partnership will be presumed not to have been ter-
minated.—Phulram v. Parbati Koser.—(3. W. Reporter, Civil
Rulings, p. 223.)

Where it appeared that a transaction between the par-
ties amounted to an agreement to enter into partnership on
specified terms, which the plaintiff on his part was ready
and willing to perform, the Chief Court held that as the
defendant had broken this agreement, the plaintiff was en-
titled to recover, as damages for the breach of contract, the
profits he would have recovered during the 2½ years the
partnership was to have lasted according to the arrangement
between the parties.—Akaliu v. Harbhaj.—(2. Punjab Re-
cord, Case No. 68.) But in Lewin v. Morrison the Agra
Court held, in a suit for a breach of an agreement to admit
the plaintiff as a partner in a business for two years, that
one year's profits would be a fair sum to assess as the
This Clause does not apply to joint and several decrees.

12.—The same principles as those described in Clause 9, will apply to liabilities for debts jointly contracted, to securities jointly undertaken, and to joint tenancy of land, in the absence of express agreement. Under these circumstances, when property; real or personal, may have been jointly pledged, mortgaged or otherwise temporarily transferred, any one of the parties may discharge his portion of the obligation and redeem his share of the property.

Damages for the breach of contract, and that they ought not to be assessed at such a sum at once as the plaintiff might have hoped to have realized at the end of two years, since it may be assumed that the time and skill which the plaintiff would otherwise have bestowed on the partnership business for the earning of those profits would now be at his disposal for other profitable employment.—(3. North West High Court Reports, p. 151.)

13.—If a partner retire he usually takes a quittance in full (Farigh khatti) from the firm, releasing him from all his responsibilities, and causes this release to be publicly notified. Should he fail to do this he will be liable for all the debts of the partnership, both before and after his retirement. But if he shall have published the notification he will not, ordinarily, be liable: his individual liabilities have been accepted by the remaining partners of the firm. The Court can, however, stay the release on the prayer of any creditor pending a final adjustment, and can subsequently annul any release if it should appear to have been obtained with a view to defraud the creditors.
"The provisions given in Clause 13, regarding the retirement of a partner and his exemption from further accountability may seem peculiar. In England a retired partner does not cease to be responsible for debts contracted while he was a member of the firm; whereas in this province his final quittance releases him, not only from his partners, but also from the creditors of the partnership. No harm can result from this recognized custom, provided that the retirement be effectually notified to the public, and that the creditors have full opportunity of objecting to the release; for both which matters the clause in question contains precautions."—(Extract from the Commentary on the Punjab Civil Code.)

The fact of one partner having obtained a decree against his co-partners for the balance due to him on the concern, after deducting his share of the losses, is no answer to a suit brought against him and his former partner by a creditor of the firm for a debt contracted before his retirement was publicly notified. The plaintiff is of course no wise bound by the adjustment of accounts suit to which he was not a party.—(3. Punjab Record, Case No. 90.) See too Sutherland's Civil Rulings, for February 1864, p. 94.

14.—But if the partnership shall have been entirely dissolved, then neither the release which the partners may have given to each other, nor any adjustment of accounts which they may have made, will relieve them from any outstanding debts which may be charged against the firm.

15.—In the event of bankruptcy or insolvency, the Court will cause the joint and the private property of each partner to be collected, and having, in the same manner, collected his joint and his private debts, will cause the one to be discharged by the other, distributing rateably to each creditor. That is to say, the sum total of each partner's assets of all kinds will be set against the sum total of his liabilities of all kinds. It will not be legal to assign one proportion to the partnership debtors, and another to the private debtors. Nor will it be legal to set the aggregate of the assets of the whole firm.
against the aggregate of their liabilities; otherwise injustice would arise, inasmuch as some partners might have more private property, and fewer private debts, than others.

"The method of paying off private and partnership debts, in the event of insolvency, as given in Clause 15, differs somewhat from the English system, but it is nevertheless equitable and is usually practised."—(Extract from the Commentary on the Punjab Civil Code.)

16.—If one partner should die, or become incapacitated, the firm will not necessarily be legally broken up; the remaining partners would be at liberty, either to give him, and his estate, a full release, or to admit his heir or representative to the partnership.

If a party become a banian to a firm, on an agreement that he is to have a lien on goods belonging to the firm for balances due to him, and subsequently a new partner is admitted to the partnership while a balance is due to the banian, although the new firm does not necessarily become liable for the debts of the old one, yet when it retained the same banian, upon precisely the same terms as those on which he was employed before, and with a full knowledge as to what those terms were, it must be taken to have impliedly continued him in his post on the previous conditions, and to have taken over the debt then due to him as a debt binding on the new firm; since, otherwise, as the new firm disposed of the goods held at the time of the admission of the new partner and over which the banian had a lien, the security which the latter undoubtedly possessed to begin with, would have gradually been diminished, a result which clearly neither of the parties could have contemplated.—Baldro Dass Agarwala v. Kuich.—(3, Bengal Law Reports, Original Jurisdiction, p. 80.)

The law regarding the effect of a change in the persons constituting a firm is thus laid down in Section 10, Act V of 1866:

X. No promise to answer for the debt, default or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no
promise to answer for the debt, default or miscarriage of a firm, consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of any thing done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise.

17.—It is the duty of Choudrees to give currency and publicity to all notifications of partnership; to see that the proper books (bahi) and registers are kept according to the usage of trade; to aid in winding up concerns when partnerships are dissolved; when bankruptcy or insolvency occurs, to act as official assignees and administrators of the effects, to assist in procuring a true registration of assets and liabilities, and in effecting compositions with the creditors.

18.—The preceding clauses are conformable to the general tenor of the Hindu and Mahammadan Laws, and to the mercantile usage of this Province. If questions should arise, for which no provision has been made in this Section, they must be decided according to custom, which the Court will ascertain from Choudrees, or other competent parties.

For the law regulating Banking and Joint-Stock Companies, see Act X of 1866.
ACT No. XV OF 1866.

An Act to amend the Law of Partnership in India.

WHEREAS it is expedient to amend the Law relating to Partnership; It is enacted as follows:—

I. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such.

Explanation.—A person who being entitled, whether as a retiring partner or otherwise, to demand and receive present payment of the value of any share or interest of or in the capital or other funds of a business shall, after the value thereof shall have been ascertained between such person and the person or persons liable to pay the same, agree in writing to allow the same to remain therein or to be used by such person or persons for the purposes of such business, shall be construed to make an advance of money by way of loan within the meaning of this Section.

II. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.
No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

IV. No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to, the liabilities of the person carrying on such business.

V. In the construction of this Act, the word "person" shall include a Partnership Firm, a Joint Stock Company, and a Corporation.
CHAPTER XVIII.
PUNJAB CIVIL CODE.

SECTION XVIII.

Bills of Exchange.

1.—The parties concerned in a Bill of exchange are the 
*drawer*, *drawee*, *acceptor*, *endorser*, *endorsee*, 
*payer*, *payee*, and *holder*.

2.—Bills of Exchange (Hoondees) are chiefly of two descriptions; namely 
*Shah-jog*, or payable to bearer, and *Nam-jog*, or payable to the party 
named in the bill or his order. There are particular formulas for these bills, both as regards phraseology, and the mode of attaching signatures and superscriptions. These forms are well known to commercial people, and should be scrupulously observed. A *Nam-jog* bill may, or may not, be accompanied by a descriptive roll of the party in whose favor it is granted. It may be payable at sight, or after a certain date, specified in the bill or fixed by custom of trade. When payable at sight it is termed *Darshani*. It may be cashed with, or without, security, but when there is a descriptive roll, or when the identity of the holder or payee is known, security is not usually required. A *Shah-jog* bill is considered payable to any respectable person (*Shah*) who may present it to be cashed. It is payable only after a certain period of usance specified or implied. It is usually cashed on the same condition with regard to security as *Nam-jog* bills. Bills of either kind can be endorsed or
PAYMENT OF BILLS.

transferred, unless the Nam-jog bill be accompanied by a descriptive roll, in which latter case a transfer would be inoperative.

Where a difference appears between the figures of the amount for which a bill purports to be drawn, and the words of the amount, it is safer to attend to the words. Where therefore in *Sanderson v. Piper*, a bill was expressed in figures to be drawn for £245, and in words for two hundred pounds value received, with a stamp applicable to the higher amount, evidence to show that the words "and forty five" had been omitted by mistake was rejected as inadmissible. The instrument was held however to be a good bill for the smaller amount.—(*Broom's Legal Maxims*, p. 587.)

Where a bill payable to the party named in it and drawn on the defendant'sbankers at *P* was sent by the payee to his brother at *P*, who got it accepted and cashed, giving a receipt in his own name and that of the plaintiff, the Calcutta Court held that, on proof that the plaintiff and the party paid were members of a united family, and carrying on business together, it was a fair presumption when the bill was sent to the brother at *P* that one was entitled to act for the other in this matter, and even that the bill was despatched by the one to the other for the special purpose of realizing the money. The Court therefore considered that though on such a bill, a payment to bearer merely would not have discharged the acceptor, yet in this case the payment was good as against the plaintiff, although he alleged that he had forwarded the bill to his brother simply for the purpose of obtaining acceptance.—*Wilayat Dass v. Banarsi Roy*.—(*Sutherland's Civil Rulings, for June 1864, p. 262. *)

In order that a bill of exchange or promissory note may be negotiable, the payment of the money must not be made dependent on a contingency: thus a bill made payable "ninety days after sight or when realized" is not negotiable. A bill too must be for the payment of money, and not for the delivery of goods.—(*Broom's Commentaries on the Common Law*, p. 440.) And except in instruments negotiable by mercantile usage parties cannot annex to their contracts the incident of negotiability, and make them floating contracts payable to bearer. Where therefore in *Dixon v. Bovill*, the owner of a quantity of iron issued a note or undertaking in writing whereby he promised to deliver on and after a future date 1,000 tons of iron to the party who should lodge the note or undertaking with him, it was held that the instrument was invalid, for the law does not give a floating right of action to any one into whose hands such a writing may come.—(*Addison on Contracts, p. 948.*)
3.—The terms within which bills or drafts become payable are usually fixed by custom, and vary according to the distance between the places at which the drawer and drawee reside. If the party who obtains the draft desire it to be made payable after a period less than the customary period, he must pay extra interest for the difference between the lesser and the full term. If he cause it to be made payable after a period in excess of the customary period, then he will receive interest on account of the extra period. If he retain the draft in possession after the expiry of the term, he will obtain no interest for that additional period unless he should have made some special agreement to that effect with the drawee.

4.—Parties who may cash, accept, purchase, or receive with endorsement, Bills of Exchange, are bound to exercise due caution, and to require adequate security from the opposite party in the transaction:—unless indeed such party be well known as trustworthy. If the payer, acceptor, receiver, or purchaser, act without certain knowledge, or without the precaution of security, he will be liable for any injury which may accrue on account of the transaction, to other parties concerned in the draft. The surety affixes his signature on the face of the Bill, and thereby becomes responsible for its amount. If there be several sureties, each will be liable for his share, and no more.

When a man draws a bill, and it does not appear on the face of it that he drew it as an agent, he cannot set up as a defence that he drew the bill as such.—*Pigou v. Ram Kishen.*—(2, W. Reporter, Civil Rulings, p. 301.)
5.—If the consideration for which the bill was granted to the holder be illegal, or grossly insufficient, or if there be involved any of those circumstances which would ordinarily vitiate a contract, then such draft may be declared invalid as between those parties: but if it have been transferred to a bond fide transferee for a good consideration, then it will be valid as between the parties to such transfer; and so also it will be valid as concerns those who may, in good faith, subsequently become parties thereto.

In an action by an indorsee against the acceptor of a bill, or maker of a note, a plea of "no consideration" should show not merely that the defendant received no consideration, but that the plaintiff gave none for the bill or note. At all events it should show that the plaintiff took the instrument with notice of the original want of consideration, in which case he will be entitled only to recover so much as he himself gave for it, or that he took it with notice of facts showing that it had been improperly obtained from the defendant or was tainted with illegality and fraud. The rule in respect to the onus probandi on an issue taken upon a plea of no consideration has been thus laid down: “where there is no fraud, nor any suspicion of fraud, but the simple fact is that the defendant received no consideration for his acceptance, the plaintiff is not called upon to prove that he gave value for the bill; but if the bill be connected with some fraud, and a suspicion of fraud be raised from its being shewn that something has been done with it of an illegal nature, as that it has been clandestinely taken away or has been lost or stolen, the holder will be required to show that he gave value for it.” The defence of “no consideration” is pleadable as to part only of the amount of a bill or note; for instance by way of answer to an action on such an instrument a man might say that in adding up an account, he erroneously supposed himself to be indebted in £100, whereas in truth £10 only was due. That, in the case of a bill or note, would be a good plea of want of consideration, except as to £10.—(Broom’s Commentaries on the Common Law, pp. 487—489.)

An alteration of a bill or note in a material particular after it has been negotiated will avoid the contract; such as the addition to a promissory note for the payment of money with lawful interest, of the words “interest at 0 per
ALTERATION IN BILLS.

cent without the assent of the maker after the note had been signed by him; the cutting off the signature of one of several joint promisors; the acceleration of the day of payment; or an alteration in the place of payment, &c. Whenever, however, the alteration is immaterial, the substance of the contract remaining the same, the contract is not vitiated although the alteration have been made by the plaintiff himself. An alteration or addition to the contract before it has been finally completed, made with the assent of the parties to be affected thereby, will not avoid the instrument, or render a fresh stamp necessary. Where, therefore, a joint and several promissory note was altered after the first two makers had signed, but before the defendant had affixed his signature, it was held that the note was not vitiated as regarded the defendant, and that no fresh stamp was necessary. So where a bill was made payable on the 1st of January, and the person to whom it was directed struck out January, and inserted March, and then accepted the bill, and sent it to the drawer, who perceiving the enlarged acceptance struck out March and again inserted January, and at that time sent the bill for payment, which the acceptor refused, whereupon the holder of the bill again struck out January, and left the bill payable in March, as the acceptor had accepted it, it was held that the acceptor was responsible for the non-payment of the bill on the 1st of March, pursuant to his original acceptance.—(Addison on Contracts, pp. 819 and 820 and 926.) For further details on this subject see the case of Master v. Miller in 1. Smith's Leading Cases, p. 776.

6.—It is ordinarily incumbent on the holder of a bill or draft to present it for acceptance within the term, if possible, and to apply for payment immediately on the expiry of the term. But it is not uncommon for holders, having obtained acceptance from the drawee, to retain bills in their possession for some further time, which may be greater or less according to accident or circumstance, especially when they repose confidence in the drawee. If, after this interval, the bill should not be cashed on presentation, or if, in the interim, the drawee should become insolvent, still the holder may demand payment from the original drawer,
and is not rendered responsible for what may appear to be the consequence of his own neglect. In these cases it is the drawer who, by mercantile custom, is made responsible for the exercise of vigilance. He is expected to ascertain the fate of the bill he has drawn, to enquire whether it has been presented, accepted, or cashed. Of these circumstances he can satisfy himself by demanding the return of the “kho-kha” i.e. of the original bill, with a certificate of payment inscribed thereon. If, from the information he is thus supposed to acquire, he should be dissatisfied with the delay that has taken place, or should be doubtful as to the ulterior results thereof, he can cancel the draft, cause payment to be stopped, or make such arrangements as may conduce to the protection of his own interests. If he omit these precautions, he must bear the consequences. If under the above circumstances, however, the holder, having procured the acceptance of the bill, should subsequently engage in dealings with the acceptor, and if the acceptor should then refuse or fail to cash the bill, the loss must be borne by the holder, and the drawer cannot be required to make good the amount.

7.—The acceptor inscribes * the word “accepted” at the foot of the draft. The money will be

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* The following Sections of Act V of 1866, require attention, as the Act applies to all British India:

XI. No acceptance of any Bill of Exchange, whether Inland or Foreign, made after the first day of May 1866, shall be sufficient to bind or charge any person, unless the same be in writing
paid to the holder, whoever he may be, whether he be the same person who originally presented the bill for acceptance or not. The whole, or a part of the amount, may be paid according to the convenience of the payer and payee. If any objection be made by the drawee, or acceptance refused, or partial payment only be tendered, or if, for any reason, payment be not rendered, the holder is bound to give immediate notice to the drawer, and to any other of the antecedent parties to the bill from whom he may intend to demand payment. If the drawee have information of the drawer's death or insolvency, he ought not to accept or cash the draft; still, if he do so, he can recover from the drawer's estate. If the bill be for a large amount, some days of grace will be allowed for on such Bill, or, if there be more than one part of such Bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him.

XII. Every Bill of Exchange or Promissory Note drawn or made in any part of British India, and made payable in or drawn upon any person resident in any part of British India, shall be deemed to be an Inland Bill; but nothing herein contained shall alter or affect the stamp duty, if any, which, but for this enactment, would be payable in respect of any such Bill or Note.

XIII. Protest of a Bill of Exchange, whether Inland or Foreign, when purporting to be made by a Notary Public, shall be prima facie evidence that the Bill has been dishonoured.
payment, and such limited period of usance will be fixed by custom.

If the payee accept only part payment from the acceptor of a bill, who is in difficulties, he may be said to have given him time, and this, under the English law of creditor and surety, would discharge the endorser from liability. Before applying this rule however to a bill transaction among natives, it is necessary that the Court should ascertain the usage in regard to the point among the merchants of the place.—Gopal Dass v. Shaikh Saiyad Ali.—(3. Bengal Law Reports, Civil Appeals, p. 198.)

In a case before the Calcutta Court, it was held that although the English law of prompt notice "by return of post" did not apply to cases of native hoondees drawn by natives upon natives, and endorsed by natives, still before holding the endorser or drawer responsible for the consideration of a hoondee dishonored by the drawee, some reasonable notice is essentially necessary to be given to the party who may be asked to pay. What, and in what manner that notice is required by native merchants in general, and the merchants of the particular district where the case arose, were points to be ascertained by enquiry by the Court.—Radha Gobinda Shaha v. Chandra Nath Dass Shaha.—(6. W. Reporter, Civil Rulings, p. 301.) See too Vol. 2. Civil Rulings, p. 214.

In Gopal Dass v. Shaikh Saiyad Ali, which was a suit to recover the balance due on some bills from the endorser, the acceptor having only paid a portion and then become insolvent, the Calcutta Court, on the issue of want of due notice, held that while the strict rules of the mercantile law of England are not applicable to the transactions in bills and hoondees as amongst natives of this country, equity and good conscience require that there should be a finding upon the question whether the endorser had been injured or exposed to material risk of injury from want of notice within a reasonable time; and therefore the parties were entitled to show whether according to the local custom of the mahajans the notice, if given at all, had been given within a reasonable time; and in the event of its not having been so given, whether the endorser had in consequence been exposed to injury or material risk thereof.—(3. Bengal Law Reports, Civil Appeals, p. 198.) This decision accords with an earlier one in 1. W. Reporter, p. 75. The Code it will be observed requires immediate notice.

Where owing to the special circumstances of the case the drawer has no right of action against the acceptor upon the transaction for which the bill was given, or upon the bill itself, the former will not be discharged either by the
payee having discharged the acceptor, or by having given the drawer no notice of dishonor.—Pigou v. Ram Kishen.—(2 W. Reporter, Civil Rulings, p. 301.)

The holder is at liberty, after giving notice of non-acceptance, to take his chance that the bill may, notwithstanding the refusal to accept, be ultimately paid by the drawee, and may accordingly present it to him for that purpose when it comes to maturity, without thereby waiving his right of recourse against the other parties.—(Macpherson on Contracts, p. 155.)

8.—If the bill be lost or stolen, the holder must give the earliest practicable notice to the drawer and to the drawee. But if he obtain a duplicate (penth) or triplicate (purpenth), he may still obtain payment from the drawer, notwithstanding that the original bill should have been cashed in the interim, inasmuch as the payer will recover from the payee or his sureties. If no security should have been taken, then the payer must pay a second time to the rightful holder, and re-imburse himself as he best can for his loss in the first mistaken payment.

9.—The endorsee or purchaser is bound to act with caution; if the seller or endorser should, eventually, appear to have had no title, and to have merely found or stolen the bill, the endorsee must make good the amount to the proper owner on demand, recovering as he can, from the endorser, that is, from the thief or the finder, or from the sureties, should any have been obtained.

10.—There may be a special endorsement on a Shāh-jāg bill, though it is not absolutely necessary. If the bill should have been transferred by mere delivery, without such endorsement, it will be difficult to bring the transaction home to the
intermediate parties. But a regular endorsement is essential to the transfer of a Nān-jög bill.

11.—Immediately that any objection, either as regards acceptance or payment, has been made by the drawee, the holder, having given notice, may sue the drawer and all other antecedent parties at once, and may obtain a decree against all, and may execute it against whomever of them he pleases. But he can only obtain the full satisfaction once. He may commence his suit immediately on non-acceptance, without waiting for expiry of term of usance.

The holder will have no right of action against the drawer of a dishonored bill, if he have delayed in giving notice of the acceptor’s failure to pay until the drawer’s right of action against the acceptor has become extinct from lapse of time.—Haro Lall Iioy v. Maharajah Shambonath Singh Bahadar.—(5. W. Reporter, Civil Rulings, p. 230.)

A purchaser of a hoondee, on its being dishonored, is at liberty to sue his endorser alone, and it is not absolutely necessary to implead the acceptor and drawer in the same suit, and he does not lose his right of suing them separately so long as limitation does not bar him.—Gopal Dass v. Sita Ram.—(4. North West High Court Reports, p. 268.) It may be doubted indeed whether two such defendants ought to be joined in the same suit, as the causes of action are different. See 3. Bengal Law Reports, Civil Appeals, p. 201.

Where the payee of a hoondee impleaded as defendants in one suit K the drawer, H the acceptor, L his own endorsee of this hoondee, viz. the person to whom he had endorsed it, but who afterwards re-converted it to him, and finally one H, whose name did not appear on the document, but who was alleged to be the principal, on whose account K drew the bill as an agent merely, the Calcutta Court animadverted on this combination of several distinct suits in one. If H were liable, then manifestly the plaintiff had no right of action against K, because he would have acted as an agent merely; while as L simply endorsed back the hoondee in order that the plaintiff might sue upon it, he ought not to have been made a defendant; the case being quite different from what it would have been had the endorsement by L been a re-endorsement in the way of business, such as to
make L liable to pay the amount of the hoondee.—Habil Benpari v. Charman Mak.—(10. W. Reporter, Civil Rulings, p. 263.)

"Plaintiff being unable to realize the amount of a promissory note from the maker sues defendant, the payee, who endorsed it to the former in part payment of a debt. Ruled that the endorser is liable. Clause 11 Section XVIII, Punjab Civil Code applies. The maker of a promissory note occupies the position of the acceptor of a bill of exchange, being the person primarily liable, and when the note is transferred by endorsement, the endorser likewise becomes liable to the holder of the note, as does every subsequent endorser, and the parties may be sued either at the same time or separately."—(Judicial Commissioner's Ruling No. 59, Thornton's Small Cause Court Manual, Addenda, p. 177.)

Lord Langdale in Sayer v. Wragstaff thus laid down the rule for distinguishing whether the giving of a bill was to be regarded as extinguishing the debt, or merely as allowing a more extended time for payment. "The debt may be considered as actually paid, if the creditor, at the time of receiving the note, have agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid; or if from the conduct of the creditor, or the special circumstances of the case, such a payment is legally to be implied. But in the absence of any special circumstances, throwing the risk of the note upon the creditor, his receiving the note in lieu of present payment of the debt, is no more than giving extended credit, postponing the demand for immediate payment, or giving time for payment on a future day, in consideration of receiving this species of security. Whilst the time runs, payment cannot legally be enforced, but the debt continues till payment be actually made, and if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given. If payment be made at or before the expiration of the extended time allowed, it is then for the first time that the debt is paid."—(Broom's Legal Maxims, p. 783.) See too Addison on Contracts, p. 984.

Fraudulent and invalid bills and notes may in general be considered as waste paper, and the creditor may resort at once to his original demand.—(Addison on Contracts, p. 931.)

12.—Payment should be made to the holder himself, or to his accredited agent, and the bill should be delivered to the payer; a receipt of payment should also be endorsed.
13.—A Gumashtah may grant, endorse or accept bills without special permission. He will not do so in his own name, but in the name of the firm. Also if he be absent from the House, he may draw and endorse bills, but in such a transaction he must attach a memorandum to the bill stating the name of the firm for which he acts.

14.—Jawabi Hoondees are merely letters of recommendation; they are rarely granted in this province, and do not require further acceptation.

The following brief account of Jawabee Hoondees is taken from Macpherson on Contracts, p. 158. “A person, desirous of making a remittance, writes to the payee, and delivers the letter to a banker, who either endorses it on to any of his correspondents near the payee’s place of residence, or negotiates its transfer. On its arrival, the letter is forwarded to the payee, who attends and gives his receipt in the form of an answer to the letter, which is forwarded by the same channel to the drawer of the order. Where such a letter had been delivered to a banker and had been endorsed on by him to B, on the credit of A, the person desirous of making the remittance, and notice of the arrival of the letter had been given to the payee by B, it was held that the banker might still cancel the order by advice to B at any time before payment had been actually made, A having failed in his promise to lodge with the banker the amount named in the letter.”

15.—The anth, a species of premium and discount on drafts current among merchants, formerly ranged at variable rates in different places. For many years past it has been fixed at an uniform rate of ten per cent, and one rupee extra on each hundred. In Bills of Exchange it is frequently the practice to denote the sum in the rupees of recalled currencies, such as the Nanukshahee, Sika, Furokabadee, &c.

Since the compilation of this Code, the influx of Europeans into the province and recent legislation have tended to
give extended circulation to other kinds of negotiable paper, and it is purposed therefore to make a few brief remarks on Currency Notes; Bank Cheques; and Promissory Notes.

Currency Notes.

"A Bank Note is a Promissory Note made by a banker [in India by the Government] payable to bearer on demand. A bank note has, however some peculiar qualities, of which the most important is that it circulates as money, and in the ordinary course of business is treated as such. In Miller v. Race, Lord Mansfield says that bank notes are constantly and universally both at home and abroad treated as cash, and paid and received as cash, and it is necessary for the purposes of commerce that their currency should be established and secured. It was there accordingly held, that a bona fide holder of a bank note for value is entitled to retain it as against a former owner from whom it has been stolen; the Court applying to a bank note the rules of law applicable to money, and observing that, "in the case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and bona fide consideration." In short, one who takes a bank note bona fide, i. e., giving value for it, and without notice that the party from whom he takes it has no title, may recover upon it, although he may at the time have had the means of knowledge of such fact, and have neglected to avail himself of it.

A person, however, who receives forged bank notes in payment for goods sold, or who discounts a forged bill, will not, in general, be precluded from suing for the price of the goods, or for the money advanced by way of discount, because, in the one case there has been a total failure of consideration, and in the other the payment was made under a mistake as to facts, and likewise without consideration."—(Broom's Commentaries on the Common Law, pp. 480—483.) See too Addison on Contracts, p. 913, and the report of Miller v. Race itself in 1. Smith's Leading Cases, p. 450; the special Punjab law as to hoondees should however be borne in mind in studying the notes to that case.

Banker's Cheques.

The chief peculiarity regarding banker's cheques is that it is the duty of bankers to know the handwriting of their customers who draw on them, and therefore if a bill purporting to be drawn by a customer of the banker's is made payable at the bank, and the bankers take up and pay the bill to a bona fide endorsee for value, who presents it them for payment, they cannot recover the amount from such
The holder of a cheque should not make undue delay in presenting it for payment; as if he do, and the bank fail, he will have to bear the loss.

Promissory Notes.

"A Promissory Note* is an absolute† promise in writing, signed by the maker, to pay a specified sum, either at a specified time, or on demand, or at sight, to a person named or designated in the instrument, or to the bearer. It need not bear any date on the face of it, nor need it be a negotiable instrument. It must be for the payment of money, not of Bank notes &c., and of a certain fixed sum of money. The promise to pay must be unconditional, and to pay generally and not out of any particular fund. If the promise be dependent on the performance by the payee of anything on his part, or is otherwise subject to any condition, the instru-

* The new Stamp Act (Act XVIII of 1869) gives the following definition. "A Promissory Note includes every instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time there in limited, or on demand or at sight."

† If the promise be conditional, the quality of negotiability is lost; see above, at p. 450.
ment will amount to an agreement, and not a Promissory Note. If there be not an absolute promise to pay (i.e., words from which such promise is necessarily to be inferred) the instrument will be either an agreement, or a mere acknowledgement or evidence of a debt, and in this latter case the instrument will require no stamp at all. The above description may be sufficient to distinguish a Promissory Note from an agreement. An agreement implies mutuality, something to be done by both parties to it, or something to be done by the one party (other than the mere unconditional payment of money,) for a consideration which has passed or is to pass from the other. It is however impossible by any definition to lay down the line of distinction between an agreement and a Promissory Note, as the distinction between the two is often a very nice one."—(Judicial Commissioner's Ruling, No. 26, Thornton's Small Cause Court Manual, Addenda, p. 167.)

If a gumashlah sign a Promissory Note without disclosing the name of his principals, the latter will not be liable, and no parol evidence is admissible with a view of establishing their liability, unless a Mahajani or Bazaar usage be established in opposition to this principle.—Shiv Charan Sahu v. Curtis.—(3.IV.Reporter, Civil Rulings, p. 139.)

"A third party having discounted a promissory note and being unable to realize the amount from the maker, sues defendant, the payee, who transferred the note without endorsement, merely receipting it. Ruled that the payee or transferer is not liable, the law being that when a note is transferred without endorsement and in exchange for money or other notes it amounts to a sale of the note, while the transferer by not endorsing it refuses to pledge himself to the solvency of the party or parties."—(Judicial Commissioner's Ruling No. 58, Thornton's Small Cause Court Manual, Addenda, p. 177.)
CHAPTER XIX.

PUNJAB CIVIL CODE.

SECTION XIX.

Debt, Interest, and Mesne Profits.

1.—By the Hindu and Mahammadan law, the heirs of a deceased person must pay his debts to the extent of the assets, or of the property he may have left to them. This principle may be enforced by the Courts. But although, by the Hindu law, a bonded debt may be, under all circumstances, claimable from the son and grandson of the obligor, this rule will not be carried out except in the case just put, and the heirs will not be chargeable with an amount greater than that which they may have inherited.

When a plaintiff seeks to recover a debt alleged to be due from a deceased person, he must, even if the case be undefended, adduce some evidence at any rate, to show not only that the debt was incurred by the deceased, but that the defendant is his representative and has succeeded to his property.—Mokhun Dass v. Radha Lall.—(1. Punjab Record, Case No. 85.)

In Gokul v. Wilsey and Chamnan, the Chief Court, on a reference from a Judge of a Court of Small Causes, ruled that the decree which the referring Court had passed against the estate of one Wilsey deceased, whose property was in the hands of a Military Court of Adjustment, was void, and could not be executed against the property, since there had been no party on the record to represent the estate.—(2. Punjab Record, Case No. 65.) An unsatisfactory decision of the Calcutta Court will be found in 3. W. Reporter, Miscellaneous Appeals, p. 21, in which a decree for a debt of the ancestor obtained against a party in possession as heir was held to be equally binding on another party, who eventually succeeded in establishing his title to the inheritance, on the
ground that the decree was given against the ancestor's estate, and was therefore binding, into whose hands soever the estate passed.

Where a plaintiff sues the defendant as representative of the original debtor, who is supposed to be dead, the suit is not maintainable before the lapse of the time which raises the legal presumption of the death of the debtor, unless there be proof of special circumstances which warrant the inference of his death within a shorter period. If no such evidence be forthcoming, and it is desired to avoid the bar under the Act of Limitation, the proper course is to institute a suit against the debtor, giving his last known place of abode, and if, after due diligence, the plaintiff be unable to procure due service of the summons to appear and answer the claim, and consequently to prosecute the suit to a decision, Section 14 of the Act of Limitation would, it seems, apply, and prevent a suit against his relatives being barred.—Karuppan Chetti v. Veriyal.—(4. Madras High Court Reports, 1st.)

In a suit brought against certain persons, as heirs of a deceased debtor, the Madras Court held that it was not sufficient to enquire whether the defendants had possessed themselves of the deceased's estate; for even if they should be found not to have taken possession of any part of the estate, still if they be shewn to be the representatives of the deceased, they would rightly be made answerable for the debt, out of any such property of the deceased as in their capacity of representatives they might be entitled to.—Avul Khadar v. Andhu Set.—(2. Madras High Court Reports, 423.)

In a suit against an heir for a debt due by his ancestor, it lies on the plaintiff in the first instance to give such evidence as would prima facie afford reasonable ground for an inference that assets had, or ought to have, come to the hands of the defendant. When the plaintiff has laid this foundation for his case it rests with the defendant to show that the amount of such assets was not sufficient to satisfy the plaintiff's claim, or that they are of such a nature that the plaintiff is not entitled to be satisfied out of them, or that there never were any assets, or that they have been duly ministered and disposed of in satisfaction of other claims.—Kottala Uppi v. Shangara Varma.—(3. Madras High Court Reports, 161.)

* In a case given in 3. W. Reporter, Civil Rulings, p. 137, the Calcutta Court however appear to have held that, although it was proved that defendant had inherited his father's estate and squandered it, the creditors of the father could not recover their dues from property inherited by the son from another quarter.
A creditor of a deceased Hindu does not, on the death of his debtor, obtain any better position as against the debtor’s estate than he enjoyed previously; so that if he stand by and allow the heirs to dispose of it to a bona fide alienee, he cannot follow it into the hands of this latter party, but can only bring his suit against the heirs personally, who will be responsible to the extent of the assets received.—Zahardast Khan v. Indraman.—(Full Bench Ruling of North West High Court of March 6th, 1867.) See too 2. W. Reporter, Civil Rulings, p. 296. So, in a Mahammadan case, the Calcutta Court ruled that the mere fact of lands having once belonged to the estate of the deceased does not shew that the plaintiff is entitled to follow them into the defendant’s hands; that though it is true that the assets of a deceased Mahammadan are primarily liable for and charged with his debts, and, further, that it is the duty of the heir to pay all debts before appropriating any portion of the assets to his own use, yet it does not follow that a third party who purchases from the heir bona fide, and for full consideration, may not by his purchase acquire a good title as against a creditor, who subsequently gets a decree against the heirs and estate of the deceased.—Saiyad Shah Ilyyat Hossein v. Saiyad Ramzan Ali.—(1. Bengal Law Reports, Civil Appeals, p. 172.)

In Gunga Narayan Pal v. Utaesh Chandra Bose, the Calcutta Court however ruled that, as by Hindu law a man’s property is liable for his debts, and property descends to an heir burdened with the debts of the ancestor, which must all be satisfied before the heir can be said to have any interest in the property at all, where A had obtained a decree against the heir for a debt of the ancestor, in whose lifetime the suit had been instituted, but before the property was sold in execution, it was attached and sold in execution of a second decree obtained by B, for a personal debt of the heir, the purchaser at the sale under B’s decree bought only the right and interests of the heir, which amounted to nothing so long as the debt to A was unsatisfied; the purchaser might indeed at the second sale have paid this debt, but not having done so, he could not exclude the second auction-purchaser who purchased the right and interest of the ancestor, for whose debt the property was primarily liable.—(Sutherland’s Civil Rulings for June 1864, p. 277.) This ruling appears tantamount to a declaration that the estate is hypothecated in the hands of the heir for the debts of the ancestor; and if so, its correctness may perhaps be doubted.

Although Hindu law distinguishes between a son’s and a grandson’s liability, requiring the former to pay a father’s debt with interest, while the latter has only to pay the grandfather’s debt, without being answerable for interest,
Suit on a bond made payable to a party deceased.

Where a person sues on a bond given to a person deceased, he may show by oral evidence that the money secured by the bond was advanced by himself and on his behalf through the deceased; but in such a suit, the plaintiff must either entitle himself as personal representative of the deceased, or else make the personal representative a party.—Deva Rau v. Venkatesa Acharyar.—(1. Stokes' Madras Reports, p. 452.)

2.—The first charge on the estate of a deceased is the cost of his decent interment—then follow the debts, (including dower if a Musalman) and the allowance to those who, by law, are entitled to alimony—and than lastly the payment of legacies and the distribution of heritable shares.

In reference to the question of interment, see Punjab Civil Code, Section IV, Clause 16, (p. 166,) and Section 276, Act X of 1865.

For the limitations as to dower, see Punjab Civil Code, Section VI, Clause 11, and for those in regard to legacies, Clauses 1 and 2, Section XI of the same Code.

3.—The debts will be first realized from the persons or property that are primarily responsible. Thus a decree against a surety for his principal's debt will not be executed, until the attempt to recover from the principal himself has been made and failed.

In the Delhi Bank v. Innes and others, the Chief Court expressly ruled that this Clause related to decrees only, and that it was consequently no bar to the creditor suing the surety alone in preference to the principal debtor.—(1. Punjab Record, p. 150.)

4.—The Courts are not bound by any restrictions with regard to Usury. Debtors and creditors are allowed to arrange the terms and conditions of interest in whatever manner they may deem most
conducive to their mutual benefit. The Courts will decree whatever rate may have been agreed upon, bond fide, between the parties. If no special rate shall have been agreed upon, then the Court will fix what may appear an equitable amount with reference to the custom of the locality, the usage of trade, or the merits of the transaction. It will be remembered that the rates of interest vary for different classes of cases and in different places.

The Interest Law for India is Act XXXII of 1839, which is as follows:

**ACT No. XXXII of 1839.**

*An Act concerning the allowance of interest in certain cases.*

Whereas it is expedient to extend to the territories under the Government of the East India Company, as well within the jurisdiction of Her Majesty's Courts as elsewhere, the provisions of the Statute 3rd and 4th William IV. Chapter 42, Section 28, concerning the allowance of interest in certain cases:

It is, therefore, hereby enacted, that upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment
shall have been made in writing, so as such demand shall give notice to the debtor, that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

Where under Act XXXII of 1839 no interest is recoverable, none can be awarded prior to suit under the provisions of Section 10, Act XXIII of 1861; since that Section does not repeal the Interest Act, but simply enacts that in cases where interest prior to suit could be legally awarded under the law in force, the Court may award such interest, in addition to any further interest, and to such extent, as the Court in its discretion may think proper and just from date of decree.—Abdul Karim Khan v. Shaikh Miah Jan.—(6. W. Reporter, Civil Rulings, p. 288.) See also Palmer v. Madho Prasad.—(2. North West High Court Reports, p. 131.)

With regard to the terms "a sum certain," and "a time certain" in the Interest Act, the Privy Council, in Juggomohan Ghose v. Manick Chaud, ruled that the certainty required must exist at the time when the promise is made, and that the Act does not, in this part apply to debts contingent in amount and time of becoming due.—(Sutherland’s Privy Council Judgments, pp. 357—360.) The whole judgment should be consulted.

In regard to bills of exchange and promissory notes made payable with interest, the interest runs from the day of the date of the bill or note: if they be silent as to interest, it is payable only from the time when the bill or note becomes due. As against the drawer of a bill, interest runs only from the time of his receiving notice of dishonour. If no rate of interest be specified on the face of a bill of exchange, the rate recoverable is the current interest rate prevailing at the place where the bill was drawn.—(Addison on Contracts, p. 1069.)

Mr. Broom, in speaking of the English Statute from which this Act is borrowed, observes that—"Cases not within its application are to be still regulated by the Common Law, under which interest is recoverable only in the following cases:—
I. By the usage of trade, e.g., on bills of exchange, or promissory notes,* or on an agreement to pay for goods, &c. by bill or note, or on a guarantee for the due payment of a bill. On a bond † also and on a mortgage ‡ interest is recoverable. [See on this head Sutherland's Privy Council Judgments, p. 360.]

II. Where there has been an express contract to pay interest. "If," says Tindal C. J. "it be the intention of the party to obtain interest, it is always in his power to insert in the contract an express intimation to that effect.

III. Where from the course of dealing between parties § a contract to pay interest may be implied." (Commentaries on the Common Law, p. 639.)

With regard to the concluding words of the Interest Act, the Madras Court remarked that—"If the practice which has unquestionably prevailed in the Mofussil Courts for a long series of years of awarding interest upon all demands of which the payment has been illegally delayed were shewn to be based upon any existing regulation or positive rule of law by which interest would at the time the Act passed have been payable on this debt, [a wakil's fee] unquestionably it would still be payable, notwithstanding the enactment. We are unable, however, to find any such provision, and it necessarily follows that there being no allegation of a demand in writing the award of interest must be disallowed."—Kisara Rukkunna Rau v. Sripati Viyanna Dikshatulu.—(1. Stokes' Madras Reports, p. 369.)

In Shade Ram and Shiv dial v. Hargopal and Totu Ram, the Chief Court, while decreeing the repayment of an advance of Rs. 800 which had been paid by the plaintiffs for the purchase of some cotton, which contract had however

* Interest was held, however, in the Bank of Hindustan, China and Japan v. Wilson, not to be recoverable on a note payable on demand, not at certain time, when no demand for payment had been made in writing and no contract to pay interest had been made out.—(1. Bengal Law Reports, Original Civil Cases, p. 41.)

† In a bond debt, where the bond itself was silent as to interest, the Calcutta Court laid it down that the rate of interest to be allowed between the time when the bond became payable and the date of suit was a matter entirely in the discretion of the Court, having regard to all the circumstances of the case.—(2 Bengal Law Reports, Appendix, p. 10.)

‡ "In one case of a non-usurious mortgage, interest not being expressly stipulated for, the mortgagee was held to be entitled to interest only from the date upon which the loan became repayable. And in another case, interest was allowed only from the date of suit until realization of the principal sum decreed."—(Murp herson on Mortgages, p. 246.)

§ "In a suit between certain villagers and their bumnesah the Chief Court ruled that "in the absence of any express contract to pay interest, there must be a distinct finding by the Court of the amount of interest awarded by it, if any be awarded, by analogy to Act XXXII of 1839."

Halla v. Soonam.—(2. Punjab Record, Case No. 37.)
come to nothing, refused to allow interest on the sum thus decreed; Roberts, J. basing his decision on the following passage of Chitty on Contracts—"The general common law rule is, that the law does not imply a contract on the part of a debtor to pay interest on the sum he owes, although the debt may be of a fixed amount, and may have been frequently demanded."—(1. Punjab Record, Case No. 51.)

In Garuda Reddi v. Gudi Janakayya Garu, the defendant had given a bond to the plaintiff’s elder brother, on whose death the succession was disputed, and the defendant, though perfectly willing to pay the debt on the production of the proper authority for its receipt, declined to pay the plaintiff as alleged heir of his brother: the Court held that under these circumstances it became the duty of the plaintiff to take out a certificate of succession, and in the absence of any such authorization, the defendant could not be justly charged with the interest which had accrued due owing to the dilatory conduct of the plaintiff himself.—(1. Stokes’ Madras Reports, p. 124.)

In Dharm Singh and another v. Deva Singh, the Commissioner having remarked in his judgment that “the plaintiff was bound to sue earlier if he were not receiving the annual income guaranteed to him by the agreement”—the Chief Court observed that “where an agreement is for interest on money lent and agreed to be repaid by a certain date, it may be that the lender after that date cannot, without a further arrangement expressed or implied, recover interest at the rate agreed upon for a definite period. But in this case no period was fixed. The agreement was, that if the jagir should be resumed he should pay principal and interest at 6 per cent. The jagir was soon afterwards resumed, and as interest ran at the rate agreed upon for some time after the resumption, it must be taken to have run at the same rate till the time of action brought. The order of the Commissioner must be modified and interest allowed.”—(1. Punjab Record, Case No. 98.)

Interest is recoverable if claimed and otherwise legally due, notwithstanding both the parties to the transaction may be Musalmans, whose religion and law forbid interest, as the peculiar law of the litigants is not binding by the Regulations in such cases.—(Macpherson on Mortgages, p. 246.)

5.—If in any case the amount of interest shall be deemed unjustly usurious, the Court will decree only as much as may appear just under the circumstances.
The following remarks are taken from the Commentary to the Code. "It is therefore recommended that the Court should first regard any explicit bonâ fide agreement entered into by the parties, or in absence of that, the custom which would naturally govern that class of transactions, to which the case in question may belong. Anything like oppression or extortion would of course be discouraged, and the Court would extend its protection to an unsophisticated debtor who might appear to have fallen into the hands of an astute and grasping creditor; this has been provided for in clauses 5 and 6."

On the authority of Barrett v. Hartley (2. L. R. Eq. 795) the Bombay Court, in Vimayak Sadashiv Voze v. Ragshi, remarked that "though the Legislature has provided [Act XXVIII of 1855] that any rate of interest which the parties may have agreed upon shall be awarded, yet this enactment in no way prevents a Civil Court in India, which administers both law and equity, from examining into the character of an agreement made between persons between whom relations exist, which will enable one party to take advantage of the other, and from declining to enforce such agreements unless they be fair and reasonable. When they are not so it may be justly inferred that the assent of the person who has subscribed the exorbitant agreement has been obtained through the pressure which the other party has been able to apply in consequence of the position in which the one stood to the other." Hence where the usufructuary mortgagee let the land to the mortgagor at a nominal rent, the value of which was far in excess of the principal debt, the Court held that this agreement must have been obtained by the pressure the plaintiff's position as mortgagee enabled him to put on the defendant, and refused to allow the plaintiff to recover under it.—(4. Reid's Bombay High Court Reports, p. 202.)

6.—The period during which interest is demanded must not exceed twelve years. If a portion of this period be anterior to British rule, the amount of interest for that portion will be adjusted on the same principles as for the remaining portion subsequent to British rule. If debtors have previously to British rule, signed bonds for exorbitant interest according as the creditor may for time have presented the balance of accounts, which
amount of interest could never, perhaps, have been recovered if the native rule had continued, but which interest is now claimed for recovery through the Courts; then the Judge will consider the relative position of the two parties, and the merits of the transaction; and will decree as much interest as may seem equitable. The debtor need not be compelled by the Court to pay the entire amount of interest, if there be reason to believe that the bond was executed through fear or ignorance.

7.—Wasilat, or mesne profits, may be decreed for any period not exceeding the ordinary term of limitation. If the amount be disputed the Court will not call upon the parties to produce accounts. Nor will enquiries be made as to the actual profits during previous years. Such proceedings are apt to stimulate litigation. But the Court will fix an approximate amount by summary calculation, either with or without the aid of arbitrators.

Although the special provisions of this clause render some of the precedents of the High Courts inapplicable, the following principles regarding the subject may be useful, especially in cases in which from well ascertained rents, or similar incomings forming the mesne profits, the question before the Court happens not so much to be how much has the defendant received, as how much is he bound to pay over to the plaintiff.

Mesne profits are the assets of an estate, minus costs of collection, Government revenue, losses by desertion and death of ryots, by drought &c.—(3. W. Reporter, Miscellaneous Appeals, p. 25.) The party entitled to mesne profits can as a rule recover all that the defendant received, together with all which he should have received had he exercised ordinarily due care and diligence—(Vol. 2. Miscellaneous Appeals, p. 10; Vol. 7. Civil Rulings, p. 78; Vol. 8. Civil Rulings, p. 103; Vol. 9. Civil Rulings, p. 374; and 1. North West High Court Reports, Miscellaneous Appeals, p. 17); or such sums as the party wrongfully ousted would have collec-
had he been in possession and which he was prevented from collecting by having been kept wrongfully out of possession.*—(Vol. 5. Miscellaneous Appeals, p. 35; Vol. 8. Civil Rulings, o. 133; Vol. 9. Civil Rulings, p. 457.) But when the person liable to pay the mesne profits has not let the land out to tenants, but has himself occupied and cultivated it, a Full Bench of the Calcutta Court held that he was only answerable for what would have a fair and reasonable rent for the land had it been let to a tenant during the period of the unlawful occupation by the wrong-doer, since as the defendant would have had to have paid this occupation value had the crops proved a failure, it was but reasonable that he should reap the profit if they turned out successful.—(9. W. Reporter, Civil Rulings, p. 445.) See also Vol. 7. Civil Rulings, p. 214; and Vol. 10. Civil Rulings, p. 463. Where the plaintiff has himself fixed the rates at which he claims mesne profits in his plaint, higher rates cannot be allowed him, even should a local enquiry show that he has made an under-valuation.—(7. W. Reporter, Civil Rulings, p. 140.)

In Suriah Row v. Rajah Eunguntz Suriah, where the evidence on both sides was unsatisfactory and worthless, the Privy Council affirmed the decree of the Sadr Court which had estimated the mesne profits from the average of two preceding years, as ascertained in a former suit in which the defendant had been a party, which sum concided very nearly with the rate claimed by the plaintiff.—(Sutherland's Privy Council Judgments, p. 88.)

A wrong-doer may be saddled with interest year by year from the date on which he was ordered to disgorge the mesne profits.—Muni Rom Acharji v. Srimati Turungo.—(7. W. Reporter, Civil Rulings, p. 173.) See too Vol. 5. Civil Rulings, p. 125, where the plaintiff having waited three years to bring his suit for wasilat after he had become entitled to possession by a decree of the Privy Council reversing an adverse decree of the Lower Court, the Calcutta Court, considering one year to a reasonable time for commencing his suit after the Privy Council decision was pronounced, refused to allow him interest for the last two years.

A party is liable for mesne profits to the legal owner if he have kept him out of possession, notwithstanding there may have been no bad faith on the defendant's part when doing

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* "Generaliter autem cum de fructibus astimandis quarrant, constat animadversi debere, non maxime possessor fructus sit sed quia petitor frui putoerit si ei possidere licenset (Dig. VI. VI. 1. 62.) The sum therefore for which the plaintiff himself leased the property has therefore been held to be a good measure of the profits he would have enjoyed, but for the wrongful possession of the defendant.—(5. W. Reporter, Civil Rulings, p. 191; and Vol. 10. Civil Rulings, p. 3-6.)
Mesne profits may be apportioned among the co-defendants.

Mesne profits.

Where the profits which several co-defendants have enjoyed by the wrongful occupation of the plaintiff's property are distinct, as where one has been in occupation and another has received higher rents than he could have recovered from the plaintiff, the Calcutta Court has been in the habit of assessing the mesne profits on the defendants in accordance with their respective liabilities.—(6. W. Reporter, Civil Rulings, p. 113.) In another like case however, at p. 230 of the same Reports, the Court declared both defendants joint wrong-doers, and therefore both jointly liable to the plaintiff, who was however in the first instance to recover from the one defendant the profits he had realized, and in the second instance from the other defendant the profits that other had obtained. Mesne profits can of course be recovered from any property in the judgment-debtor's possession.—(4. W. Reporter, Miscellaneous Appeals, p. 7.)

If the defendant, on whom from his necessarily superior knowledge the onus of showing the amount of the mesne profits specially rests, absent himself at the time of enquiry before the first Court, or by neglect, non-production of evidence in his power, or otherwise impede the action of the Court, he will have only himself to blame should the amount awarded against him be larger than it otherwise would—(3. W. Reporter, Miscellaneous Appeals, p. 25, ), and he is not entitled to invoke the aid of the Court on appeal.—(8. W. Reporter, Civil Rulings, p. 203.) But in Karu Lall Thakur v. Forbes the same Court observed that the fact of the

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Hunt of proof in disputes regarding mesne profits is naturally on (hedefen (lant.

so.—Baijnath Prasad v. Badhu Singh.—(10. W. Reporter, Civil Rulings, p. 486 ; Vol. 8. Civil Rulings, p. 479.) But see a contrary view taken by the late Calcutta Sadr Court in a case referred to in 7. W. Reporter, Civil Rulings, p. 226. Where however, the defendant had held the land by consent of the plaintiff or his representative or de facto agent, and under no condition express or implied to make good the profits, the legal owner will not be entitled to recover them.

—Mahammad Ali Bova Sabbi v. Mohiuddin Naimar.—(1. Stokes' Madras Reports, p. 107.) The learned Reporter appends to this case the following note—"Where there is a mere bonâ fide adverse possession, English Courts of equity do not carry back the account beyond the filing of the bill —(Pulleney v. Warren, 6. Ves. 93; Hicks v. Sallit, 3. DeG. M. and G. 513,) unless there has been a demand of possession by the plaintiff before bill filed, or acts equivalent thereto.—(Penny v. Allen, 7. DeG. M. and G. 409, 428.) But where the equitable owner is guilty of laches the account will be carried back only to the filing of the bill—(Schroder v. Schroder Kay 591,;) and in one case where the laches was great, an account was not directed beyond the date of decree.—(Acherley v. Roe, 6. Ves. 565, 573.)"

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defendant failing to appear before the Commissioner appointed to make a local enquiry into the mesne profits did not bar him from objecting to anything in the investigation which was erroneous, although he was not entitled merely on the score of absence to ask for further investigation or to impugn the propriety of the enquiry as being ex parte.—(7. W. Reporter, Civil Rulings, p. 140.)

A decree for possession does not invariably show that the plaintiff as a necessary concomitant of such an award is entitled to wasilat, for it may so happen that a plaintiff in suing for possession has been guilty of such laches as to deprive him of his right to mesne profits.—(Sutherland’s Civil Rulings, for April 1864, p. 158.) But when the plaintiff has been restored to possession by proceedings under Section 15 Act XIV of 1859, the prior possession of the plaintiff is sufficient prima facie evidence of title to warrant a decree in his favor for mesne profits during the time he was out of possession under the defendant’s forcible dispossession unless the latter can show a better title in himself.—(2. Bengal Law Reports, Civil Appeals, p. 67.)

For the law for limitation in wasilat suits, see Tremlett’s Limitation Law, p. 67.

8.—The Court will duly inform the parties that interest, mesne profits, and other accessories, if sued for at all, must be claimed together with the principal, and that the amount of such collateral claim must be added in when the value of the suit is estimated.

“Section 10 [of Act VIII of 1859] makes claims for the recovery of land and of the mesne profits of such land distinct causes of action. The rule contained in the Punjab Principles of Law, Section XIX, clause 8, requiring them to be sued for together, must therefore give way. But under the provisions of Sections 8 and 9, they may still be sued for together, unless the Court be of opinion that they cannot conveniently be tried together. Section 197 again gives the Court an option, where it has not directed separate trial, of determining the amount of mesne profits at once, or of reserving the enquiry into this point until execution of decree. And Section 11 of Act XXIII of 1861 provides for the determination of any question so reserved, regarding the amount of mesne profits, or the amount payable under Section 196 by the Court executing the decree.”—(Chief Court’s Book Circular No. XXXIII of 1866, para 2.)
Rule for the joinder of different claims in one suit.

"The general rule is that a suit, while on the one hand it should embrace the whole subject of dispute between the parties, should not on the other hand comprise several distinct claims all made by the plaintiff against the same defendant, but which are dissimilar in their nature. Between these limits much must be left to the discretion of the Judge, who must deal with each case on its merits. No very precise or positive rule can be laid down. If from the circumstances of the case it appear that the several items constitute one account, or were treated or intended to be treated by the parties as one demand, then they must be included in the same suit. If, however, there be nothing to connect the several items, and nothing in the circumstances of the case to indicate the existence of an account current, or to show that the items were treated by the parties as one demand, then they may form separate causes of action."—(Judicial Commissioner's Ruling, No. 5, Thornton's Small Cause Court Manual, Addenda, p. 159.)

The remainder of the Section treats of insolvency, and it may be well to preface it with the following extract from the Commentary to the Punjab Civil Code:

Extract from the Commentary.

"The objects contemplated by the rules of insolvency are—

"First: that an insolvent of whatever class or profession he may be, having surrendered his person to the Court, and also his entire property, in order that it may be equitably applied to the liquidation of his debts, and having satisfied the Court and his creditors that he has endeavoured to discharge his liabilities, and has been innocent of fraud, concealment, or gross misconduct, may be released from personal distress and confinement, and pursue his avocations unmolested, though not released from the obligation of payment.

"Second: that those creditors who may apprehend that the insolvent's property will be made away with, or injured by the insolvent himself, or unduly appropriated by one or more of the creditors, to the prejudice of the others, should be able to move the Court for the insolvent's arrest, and detention on bail or in custody, in order that he may be compelled to make a full disclosure of his circumstances, and to surrender his property to be administered by the Court for the general benefit of the creditors at large."

The Chief Court, on the extension of the Civil Procedure Codes to this Province, issued the following Circular in regard to the subject of Bankruptcy:—
BOOK CIRCULAR No. XXXVI of 1866.

To

ALL COMMISSIONERS AND DEPUTY COMMISSIONERS
IN THE PUNJAB.

Dated Lahore, 10th November 1866.

With reference to the provisions of Sections 273 and 280, of Act VIII of 1859, attention is called to the fact, that the Bankruptcy Jurisdiction of the Punjab Courts, under Principles of Law, Section XVII, para 15, and Section XIX, paras: 9 to 13 and 15, is not affected by the introduction of the Code of Civil Procedure. The sections above quoted provide for the case of a judgment-debtor imprisoned in execution of decree, who is willing to surrender all his property for the purpose of satisfying the decree, and supersede the analogous rules given in Punjab Civil Procedure, Section V, paras: 18 and 19. But though Act VIII of 1859 contemplates the existence of a law of Bankruptcy or Insolvency, as may be seen from Section 106, it does not contain such a law, and there is nothing in it inconsistent with the rules in force in the Punjab on this subject.

2. Courts exercising Bankruptcy Jurisdiction must, however, follow the procedure of Act VIII of 1859, as far as practicable, under the terms of Act XXIII of 1861, Section 38. They should use the ordinary style of the Court instead of adopting any other designation, such as that of "Commissioner of Bankruptcy," and should avoid the employment of language not warranted by the provisions of the Principles of Law or the Code of Civil Procedure.

3. Under the provisions of Section 8 of Act XXIII of 1861, the Court may, pending any enquiry which may be necessary, leave a defendant who applies for his discharge under Section 273 of Act VIII of 1859 in the custody of the officer of the Court, on the defendant depositing the fees of such officer, "which shall be at the same daily rate as the lowest rate charged in the same Court for serving process." As the lowest rate charged for serving process in the Courts of the Punjab is 4 annas, the Chief Court direct that the fees of the officer of the Court shall be calculated at that rate daily.

9.—In case of insolvency or bankruptcy of any kind whatever, the Courts are authorized, at the instance of the debtor or debtors, or of the creditor, or one or more of the creditors, to take a state-
ment on oath of the assets and liabilities of the debtor; to register all claims of creditors; to invite, by proclamation or other notification, the appearance of claimants by a certain date to be named by the Court; to detain the debtor on security, or in default thereof, in custody; to attach all his property, moveable or immoveable; and to exempt his person and property from further legal process, pending enquiry and the final orders of the Court.

The following Circular has been issued in regard to the locality in which an adjudication of bankruptcy is to take place:—

BOOK CIRCULAR No. XIX of 1867.

To

ALL COMMISSIONERS, DEPUTY COMMISSIONERS, AND
JUDGES OF SMALL CAUSE COURTS.

Dated Lahore, the 9th July 1867.

A case is now before the Chief Court in which a person, the majority of whose debts were contracted in another province, was adjudicated a bankrupt by a Civil Court in the Punjab. The Chief Court, therefore, think it necessary to caution all subordinate Civil authorities, to whom certain Rules of Bankruptcy* were forwarded with Judicial Commissioner's No. 522-7, dated 14th February 1863, against the making of an adjudication too readily in cases where the insolvent petitioner may possibly have contracted debts elsewhere, as well as within the jurisdiction of the Court.

2. In his No. 1394, dated 1st May 1863, (Ruling No. 36 on References from Judges of Small Cause Courts) the Judicial Commissioner ruled that, "when the liabilities and

* In the case referred to in this Circular the Chief Court remarked—"Nothing relating to insolvency that is not found in the Principles of Punjab Civil Law has the authority of law: although so many of the Bankruptcy Rules of 1868 as prescribe procedure consistent with the powers therein given may be usefully followed, the section relating to insolvency in the Code is very imperfect, but little difficulty will arise if its letter and import be carefully adhered to. Fair distribution among creditors, and open dealing with them in their presence, are the main principles."—(2. Punjab Record, Case No. 94.)
assets of a bankrupt are in two separate Provinces, the Courts of either province have jurisdiction, but it is a question of expediency for the Court whether it will act when the greater portion of assets or liabilities, or both, is not within its jurisdiction.” The Chief Court now further rule that the Court to which application is made has full discretion to dismiss generally the insolvent’s petition on the merits, and this would obviously be the only proper order to make when the liabilities of the insolvent were contracted at Calcutta, or elsewhere out of this province.

3. The application should also be rejected, if it appeared to be made with the view of preventing opposition and enquiry, at the instance of the creditors, into the manner in which the debts were contracted, and the reasonable expectation the petitioner could have entertained at the time of contracting them of being able to repay them. It would also be the right order to make, where the adjudication could not be made with due regard to the interests of the general body of creditors in securing a fair distribution among them of the assets.

4. The simple fact that an insolvent is in confinement in execution of a decree, is not a ground on which alone it would be right to declare him insolvent; and it would be sufficient in such a case that protection should be given to him, if he were found entitled thereto, under the provisions of Section 273 of Act VIII of 1859, and Section 8 of Act XXIII of 1861.

"When there is a separate and independent branch of a firm, the Court of Bankruptcy of the province has jurisdiction, and will exert it or waive it, according to what appears expedient, and for the benefit of the creditors in each case." —(Judicial Commissioner’s Ruling, No. 41, Thornton’s Small Cause Court Manual, Addenda, p. 173.)

In a case in which the parties to it desired that their deceased father’s estate should be wound up by the Court of Bankruptcy, the Judicial Commissioner ruled that, although if the deceased during his life-time had been declared a bankrupt, and had died after adjudication, the Court would have followed the precedent of the English Courts, and have proceeded in the bankruptcy, as if such bankrupt were living —(Section CXVI of the Bankruptcy Act), yet there was no jurisdiction in a Bankruptcy Court to declare a man actually deceased a bankrupt.—(Addenda to Thornton’s Small Cause Court Manual, p. 178.)

In Whitmore v. Mason, it was held that no person can reserve any right to himself up to the time of his bankruptcy, and stipulate that, in the event of becoming insolvent, that
right shall pass to some one else, and not to his creditors.—
(Warren's Law Studies, p. 984.)

In reply to an enquiry whether in a distribution of dividends in bankruptcy cases, creditors whose names appear in the schedule filed by a bankrupt, but who had never laid any claims before the Court, either in person or by writing were entitled to consideration, or, in other words, whether their shares were to be held in deposit till they chose to claim them; the Judicial Commissioner ruled that—"All creditors, who in the ordinary course of communication have had reasonable time to register their claims, and have failed to do so, should be considered to have abandoned them, and dividends should be held in deposit, until the creditors or supposed creditors shall have had such reasonable time to apply for registration, after which they should be credited to the general estate. A clause to this effect should be inserted in every proclamation or notice to creditors. Of course, if a creditor appear after the first dividend he may take his chance for a share of the rest. The same rule may apply to unclaimed dividends due to creditors who have proved debts, but who have failed to apply for them."—(Addenda to Thornton's Small Cause Court Manual, p. 172.)

Creditors who have registered their claims, but find their right to share in the assets of the bankrupt disputed, can enforce their demands by regular civil suits against the representatives of the estate.—Jansu and other v. Harbhaj Rai.—(1. Punjab Record, Case No. 23.)

"When a person petitions to be adjudicated bankrupt, he generally places the whole of his property at the disposal of the Court for the benefit of his creditors. If the property be situated out of the jurisdiction of the Court, it may be dealt with in two ways:

1. It may be removed into the Court's jurisdiction; or,
2. If this would be too expensive, or the property be immoveable, it may be sold where it is situated, and this would generally be done by the Deputy Commissioner of the District within whose jurisdiction the property may be, on the application of the Court by which the owner of the property was adjudicated bankrupt, or the Court might depute some other person to dispose of the property. If the second course be adopted, the Court should transmit a list of the property, and a copy of any order for attachment and sale of the property that may have been passed, to the Deputy Commissioner of the District in which the property is situated, and the Deputy Commissioner, unless there be any sufficient reason to the contrary, should cause the property to be attached and sold, according to the rules in
force for the attachment and sale of property in execution of decrees, and the sale proceeds remitted to the Court by which the attachment was ordered. If the property consist of decrees which require to be executed out of the jurisdiction of the Court by which they were passed, the procedure laid down in Section 284 et seq. of Act VIII of 1859 should be followed."—(3. Punjab Record, Case No. 65.)

10.—After a full enquiry into the origin, nature and circumstances of the debts, and the conduct of the debtor in relation thereto, and after the completion of arrangements for the disposal or administration of his property for the benefit of the creditors, the insolvent will be discharged by the Court, on his signing an agreement to liquidate his unpaid debts from any property he may subsequently acquire; provided that his discharge shall not be opposed by any of the creditors on the ground of alleged concealment, fraud, recklessness, or other gross misconduct in reference to the debts. If the insolvent should appear to have been guilty of any misconduct as above described, and if his discharge, for that reason, should be opposed by any of the creditors, the Court may, at its discretion, award a term of imprisonment in the civil jail not exceeding one year.

According to English law, an adjudication in bankruptcy discharges the insolvent from his liability for any debt which was to be paid at future dates or periods, by instalments or otherwise, equally with debts then payable. By the 12 and 13 Victoria C. 106, if the assignees of a bankrupt entitled to land under a conveyance or agreement subject to a perpetual yearly rent, elect to take the land, or the benefit of the conveyance &c., the bankrupt is not liable to pay any rent accruing after the issue of the fiat or filing the petition for adjudication, or be sued in respect of any subsequent non-performance of the covenants or agreements in any such conveyance, or agreement, or lease; and if the assignees decline to take such land, or the benefit of such conveyance, agreement, lease, &c. the bankrupt will not be
liable if, within fourteen days after notice that the assignees have declined, he deliver up such conveyance, agreement, lease, &c. to the person then entitled to the rent. — (Addison on Contracts, p. 988.) Although this statute law be not, as such, in force in India, the principle seems a just one for regulating such cases, should they occur here. On the principle that covenants founded on mutuality of obligation and liability must be mutually binding on the parties to them, if a deed of covenant inter parties originally binding upon all become ineffectual and inoperative as to one party by his becoming bankrupt, it is held to be wholly void.— (Addison on Contracts, p. 1033.)

The Judicial Commissioner ruled that "when a Court, under the punitive clauses of the bankruptcy rules, sentences a fraudulent bankrupt to a term of imprisonment, he should call on the detaining creditors to lodge the expenses for the whole of that period. This will put it out of the power of a detaining creditor to bring a pressure to bear on the bankrupt and obtain favorable terms for himself by a promise of freedom, for it will rest with the Court to decide whether it will allow him to withdraw opposition at that stage. Moreover, if the bankrupt, from his own funds, not discovered in the schedule, satisfy a creditor, he is guilty of fraud, which allows the other creditors to come into Court again."—(Addenda to Thornton's Small Cause Court Manual, p. 170.)

11.—The attached property of the insolvent will be sold or administered, under the direction of the Court, either through the agency of its own officer, or of assignees, in the manner most conducive to the interest of the creditors; and the proceeds will be divided amongst the said creditors by a "pro rata" distribution. The Court will also give effect to any composition or arrangement agreed upon between the debtors and the majority of the creditors, provided that no injustice or injury shall appear to be unnecessarily inflicted on any of the parties concerned, and that no fraud nor collusion be suspected. If any individual among the creditors object to such arrangement, the Court will decide as to the validity or otherwise of the objection.
The bond fide assignment of the entire property of a debtor to trustees for payment of his creditors divests him of any interest which could be the subject of an execution until those trusts have been carried out.—Bomanjee Manockjee v. Nousrojee Pallonjee.—(1 Bombay High Court Reports, p. 233.)

The assignee in bankruptcy is at liberty to open letters on business matters to the address of the bankrupt in his presence, or with his permission; in doubtful cases he should take the orders of the Court. If the letter relate to other matters it is to be sealed up.—(Judicial Commissioner's Ruling No. 34, Thornton's Small Cause Court Manual. Addenda, p. 172.)

The assignees may elect to adopt or reject the bankrupt's executory contracts, according as they are likely to be beneficial or onerous to the estate.—(Addison on Contracts, p. 857, and Broom's Legal Maxims, p. 834) See too 12 and 13 Victoria, C. 106 and 145, given in the remarks under clause 10.

"Although" writes Mr. Broom, "the general effect of the various provisions in the enactments relating to bankruptcy is to give the assignees of an uncertificated bankrupt the beneficial interest in property acquired and contracts entered into by him, yet when an injury is done to the person, feelings, or reputation of the bankrupt, and not to his property, the right of suit for such an injury does not pass to the assignees, but remains vested in, and must be exercised, if at all, by the bankrupt: and even where there is a consequential damage to the personal estate resulting from an injury to the person, as in the case of the breach of contract to cure or to marry, the damage may be so dependent upon, and inseparable from, the injury, that no right of action in respect of such consequential damage will pass to the assignees."—(Legal Maxims, p. 461.)

Under the English Bankruptcy statutes, if the bankrupt acquire property subject to debts and obligations, then any property taken by the assignee under that state of things, is taken subject to those charges and equities which affect the property in the hands of the insolvent. And if the insolvent carry on trade at a subsequent period, with the assent of the assignee of the estate, under the Insolvency Act, the property which is acquired in the subsequent trading will be subject in equity to the charge of the creditors in that trade, in priority to the claim of the assignee under the first insolvency.

Payment to one of several assignees of a debt due to the bankrupt is a valid payment to the assignees generally, unless the other assignees have expressed their dissent and interfered to prevent the payment.—(Addison on Contracts, p. 984.)
A Government department has no preferential rights as such.

The Commissariat department, as a Government department, has no preferential claim as such over other creditors. — (Judicial Commissioner's Rulings, No. 39, Thornton's Small Cause Court Manual, Addenda, p. 173.)

Rights of priority of judgment-creditors.

In cases of insolvency, judgment-creditors have no priority of claim over others. They are entitled only to a dividend, unless execution of the decree have been sued out prior to the Court declaring the estate insolvent.—(Book Circular No. X of 1859.) On a reference in regard to this point, the Chief Court ruled that, notwithstanding the extension of Act VIII of 1859, attachment and sale before adjudication of bankruptcy are still both ordinarily necessary to give priority to the claim of a judgment-creditor, unless the sale of the property attached in execution had been postponed by order of the Court, and the period required by law between attachment and sale had expired; in which latter case also the judgment-creditor would be entitled to priority although the sale had not taken place.—(3. Punjab Record, Case No. 63.)

Insolvency does away with any term previously granted to the debtor.

A debtor can no longer claim the benefit of a term given him for payment when he has become bankrupt.—(Macpherson on Contracts, p. 82.)

If a debtor induce his creditors to compound their debts by concealing from them the true state of his affairs, the deed will be void, and the creditors remitted to their original rights.—(Addison on Contracts, p. 908.)

A composition deed obtained by concealment on the debtor's part is void.

If a bankrupt's estate can pay more than twenty shillings in the pound, the surplus is to be applied to the payment of interest on debts bearing interest by the express or implied contract of the parties.—(1. Stokes' Madras Reports, pp. 221 and 217.)

Distribution of the surplus when there is one.

If a bankrupt's estate can pay more than twenty shillings in the pound, the surplus is to be applied to the payment of interest on debts bearing interest by the express or implied contract of the parties.—(1. Stokes' Madras Reports, pp. 221 and 217.)

12.—If it appear that the debtor, after becoming insolvent, or in expectation of becoming so, have transferred his property, or any part thereof, with a view to defrauding his creditors, or to giving one or more creditors a fraudulent preference over the others, the Court will annul such transfer, declare the title defective, and treat the property after the manner described in the preceding Clause.
If money be paid to one creditor to induce him to sign the composition deed unknown to the other creditors, it may be recovered. So if the composition is to be paid by instalments, and one creditor secretly bargain for and obtain better security for the payment of his instalments than is possessed by the other creditors, the security so obtained is void.—(Addison on Contracts, p. 909.) See too 3. Madras High Court Reports, p. 172. "It matters not whether the debtor have been a voluntary party to the fraud, or have been induced to enter it into by threats, or the like; for the relief is granted, not on account of the debtor, but of the unsuspecting body of creditors at large."—(Norton’s Topics, p. 283.)

If an insolvent debtor with a view to defraud his creditors transfer property to a third person, nominally for valuable consideration, but really upon a secret trust to restore it, and afterwards sue the trustee for recovery of the property, the Court will give him no assistance, for in pari delicto melior est conditio defendendi; but at the instance of a defrauded creditor the Court will set aside the transaction, and recover the property for the benefit of the estate.—(Norton’s Topics of Jurisprudence, p. 43; Broom’s Commentaries on the Common Law, p. 289; and 6. W. Reporter, Civil Rulings, p. 90). So too the creditors can set aside a nominal sale made without consideration, at a time when the grantor was deeply in debt, although no decree had been actually passed against him.—(7. W. Reporter, Civil Rulings, p. 513.)

But where there is a real transaction between the parties for valuable consideration, whether by way of sale or mortgage, the transaction will be valid even as against a creditor, though the object may have been to defeat an expected execution; while even transactions which might be impeached as fraudulent by a creditor cannot be so called in question by the parties themselves.—Sakanrappa v. Kamayya.—(3. Madras High Court Reports, p. 231.) While in the case of the Trustee of Palmer’s Estate v. Bomgartner, the Agra Court ruled that a debtor in the Mofussil, even with unsatisfied decrees outstanding against him, can prior to attachment make an alienation of his property for adequate consideration, or give a preference to a particular creditor or class of creditors over.

* The Roman Law gave the actio Pauliana to the creditors of a man who alienated his goods to their injury, as by paying money before it was actually due, or by doing any act which might prevent the creditors from receiving their share in the distribution of the bankrupt’s property. The action lay against the alienee, whose privity to the fraud, if he had received the property as a gift, it was not necessary to prove; but if he parted with it to a third alienee, who was bonâ fide, such last-mentioned alienee was not liable. [See this recognized in a case reported in Sutherland’s Civil Rulings for May 1864, p. 225.] “Si cui donatum est non esse quareendum an sciente, sed hoc tantum an fraudenter creditoribus.”—(Phillimore’s Roman Private Law, p. 189.) See also 3. W. Reporter, Civil Rulings, pp. 92, 291.
ALIENATIONS BEFORE BANKRUPTCY.

A voluntary grant will be upheld although the grantor may subsequently become insolvent.

Where a husband made a voluntary gift of land to his wife, and it appeared that at the time of the gift the grantor, although he owed some debts, was thoroughly solvent and in no degree vergens ad inopem, and that the gift was accompanied with possession, the Calcutta Court refused to make the property liable at the instance of a party who became a creditor of the husband long after the date of the gift.—Shaikh Inayat Ali v. Must. Rampreah Kunwar.—(1. W. Reporter, p. 21.)

Where the wife of a prisoner, awaiting his trial in jail on a criminal charge, but who was subsequently discharged, deposited certain jewels with the defendant, the Chief Court held that as it was unnecessary under the circumstances to consider the effect of a sentence involving forfeiture, or of a fine imposed and unpaid, there was on the facts disclosed no legal bar to a suit for the recovery of the deposit.—Mannu Khan v. Jowula Singh.—(4. Punjab Record, Case No. 5.)

Proof required when a transaction to be collusive in fraud of the creditors.

When a transaction is impeached as being merely nominal with a view to defraud creditors, it is not sufficient to show that the purchase money was paid in the presence of witnesses, as it may afterwards have been privately returned, especially when the parties to the transaction are relatives—(6. W. Reporter, Civil Rulings, p. 90); neither in such cases is evidence of the execution of the document enough without other proof that the transaction was bona fide.—(6. W. Reporter, Civil Rulings, p. 310.) See also Vol. 10. Civil Rulings, p. 445; and a very strong case in Vol. 1. p. 319, where two of three Judges of a Bench of the Calcutta Court held, in the case of a sale of immovable property by a husband to his wife for money when the seller was indebted at the time although not actually sued, that the sale ought not to stand if the object of it were merely a domestic arrangement to substitute for tangible property which the creditors might others, or make over his estate to trustees for division amongst all, or among a particular class of his creditors; and this notwithstanding that the effect of the alienation or preference may be to defeat the operation of an expected execution, provided indeed that the debtor’s intention be to confer on the assenting creditors a substantial interest in the property assigned. Such a making over of his property by the insolvent to trustees is not rendered invalid by its being stipulated that those creditors only shall share in the assets realized by the trustees, who are willing to release the debtor or from any further claim in regard to their debts, nor will it be invalidated by containing an arrangement that the trustees shall have power to carry on the debtor’s business in order to its better winding up.—(4. North West High Court Reports, p. 104.)
fasten on something which could easily be secreted. The Court therefore directed an enquiry as to the subsequent possession of the property, the application of the purchase money, the publicity of the sale &c., in addition to the fact of payment by the wife of a fair price from her own funds.

13.—An insolvent, once released or discharged, will not subsequently be liable to arrest or imprisonment, on account of any debt registered up to the date of the discharge; unless he shall be proved to have been guilty of fraud or concealment. But any property he may afterwards acquire, or be found in possession of, will be liable to seizure for liquidation of those debts.

Where a creditor has however accepted and been paid a composition in full satisfaction of his claims, he cannot recover on a bond he may have obtained from the wife of his debtor, nominally for another consideration, but in reality for the balance of the compounded debt.—Mahant Jayram Gir v. Rani Shriuraj Koor.—(2. Bengal Law Reports, Privy Council Cases, p. 98.)

If a creditor keep back a portion of the debts due to him, and do not correctly state the amount of his claim in the composition deed, his conduct is fraudulent, and he will not be allowed to sue the debtor for the omitted debts.—(Addison on Contracts, p. 909.)

In an English case, Rossi v. Bailey, a debtor had made a composition with his creditors and got a protection order. A creditor who did not agree to the deed sued the debtor, and the order not being pleaded, judgment was given against him. In executing the decree, the protection order was not allowed to be set up.—(3. Law Reports, Q. B., p. 625.)

14.—In the conduct of the cases described in the preceding Clauses, the Courts will be guided by the rules of procedure as laid down in Sections I, and V, Part II, of this Code.

As the Second Part of the Punjab Civil Code has been superseded by the Codes of Civil Procedure, the Courts will now have to be in general guided by the rules therein laid down.—(Section 388, Act VIII of 1859.) See too Para 1 of Book Circular XXXVI of 1866, above, at p. 479.
On a reference from a District Court, the Judicial Commissioner ruled that creditors who register their claims should not be required to file stamps proportioned to their suit; for it might so happen that no assets are available, so that loss would be incurred in the prosecution of a just claim. But at the termination of the case stamps proportioned to the assets actually distributed among the creditors, should be realized, unless the claim registered be a judgment-debt. Also suits instituted by the estate against its debtors should bear the usual stamps and fees.—(Book Circular X of 1859.)

15.—Nothing in the preceding Clauses will apply to persons who may have been admitted to the benefit of the insolvency laws at the Presidency.
CHAPTER XX.

On Torts.

PART I.

On Civil Wrongs generally, excepting Defamation.

A tort (tortus) is defined to be "a wrong independent of contract," being an infringement or withholding of some legal right, or a violation of some legal duty. The right of action for a tort is based either:

First, on the invasion of some legal right:

Or secondly, on the violation of some duty towards the public productive of damage to the plaintiff.

Or thirdly, on the infraction of some private duty or obligation productive likewise of damage to the plaintiff.—(Broom's Commentaries on the Common Law, p. 642.)

In actions founded on the invasion of some legal right actually in the plaintiff's possession, and to the enjoyment whereof he is entitled, such as wrongs done to the person or reputation, tortious conversions of goods, or direct injuries to property, the plaintiff in order to entitle himself to damages may be called upon to show two things—the existence of the right* alleged, and its violation. In this class of actions it will be observed that proof of actual damage accruing from the wrong is not specified as requisite to entitle a plaintiff to recover, since injuria sine damno does very frequently suffice as the foundation of an action: where however it must be remembered that injuria signifieth a legal injury, or the violation of a legal right. The leading case of Ashby v. White, which was an action against a returning officer for maliciously refusing the plaintiff's vote at an election, clearly shows that it is actionable to deprive a man of a right given him by law, albeit no loss, damage or injury be occasioned thereby. On this principle it has been held that an action lay against a banker, for refusing to honor a customer's cheque, when he had sufficient funds belonging to the drawer in his hands at the time, although no actual damage was sustained in consequence.—Mazetti v. Williams.

* "It seems," observed the Privy Council Judges in Rogers v. Rajendra Datt, "that it is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will however directly do him harm in his interests is not enough. The cases are of daily occurrence in which the lawful exercise of a right operates to the detriment of another necessarily and directly without being actionable."—(Sutherland's Privy Council Judgments, p. 415.)
NEGLIGENCE PRODUCING DAMAGE. [ CHAP. XX—Part I.

Again, in Fray v. Voules it was decided that an order to a lawyer to sue, with positive directions not to compromise, makes it his duty not to compromise, and if he do so, it is a breach of his duty for which, at all events, nominal damages are recoverable. So the fraudulent use and appropriation of a trade-mark is per se actionable.—(Broom's Commentaries, pp. 643, 644, 84—87.) And in Mir Bakir Ali v. Mir Hossein and others the Calcutta High Court, in like manner, expressly ruled that special damages need not be proved in an action for slander and assault.—(Sutherland's High Court Decisions for June 1864, p. 302.)

In actions coming under the second class, viz. the violation of some duty towards the public and consequent damage to the complainant, three different matters must be proved—the existence of the alleged duty; its breach; and resulting damage. Mr. Broom thus enunciates the principle embodied in this class of actions. "Whenever a duty (including by this word, the duty of refraining from doing, as well as that of doing acts of a particular kind or tendency) has to be observed towards the public by an individual, and another is specially injured in consequence of the non-observance, or non-discharge of such duty, or through misfeasance or malfeasance in its discharge, an action will lie at the suit of the latter party against the former: the gist of such action being negligence producing damage." As an illustration it may be observed that whenever an instrument dangerous in its existing state, and calculated to inflict damage on those who may come in contact with it, is so placed as to be likely to cause bodily injury, the person thus placing it is liable, if hurt ensue, to the party injured: yet when the legislature has authorized the use of a particular thing, and it is used with every caution to prevent injury, for the authorized purpose; the sanction of the legislature carries with it this consequence. that if damage result from its use, independently of negligence, the party using it is not responsible.—(Broom's Commentaries, pp. 646, 647.)

The following cases furnish instances of actionable negligence. In Vaughan v. Menlove, the defendant was held answerable for the injury caused by a hay-stack, which he had erected on the border of his land, igniting from internal fermentation and setting the plaintiff's house on fire. So it has been decided that if a man burn weeds so near the border of his land that damage ensues to the property of his neigh-

* In Naba Krishna Mookerjee v. The Collector of Hooghly however, the Calcutta Court expressed an opinion that they did "not consider it to be the law of this country that a plaintiff who proves the infringement of a right is necessarily entitled to a verdict for nominal damages, though he fail to prove an actual loss." In this case the defendant had previously admitted the plaintiff's claim, and modified his own conduct in accordance with his admissions.—(2. Bengali Law Reports, Civil Appeals, p. 278.)
When however reasonable care is taken to guard against ordinary accidents, no liability arises from extraordinary. Therefore, in Blyth v. Birmingham Water Works Company, where a company incorporated for supplying a town with water, constructed their apparatus according to the best known system, and kept it in proper repair for twenty-five years, at the end of which time a frost of unusual severity acted on the apparatus so as to cause injury to the property of the plaintiff, the company was not held liable for negligence.—(Norton's Topics, p. 181.) So in Guru Charan Mallick v. Ram Datt, which was a suit to recover damages caused by the bursting of the defendant's bund, the Court ruled that the plaintiff could not be entitled to damages so long as the bund was erected by the defendants in a lawful manner, and so long as it was no fault of theirs that it was burst during the rains; although had it not been so constructed as that it might reasonably have been expected to resist the flood, such as any careful man would have erected, liability for damages would have accrued.—(2 W. Reporter, Civil Rulings, p. 43.)

The question of negligence will also be much affected by the circumstances under which, and the place and time at which, the act may be done. This is clearly shewn in the following extracts from Justinian's Institutes.—(Lib. IV. Tit. III. 4, 5, 6.)

4. *Iaquae si quis dum jaculis ludit vel exercitatur, transeuntem servum* tuum trajecterit, *distinguitur* nam si id a militie in campo eove ubi solitum est exercitari, admissum est, nulla culpa eys intelligitur; si alius tale quid admisit, culpa reus est. *Idem juris est de milite, si in alio loco quam qui exercitandis militibus destinatus est, id admisit.* 5. *Idem si putator, ex arbore dejecto ramo, servum tuum transeuntent occiderit:* si prope viam publicam aut vicinalen id factum est, neque proclamavit ut causas evitari possit, culpa reus est; si proclamavit, nec ille curavit cavere, extra culpam est putator. *Æque extra culpam esse intelligitur, si seorsum a via forte vel in medio fundo exsebat, licet non proclamavit; quis in eo loco nulli...*
extraneo jus fuerat versandi. 6. Præterea si medicus qui servum tum secuit, dereliquerit curatiorem, atque ob id mortuus fuerit servus, culpa reus est.” Similarly, in Degg v. Midland R. Company, Bramwell B. observed—“ There is no absolute or intrinsic negligence: it is always relative to some circumstances of time, place or person; ” and Alderson B. defined it as consisting “in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do; in either case causing, unintentionally, mischief to a third party.”—( Norton’s Topics, p. 180.)

It must be observed that to support these actions, the plaintiff must have received special * damage, for when he suffers wrong or sustains damage only in common with other members of the community, no personal right of action accrues, since it is a well settled rule of law that an individual cannot enforce a public right, or redress a public wrong by suit in his own name. Even when one person sustains damage in common with the public, but, from the circumstances in which he is placed, suffers more frequently or more severely than others, he will not, on that account, have, as of course, a separate right of action (Broom’s Commentaries, pp. 647 653); since if this were not so, an individual might be harassed with a hundred suits in regard to the same matter. See the law as here given followed by the Calcutta Court in a case given in 3. Bengal Law Reports, Civil Appeals, p. 295, in which the plaintiff’s suit for obstructing a public road was dismissed on his failing to show that he had been specially inconvenienced by the obstruction. In this case also the Court over-ruled the contention that the plaintiff by having been one of the persons who dedicated the road to the public thereby became the guardian of the public with a right to sue whenever there was an obstruction.

Where the performance of a duty, created by an Act of the Legislature is enforced by a penalty recoverable by the party grieved by the non-performance, there is no other remedy than that given by the Act, either for the public or for the private wrong: but where the duty is simply prescribed, or prescribed under pain of a fine, the right of action for special damage to an individual remains to the person aggrieved, even though not reserved in express words by the

* Hence damages cannot be recovered in a suit against a witness for having neglected to appear when summoned to give evidence for the plaintiff in a former suit, unless the plaintiff can show he had sustained actual detriment from the loss of the defendant’s testimony as a witness.—Devarkathan Kori v. Amandra Chandra Sanyal.—( 6. W. Reporter, Small Causes Court References, p. 18.) See on this subject Section 10 Act X of 1855, which makes a defaulting witness liable to the party summoning him for all damages which the latter may sustain from the witness’ neglect or refusal to discharge his legal duty.
Act; provided however that another specific remedy for the infringement of the duty be not prescribed in the same enactment.-(Broom's Commentaries, pp. 655 and 661.) See also 3. Madras High Court Reports, p. 35.

The third class of actions for tort, are those founded on the infraction of some private compact, or of some private duty or obligation, and consequential damage to the complainant, such as duties flowing from contract express or implied, from bailment, from the relation of master and servant, of shopkeeper and customer, of landlord and tenant, from the occupation of land, &c. In such cases the plaintiff must prove some kind of contract or obligation out of which the specific duty alleged will flow in legal contemplation, or he must adduce evidence of facts establishing such a relation between the defendant and himself, that specific duty will thence result. He must then show a breach of the duty thus raised, and consequential damage to himself. A private as well as a public duty may exist by virtue of the Statute or of the Common Law, as for example, an action will lie against a Railway Company for acts of wrongful omission of their statutory duty in regard to the transfer of shares, and for wrongfully declaring the same forfeited and selling them.—(Broom's Commentaries, pp. 661 and 662; and 3. Punjab Record, p. 122.)

Torts are divided by Mr. Broom into three classes:—

First; torts to the person and reputation,

Secondly; torts to property, whether real or personal,

Thirdly; torts not directly affecting the person, reputation or property.

Before however proceeding to speak of these several classes, it may be expedient to insert here some remarks common to the whole subject.

On the principle Actio personalis moritur cum persona, Section 268, Act X of 1865 enacts that causes of action for defamation, assault as defined in the Indian Penal Code, and other personal injuries not causing the death of the party, do not survive to, or against a man's executors or administrators. The words in italics point to the provisions of Act XIII of 1855, which give a right of action for the benefit of certain of the relatives, when the death of the deceased was caused by such wrongful act as would have entitled him to maintain an action and recover damages in respect thereof, if death had not ensued. For further particulars, see the Act itself, given below at the end of this portion of the present Chapter. Act XII of 1855 also provides that the representatives of a person deceased may sue, or be sued for.
CONTRIBUTORY NEGLIGENCE.

Contributory negligence.

In all cases in which the plaintiff has himself contributed to the injury sustained by him, and on account of which he sues, the maxim *Volenti non fit injuria* must be carefully borne in mind. In such case the rule is that; "although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequence of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided it, he is the author of his own wrong," and will be held in law to have disentitled himself to complain. "Every person" however, observed Pollock, C. B., "who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct," and the question whether or not the complainant contributed to the mischief that happened, by want of ordinary caution, is necessarily one of degree, to be answered by reference to the facts adduced in evidence.—(*Broom's Commentaries*, p. 679.)

Waits v. North Eastern R. O.

The rule of contributory negligence is applicable in the case of a child of tender years who is under the care of an adult, through whose negligence a bodily hurt is done to it. Thus, in Waits v. North Eastern Railway Company, the facts were these:—A little boy, five years old, accompanied his grandmother, who took a railway ticket for herself and a half ticket for her grandson: in crossing the railway to await the arrival of their train she was killed, and her grandson severely injured by a goods train. He, by his next friend, sued the company for negligence in not warning the grandmother of the approach of the train. The Court held that the child was completely identified with his grandmother, and as she could not have recovered, had she survived, owing to her own negligence, no more could the child.—(*Broom's Common Law*, p. 679; and *Warren's Law*
Where the plaintiff may have been guilty of an illegal act or of negligence, yet if that act or negligence did not in any degree contribute to the accident, he will not be prevented from recovering. Thus, in *Davies v. Mann*, where the defendant negligently drove his waggon over and killed an ass, which had been left on the highway with its forefeet hobbled, which prevented its getting out of the way of the waggon, which was going at a great rate, the plaintiff was held entitled to recover its value; for though the ass was wrongfully in the road, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. See *Norton's Topics of Jurisprudence*, pp. 114—118, for this and other cases. No man however can by his wrongful act impose a duty on another; so that if a man passing in the dark along a footpath should happen to fall into a pit dug by the owner of an adjacent field; in such a case the party digging the pit would be responsible for the damage sustained, were the pit dug across the road; but if it were only in an adjacent field, the case would be different, for the falling into it would then be the act of the injured party himself.—(*Broom's Legal Maxims*, p. 267); and see the extract from the *Institutes of Justinian*, above, at p. 492.

As a general rule, privity is not necessary to support an action *ex delicto*, though where the tort complained of flows directly from a contract, express or implied, there will be direct privity between the parties. Thus, in *Gerhard v. Bates*, the defendant was held answerable for the loss the plaintiff suffered, through being deceived by certain false statements contained in a prospectus, which the defendant had put forth with intent to deceive the public in regard to a certain mining company, the plaintiff having been led by the prospectus into taking shares;—the Court observing that, although the parties were entire strangers to each other, the action lay, as it would be strange if a man who had so suffered damage from the wrongful act of another were without remedy. A leading case on this subject is *Langridge v. Levy*, the facts of which are as follows:—The plaintiff's father purchased of the defendant a gun, warranted to have been made for a particular maker, for the use, as he stated at the time, of himself and his sons. The plaintiff, having been injured by the bursting of the gun, sued the defendant.
and recovered £400 damages; it being proved at the trial that the gun had not been made by the warranted maker. The Court held, on a motion in arrest of judgment, that the defendant having been guilty of deceit was responsible for its consequence while the instrument sold by him was in the possession of an individual to whom his fraudulent statement had been communicated, and for whose use he knew that it had been purchased. "But if, in that case," said Coleridge J. in Blackmore v. Bristol and Exeter R. C., "a friend of the father's or of the son's had by their permission used the gun, and sustained the accident, we apprehend, according to the reasoning used in both the last mentioned cases—(Langridge v. Levy and Winterbottom v. Wright)—no action could have been maintained by him. It has always been considered that Levy v. Langridge was a case not to be extended in its application." It must not be inferred from this case, writes Mr. Broom, that wherever a duty is imposed on a person by contract or otherwise and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer. Such a principle if recognized would impose an indefinite extent of liability, and lead to the most absurd and outrageous consequences. The general proposition that privity is not necessary to support an action ex delicto must also be limited in this manner; that an action will not lie at the suit of C for the breach by B of a duty which he owes to A. If this were not so, a disappointed legatee might sue the solicitor employed by the testator to make a will in favor of a stranger whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested.—(Broom's Commentaries, pp. 664—670.)

A minor is liable to an action founded on tort, such as assault or defamation; but in many cases the gist of the action must be narrowly watched to see that the plaintiff do not convert a breach of duty arising out of contract into a tort, so to be able to deprive the defendant of the protection the law affords him. For example, if a horse lent to a minor be immoderately ridden by the latter and injured, the borrower will be protected by his infancy.—(Addison on Contracts, p. 937; and Broom's Commentaries, p. 582.)

On the principle too that whenever one person receives an injury or bodily hurt directly from the voluntary act of another, that is a trespass, although there were no design to injure, even a lunatic is held to be civilly answerable for his torts.—(Broom's Commentaries, p. 675.)

A married woman is responsible for all torts committed by her during her coverture, and her husband must be joined with her as co-defendant.—(Broom's Commentaries, p. 587.)

See p. 41 of this work.
We have already seen—(ante, pp. 19—21)—that when the injury, for which the plaintiff demands redress, amounts to an offence against the community, such as theft, house-breaking &c., the right of civil action is in general suspended, on grounds of public policy, until criminal proceedings have been taken against the wrong-doer. See Section 1 Act XIII of 1855, at the end of this Part of the Chapter, for an exception to this rule.

See the remarks at p. 25 of this work for the law in regard to the disability of one tort-feasor to call on his companions in the wrongful act for contribution. The Editors of Smith's Leading Cases, (Vol. II., p. 460,) in the notes on the leading case on the subject, Merryweather v. Nixon, remark that—“It is important to observe that the rule laid down in the principal decision applies only to cases in which the person asking redress must be presumed to have known that he was doing an illegal act; and does not, it would seem, extend to cases in which that person is a tort-feasor by inference of law only*; as, for instance, where one of several partners has been sued for negligent acts done, not by himself, but by a servant of the firm.”

Mr. Broom enunciates the following propositions with regard to the law of ratification in actions on tort:

(1.) “If A commit a trespass, whether to the person or to property, professing at the time to act on behalf of B, though without authority from him, and B afterwards knowingly ratify the trespass; B may thus be rendered liable for it.

* In Sriprat Rai v. Soharam Rai, which was a suit in which one of several co-defendants against whom a decree had been passed for having wrongfully caught fish in another's estate, sued his co-defendants for contribution, a Full Bench of the Calcutta Court held that, as it had not been found that the co-defendants in the former suit knew that the act they were committing was illegal, or that they were doing an immoral act, or that they were attempting to catch fish in water in which they knew they had no right to fish, they were not doing a wrong in the moral sense of the word, although they were infringing the rights of another, and that consequently a suit for contribution was not barred merely on the ground that the decree was for damage caused by a wrong, in the legal sense of the word, done to the plaintiff.—[7. W. Reporter, Civil Rulings, p. 384.]

† Addison sets forth the law thus: “To make a trespasser by relation from having ratified and adopted an act of trespass done in his name, or for his benefit, it must be shewn that the act was ratified and adopted by him with full knowledge of its being a trespass, or of its being tortious; or it must be shewn that in ratifying and taking the benefit of the act, he meant to take upon himself, without enquiry, the risk of any irregularity which might have been committed, and adopt the transaction, right or wrong.”—(Addison on Torts, p. 831.) For an interesting case on the necessity of knowledge on the part of the principal in order to his being responsible for the wrongful act of his servant by ratification, see 2. Bengal Law Reports, Orig. Jurisd., p. 740.
Torts to the Person.

We now proceed to consider torts affecting the person; those relating to the reputation being discussed in the following chapter under the head of Section XX of the Punjab Civil Code.

It is to be observed in limine that the existence of an evil intention in the mind of the tort-feasor is not essential in order to give a right of action for a bodily injury, whether direct or consequential. "Though a man doth a lawful thing," it was observed in Lambert v. Bessey, "yet if any damage do thereby befall another, he shall answer it, if he could have avoided it." And again, "trespass may sometimes lie for the consequences of a lawful act;" thus, "if a man assault me, and I lift up my staff to defend myself, and in lifting it up [undesignedly] hit another, an action lies by that person, and yet I did a lawful thing" in endeavouring to defend myself. The case of Weaver v. Wurtl moreover clearly shows that an action will lie for a mere mischance for an act done by the defendant, casualiter et per infortuitum et contra voluntatem suum—the accident not having been inevitable nor occasioned by the plaintiff's negligence.—(Broome's Commentaries on the Common Law, p. 674.) See too Rogers v. Rajendra Datt and others, Sutherland's Privy Council Judgments, p. 418.

What is needed to render a threat an actionable assault.

"I own I have considerable doubt whether any mere threat," observed Pollock C. B. in Cobett v. Grey, "not in the slightest degree executed, that is, a person saying to
another, 'If you do not move, I shall use such and such force,' is an assault. My impression is, that it is not. I do not know at what distance it is necessary for the party to be. No doubt, if you direct a weapon, or if you raise your fist within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault, 'I will commit an assault,' I think that is not an assault.' And again, in *Allsop v. Allsop*, the same Judge remarked—"If a sword be flourished at such a distance that it would be impossible to hurt any person, it would not be an assault."—(Broom's Commentaries, p. 676 n-k.) The extracts show that to render a threat of using unlawful force actionable, there must be a present ability to carry the threat into execution.

Any use of criminal force, *even if it amount only to the least touch* of the plaintiff's person wilfully or in anger, is of course still more than a mere "assault," actionable. It will however be justifiable and lawful, when the person using it has authority, as a parent or schoolmaster over his child or pupil, and inflicts only moderate correction. So again, on the principle of self defence, if a man first strike me, or even assault me only, I may strike in my own defence, and plead that it was the plaintiff's own assault which occasioned the blow. Similarly I may lay hands on a man to prevent his depriving me of my goods or possession, and if he persist with violence, proceed to beat him away.—(Broom's Commentaries, p. 677.) The reader is referred to Sections 349, 350 and 351 of the Indian Penal Code for definitions of "criminal force" and "assault," as being descriptions of two kinds of invasion of a man's personal security which constitute actionable civil as well as criminal wrongs. For the question of damages to be awarded when the assault is premeditated or deliberate, see *Ramjoy Masoomdar v. Russell*.—(Sutherland's Civil Rulings, for July 1864, p. 370.)

The case *Scott v. Shepherd* is important, as showing that a man is responsible for all the injury which is the direct result of his own unlawful act. The defendant threw a lighted squib into a covered market-house, where a large concourse of people were assembled: the squib fell on a stall, and a bystander, to prevent injury to himself and the wares, caught it up and threw it across the market; here it fell on another stall, the owner of which caught it to save his own goods from injury, and threw it to another quarter, and in so throwing it happened to strike the plaintiff in the face, and the combustible matter then bursting put out one of his eyes. The Court held that all that was done subsequently was only a continuation of the first force and first act, which would continue until the squib was spent by burst-
Liability of the owner who keeps wild or fierce animals.

Although a man has a right to keep an animal which is feræ naturæ, and no one can interfere with him in doing so until some mischief happens, yet as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible; and there is, in truth, as judicially observed, no distinction between the case of an animal which breaks through the tameness of its nature and is fierce and known by the owner to be so, and one which is feræ naturæ. "Whoever," says Lord Denman, "keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is primâ facie liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities." (Broom's Legal Maxims, p. 379; and Norton's Topics, p. 187.) Therefore in Larch v. Blackburn, where the plaintiff was bitten by a dog of the defendant's, which he knew to be fierce, the Court held that the defendant was not freed from responsibility by having put up a notice "Beware of the dog," as the plaintiff could not read, and there were no circumstances in the way in which the dog was kept to apprise him of the danger. The plaintiff had been bitten, while going in the middle of the day to the defendant's house by a back way; which it was contended was a private way for the defendant and his family only. The Judge, in addressing the jury, observed that there was no evidence to show whether the plaintiff was at the spot with a lawful or unlawful object, but the law would rather presume a lawful object, which was not in itself improbable under all the circumstances: and although the defendant had a right to keep a fierce dog to protect his property, yet he was not warranted in placing it on the approaches of his house, so as to injure persons going along those paths to the house on a lawful purpose. (Norton's Topics, p. 112.)

Acts injurious to health.

But not only has the sufferer a right of action for an assault, or for battery, or for an accident caused to his
person by the wrongful negligence of the defendant, or even by an act, not wrong in itself, yet not unavoidable, but he shall have an action for injuries affecting his health, where "by any unwholesome practices of another," writes Blackstone (3. Commentaries, p. 122) "a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions or wine; by the exercise of a noisome trade, which infects the air in his neighbourhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary. For it hath been solemnly resolved that malapraxis is a great misdemeanor and offence at common law, whether it be for curiosity and experiment, or by neglect."

The second interference with health mentioned by Blackstone is an instance of nuisance. Nuisance is of two kinds, public and private, the former being defined at Section 268 of the Indian Penal Code: and the distinction is of importance, as a public nuisance is not actionable at the suit of an individual, unless it inflict on him some particular or special damage.—(Broom's Commentaries, p. 709; and ante, p. 494 of this Chapter.) In Deane v. Clayton the erection of anything so near the house of another as to render it useless and unfit for habitation was held actionable.—(Broom's Legal Maxims, p. 367.) And Mr. Scarlett, in his edition of the Punjab Civil Code, gives the following extract on the subject—"To keep hogs near one's house, or to exercise any offensive trade, as a tanner, tallow-melter, soap-boiler, or the like, are all nuisances, for which an individual has remedy by action. So also is it a nuisance, if life be made uncomfortable by the apprehension of danger, as by keeping great quantities of gunpowder near dwelling houses. And where a defendant employed a steam engine in his business as a printer, which produced a continual noise and vibration in the plaintiff's apartments, which adjoined the premises of the defendant, it was held a nuisance. It is a nuisance to erect a smelting house for lead so near the land of another that the vapor or smoke kills or injures his corn or grass."

"It used to be thought," observed Byles J. in Hale v. Barlow, "if a man knew there was a nuisance, and went and lived near it, he could not recover, because it was said it is he that goes to the nuisance, and not the nuisance to him: that used to be thought one hundred years ago to be the law. That however is not the law now."—(Norton's Topics, p. 113.) Mr. Norton continues—"The two questions in every case of nuisance are—1st, is it a proper place for carrying on the trade complained of? and 2ndly, if not, then is the nuisance such as to make the enjoyment of life and property uncomfortable? In Elliotson v. Feetham long user was held a justification of a noisy trade."
Liability of owner of realty for nuisances committed thereon by others.

"It has been held that the owner of realty is not responsible for a nuisance committed thereon by the occupying tenant, unless, indeed, he have been a party to the creation of the nuisance after the demise, or have demised land with the nuisance existing. The question moreover was on a recent occasion raised, but not decided, whether in any case the owner of real property, such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others, not standing in the relation of servants to him, or part of his family; and the Court observed that, "it may be that in some cases he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts, which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or field should permit another to carry on there a noxious trade so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants, he would have violated the rule of law Sic utero tuo ut alienum non laedas." And to the foregoing observations the Court add that "in none of the more modern cases has the alleged distinction between real and personal property in regard to the civil liability of its owner, been admitted."

—(Broom's Legal Maxims, p. 827.)

Action against physicians and others for mala praxis.

The action for negligent treatment of a patient is sustainable on the principle, that every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of skill and care. He does not indeed, if he be a surgeon, undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill, but he does undertake to bring a fair, reasonable and competent degree of skill to the treatment of his patient—(Broom's Commentaries, p. 710.) See too Taylor's Medical Jurisprudence, p. 501.

Wrongful interference with personal freedom.

Another class of wrongs to the person consists in undue interference with a man's freedom. Under this head would come actions for damages for "wrongful restraint" or "wrongful confinement," as defined in Sections 339 and 340 of the Indian Penal Code. It is not of course every act of restraint which will support an action, since, for example, if a person come into a house and make a noise and disturb the peace of the family, the master of the house, although no assault have been committed, may turn him out, or call a policeman to do so.—(Broom's Commentaries, p. 712.)

Arrests on criminal charges.

In the matter of arrests on a criminal charge an action would appear to lie against a policeman for arresting on his own authority a man on a charge, for which he is not
authorized, under the Criminal Procedure Act, to arrest without a warrant; or for arresting a vagabond, or reputed thief or receiver of stolen goods, or bad character, unless the policeman be in charge of a police-station, or be acting under the direct orders of such an officer.—(Section 101, Act XXV of 1861.) A policeman making an arrest under the powers vested in him by Section 100 of the Act is neither civilly or criminally answerable, should the person arrested turn out to be innocent. But he will be liable if he arrest A under a warrant against B.—(Broom's Commentaries, p. 711.) So probably a person would be held liable, who had made an arrest under a warrant which had not been directed to him in the first place, or endorsed to him under Section 80 of the Criminal Procedure Code. Again, a police officer, detaining an accused person in custody more than twenty four hours without a Magistrate's order, in contravention of Section 152 of the above Code, subjects himself to liability to an action for damages. For the protection of a police officer executing a warrant issued by a Magistrate or Justice of the Peace in excess of jurisdiction, see Act XVIII of 1850, quoted at p. 84 of this work.

A private individual will be protected against an action for assisting to arrest the plaintiff, if he have acted under the provisions of Sections 78 or 82 of the Civil Procedure Code. If too a man prefer a complaint to a Magistrate, who in consequence issues a warrant, under which the accused is taken into custody, the complainant will not be liable for the illegality of the imprisonment should the Magistrate have exceeded his jurisdiction in issuing the warrant.—(Broom's Legal Maxims, p. 125, note y.) See Act XVIII of 1850.

"A private individual," writes Mr. Broom, "being present at the time when a felony is committed, may legally, and ought to arrest, or aid in arresting the offender. He may even break into a private house in order to prevent the commission of a felony. Or, a felony having been committed, he may give in charge the guilty party to a policeman. Mere suspicion that a particular person has committed a misdemeanour will not however justify the giving into custody without a warrant. Again, an arrest and imprisonment may be justified on this ground, that a felony having been committed there was reasonable and probable cause to suspect and accuse the plaintiff of it, and therefore to arrest and imprison him with a view to charging him with the offence."—(Broom's Commentaries, pp. 713 and 714.) Speaking generally, the felony and misdemeanour of English law are represented under the Indian system by 'offences for which the police may' and 'offences for which they may not arrest without a warrant.' For the Regulation law,
authorizing the village headmen and watchmen to arrest certain offenders, see below at the end of this part.

**Malicious prosecutions which need to be fully proved.**

Malicious prosecutions properly come under the head of wrongs to the reputation, but may more conveniently be discussed here. The following extract from Mr. Broom's *Commentaries on the Common Law* (p. 730) contains the following lucid sketch of what a plaintiff who sues for damages on this ground must establish. "The essential ground of the action for a malicious prosecution," he writes, "is that a legal prosecution was instituted or carried on maliciously and without reasonable or probable cause," whence damage has ensued to the plaintiff. This allegation of the want of probable cause, as remarked in *Johnstone v. Sutton*, "must be substantively and expressly proved, and cannot be implied. From the want of probable cause, malice may be, and most commonly is, implied; the knowledge of the defendant is also implied. From the most express malice, the want of probable cause cannot be implied. A man from a malicious motive may take up a prosecution for real guilt, or he may, from circumstances which he really believes proceed upon apparent guilt; and in neither case is he liable to this kind of action." "It is true," says *Tindal, C. J.* "that in order to support such an action, there must be a concurrence of malice in the defendant and want of probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice in the defendant and want of probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action, for he may have had good reason to make the charge, and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible *where malice† is combined with want of probable cause*. What shall

* For Indian cases in which the Courts have followed the rule given in the text, see *2. Madras High Court Reports*, p. 158, where the Court also held that the conviction of the plaintiff was conclusive proof of the charge having been on reasonable and probable cause; [See 1. Smith's Leading Cases, p. 247]; *3. Madras High Court Reports*, p. 238, where the plaintiff had been at first convicted, but acquitted on appeal, and it was held, following English decisions, that although, in every case, the judgment of one competent tribunal against the plaintiff might not be a conclusive answer to his suit, as there might be circumstances which would deprive it of such effects, as where it might appear, for example, that the defendant when instituting the prosecution had intentionally kept back information favorable to the accused, yet that in the absence of any such special circumstance to rebut it, such a conviction must be considered to afford very strong evidence that the defendant had reasonable and probable cause for what he did.—*Parimi Bapirazu v. Bellamkonda Channa*, *3. W. Reporter, Civil Rulings*, p. 109; *Vol. 5. Civil Rulings*, pp. 324, 282; *Vol. 6. Civil Rulings*, p. 245.

† In *Moti Ram v. Hira Nand*, the Chief Court ruled that the absence of reasonable and probable cause for the criminal proceedings is sufficient to support a civil action for damages without actual malice.—*(3. Punjab Record,
amount to such a combination of malice and want of probable cause, is so much a matter of fact in each individual case, as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man, that the accuser had no ground for proceeding, but his desire to injure the accused." For the legal sense of malice in this and similar proceedings see under Section XX of the Punjab Civil Code. In Kishen Dyal v. Nund Kishore and others, the Chief Court observed that the fact of the plaintiff having been acquitted by the Criminal Courts was not even prima facie evidence that the charge which the defendant had brought against him was unreasonable and false: a point which needed to be fully proved in a civil action for damages.—(3. Punjab Record, Case No. 4.) But in a case given in 6. W. Reporter, Civil Rulings, p. 29, the Calcutta Court ruled that "an accusation which has been held by a Criminal Court to be unfounded is sufficient prima facie evidence that that accusation was maliciously brought, and it is for the accuser when in his turn a defendant, to rebut that evidence by showing that he had reasonable and probable cause for making his accusation."—Hira Chand Basu v. Bani Madhab Chatterjee. Following the analogy of the law here laid down, the Calcutta Court, in Chintamani Basu v. Digambar Miller, held that where a Magistrate has made an injunctive order under Section 308 of the Criminal Procedure Code, the party aggrieved by the order cannot sue the party who instituted the proceedings before the Magistrate, unless he can show that in taking those proceedings he was actuated by malicious motives against the plaintiff, or intended wrongfully to injure him.—(10. W. Reporter, Civil Rulings, p. 409.) When this action lies, substantial damages can be awarded without proof of actual damage accruing to the plaintiff, as he is entitled to compensation for injury to his reputation by the criminal charge and proceedings.—Ramjiban Mookerjee v. Woona Charan Hajrah.—(7. W. Reporter, Civil Rulings, p. 117.)

"If an individual under color of the law do an illegal act, or if he abuse the process of the Court to make it an instrument of oppression or extortion, this is a fraud upon the law, by the commission of which liability is incurred."—(Machpherson on Civil Procedure, p. 33.) But this liability will not arise where the defendant erred by a reasonable inadvertence, as, where an attorney by mistake sued to

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An intended abuse of the law is actionable.
judgment and execution a person of the same name as the intended defendant—*Davies v. Jenkins*;—or where, as in *Roget v. Lewis*, a person privileged from arrest was nevertheless arrested through malice, but not without reasonable and probable cause.—(1. Smith's Leading Cases, p. 246.) Similarly, if without malice, and on reasonable cause a person obtain from a competent Court an order for the attachment of property as belonging to his debtor, he will not be answerable for the result of the order of that Court, even if the property should turn out not to belong to the debtor.—(9. W. Reporter, Civil Rulings, p. 183.) See too Vol. 7. Civil Rulings, p. 355.)

With regard to the amenability of the judicial and fiscal officers of Government for their acts, see Clause 15 Section I Punjab Civil Code, and remarks thereunder at p. 33.

**Torts to property.**

There need be little said on the subject of torts to real property in the present chapter, as the rights appertaining to the ownership or demise of real property forms a separate chapter (XXIII) of this Work; and it is manifest that these rights being ascertained, any invasion of them will constitute good grounds for an action in tort for damages. A few remarks however will be made here on the subjects of Ejectment and Trespass.

**Ejectment suits.**

Ejectment is the action by which a person having a right of entry into land recovers its possession. This remark holds true, whether the relation of landlord and tenant exist or not between the litigating parties. Where this relation does not exist the plaintiff must show in himself a good and sufficient legal title to the land claimed; so that if the occupant can answer the case set up on the part of the claimant by showing the real title to be in another that will suffice for his defence.*—(Broom's Commentaries on the Common Law, p. 755). In order therefore that the plaintiff may recover, he must show, when the defendant holds adversely to him, that he has been in possession within 12 years anterior to his suit, and a failure to do this will be fatal to his right of action.—(1. W. Reporter, p. 67.) See further on this subject Tremlett's Law of Limitation, pp. 33—36. In cases in which the defendant admits the general title of the defendant, but asserts a special plea of grant to himself by virtue

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* But where the occupant is proved to owe his possession to the act of a third person through whom the plaintiff also claims to derive his title, the defendant is not at liberty to impeach the title of that third party.—*Sakalchand Savaichand v. Dayabhai Ichhachand.*—(4. Reid's Bombay High Court Reports, p. 70.)
of a lease, &c., the burden of proof is, of course, shifted on the defendant of establishing the deed or grant under which he claims.—(2. W. Reporter, Civil Rulings, p. 208.)

The case of Girdhar Hari v. Kali Kant Roy is instructive as throwing light on the rule of law that in ejectment cases it is for the plaintiff to prove his title. Here the plaintiff claimed to recover possession of certain lands, the tenure of which his assignor he contended had bought from the defendant. The latter admitted the sale of the tenure, but pleaded that the lands claimed formed no part of it, but belonged to another holding of the defendant. On special appeal it was urged for the plaintiff that the onus should have been thrown upon the defendant of proving the extent of the tenure while it was in his occupation, and that the disputed land was a portion of his other tenure, as being facts specially within the defendant's knowledge. The Calcutta Court after considering the cases and authority alleged in support of this contention came to the conclusion that the principle was neither in accordance with the real state of English law nor correct in itself: Markby J. quoting with approval the dictum of Lord Denman C. J. in Doe v. Bridge v. Whitehead (8. A. and G. 571) that "the proof may be difficult where the matter is peculiarly within the knowledge of the defendant, but that does not vary the rule of law"—(3. Bengal Law Reports, Civil Appeals, p. 161.)

Where the plaintiff has been against his will ejected from immovable property, otherwise than by due course of law, he can within six months from the date of such illegal dispossession avail himself of the procedure enacted in Section 15, Act XIV of 1859. If however he neglect to have recourse to this remedy, and bring a regular action in ejectment, it appears still a doubtful point if on proof of such wrongful dispossession, and on failure by the defendant to show a good title against him, the plaintiff will be entitled to a decree, or whether in such a case the general rule applies, and the plaintiff is bound to make out a title before he can recover. (See Tremlett's Law of Limitation* pp. 82—84, for the conflicting decisions.) This in many instances may be a question of much importance, for the Indian Limitation Act, unlike the English Statute (3 and 4 Will. IV. c. 27 s. 34) contains no provision that at the end of the period of limitation, the right and title of a party out of possession shall be extinguished.

* Three cases, one in Sutherland's Civil Rulings for July 1864, p. 379, another in 10 W. Reporter, Civil Rulings, p. 102, and a third in 3. Bengal Law Reports, Civil Appeals, p. 298, will be found to be in accordance with the judgment of Miller J. as given in Ahwajah Inayat Ullah Chowdry v. Kishen Sunder Sarmah.
In a suit for entry the plaintiff's title must be fully tried.

A lessee of a proprietor out of possession can sue in ejectment.

A person with title can recover against any person in possession.

Possession as evidence of title.

It is improper and illegal to decide a suit for possession of land merely in accordance with the Settlement Record whose accuracy is impugned, referring the party who impugns it to a separate suit to establish the point, thus manufacturing two cases out of one.—*Ghaha v. Data.*—(4, *Punjab Record*, Case No. 55.)

A lessee of an alleged proprietor out of possession can sue in ejectment, and if he can establish the title of his lessor and the grant to himself, he will be entitled to a decree, although the lessor himself may have refrained from suing.—*Brojo Lall Singh v. Ballab Singh.*—(1. *W. Reporter*, p. 216.) See too 2. *Bengal Law Reports, Civil Appeals*, p. 207.

If the plaintiff make out his title to the estate he is entitled to recover, whether the defendant be the person who deprived him of the possession thereof, or whether he obtained it in good faith from the original wrong-doer.—*Ram Sundar Chakerbutty v. Beckwith.*—(1. *W. Reporter*, p. 255.)

"When parties are in possession of an estate it is generally to be presumed that they have been in possession as owners; and it lies on the party making the allegation that that possession is of a different nature, such as that of an under-tenant or the like, to prove such allegation".—(9. *W. Reporter, Civil Rulings*, p. 556); while the possession need not even be long to raise a presumption of title, where no evidence to contradict that title is brought by the opposite side.—(9. *W. Reporter, Civil Rulings*, p. 120.) "It has occurred to us during the argument before us of this case," observed the Court in *Kali Chandra Sen v. Ada Shaikh*, "and, indeed, on other occasions, that the fact of possession, as an ingredient in the contest between the parties, whether coming in on the one side or the other, has not been dealt with in its proper character by the Advocates who have argued before us; indeed, there are some cases, as it seems to us, in our books of Reports, which attach a greater virtue to a possession of land than we can at all see really belongs to it. In matters of this kind, possession, excepting in some few instances—and they are few, indeed, where it is of such a length and of such a character, as of itself to constitute title—is but evidence of title; and we believe that it is evidence of title for one reason only, namely, that undisturbed possession without anything more is presumed to be referable to rightful title; and to absolute ownership. To that extent, we are of opinion that in all cases undisturbed possession, if not further explained, is evidence of title, but even then it is only evidence of title, and it may be shewn by the other side interested in the matter that the possession relied upon, was not, in fact,
referable to a title such as would enable the party who adduced it to succeed in the suit.* In the present case, as far as we can understand the judgment of the Lower Appellate Court, that Court came to the conclusion that the plaintiffs had enjoyed possession of the property which is the subject of suit for a considerable time; and although it does not say it in so many words, yet it says enough to show that the possession it speaks of was an undisturbed possession, a possession as of right. If then, this stood entirely alone, it would, we think, be very strong evidence of title and rightful ownership on the part of the person who had possession, and, accordingly, he would have a right to succeed upon that evidence alone, supposing the other side did not bring forward evidence of a better or prior title, or something which should explain the possession and show that the presumption which **prima facie** arises from the mere possession itself is ill-founded. Of course, we need hardly add that when we say it seems to us that undisturbed possession is evidence of a rightful ownership, we mean that it is evidence of rightful ownership at the time of the possession; obviously, some one, other than the party so possessed may perfectly well and rightly become owner after him, or some other person may have been rightful owner before him."—(9. W. Reporter, Civil Rulings, p. 602.) And in *Salim Shaikh v. Baidonath Ghatek*, the Court observed that "a person in possession of property ought to be presumed to be in legal possession until the contrary be shewn, but this is I believe the only presumption which a Judge, as matter of law, is absolutely bound to make. For any purpose beyond this, possession is only evidence to be taken, conjointly with the other evidence (if any) by which it is sought to establish or impugn the title."—(3. Bengal Law Reports, Civil Appeals, p. 312.)

Oral evidence, if believed, may be as good for proving a man's title to land as documentary evidence, and it is consequently an error in law to dismiss a claim simply because no documentary evidence is adduced in support thereof—(10. W. Reporter, Civil Rulings, p. 217.) See also 3. Bengal Law Reports, Appendix, p. 109. Again, if a party claims to hold land by virtue of a grant, such grant being evidenced

* Where in an ejectment suit the plaintiff relied on his previous twelve years' possession, and did not succeed in showing a title, the Calcutta Court held that there was nothing in the law which makes anterior possession on the part of a person suing to recover possession a sufficient ground for putting that party into possession without looking at the allegations of the defendant. A twelve years' limitation would undoubtedly be a very sufficient answer to a party suing to recover possession, but the converse of the proposition is not true, for it cannot be said that a plaintiff is in the same position quoad a plea of limitation as the defendant: before he can oust the defendant, he must show that he has some title to recover.—*Lakhi Kumar v. Ram Dutt Chowdhry.*—(3. Bengal Law Reports, Appendix p. 44.)

Oral evidence if trustworthy is sufficient to establish a title to land.
by a sanad, there is nothing to prevent his establishing the grant by other means if he fail to prove the sanad.—(3.
Bengal Law Reports, Civil Appeals, p. 99.) But if the grant be not established proof of ten years' occupation will not entitle the alleged grantee or lessee to a decree.—(3. Bengal Law Reports, Appendix, p. 93.)

If in an ejectment suit, the Court consider the title to the land belongs to neither plaintiff or defendant, it can only dismiss the plaintiff's suit, and its decree will be so far void as being ultra vires if it proceed to declare that the defendant also has no right in the land, since the suit did not put in issue the defendant's title as against any one.—Lall Singh v. Dharm Chand.—(3. Punjab Record, Case No. 97.)

Where a plaintiff in a civil suit obtained an order from the Magistrate under Section 318, Act XXV of 1861, that he should be maintained in possession until ousted by due course of law, the Calcutta Court ruled that the fact of the plaintiff's suit having been dismissed because he failed to establish a title, was no reason for the Criminal Court setting aside the Magistrate's order; if the petitioner (the defendant of the former suit) was entitled to eject the plaintiff his proper course was to lodge an ejectment suit.—Juggesh Prakash Ganguli v. Nikkamal Mookerjee.—(3. Bengal Law Reports, Civil Appeals, p. 57.)

Any entry upon a man's land, if unauthorized by him, and unjustified by law, carries necessarily with it some damage or other; and therefore proof of the alleged trespass, without any proof of damage sustained, will entitle a plaintiff in possession of the land* to a verdict.—(Broom's Commentaries, p. 764.) This action may be brought by the tenant in possession of the lands under a demise, and also by the reversioner, provided however in his case that the injury be of a nature so permanent as to effect his reversion. —(Broom's Commentaries, pp. 764 and 767.) If, for example, A hold a field under a lease from B, the owner, for a term of years, and C set up a right of way across it, and proceed to traverse it accordingly; B may sue him for the unlawful entry, on the ground that his proprietary interest will be affected by the field becoming burdened with the easement claimed; but if C enter, as a mere trespasser, and under no claim of right, it would appear that a suit will not lie against him, except at the instance of A.

A man, whose possession is unlawfully invaded is not bound to give effect to that invasion because it is made under color of legal process, nor does he lose his right to recover damages for the injury caused him because he may have

* See Broom's Commentaries on the Common Law, pp. 768—770.
forcibly resisted the wrongful act.—Mohun Dass v. Gokul Dass.—(Sutherland's Privy Council Judgments, p. 644.)

In some cases a forcible entry on another man's house or land is justifiable, and shall not be held trespass: as, if a man come thither to demand or pay money there payable, or to execute in a legal manner the process of the law. A man may, therefore, under certain circumstances, enter to abate a nuisance, or a reversioner to see if any waste be committed on the estate.—(Broom's Commentaries, p. 771.) An act, however, primâ facie lawful, may be unlawful if done with an improper or lawless object. "I take it to be clear law," observed Erle J. in Reg. v. Pratt, "that if in fact a man be on land, where the public have a right to pass and repass, not for the purpose of passing and repassing, but for other and different purposes, he is in law a trespasser."—(Broom's Legal Maxims, p. 319.)

When too a man enters on another's ground under lawful authority to do so, but while there misbehaves himself or abuses the authority the law has intrusted him, he shall be accounted a trespasser ab initio.—(Broom's Commentaries, p. 773.)

It need scarcely be remarked that a man is liable for the trespass of his cattle, as well as for his own trespass, see Section 19 Act III of 1857. In such cases the injury done to the plaintiff's property should not be assessed by striking an average of the amount of injury as deposed to by the different witnesses, as it assumes the credit and means of knowledge of each witness to be equal.—(Sutherland's Civil Rulings, for July 1864, p. 363.)

We have already considered above the question of nuisances which are prejudicial to health, at p. 503, and many of those which affect property only, such as fouling running water &c. &c., will come before us in Chapter XXIII.

No action will lie against a man for establishing a rival school, which draws away the scholars from a school previously established; or for building a mill near the mill of his neighbour, to the grievous damage of the latter by the loss of custom.—(Broom's Legal Maxims, p. 197.) But wherever a grant has been made for a valuable consideration, which involves public duties and charges, the grant shall be construed so as to make the indemnity co-extensive with the burden.—Qui sentit onus, sentire debet et commodum. In the case, for instance, of a ferry, there is a public charge and duty. The owner must keep the ferry in good repair. He must keep sufficient accommodation for all travellers at all reasonable times. He must content himself with a reason-
able toll. In return, the law will exclude all injurious com-
petition, and deem every new ferry a nuisance, which sub-
tracts from him the ordinary toll and custom. The franchise
is, therefore, construed to extend beyond the local limits,
and to be exclusive within a reasonable distance, this being in-
dispensable to the fair enjoyment of the right of toll; and
the same principle applies equally to the grant of a bridge,
for the duties attaching to the grantee are, in this case also,
publici juris, and pontage and passage are but different
names for exclusive toll for transport.—(Broom's Legal
Maxims, p. 683.)

Under the maxim, Sic utere tuo ut alienum non luedas,
Mr Broom remarks that the following propositions may
be considered to be settled law with regard to the rights of
property:—

I. "It is, prima facie, competent to any man to enjoy
and deal with his own property as he chooses.

II. "He must, however, so enjoy and use it, as not to
affect injuriously the rights of his fellow subjects.

III. "Where rights are such as, if exercised, to con-
flict with each other, we must consider whether their exercise
by either party be not restrained by the existence of some
duty imposed on him towards the other. Whether such
duty be or be not imposed must be determined by reference
to abstract rules and principles of law.

IV. "A man cannot by his tortious act impose a duty
on another.

V. "But, lastly, a wrong-doer is not necessarily, by
reason of his being such, disentitled to redress by action, as
against the party who causes him damage, for sometimes the
maxim holds that injuria non excusat injuriam." "In
connection with the above propositions," the writer adds,
"the doctrine of contributory negligence must be kept in
mind, and the rule that volenti non fit injuria" [see p. 496
of this work].—(Legal Maxims, p. 381.)

Under the head of torts to personal property fall actions
for the wrongful taking or wrongful conversion of the plain-
tiff's moveable property. For such actions of this nature as
arise, as they frequently do, from bailment, the reader is
referred to Chapter XVI of the Code.

The property of an author or composer of any work,
whether of literature, art or science, in that work while
unpublished and kept for his private use or pleasure, cannot
be disputed; but if the composition shall have been pro-
duced and filed in a Court of Justice this right of private
ownership is destroyed, even if for irregularity or for failure
of the original purpose which lead to its production, the
document shall have been removed from the file and given
back to the party who originally produced it, so that an
action on the ground of the invasion of a right of property
is not sustainable by that party against a defendant who may
have published the composition temporarily so filed, even if
the publication shall have taken place after the removal of
the document from the records of the Court. If the publi-
cation shall have been effected however by means of any
fraud or deceit on the plaintiff, than the action will lie if the
plaintiff can establish that damage directly resulted to him-
self from the deceitful act.—Leitner v. Plowden.—(3. Punjab
Record, Case No. 45.)

For loss caused to the plaintiff by being needlessly in-
volved in law proceedings, see the Judicial Commissioner’s
Ruling, quoted at p. 11 of this work, and the references
there given, which appear to be at variance with it: to which
may be added para 362 of Mr. Scarlett’s Punjab Civil Code,
which agrees with Broom’s Commentaries on the Common
Law, pp. 729 and 733.

Torts not directly affecting the person or property.

Under this head come actions for damages for adultery:
for the anomalous way in which under the Punjab Civil Code
adultery may be proved, by the production of the judgment
of the Criminal Court, see Clause 16 Section VI of the
Punjab Civil Code (p. 208), and for the considerations in
which the damages are to be measured the following Clause.
Where however, no criminal proceedings had been taken,
the plaintiff would have to substantiate, that the woman with
whom the intercourse was alleged to have taken place was
his legal wife, and that the defendant, while she was his
wife, had illicit connection with her. The action will fail,
on the principle volenti non fit injuria, if the defendant can
show that the plaintiff had connived at his wife’s miscon-
duct; but proof that he has only been guilty of negligence,
or even of loose or improper conduct not amounting to a
consent, will only go in mitigation of damages.—(Broom’s
Legal Maxims, p. 266.) So too, it may be presumed, that
the defendant might produce evidence to show that the
woman was notoriously lewd, or had previously been guilty
of immorality, since the injury he has done the plaintiff
varies directly with the previous character of the wife.

Any person detaining a wife from her husband whereby
he is deprived of her comfort and society, commits a tortious
act, for which he shall, by English law, pay in damages;*

* See the case of Winsmore v. Greenbank, quoted in Warren’s Law
Studies, p. 811.
and such suits are frequently brought in this country against the parents or near relations, when the wife having abandoned her husband, has gone and taken up her abode with them. Since however in this Province that wretched production of mistaken philanthropy Book Circular XXXV of 1860, (p. 187,) is unfortunately law, it seems doubtful how far this action is sustainable, unless indeed the plaintiff can make out a very clear case of enticement, which from the nature of things is seldom practicable, as the girl is usually quite at one with the defendants by the time the case comes before a Court.

In suits for seduction see Clause 15 Section VI Punjab Civil Code. The way in which English law bases this action on the loss of service is well known. (See Brown's Commentaries, p. 836.) The Clause in the Punjab Code would be equally applicable, were the parties to the transaction Europeans or Natives, though evidently compiled with reference to the latter.

On the ground of loss of service, an action lies by a parent for a personal injury to his child, or by a master for the battery of his servant, or for his being bitten by a dog: but in the case of the master and servant, the injury must be great enough to cause a loss of service.—(Broom's Commentaries, p. 837, and Warren's Law Studies, p. 811.)

"Another species of injury incident to the relation between master and servant may here properly be noticed. It consists in the wrongfully and maliciously or with notice interrupting this relation, by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured. Whoever thus entices away the servant of another commits a wrongful act, for which he is responsible at law. Nor does the principle here stated seem to be limited in its applicability to the case of menial servants, to which the Statute of Labourers (25. Edw. 3, st. 1) relates. It has been held to extend to the case of persons who have contracted for personal service for a time, and who, during such period, have been wrongfully procured and incited to abandon such service, to the loss of the persons whom they have contracted to serve. For this injury, the remedy is by a special action on the case against the wrong-doer, though the master may also have an action against the servant for non-performance of his agreement." (Broom's Commentaries, p. 838.) So in Lunley v. Gye, where the plaintiff brought an action against the lessee of a rival theatre for enticing away the celebrated operatic singer Johanna Wagner, and inducing her to break her contract to sing at the plaintiff's theatre for
a certain period and not elsewhere, the action was held to lie; on the ground that the action for maliciously procuring a servant to quit his employer's service is maintainable, whenever there is at the time of persuading a binding contract or hiring and service, whether the service be then actually subsisting or not.—(Warren's Law Studies, p. 813.) But when the master has recovered from the servant a stipulated penalty agreed on in case of his leaving his service no action will lie against the seducer.—Bird v. Randall.—(Mayne on Damages, p. 286.)

Similarly, by Roman law the "actio servi corrupti lay against the seducer or corrupter of a slave, quo eum deteriorem faceret, or the harbourer of one who had run away. With its usual discrimination and humanity, the Roman law does not hold him responsible who did this, vel humanitate, vel misericordia ductus, vel alia probata et justa ratione. It applied to one who made a bad slave worse, as well as to one who made a good slave bad."—(Phillimore's Roman Private Law, p. 189.)

If A fraudulently make a representation which is false, and which he knows to be false, to B, meaning that B shall act upon it; and B believing it to be true, act upon it and thereby receive damage, A will be liable at suit of B for damages.

An action appears to be maintainable against a defendant, for maliciously and with intent to injure the plaintiff, inducing a third party to break a contract, notwithstanding such breach of contract would be a wrongful act of the contracting party; although it has been urged, that inasmuch as it is a wrongful act, it cannot be held to be the "legal" or "natural" consequence of the defendant's representations. —(Broom's Commentaries, pp. 93 and 94.)

The damages recoverable in an action ex delicto ought in general to be purely compensatory, although a wider latitude is necessarily allowed in assessing them than in actions of contract, as injury to the feelings, and many other matters which have no place in questions of contract may be considered.—(Broom's Commentaries, p. 840.)

In assessing the value of a chattel which the defendant has wrongfully converted, the maxim omnia præsumuntur contra spoliatores, may be justly applied when no satisfactory evidence is forthcoming as to the value of the article, owing to the defendant's refusal to produce it. See the leading case of Armory v. Delamirie, (p. 339 of this work.)
"But although," as remarked by Lord Denman, C. J., in Randle v. Little, "it is important to uphold the principle, that a plaintiff is entitled to recover, by way of damages, all that at the commencement of the suit he has lost through the wrongful act for which the defendant is sued," the rule here stated will often fail to guide us, with satisfactory certainty, to a determination of the measure of damages in tort. If, for example, in an action for a trespass to land and injury done by treading down the grass and herbage, the jury, in estimating damages, were to be restricted to exactly the amount of the injury sustained by the plaintiff, it would, in effect, be placing a wrong-doer, in many cases, upon precisely the same footing as one who enters with the owner's permission; for the lowest terms upon which the last named party could have expected to have obtained such permission would have been, that he should make compensation for the full amount of damage that might be done to the grass: in other words, it would be putting an unlicensed trespasser upon the same footing as one who entered with leave and license. So in an action against the sheriff for wrongfully seizing the plaintiff's goods, it was remarked by Alderson B., that juries have not much compassion for trespassers, and are not bound to "weigh in golden scales" how much injury a party has sustained by a trespass. And on one occasion, where the action was in trespass for entering the plaintiff's house, breaking his locks, seizing his papers, &c., Pratt, C. J., thus forcibly delivered himself—"Damages," he remarked, "are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself. At all events, without adopting literally the above expressions, there can be no doubt that, in actions for seduction or malicious injuries, juries have been allowed to give exemplary, or what are sometimes called "vindictive" damages, and to take all the circumstances into their consideration—a remark which seems applicable also to any case in which the process of a Court of Justice has been abused, and a gross outrage has been committed under the forms of law." * * * "But although," Mr. Broom continues on the following page, "an action ex delicto may sometimes, in strictness, be maintainable for an injury done unintentionally during the prosecution of a lawful act, yet, in determining the amount of damages to be awarded to a complainant, a jury will, in general, doubtless look at the circumstances accompanying the particular act complained of, and, amongst them, at the apparent animus of the defendant. It seems indeed just and right that they should do so, inasmuch as the amount of injury for which compensation is to be given will, in some cases, be most materially affected by the motive which prompted to its
commission, or by the intention with which it was done. In an action of trespass, for instance, an insulting gesture accompanying an act which, though not attended with violence, amounts in law to an assault, may greatly augment the mental anxiety and injury caused thereby; and the offensive demeanour of a defendant, or the rank and social position of a plaintiff, may properly be taken into account in fixing the damages which, in such a case, should attend the verdict. Again, wherever the gist of an action \textit{ex delicto} is \textit{mala fides}, fraud, or deceit, it is manifest that the motive or intention of the party charged with want of good faith or with deceit is a matter peculiarly and specially for investigation before a jury."—(Broom’s Commentaries on the Common Law, pp. 842 and 844.)

As illustrations of the remarks contained in the foregoing paragraph may be mentioned the case of \textit{Sears v. Lyons}, where the defendant threw poisoned barley on the plaintiff’s premises in order to poison his poultry, and some of the fowls died in consequence; in which suit the jury found for the plaintiff with £50 as damages (Norton’s Topics, p. 127); and \textit{Hill v. Srihari Roy and others}, where the defendants maliciously and from gross negligence allowed their cattle to trespass on the plaintiff’s land and destroy his indigo crop, knowing its value to plaintiff: here substantial damages, sufficient to compensate for the loss of profits from the indigo, were decreed, and not the mere value of the growing plants destroyed.—(9. Sutherland’s W. Reporter, p. 156.)

In \textit{Ross v. Punjab Horse Dawk Company}, the plaintiff, having engaged a dawk carriage from the defendants to convey him from Peshawur to Rawulpindéé, found no horses ready for him at an intermediate station, and was obliged in consequence to make his own arrangements, at a cost of Rs. 13-8-0. The Chief Court held that the plaintiff’s having secured his dawk at rather a low rate did not affect the liability of the defendants for a breach of the legal obligation imposed on them to carry in usual and reasonable course of a carrier’s business, and taking into consideration the injury to the plaintiff’s health caused by the delay, as well as the actual outlay necessarily incurred, they awarded Rs. 150 as damages, “assessing them on the principle that in the violation of a legal obligation, such as the defendant had incurred, a certain latitude is allowed to Courts.”—(2. Punjab Record, p. 144.)

The Acts referred to at p. 495 of this Chapter are as follows:
ACT No. XII OF 1855.

An Act to enable Executors, Administrators or Representatives to sue and to be sued for certain wrongs.

Whereas it is expedient to enable Executors, Administrators or Representatives in certain cases to sue and be sued in respect of certain wrongs which, according to the present law, do not survive to or against such Executors, Administrators or Representatives; It is enacted as follows:

I. An action may be maintained by the Executors, Administrators or Representatives of any person deceased, for any wrong committed in the life-time of such person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person: and further, an action may be maintained against the Executors or Administrators or Heirs or Representatives of any person deceased for any wrong committed by him in his life-time for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person’s death, and so as such action shall be commenced within two years after the committing of the wrong: and the damages to be recovered in such action shall, if recovered against an Executor or Administrator bound to administer.
according to the English Law, be payable in like order of administration as the simple contract debts of such person.

It will be observed that under this section, if the wrong occurred nearly a year before the death of the deceased, the action need not have been commenced until the lapse of little short of two years: but Clause 2, Section I, Act XIV of 1859 fixes the period of limitation in "suits for damages for injury to the person and personal property" at "one year from the time the cause of action arose;" and Section III of the Limitation Act, which treats of special periods of limitation enacted by particular Acts, provides only that such special periods are to be applied when they happen to be shorter than those laid down in Act XIV of 1859 itself. It would seem therefore that this section is so far modified by subsequent legislation that it is needful that the action should be brought within one year from the occurrence of the wrong complained of.

As the Act relates only to wrongs which previously did not survive to the representatives of the deceased, it does not apply to suits to recover the value of property alleged to have been wrongfully converted and sold by the deceased.—Srimati Chandra Mani Dassi v. Santo Mani Dassi.—(1. W. Reporter, p. 251.)

II. No action commenced under the provisions of this Act shall abate by reason of the death of either party, but the same may be continued by or against the Executors, Administrators or Representatives of the party deceased. Provided that, in any case in which any such action shall be continued against the Executors, Administrators or Representatives of a deceased party, such Executors, Administrators or Representatives may set up a want of assets as a defence to the action, either wholly or in part, in the same manner as if the action had been originally commenced against them.
ACT No. XIII OF 1855.

An Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong.

Whereas no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is often-times right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him; It is enacted as follows:

I. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime. And it is enacted further, that every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the Executor, Administrator or Representative of the person deceased; and in every such action, the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be
brought, and the amount so recovered after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct.

The words "and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action" have been held, in the corresponding English Statute, 9 and 10 Vict. c. 93, from which the Indian Act is copied, in Pym v. Great Northern R. C., to refer "not to the nature of the loss or injury sustained, but to the circumstances under which the bodily injury arose, and the nature of the wrongful act, neglect, or default complained of:" thus, adds Mr. Broom, if the deceased had by his own negligence materially contributed to the accident whereby he lost his life, inasmuch as he, if living, could not have maintained an action for damages, although there had been negligence on the part of the defendant, an action would not lie under the Statute."—(Legal Maxims, p. 877.)

Again, treating of the same Statute, Mr. Broom writes: "For a tort committed to the person, it is clear that at common law no action can be maintained against the personal representatives of the tort-feasor, nor does the Stat. 9 & 10 Vict. c. 93, supply any remedy against the executors or administrators of the party, who by his 'wrongful act, neglect, or default,' has caused the death of another; for the first Section of this Act renders that person liable to an action for damages 'who would have been liable if death had not ensued,' in which case, as already stated, the personal representatives of the tort-feasor would not have been liable."—(Legal Maxims, p. 880.)

II. Provided always that not more than one action or suit shall be brought for, and in respect of the same subject matter of complaint, and that every such action shall be brought within twelve calendar months after the death of such deceased person; provided that, in any such action or suit, the Executor, Administrator or Representative of the deceased may insert a claim for, and recover
any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.

For reasons analogous to those given in the remarks under Section I, Act XII of 1855, it seems probable that the action given by this Act must now be brought within one year reckoned from the date of the injury, and not from the death caused by it.

III. The plaint in any such action or suit shall give a full particular of the person or persons for whom, or on whose behalf, such action or suit shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

IV. The following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject matter, that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things, and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother, and grand-father and grand-mother; and the word "child" shall include son and daughter, and grand-son and grand-daughter, and step-son and step-daughter.

The Regulations referred to at pp. 505, 506 of the Chapter are as follows:

Claim for loss to the estate may be added.

Plaintiff shall deliver particulars, &c.

Construction of Act.

3
REGULATION III OF 1812.

Sec. IX.—Clause Third. At the expiration of every period of six months, reckoning from the 1st of January last, or oftener when circumstances may appear to require it, the zillah and city magistrates shall cause lists to be prepared from the above-mentioned registers, of all persons therein named who may not have been apprehended, and shall transmit copies of the said lists to the principal landholders, farmers, and managers of land, together with warrants for the apprehension of the persons therein named, agreeably to the forms annexed to this Regulation, Nos. 4, 5, and 6. Transcripts of the lists thus prepared shall be at the same time transmitted by the magistrates, under their official seal and signature, to the police darogahs for their information.

Fourth. The magistrates shall be careful to obtain from the landholders, farmers, and managers of land, or from their representatives, to whom the said lists and warrants may be delivered, written acknowledgments of the receipt of them.

Fifth. All zemindars, talookdars, and other proprietors of lands, whether malguzarry or lakheraj, all sudder farmers and under-renters of land of every description, all dependent talookdars, all naibs and other local agents, all native officers employed in the collection of the revenues and rents of land on the part of Government or of the Court of Wards, to whom the lists and warrants mentioned in the preceding clauses of this Regulation shall have been delivered, are hereby authorized.
either to cause the immediate apprehension of any of the persons named in either of the said lists who may be found within the limits of the estates held or managed by them, or to apply to the nearest police officer for any aid which may be required in the execution of that duty, or simply to communicate to such officer such information as may have been obtained respecting the place to which the persons in question may resort, or in which they may be concealed.

Sixth. Persons who may be apprehended under the provisions of this Regulation shall be delivered as speedily as possible into the charge of the nearest darogah or other officer of police, for the purpose of being forwarded under safe custody to the magistrate; and an acknowledgment shall uniformly be given by such darogah or other officer of police, specifying the names of the prisoners and date on which they were delivered into his charge.

REGULATION XX OF 1817.

Sec. XXI.—Clause Fifth. The village watchmen shall apprehend and send to the darogah, or other police-officer presiding at a thannah, any person who may be taken in the act of committing murder, robbery, housebreaking, or theft; also proclaimed offenders, and persons against whom a hue and cry shall have been raised of their having been concerned in a recent criminal offence. It shall further be the special duty of the village watchmen to convey to the thannah immediate intelligence of any robbers who may have concealed themselves in their respective villages, or in the adjacent country; and
also of any vagrants, or other persons who may be lurking about the country without any ostensible means of subsistence, and who cannot give a satisfactory account of themselves. It shall likewise be the business of the village watchmen to convey early intimation to the thannah of all murders, robberies, burglaries, thefts, violent affrays, and other heinous offences perpetrated in the villages or places in which they may be stationed.

Tenth. On the occurrence of a gang or highway-robbery, or any robbery by open violence, murder, burglary, or theft, attended with wounding, or any other heinous offence, attended with a violent breach of the peace, the village watchmen shall, to the utmost of their ability, resist and endeavour to apprehend the offenders, and shall require the head men of the village to collect the inhabitants and to oppose and seize the criminals, or to pursue them if they have fled; and it shall be incumbent on the inhabitants of the villages through which, or near to which, the pursuit may lie, to afford, on the requisition of the village watchmen or other police-officer, every practicable assistance towards the apprehension of the robbers or other offenders, and recovery of any property stolen or plundered by them, continuing the pursuit from village to village. Any head man or watchman of a village who may be convicted before the local magistrate of wilful inattention to such requisition shall be liable to fine and imprisonment, not exceeding the limitation prescribed by Section XIX. Regulation IX. 1807.
CHAPTER XX.
PART II.
PUNJAB CIVIL CODE.
SECTION XX.

Defamation.

1.—Any person who makes a false statement, verbal or written, calculated to injure the character of another, is held to have committed libel, and may be sued for damages by the party injured. The Courts will not recognise any distinction between libel and slander.

2.—The defendant may plead the truth of the statement in question. If its truth should be substantiated, and if its publication should appear to be for the benefit of the community at large or of some individual, and not to have proceeded solely from malicious motives,—then such statement will not constitute libel. But if the statement shall appear to have been unnecessarily and maliciously made; then its truth cannot be accepted as a complete justification, though it may be urged in mitigation of damages.

Clauses 1 and 2 of this Section must undoubtedly be read in connection, as constituting together a definition of actionable defamation, viz. any statement, whether written or spoken, made unnecessarily and from solely malicious motives with a design to injure the character of another is when published actionable; and its truth or falsehood will only affect the amount of the damages. I now proceed to consider first, the legal meaning of malice, and how it is proved in actions for defamation: secondly, what statements are held to be injurious: thirdly, what constitutes publication: fourthly, what communications are regarded as privileged: fifthly, the question of the truth of the defamatory statements: and lastly, the subject of the damages.
Definition of malice.

"Malice" writes Mr. Warren, "is of two kinds: malice in law, and malice in fact otherwise called "express" malice. "Malice" said Lord Campbell, in pronouncing the judgment of the House of Lords, "in the legal acceptation of the term, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another." "I take it to be a general rule," said Lord Tenterden in Duncan v. Thwaites, "that an act unlawful in itself, and injurious to another, is considered, in both law and reason, to be done malo animo, towards the person injured." Mr. Baron Bayley, in Bromage v. Prosser, thus accurately defined and clearly illustrated malice in law: "If I give a perfect stranger a blow likely to produce death; I do it of malice, because I do it intentionally, and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery; it is a wrongful act and done intentionally. If I am arraigned for felony, and wilfully stand mute; I am said to do it of malice, because it is intentional, and without just cause or excuse. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not; I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not; and if I have no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces?" —(Law Studies, p. 825.) So in Peter v. Dufour, the Calcutta Court laid it down that the law will infer that a statement which is clearly false in fact and injurious to the character and reputation of the plaintiff is malicious. In this case the Court had also found that the defendant had not made the allegations which constituted the libel from a fair and reasonable hope of protecting his own interests. —(6. W. Reporter, Civil Rulings, p. 92.)

Malice in fact.

"Malice in fact," writes Mr. Broom, "is said to be of two kinds, viz: personal malice against the individual, and that sort of general disregard of the right consideration due to all mankind which, indeed, may not be previously directed against any one, but is nevertheless productive of injury to the complainant. This seems very nearly equivalent to saying that "malice in fact" may be proved to have existed in one or other of two ways—either by direct evidence, as of expressions used, of declarations made, or of conduct generally—evincing enmity towards a particular individual; or again, it may be shewn by proof of some act from which a jury would be held justified in inferring a malicious motive; and the act relied upon as evidence of malice may possibly be one not aimed at the particular individual who has suffered by it." —(Commentaries on the Common Law, p. 726.) So Mr. Norton observes in a note on Section 682 of his work
on Evidence. It may be useful to have a clear understanding of the distinction between legal and actual malice, because in trials of actions for slander, the distinction constantly arises. If the occasion on which the defamatory matter is published be not lawful, and therefore not privileged, there is no necessity for the plaintiff to prove that the defendant was actuated by malice; because as the act was not indifferent, the law implies malice (which is styled legal malice), and the plaintiff need only show that the libellous matter is false in fact; as if a scurrilous libel affecting private character be published in a newspaper: but when the occasion is justifiable, for instance, a criticism of a volume of poems, as the occasion is lawful, express or actual malice must be proved.

Under Lord Campbell's Act (6 and 7 Vict. c. 96) in an action for libel in a newspaper or periodical publication, the defendant may plead that libel had been inserted without actual malice or gross negligence; and that before the commencement of the action, or at the earliest opportunity afterwards, he had inserted a full apology for the libel;—or that if the publication was at intervals exceeding a week, he had offered to publish the apology in any newspaper or periodical publication to be selected by the plaintiff: and under Stat. 8 and 9 Vict. c. 75, at the time of pleading, the defendant must pay into Court a sum of money, by way of amends for the injury sustained by the publication complained of. Although these Statutes are not in force as law in India, their provisions seem equitable and fair.*

Although, as we have seen above, when a defamatory statement is made under circumstances which render it prima facie privileged, the law will not presume malice, yet the plaintiff may, if he can give evidence of express malice, as, in such cases, the actual intention of the party affords the boundary of his legal liability.—(Broom's Commentaries, pp. 738, 739, and Broom's Legal Maxims, p. 312.)

Express malice may be shown in a statement which would otherwise have been privileged.

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* In Harrison v. Kingcote and others, which was an action to recover damages for a libel on the plaintiff which had appeared in the Mofussilite Newspaper, the Lahore District Court held that, although the fact that the defendant did not originate the libel, but merely copied it from another Newspaper, would usually avail in mitigation of damages, as serving in some degree to rebut the presumption of malice, yet that where there is evidence of the defendants being influenced by actual malice against the plaintiff, the previous appearance of the libel in another periodical can go but a short way in relieving the publication of its malicious character. The Court also laid it down that native proprietors of Newspapers printed in English were not by reason of their ignorance of the English language relieved from full responsibility for articles appearing in those Papers, "since they know or must be held to know the position in which they place themselves and the responsibilities they incur when they undertake the publication of a Newspaper. It rests with them to select and appoint an Editor, and if the Editor abuse his position and maliciously attack the character of individuals, both he and the Proprietors who appointed him must be held liable to answer in damages for the injury caused."—(Selected Papers of the Punjab Law Society for 1868, p. 173.)
How malice may be substantiated. The existence of malice may be satisfactorily established in a vast variety of ways. Thus, proof of a long system of libelling the plaintiff would be evidence to show that the defendant was actuated by malice in the particular publication complained of, and that it did not take place through carelessness or inadvertence; and the more nearly the evidence approaches to proof of a systematic practice of libelling, the more conclusive will it be. The circumstance that the other libels are more or less frequent, more or less remote from the date of publication of that in question, will affect merely the weight, not the admissibility of the evidence. "Matters occurring after action," observed Pollock, C. B., in Darby v. Ouseley "may be given in evidence to enhance the damages, as showing the malice of the original publication, just as a repetition of the same or a similar libel may be."—(Broom's Commentaries on the Common Law, p. 740.)

What statements are held to be injurious. Any statement reflecting on the character of another, or tending to bring him into hatred, contempt, or ridicule, if published without lawful justification, will amount to defamation. Defamation may be effected by the use of signs as well as words.—(Broom's Legal Maxims, p. 312.)

Publication. "A libel may be "published" in various ways, e. g., by reading it aloud, by selling it, or distributing it gratis, by sending it by post, otherwise to any third person. A paper containing libellous matter may, moreover, be published without any actual manifestation of its contents, in like manner as an individual publishes an award without reading it to the parties who have submitted to his arbitration, or a will without declaring its contents to those to whom he makes the publication. In the case of a libel, publication, it has been said, is "nothing more than doing the last act for the accomplishment of the mischief intended by it." The moment a man delivers a libel from his hands and ceases to have control over it, there is an end of his locus penitentiae, the injuria is complete, and the libeller may be called upon to answer for his act. The making of a libel known, then, to any individual other than the party libelled,* amounts indisputably in law to a publishing of the libel. Even the addressing to the wife a letter containing libellous matter reflecting on her husband is a publication. And in an action for libel, it is no justification that the libellous matter was previously

* But where the libel is contained in a letter written and sent as an ordinary private letter by post by the defendant to the plaintiff, no damages are recoverable for the injury caused to the plaintiff's feelings from perusing it: neither will the fact that another party than the plaintiff actually opened and read the letter amount to publication, unless it can be shown that the defendant when he despatched the letter knew that in the ordinary course of business in the plaintiff's house the letter would be opened and read by some one other than the plaintiff.—Kamal Chandra Bose v. Nobin Chandra Ghose, —(10. W. Reporter, Civil Rulings, p. 186.)
published by a third person, and that the defendant at the
time of his publication of it disclosed the name of that
person, and believed all the statements contained in the
libel to be true."—(Broom's Commentaries on the Common
Law, p. 745.)

As to spoken defamation, on the principle Semel emissum
volat irrevocabile verbum an action will lie to recover damages
for mere abusive language (1. W. Reporter, p. 19), as injury
might result therefrom to a man's feelings, so as to entitle
him to damages.—(Vol. 6. Civil Rulings, p. 151.) See a like
8. Civil Rulings, p. 256, in which last case the Court obser-
ved that "it does not follow that because a man's profes-
sional position or gains are not injured by abuse received by
him that his feelings are not injured and outraged." But
may it not be doubted if the ground given in this judgment
and in the one from 6. W. Reporter is the true one? Are not
the damages recoverable by reason of the injury the plain-
tiff's character is likely to suffer from the abuse in the minds
of the bystanders; and in the event of no third party being
present could the action be sustained? See the English
case on the principle on which damages are recoverable for
slander.

The rule for determining whether a particular com-
munication be privileged or not is thus stated in a recent case,
Harrison v. Bush:—

"A communication, made bonâ fide upon any subject
matter in which the party communicating has an interest,*
or in reference to which he has a duty, is privileged, if made
to a person having a corresponding interest or duty, although
it contain criminating matter which, without this privilege,
would be slanderous and actionable."

If therefore a man receive a letter informing him that
his neighbour's house would be burnt by A, which he himself
believed, and had reason to believe to be true,† he would be

Illustrations of
privileged statements.

* But if a party in an application which he makes to a Court to remove
a case of his which may be pending in a subordinate Court to another Court,
on the ground that the Judge was a personal enemy of his, and a friend of
his opponent, proceed also to make other grave charges of misconduct against
the Judge, which charges cannot be substantiated, the whole communication
will not be held to be privileged, and the petitioner will not be protected
from paying in damages, notwithstanding that the private enmity may be
true and there was on that account reason sufficient for ordering the transfer
of the case.—Shibnath Tulapatro v. Sat Kouri Deb.—(3. W. Reporter, Civil
Rulings, p. 198.)

† But if the defendant have the means by enquiry of ascertaining whe-
ther the charge be true or false, and neglect to make enquiry and exercise no
efforts to arrive at the truth, his belief can hardly be said to be an honest
belief.—(Addison on Torts, p. 691.)
PRIVILEGED COMMUNICATIONS.

justified in showing the letter to his neighbour, though it might turn out that the accusation against A was false. Again, if A knew that B was about to employ an agent, whom A suspected to be a man of unprincipled character, A would be justified in communicating his knowledge to B, though he was in fact mistaken: but he would not be justified in doing so in the hearing of other persons not interested in the fact, for the occasion warrants a communication to B only, and as to the rest, it is mere excess, not warranted by the occasion. Similarly, a character of a servant bonâ fide given is privileged, and in giving it bonâ fide is to be presumed; even if the statement be untrue in fact, the master will be held justified by the occasion, unless it can be shown to have proceeded from a malicious mind, one proof of which may be that it was false to the knowledge of the party making it. A master has of course a right to charge his servant bonâ fide for any supposed misconduct in his service and to give him admonition and blame, and the simple circumstance of the master doing this in the presence of a third person will not, of necessity, take from him the protection of the law. Should it appear, however, that an opportunity had been sought for making such charges before strangers, when it might have been done in private, this fact alone would be strong in proof of a malicious intent.—(Broom's Legal Maxims, 1212 sq. & 1314; and Broom's Commentaries, pp. 739 & 740.) See especially a definition of privileged statements per Willes J, given in a note on p. 740 of the last named work.

Comments on literary productions.

A comment upon a literary production, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment do not exceed the limits of fair and candid criticism, by attacking the character of the writer unconnected with his publication, although the author may suffer a loss from it.—(Broom's Legal Maxims, p. 315.)

Comments bonâ fide and honestly made on the conduct of Judges and other public functionaries, whose conduct lies before the public, are perfectly justifiable. It may not un-frequently be difficult to say how far the criticism applies to the public, and how far to the private conduct of the individual; and yet this distinction is highly important, since much greater latitude is allowed to comments on the former than upon the latter, and remarks perfectly unobjectionable in the one case might be unjustifiable and libellous in the other. —(1. Broom's Legal Maxims, p. 315.) In a recent case, Campbell v. Spottiswoode, it was ruled that however severely the public conduct of a man might be criticised, however much his acts might be denounced as foolish, impolitic, or disastrous in their consequences, such hostile criticism
would not be libellous; but if the defendant went beyond this and imputed corrupt motives, his doing so with a *bonâ fide* belief that his statements were true would not protect him unless he could show that his belief was well founded and not without cause.—(11. E. W. Reporter, Q. B., p. 569.)

Further, within the class of privileged communications may, as a general rule, be included the publication of a full, _fair_, and unvarnished account of what passes in a Court of Justice, not being _ex parte_ or mixed up with injurious comments. To this rule there are, indeed, exceptions, _e. g._, matters may appear in a Court of Justice having so immoral a tendency, or being so injurious to the character of an individual, that their publication could not be tolerated. "The only case," says _Littledale, J._, "in which an editor of a newspaper can justify a libel on the ground that it contains an account of a trial, is where he really gives a true and accurate report of it; and even in that case it will be for the Court to consider whether it was lawful to publish it." * * * "A counsel, moreover, entrusted with the interests of others, and speaking from their information, for the sake of public convenience, is privileged in commenting fairly and _bonâ fide_ on the circumstances of the case confided to him, and in making observations on the parties concerned, and their instruments or agents in bringing it into Court. But, though such may be the duty of counsel, and though it may be incumbent on him to state facts injurious to the characters of individuals, if he speak conscientiously, according to his instructions, it does not follow that others will be privileged in printing and publishing what he says; for, as to them, the reason of the privilege, which is the advancement of public justice, does not apply. They may consequently be required to prove the truth of the imputations complained of, or, at all events, to show that the publication contains a full and accurate account of the proceedings which it professes to report."—(_Broom's Commentaries_, pp. 743—745.)

"However harsh, or hasty, or even untrue," observed _Willes, J._, in _Revis v. Smith_ "may be the conduct of a privileged person speaking on a privileged occasion, if he honestly and *bonâ fide* believe what he utters to be true no action will lie: it is _damnum absque injuria._"—(_Broom's Commentaries_, p. 77.)

It is noteworthy that according to the law prevailing in this Province the truth of the alleged defamation is not a complete answer to the action, if the statement appear to have been unnecessarily and maliciously made. The rule of English law seems based, however, on a truer appreciation of the real nature of the action, which is a demand by the plaintiff for compensation for injury done to the good name he is entitled to enjoy: but if he have been guilty of the
Evidence as to motive admissible with a view to fixing the damages.

Damages recoverable albeit the defamation was uttered under present anger, and not upon malice aforethought.

Special damage would probably not have to be proved in order to obtain a decree.

In an action for libel, either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of the defamatory matter; for the spirit and intention of a party publishing a libel are fit to be considered in estimating the injury done to the plaintiff.—(Broom's Commentaries, p. 736).

Lord Bacon, on the maxim, Excusat aut extenuat delictum in capitalibus quod non operatur idem in civilibus, observes, 'The law makes a difference between killing a man upon malice aforethought, and upon present heat and provocation, in maleficis voluntas spectatur non exitus; but if I slander a man, and thereby damnify him in his name and credit, it is not material whether I do so upon sudden choler, or of set malice; but I shall be, in either case answerable for damages in an action.' (Maxims, reg. 7.) The amount of the damages however, as we have just seen, may be considerably increased by proof of deliberate malice.

According to English law, special damage must, in general, be proved in actions for slander: but it is presumed that in this province there would be no such necessity, as the first clause of this section of the Code does away with any distinction between libel and slander. For the English rule, the reader is referred to Broom's Commentaries, p. 749.

3.—Injurious statements made, by any party, in a Court of Justice, which may be strictly relevant to the matter before the Court, cannot be made the subject of an action for libel. But if the statements are irrelevant and libellous, then the fact of their having been uttered in a Court of Justice will not protect the party uttering them, if conduct imputed to him by the defendant, then, so far as such conduct would impair his good name, he must be held to have consented to the loss, as every man is regarded in law as intending the natural results of his own acts, and volenti non fit injuria. "The truth," remarked Littleton, J., in McPherson v. Daniels "is an answer to the action, not because it negates the charge of malice, &c., but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character, which he either does not, or ought not, to possess."—(Broom's Commentaries, p. 735). Similar is the language of the Civil law—"Eum qui nocentem infamat non est aequum et bonum ob eam rem condemmini: delicta, enim, nocentium nota esse oportet et expediet."
an action should be brought for the libel. If the Court, before whom they were made, should have fined the party making them, for contempt, that will not prevent the injured party from suing for damages.

In Mohun Lall v. Levinge the Chief Court held that words highly defamatory to the opposite party, if spoken on oath by a litigant and material to the case he puts forward, are privileged on the ground of relevancy; and this apparently when the statement contained in them is false to the knowledge of the maker.—(3. Punjab Record, Case No. 39.)

The omission of a mere courtesy, as styling a person “the defendant” instead of giving him the honorific terms to which in native parlance he may be entitled, cannot be held to be equivalent to slandering or libelling.—The Zemindar of Bobbily v. The Zemindar of Salur.—(3. Madras High Court Reports, p. 4.)

Although when two parties quarrel and engage in law suits, an action will lie to recover damages for the use of words of general vituperation, such as “fraudulent,” “deceitful,” “unconscientious,” &c., applied by the one litigant to the other in petitions filed in Court during the course of the suit, yet as usually the credit of either party is in this country very little affected by the use of these expressions, which are constantly had recourse to under such circumstances, the damages ought not to be heavy.—Mirza Ekhal Bahadar v. Solano.—(2. W. Reporter, Civil Rulings, p. 163.)

In Mathra Dass v. Maya, where the plaintiff sued the defendant for having falsely accused him of murder, in evidence which he had given in a criminal trial, the Chief Court observed, that as it appeared there had been a fight between the plaintiff and the man said to have been murdered, under the circumstances there did not seem to have been an entire absence of reasonable and probable cause for the defendant's statements, while no express or actual malice was proved at the trial; and they held therefore that the suit for damages would not lie.—(2. Punjab Record, Case No. 25.)

For the protection of pleaders for observations made in conducting their clients' cases before a Court of Justice, see the remarks under the previous clause, (p. 535). See too on this subject Warren's Law Studies, p. 392, for extracts from the leading case of Hodgson v. Scarlett.
4.—If the libellous statements should involve any legal criminality, and have been visited with punishment in a Criminal Court, this circumstance will not bar an action for libel. For instance, if a party should have been punished by a Criminal Court for bringing a false charge, he may still be sued for damages by the injured party in a Civil Court.

An act proved in a Criminal Court being made the ground of a Civil action, evidence offered in its disproof cannot be refused by the Civil Court.—Christian v. Parker (Morley's Digest, N. S. Tit. Ev., Case 4.)

The following remarks may be added before closing this Chapter:

If A obtain a decree against B and C jointly and severally in action for libel, and in execution recover the whole amount from B, B has no right of action against C for contribution; see p. 25 of this Work.

It is actionable to slander a man's title to his property, by uttering false and malicious statements concerning it, from which special damage necessarily or naturally ensues; but it is essential to prove that the defendant made the false statement, malice fide, with actual malice,—influenced by a malicious intention to injure the plaintiff, and that the special damage ensued from it. A mere false statement, without malice, will not suffice.—(Warren's Blackstone, p. 471.) See also Broom's Commentaries, p. 750.
CHAPTER XXI.

PART I.

PUNJAB CIVIL CODE.

SECTION XXI.

Canons regarding Landed Property.

1.—The rights and interests of a landed proprietor may be represented by, firstly:—actual holding or possession, or, secondly:—by share, or, thirdly:—by both, that is, partly by share and partly by possession, and no decree can be valid which runs counter to the tenure of the estate.

The following passages from Mr. Cust’s Revenue Manual give a lucid sketch of the rights of the full proprietor; and of the nature of village holdings:—

"The full proprietor is the party who is recorded at settlement as the owner of the village. He is known by various names in different parts of the country. If the owners are numerous, they are represented to the outer world and governed in their inner concerns by the head-men. The owner of the land cannot be disturbed in his possession unless under the formality of a Government process for revenue balances, or a decree of a Civil Court. He enjoys in addition to the land all manorial rights. He may cultivate land, if he choose, on his own property or on that of another, but that is not an essential feature of his tenure, and many do not cultivate. He may reside on his property or elsewhere. He is eligible to the post of village head-man, but that office neither adds to nor diminishes his proprietary rights. He must collect his rents from his tenants in one item of demand; cesses are not allowed. He must give some kind of receipt to his tenants on demand, and can be summarily compelled so to do. He possesses the inherent right to distrain the crops of any of his defaulting tenants, and the tenant possesses the counter-right of bringing a summary suit for replevin. He can sue the tenant for balances of rent * * * in the Civil Court within the period of limitation for that kind of suit. He can be sued by the tenant for exaction or ouster. * * * He has a right to demand his rent, when paid in kind, as soon as the crop is cut, and in cash one month before the revenue.
instalments fall due. He cannot anticipate his demand for rent, nor will the plea of any such payment in anticipation be recognized by the Courts. He can sell, give, or mortgage his land in accordance with the conditions of the settlement paper. He cannot under existing rules sub-lease, but can, with permission of the Government officials, grant a farm: he may appoint a manager to act and answer for him. At settlement he has a preferential right to the lease of his estate: he can refuse, and is then entitled to compensation for rent from the Government farmer. He has the right of pre-emption of all interests in the land which are exposed to sale within his village. He is bound to attend on the summons of the Government officials, to provide for the repair of roads, to aid the Government police, not only not to harbour but to produce criminals, to keep a village accountant and a village watchman. A single man may of course possess the whole estate and village, but under the ordinary operation of law, without the interference of sales, such would in the course of time be rare.

* * * * * * * * *

One village may exhibit in its own limits specimens of all the tenures, for the larger and smaller sub-divisions of an estate held entirely or partly in severalty may be held each on a different tenure, and have a different mode of paying the Government revenue. Moreover, by common parlance Pattidari has come to mean estates in which the shares follow law, and Bhyacharah those which follow custom. The more familiar application of the vernacular technical terms is as follows:—

I.—Zemindari.

Zemindari, when the property is territorially undivided, the collections from the tenants being all made in common together with manorial products thrown into common stock, and, after the satisfaction of Government revenue, the profits being divided by a known law.

II.—Pattidari.

Pattidari, when the property is territorially divided into main divisions, or into sub-divisions, or into both, and further into fractional shares in each sub-division, according to a known law deduced from ancestral right.

III.—Bhyacharah.

Bhyacharah, when the property is divided into greater or smaller holdings, and a measured area based on actual possession represents the interest of each shareholder, possession from a time beyond the law of limitation having trodden down all claims founded on ancestral right.

Both Pattidari and Bhyacharah estates may be pure or impure, according as the partition has extended to the whole village area, in which case it is called pure or perfect: if any common land is left, it is called impure or imperfect.
Zemindari tenure may be pure and impure, and when a large amount of area is cultivated by the co-sharers, it is clear that the tenure is rapidly passing into Pattidari. Pure Pattidari or Bhyacharah is exceedingly rare. The cases are very few in which the waste land, the tanks, the village location are divided: as long as anything is in common the tenure is impure.

Phases innumerable, following the varieties of human complications, of these three families are to be found. The same community may by their free will, the operation of law, the unskilful manipulation of the Settlement officer or the mistakes of the Collector, pass and repass through them all.”

In Megha and others v. Khazana and others, it appeared that a landowner had died without any but remote heirs, and his estate was contested between the defendants, who belonged to the same thola as the deceased, and the plaintiffs, who belonged to the other two tholas into which the patti was divided; the litigants being all remote descendants of one B, the original proprietor of the patti, but so distant that their relationship could not be traced. The Chief Court, while holding that the inheritance should be regulated by village custom, in the absence of other proof regarding this, accepted the stipulation in the village administration paper, that the revenue liability was to be distributed first among the co-parceners, then among the tholadars, and lastly among the pattidars, as showing such a close connection between the tholadars, as against the pattidars, as to give them a superior title to succeed to the entire inheritance.— (3. Punjab Record, Case No. 54.)

2.—A share may be represented by a symbol, such as a well, plough, rupee, seer, and the like, or by fractional parts thereof.

3.—The interest and landed estate may be expressed either by the amount of share, or the amount of land in possession, or partly by both.

4.—When one portion of an estate is divided or held by possession, then the remaining undivided portion is divisible, either according to possession, or according to shares.
Disputes regarding shamilat deh.

As we have seen above, almost all villages retain a portion of their land undivided, under the name of shamilat deh. When this land comprises cultivable waste or tanks or plantations yielding an income, disputes regarding it are likely to arise in regard to the persons entitled to share in it, to ejectment of tenants or squatters on it, and to its partition.

Rights to village waste lands in Multan.

In the Multan Division, many of the villages (as constituted for revenue purposes) consist of a fortuitous aggregate of wells with a convenient arrondissement of land attached to each, and a convenient amount of waste attached to the whole, and in such cases the fact of a person or brotherhood being the owners of the village site affords little or no evidence of their property in the waste lands demarcated in the mahal as at present constituted.—Kaim Shah v. Mahamd.—(3. Punjab Record, Case No. 64.)

Muafidars are not necessarily entitled to share in the common land.

A right to share in the common land does not of necessity attach to the biswaibars of a muafi plot in the village.—Abdul Samand v. Ruldu.—(2. Punjab Record, Case No. 45.)

Test for deciding whether a muafidar is entitled to a share in the common land.

The right of a muafidar, who is also the proprietor of his revenue-free holding, to share in the common land will in general turn on the way in which his proprietary right was acquired. If the ownership of the soil vested in him before the revenue-free grant of it was conferred on him, a very strong presumption would arise that his position with regard to this plot was not different in any way from that of owners of other land in the village; but if the claimant had succeeded in usurping the ownership of the soil by virtue of the grant of it by a Native Government, which was without authority to make it, as it belonged to the village community and was not the Government's to give away, or had taken advantage of his position of muafidar, his own strength and the weakness of the village proprietary body, to possess himself of the ownership without any legal right; then, in either case, the title to the muafi plot, though originally bad, would become indefeasible by prescription if the possession had lasted for a period beyond the term of limitation; but as it would not necessarily follow that along with the ownership of the muafi plot he had also usurped all the rights and privileges belonging to the owners of the soil, no presumption would arise of his possessing any contingent or incident rights and interests, attaching to the ownership in the soil, beyond those proved to have been acquired and held for a period beyond the term of limitation.—Bassawa Sing v. Gulab Sing.—(3. Punjab Record, Case No. 44.) See too 1. Punjab Record, Case No. 52.
Under the general system of property established in this Province, in the absence of any stipulations to the contrary in the wajib-al-arz, an hereditary cultivator is not entitled to a share in the shamilat, such a share being a distinguishing adjunct to proprietorship.—Akbar v. Fatah Shah.—(2. Punjab Record, Case No. 8.)

Where it appeared that a particular portion of the shamilat had been for many years in the exclusive occupation of certain of the village proprietors, the Chief Court declined to interfere with their occupation in a suit brought by other members of the proprietary who claimed the land as belonging to their pona by virtue of a previous partition, which however had been made seventeen years before and was never acted on. The Court added "that the plaintiffs were of course at liberty to take proceedings for having a complete butwara of the whole shamilat made de novo, but in these proceedings the defendants would be entitled to have their possession of the land, which they have reclaimed, maintained as far as practicable."*—(4. Punjab Record, Case No. 20.) See too above, at p. 260 of this work.

One of the proprietors of the village may become a tenant-at-will of the rest of the co-proprietors in regard to the shamilat, and for purposes of division or other objects common to the proprietary body he may be ejected; but the act of ejection must be on the part of the proprietary body generally, and cannot be brought about by a certain number of them only.—Nihal Singh v. Ratan Singh.—(1. Punjab Record, Case No. 99.) See Clause 16 of this Section.

In Lakshman v. Tej Ram the Chief Court held that in the absence of any provision in the wajib-al-arz to the contrary the majority of the proprietors could allow parties to erect worksheds on the common land, and that the other proprietors would have no right to eject them by reason of their not having been consulted unless they could show they had sustained special damage by the erection. (3. Punjab Record, Case No. 43.) While in Hira Mall v. Gulab Singh (1. Punjab Record, Case No. 92, and Vol. 2. Case No. 58), it was held that the majority could eject a person who had occupied a site in the shamilat by the leave and license of the proprietary body, although the minority were opposed to his occupation being interfered with. In ejectment suits

* But if shamilat land have been broken up by one of the proprietary body without regard to some special provisions of the village paper regarding such proceedings, respect need not possibly, under the particular circumstances, be had to this possession when a general partition is effected.—(4. Punjab Record, Case No. 34.)

† See some good remarks on this principle under the head of "Refertur ad universum quod publice fit per maiorem partem" in Phillimore's Principles and Maxims of Jurisprudence, p. 76.
of this nature the whole proprietary body must be made parties to the suit.—Kahn Singh v. Gobind Dass.—(1. Punjab Record, Case No. 39.)

Where the proprietary body made a grant of land in times long past to a party in consideration of his acting as Imam of the village mosque, and subsequently a dispute arose and the minority wished to resume their portion of the grant as they were dissatisfied with the present incumbent, it was held the grant was of the nature of a grant to a village servant, tenable only during the pleasure of the grantors, and resumable by them when they desired to dispense with the services of the grantee, or for any other reason, at their pleasure: but as the grant was made jointly by the village proprietary body, and the shares of the plaintiffs in the land granted were joint, and not separate from those of the other shareholders, the grant was resumable only as a whole, and not piecemeal, and could not be resumed until the major part of the property of the village desired its resumption.—(3. Punjab Record, Case No. 70.)

Where a fakir had been allowed to squat on common land and to plant trees there, the Chief Court held that he could not be disturbed by the hereditary cultivators, although it might be open to the proprietary body to dispute his title. —Gurdit Singh v. Gabia.—(3. Punjab Record, Case No. 103.)

Where it appears that one sharer is dealing with joint village land in such a way as to permanently exclude his co-sharers from all use of it, his proceedings being without and even against the consent of the others, the law of joint property enables another of the co-sharers to interfere and obtain a decree for the restoration of the land to its former condition.—Doulat Ram v. Tara.—(1. North West High Court Reports, p. 12.)

The conditions under which the shamilat can be divided among the sharers are usually recorded in the settlement papers. For the procedure to be followed see above at p. 275 of this work. Where partition is made dependent on the will of the majority, the fact of the minority having reclaimed and planted a portion of the shamilat gives them no exclusive rights in the portions so occupied by them, or veto on the partition; but in effecting it, these parties should, as far as possible, be maintained in possession of the land brought under cultivation by them to the extent of their shares.—Nakhwa v. Sobha.—(3. Punjab Record, Revenue Judgments, Case No. 8.)

"We know of no authority," observed the Chief Court in Wali v. Chaman, "for the notion that a private partition of the shamilat, made by the mutual consent of all concerned,
is of less binding effect that what called a regular partition, by which is intended such a partition as is conducted by the Revenue Authorities in this Province under present rules. A private partition may have gone off, and have never taken effect; it is also more difficult to establish under such a partition from the want of record to whom a particular plot of land may have fallen. But if a private partition have been complete and taken effect, and it be established that a particular plot of land fell to a certain proprietor by that partition, then the title of that proprietor in this land is as good as if he held it by a butwara; and a subsequent partition, in the absence of any agreement between the parties to that effect, altering the distribution of land previously divided among the proprietors by a private partition, complete in all its features as above explained, cannot legally be had. There is no distinction between the effect of a private partition, and an imperfect partition, which is the partition ordinarily effected at present by the Revenue Courts of this Province; and the main distinction between such partitions and a regular butwara under Regulation XIX of 1814 or Act XIX of 1863, where this Regulation or Act is in vogue, consists in the maintenance of the responsibility of the whole village for the Government revenue by the one, while it is put an end to by the other."—(4. Punjab Record, Case No. 66.)

5.—Any person possessing a share or a holding in an estate, is entitled to his rateable portion in any perquisites or common accessories which may be attached to the general property, or may belong to the body of shareholders at large, such as produce of forests, grass, &c. And if the right of such person be transferred, then the transferee would succeed to these perquisites, unless special cause should be shown to the contrary.

A proprietor may lose his right to share in these perquisites, or common accessories, by non user for more than twelve years, as it then will be presumed that he has abandoned the right.—Kishen Lall v. Mutasadi.—(1. Punjab Record, Case No. 52.) See also Case No. 71 in the same Volume.

In the Government v. Taylor, the question arose as to the validity of the sale by some members of a co-parcenary body of their rights of digging kunkar in undivided common land. The Chief Court held that "in this land the property was
Village expenses, or Mulbah.

In every village there are certain annual expenses, which by the custom of the county, and the leave of Government, are charged to the common fund (mulbah). It is not easy to define what these expenses are, hospitality to strangers, religious fees, travelling expenses, repair of public buildings, and even bribes to public officials, have been found. A greater demand than five per cent on the Government demand is not allowed; and when the Government demand is high, this per-cent may be reduced: this matter is generally recorded at settlement. A separate...
account is kept, and all items must be disbursed at the regular shop and recorded at once by the village accountant. With the head-men rests the authority to disburse for the benefit of the community, but they have to audit their accounts annually, and a suit for exaction will always lie against them. If at any time the head-men wish to expend a sum above the maximum, the sanction of the community must first be obtained. The object in view is to guard against peculation, and still to preserve to the head-men the exercise of that discretion which is warranted by their position."

(Oust's Revenue Manual, p. 62.)

7.—Absentee sharers are usually held to be entitled to re-admission within a reasonable time, on the payment of any claims which the brotherhood may have against them. In the conditions of such re-admission the settlement records must be consulted.

A clause in the village wajib-al-arz which stipulated that members of the brotherhood who were absent at settlement should be restored to their holdings on their return, having been disparaged by the Lower Courts as unauthentic and perfunctorily entered, the Financial Commissioner, in reversing their decisions, remarked—"I think the sweeping condemnation of the wajib-al-arz is hardly justifiable. If the matter had been one which related to some arbitrary rule laid down by Government officers, I can understand that doubts of the validity of the clause might have been entertained; but when the clause related to a custom so well known and recognized by the inhabitants of a Pattidari village as that of re-admitting an absentee to his share of land irrespective of the law on the subject, there seems no good reason for declaring the clause invalid merely because the Extra Assistant Commissioner could not believe that the respondents had knowingly agreed to the condition, and because the name of the patwari was not entered in the wajib-al-arz. * * * Considering that the plaintiff's father was absent at settlement—that notwithstanding this, the land belonging to himself and his brother was distinctly recorded field by field in khasrak and khattioni—and that the word 'ikrar' was entered against the name of those two brothers in the pedigree table, as it is also against the name of another absentee, evidently alluding to the condition of the wajib-al-arz whereby the resident khewatdars agreed to give up the land of persons recorded as absentees, but not of persons recorded as absconding;—considering also the universal disregard of the period of limitation by
the shareholders of a village held on ancestral shares, and the facility with which promises of re-admission in favor of absentees were made, and re-admissions actually permitted by the resident khewatdars, I am quite unable to see any great improbability that the clause entered in the wajib-al-arz of this village was really an expression of what the khewatdars desired and approved." In this case the plaintiff and his father had been out of possession for 40 years.—Gurmuck Singh v. Prem Singh.—(3. Punjab Record, Revenue Judgments, No. 7.) In Kishen Lall v. Mutasadi, however, the Chief Court held that sixteen years was not "a reasonable time" in the terms of this clause.—(1. Punjab Record, Case No. 52.)

8.—The right of dwelling in a village is distinct from that of holding land in the estate attached to the village; consequently when a sharer's share is alienated, his dwelling house is not necessarily included. But all his rights and interests in the common ground of the village site would cease and be transferred. A non-proprietary resident cannot be ousted from his occupancy, but if he desert his house the ground site reverts to the proprietors, who may then dispose of it. If he desire to sell his house, the proprietors may claim pre-emption.

"A proprietor in an imperfect pattidari village, who possesses a residence in it, has a full right of property in that dwelling house, although some of the village lands and the unoccupied parts of the abadi, and the portions of the abadi in which cultivators reside, remain joint. This being so, we can see no distinction between this and the case of a malik kabhaz, whose dwelling-house we consider follows the tenure of his land, and does not, or the land on which it stands, belong to the village proprietary body."—Kripal Singh v. Kesri.—(4. Punjab Record, Case No. 67.)

In Mahila v. Gunga Devi, the defendant, a non-agricultural resident of the town of Mokatsar in the Lahore district, having sold her house, the plaintiffs, as proprietors of the village questioned her title to make such a transfer, and claimed the house according to the stipulations in the wajib-al-arz, and the general custom of the country, by which the houses of non-agricultural residents in rural
districts revert to the proprietors on their occupants quitting them. The Chief Court, finding that Mokatsar, though a town now, was a village at the time of the settlement in 1855, and that the occupation of the defendant had not been so long that the plaintiffs had lost the rights belonging to them as proprietors in an agricultural village, upheld the decision of the first two Courts, who had deemed the case one for compromise, and gave the plaintiffs a decree for the value of the site, leaving the defendants with the property of the building on that site.—(2. Punjab Record, Case No. 86.)

Where a custom had prevailed that non-proprietary cultivators might not sell the sites of their houses without the permission of the Chowdhries, but owing to the depression of the Chowdries from political causes for some sixteen years the non-proprietary cultivators had disregarded this, and sold without let or hindrance; the Chief Court held that the interruption was fatal to the custom, and the place in which the house was situated being a town and not a mere agricultural village, the sale was good without the leave of the Chowdries being obtained.—Ghaman v. Ghulam Mahammad.—(3. Punjab Record, Case No. 52.)

The term "non-proprietary resident" in this clause should apparently be understood to mean a person, not a member of the proprietary body of the village, who has acquired a right of occupying a house in the village homestead by a grant, express or implied, from the general proprietary body; and not one who is a tenant in respect of the particular house in question of another resident in the village. The Chief Court however, in Baksha v. Fida (3. Punjab Record, Case No. 20,) appear to have adopted this construction.

A party, who takes possession, without any right whatsoever, of ground from which the tenant has absconded, cannot by making additions or alterations to the house acquire any rights against the landlord who without undue delay sues to eject him and who is not shown to have assented to the additions made.—Kundhyee v. Sahib Zaman Khan.—(1. North West High Court Reports, p. 9.)

9.—There may be two or more kinds of property in the same land, quite distinct from each other. As for instance, there may be, on the same holding, a talooqudar, a proprietor, and an hereditary cultivator. The rights of either of these three parties may be transferred without any prejudice to the rights of the others.
For the nature of talukahdari tenures see Cust's Revenue Manual, pp. 7, 23, 62; Directions for Settlement Officers, para 99. See also 3. Punjab Record, Revenue Judgments, No. 6, for a decision as to the rule by which jagirdars are to collect their dues by cash, and not grain, rates whenever the proprietors are opposed to the latter system; and 4. Punjab Record, Revenue Judgments, No. 1, for a like ruling as to the assignees of jagirdars.

By Clause 1 Section 10 of Reg. VII of 1822 Government is empowered to make its selection as to which of two classes of proprietors it will admit to engagements, and the Civil Courts have no power to question the exercise of its discretion in the matter.—Ghya v. Hardevi.—(4. Punjab Record, Case No. 42.)

As to hereditary cultivators, see below under Act XXVIII of 1868.

10.—The privileges of a cultivator, whatever they may be, are not affected by change of proprietors, unless the estate be transferred for arrears of revenue.

For a description of the procedure in sales for arrears of revenue, and of its effect on the rights of the parties to it, see Cust's Revenue Manual, pp. 161—164.

11.—There may be various rights connected with the land. The rights of cultivating and enjoying the profits thereof, of cutting timber, of making wells and gardens, and the like, may be found distinct, and belonging to different persons.

An interesting account of the chukdar system prevailing in the Multan Division, under which the person who sinks the well and provides for the cultivation is usually different from the proprietor of the soil, will be found in 3. Punjab Record, Case No. 34.

12.—Parties in temporary possession of proprietorship of land, such as lessees, will not, unless it should have been expressly stipulated, possess other rights, beyond the right of holding and cultivating; but they may cut timber from trees.
growing wild, for ordinary agricultural purposes. They may, however, claim compensation for improvements, if such claim appear fair, or if there have been an express engagement.

Where a lease contains words of actual demise, and is not merely an agreement for a lease, it is just as effectual and binding on the lessor as a lease when the tenancy is conditioned to commence at a future day, or on the expiry of another lease, as when it begins immediately.—Pitcha Kulli Chetti v. Kamala Nayakkam.—(1. Stokes' Madras Reports, p. 153.)

A person who takes a lease in ignorance that the landlord had agreed previously to grant a lease of the same property to a third party has a good title to hold against this third party.—Naddear Chand Sen v. Kishori Lall Chuckerbutty—(7. W. Reporter, Civil Rulings, p. 463); but if he took with notice, then he cannot in equity maintain the lease to the prejudice of the earlier promisee.—Dwarkanath Chowdhry v. Komal Lachan Dass Mandal.—(10. W. Reporter, Civil Rulings, p. 414.)

"If the acknowledged manager and agent of the landlord have granted permission to a certain person to cultivate the land upon certain terms, and the land be cultivated and seed sown accordingly; the landlord cannot make a lease to another person, which shall have the effect of entitling him to interfere in any way with the growing crops which were sown upon the faith of the agent's permission."—(Macpherson on Contracts, p. 40.)

Where the defendant had covenanted to grant the plaintiff a lease of a five annas share in certain property, and after much litigation the lessor's right was determined only to be a three annas share, the Calcutta Court ruled that the maxim caveat emptor did not apply, but that the defendant, although no fraud or wilful misrepresentation was shown, was liable for damages sustained by the plaintiff by the breach of the contract to put him in possession of the share of which he granted the lease. There was an implied, if not an express, affirmation on the part of the lessor that he owned the share of which he gave the lease; and as he did not, and the plaintiff suffered loss thereby, he must compensate him for that loss.—Pirangal Singh v. Shah Ahmad Hossein.—(7. W. Reporter, Civil Rulings, p. 22.)

In Bejoy Gobind Singh v. Shankar Datt Singh the plaintiff took a sub-lease from a party who was himself a lessee under the proprietor; the sub-lease was never acted on, as after
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his right to the proprietor.

granting it, the intermediate lessee himself surrendered his lease to the proprietor. It was held that the plaintiff had no right of action at all against the proprietor, with whom he had not contracted, and who moreover was not bound to look beyond his own lessee, but that, if he were entitled to any redress, it would be by suing his own immediate lessor. —(10. W. Reporter, Civil Rulings, p. 367.) But is this correct, if the first lessee granted a valid estate to the sub-lessee could his subsequent surrender of his rights avail for more than he had left himself at the time?

Acquiescence in a lease granted by one co-sharer binds the others.

A party who has recognized his predecessor’s lease cannot afterwards deny his power to execute it.

Where a lease was granted by a Hindu widow, and after her death the heir claimed and received rents from the lessee at the rates entered in the lease, which was in nowise disputed; it was held that the heir could not afterwards come forward to have the lease annulled as being in excess of the grantor’s limited interest as a Hindu widow.—Ran Sagar Singh v. Rani Kashesari.—(2. W. Reporter, Civil Rulings, p. 291.)

Quiet enjoyment is virtually covenanted for by the lessor, and therefore if the lessor be deprived of the property by a decree of Court, the lessee is entitled to recover any rent which he may have paid in advance.—Ram Gopal Sain v. Alim Makh.—(7. W. Reporter, Civil Rulings, p. 405.) See further on this subject below, under Chapter XXIII, Part III.

Mere non-payment of rent does not make a tenant’s occupation adverse to the landlord.

So long as the relation of landlord and tenant exists, the mere omission by the tenant to pay his rent does not constitute an adverse possession, and the statute of limitation has no application. And the Court is warranted in inferring that relation to exist from the tenant’s admission that he received the land formerly from the plaintiff, coupled with the absence of all evidence to show that the plaintiff had ever parted with his title.—Toynlecho Tarini Dossi v. Mohinta Chandra Muttuck.—(7. W. Reporter, Civil Rulings, p. 400.)

Payment of rent to one of several joint lessors.

Where several persons are joint proprietors, a payment of the rent by the tenant to one is a payment to all, and the lessee is completely discharged.—Udit Narayan Singh v. Hudson.—(2. W. Reporter, Act X Rulings, p. 15.) See too Vol. 10. Civil Rulings, p. 444, where one of the joint proprietors had acquired his share at an execution sale, and it
was held that having thus purchased the interests of a co-sharer, he came into all the arrangements made regarding the collection of the rents, and therefore that the payment to another joint proprietor was a good payment so far as releasing the tenant from his demands went.—Ramnath Singh v. Gondee Singh.

A mere notice by the tenant of relinquishment of his holding will not relieve him from his liability to pay rent; but he must establish that he has actually yielded up the estate.—(1. W. Reporter, p. 20.)

Where a lease is given jointly to two tenants, both are jointly liable for the rents, and one of them cannot divide this liability and demand only to be answerable to the landlord for a moiety.—Jagendra Deb Roy Kat v. Kishen Bandhu Roy.—(7. W. Reporter, Civil Rulings, p. 272.) This principle applies even when the tenants have divided the land between them in certain shares, unless it be shown that this partition had been recognized by the landlord.—Bholanath v. Baharam Khan.—(Vol. 10. Civil Rulings, p. 392.) Consequently on this joint responsibility, it also follows that the landlord cannot sue one of several joint tenants for the rent on the whole or a portion of the holding.—Rup Narayan Singh v. Jaggu Singh.—(Vol. 10. Civil Rulings, p. 304.)

If the plaintiff prove no payment of rent, nor any contract or agreement to pay it, an action for rent will not lie.—Shiv Sakai v. Ata Hossein.—(2. North West High Court Reports, Revenue Appeals, p. 10.)

Where a tenant sought to recover damages for being wrongfully restrained by the lessee from felling timber, the Privy Council laid it down that the tenant must base his claim to the right which he averred had been wrongfully interfered with, either first, upon its being a necessary incident of the lease, by reason of the objects of the lease; or secondly, upon some positive law; or thirdly, upon some custom to be incorporated in the lease; or fourthly, upon the express terms of the lease.—Rattonji Edulji Shet v. The Collector of Tanna.—(10. W. Reporter, Privy Council Judgments, p. 13.)

A tenant having, contrary to the terms of his lease, felled and sold timber, the Calcutta Court ruled that the landlord's action lay against the tenant and his surety, and not against the purchaser of the trees from the tenant.—Gopi Kishen Gosain v. Doulal Mian.—(1. W. Reporter, p. 156.)

"If a tenant hold land for a term, and under-let that land, he cannot determine the interest of his under-tenant by surrendering his term to the landlord, because from the
date of his under-lease he has parted with his own interests in the land to the extent of the interest created by the under-lease. Under these circumstances the proprietors are not entitled to treat the under trespassers and to turn them out of possession until either the lease of the immediate tenants, or the under-lease to the defendants, have been determined in due course of time."—Hiramani v. Gunga Narayan Roy. —( 10. W. Reporter, Civil Rulings, p. 384. )

A covenant not to assign, under-let or otherwise part with the demised estate runs with the land, and a lessor can sue an assignee of the lessee for the breach of it. The measure of damages in an action for such a breach of covenant is such a sum as will, as far as money can, put the plaintiff in the same position as if he had still the defendant’s liability, instead of the liability of another of inferior pecuniary ability for breaches both past and future.—Williams v. Earle.—( 3. Law Reports, Q. B. p. 739. )

Penalties, such as ejectment for non-clearance, when sought to be enforced, must be clearly set forth in the lease, and the Courts will not infer or presume them if the deed be silent on the point. It is the lessor’s own fault if he provide a condition, without at the same time providing a penalty for non-fulfilment of it.—Tamizuddin Chowdhry v. Mir Sarwar Khan.—( 7. W. Reporter, Civil Rulings, p. 209. )

If a tenant have legally incurred forfeiture of his lease, the fact that indulgence was shown him by the landlord on two previous occasions cannot be held to prevent the latter from exercising his legal rights on a fresh breach and cancelling the lease under the power secured to him by its provisions.—Cutenho v. Souza.—( 1. Stokes’ Madras Reports, p. 15. )

If the tenant’s lease be a joint one, any one of the joint lessors after the expiry of the term of the lease can refuse the lessee leave to remain in the tenancy.—Madan Singh v. Narpat Singh.—( 2. W. Reporter, Civil Rulings, p. 290. )

If a tenant be only a tenant-at-will, the fact of his having taken out no lease and paid nothing over and above the revenue does not in any way affect the right of the landlord to eject him.—Haria v. Bikhari.—( 3. Punjab Record, Case No. 23. )

When all of several co-sharers have allowed a tenant to enter and occupy land, the latter cannot be ejected without the consent of all: but one or more co-sharers cannot allow a stranger to occupy a portion of the joint estate without the consent of the other co-sharers, unless they be authorized to act on their behalf; and if they do so allow him, the dissen-
tient co-sharers may sue and eject him.—Lakshman Prasad v. Dabideen.—(3. North West Revenue Reporter, p. 46.)

If the landlord appoint an agent simply to receive the rent, a notice of an intention to renew the lease made by the lessee to such agent will not be binding on the lessor, unless it be proved that the agent communicated the notice to the agent in the time specified for notice being given to the lessor.—Barnet v. Skinner.—(2. W. Reporter, Civil Rulings, p. 209.)

Where on the expiration of a lease, the lessee is allowed to continue in possession as a yearly tenant, he does so on the terms contained in the expired lease, so far as they are consistent with a yearly holding.—Sayaji v. Umaji.—(3. Reid's Bombay High Court Reports, Civil Appeals, p. 2.)

In M'achintosh v. Gopi Mohan Mazumdur, the defendant had rented the plaintiff's estate to sow indigo on, and having held possession of the land after the expiry of his lease until the crop was gathered, contended that as this kind of crop did not ripen for some months after the lease ran out there was an implied permission on the part of the landlord to allow the tenant to hold over till it could be reaped. The Court however held that no implication of consent could be received where there had been every opportunity of obtaining a consent in express terms, and still less was this so, when the landlord had expressly declared that the lease would not be renewed, and that he should re-enter on its expiry; the tenant should have protected himself when taking the lease, and as he had neglected to do so he was not warranted in sowing a crop, which he must have known would not ripen until after the expiry of his lease. When a tenant thus holds over without right, his use and occupation of the land is a trespass, and he is liable, not for rent as a tenant, but for damages as a trespasser; such damages being measured by the profit the landlord would have reaped from the estate had he recovered possession at the right time.—(4. W. Reporter, Civil Rulings, p. 24.)

Where injury of a permanent nature is done to land in the possession of a lessee by a third party, such as making excavations for bricks, &c., a suit for damages against the wrong-doer may be brought by the lessor.—Dhirmani Dassi v. Croft.—(3. W. Reporter, Small Cause Court References, p. 20.)

When injury of a permanent nature is done to land in the occupation of a lessee, the lessor can sue.

13.—There may be hereditary and non-hereditary cultivators. The rent of the hereditary cultivator cannot be enhanced, within the term of settle-
The landlord has generally no right to enter on an hereditary cultivator's estate to fell timber. At his death, his next male heir or heirs will succeed to these privileges. But he cannot, unless there shall have been an express stipulation, bequeath or transfer his rights, nor sub-let his holding. He may also possess the privilege of cutting timber, digging wells, and making gardens, but it is requisite that the exercise of these privileges should have been guaranteed at the settlement. If he should vacate his land, all privileges cease, and cannot subsequently be resumed without the consent of the proprietor.

The law as laid down in this Clause has been recast and modified by Act XXVIII of 1868, and the precedents relating to the status of hereditary cultivators will be given under the Sections of that Act.

The following ruling however seems rather to belong to this place. In Nikka v. Lukha, the plaintiff, who was the proprietor of the land in the occupation of the defendant, as hereditary cultivator, claimed a right to enter on it to fell and carry away timber. The Chief Court found that the plaintiff had not proved that the custom was in his favor, nor was the right secured him by the wajib-al-arz. The only provision regarding such trees was contained in para 16, which provided that an hereditary cultivator, though at liberty to cut them for the manufacture of the implements of husbandry and the repair of his house, shall not be entitled to sell them to others; but it by no means follows from this, that the proprietor is entitled to cut and sell the trees without the cultivator's consent; were the cultivator to default, these trees would be an asset, or were he to abandon his holding they would revert with the possession of the land to the proprietor, and the clause in the administration paper secures this and prevents waste on the part of the cultivator. The right of the proprietor to enter on the cultivator's cultivated land and cut down trees could not, however, be presumed from such a provision, and in the absence of such, and of proof of custom in his favour, the Chief Court declined to import into the relation of landlord and tenant the right claimed.—(Z. Punjab Record, Case No. 95.)
14.—A non-hereditary cultivator, or tenant at will, cannot claim any of these privileges unless they shall have been expressly guaranteed him. But a timely and formal notice is necessary before he can be ousted, or before his rent can be enhanced. And a written engagement is required to support the demand of the landlord for the payment of enhanced rent.

15.—Any cultivator, having been illegally ousted, may sue for damages, and if he be reinstated, the party who may have held possession during the interim, may, on being removed, also claim damages from the landlord.

16.—In joint undivided estates, any sharer may cultivate land on the terms usually granted to a cultivator.

17.—The outgoing cultivator has no claim to compensation for improvements in the absence of express engagements.

For the present law regarding improvements by tenants see Sections 37—41 Act XXVIII of 1868.

18.—The authorized sewerage, or extra items, may be charged together with arrears of revenue, but no item, except those fixed at the settlement, can be entered in the village expenses.

19.—The landlord cannot, without special agreement, claim from the tenant any items in addition to the rent.

20.—The proprietary body cannot realize bazaar collections, or any other dues, from the non-agricultural residents, except the house tax, or
other police rates demanded by Government, or other items fixed at the settlement.

This clause is based on Clause 1, Section 9 of Regulation VII of 1822, which is here given in extenso:

REGULATION VII OF 1822.

Sec. IX.—Clause First. It shall be the duty of collectors, and other officers exercising the powers of collectors, on the occasion of making or revising settlements of the land revenue, to unite, with the adjustment of the assessment and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose, their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures, as full as practicable a specification of all persons enjoying the possession and property of the soil, or vested with any heritable or transferable interest in the land, or the rents of it, care being taken to distinguish the different modes of possession and property, and the real nature and extent of the interests held, more especially where several persons may hold interests in the same subject-matter of different kinds or degrees. This record shall, in pattidari or bhyachara villages, or the like, include an accurate register of all the co-parceners, not merely the heads of divisions, such as the pattis, thokes, or behris, but also as far as possible of every person who occupies land, disposes of its
produce, or receives rent as proprietor, or as agent for one or more proprietors holding land and disposing of its produce, or receiving the rents of it in common, with a detailed statement of the interior arrangements adopted by the brotherhood, for the distribution of the profits derived from sources common to the coparcenency where any such exist, and for determining the share of the Government jumma, and of the village expenses which each parcener is to contribute, or the other modes in which the engaging parcener or intermediate pat-tidars and behridars collect from the cultivators. A record shall likewise be formed of the rates per beegah of each description of land or kind of produce demandable from the resident cultivators not claiming any transferable property in the soil, whether possessing the right of hereditary occupancy or not, and the respective shares of the sudder malguzar, or other manager, and the cultivator, in lands cultivated under kunkut, batai, or similar engagements, with a distinct specification of all cesses or extra collections made by the malguzar, or village manager, or other. The names of all the village putwaris and village watchmen shall also be registered, with a statement of the amount and nature of the allowance assigned them. And all lakheraj tenures shall be carefully recorded, with a specification of the nature of the tenure. The information collected on the above points shall be so arranged and recorded as to admit of an immediate reference ereafter by the Courts of Judicature; it being understood and declared that all decisions on the demands of the zemindars shall
hereafter be regulated by the rates of rent, and modes of payment avowed and ascertained at the settlement, and recorded in the collector’s proceedings, until distinctly altered by mutual agreement, or after full investigation in a regular suit: and all cesses or collections, not avowed and sanctioned, nor taken into account in fixing the Government jumma, shall be held illegal, and unauthorized, unless now or hereafter specially sanctioned by Government.

Where the settlement proceedings provide for the levy of a cess in a village but it is not expressly stated what parties are to receive it, or at what rate it is to be levied, the Civil Courts must decide these points by evidence as to custom, and the numbers who are to share in the due cannot be determined by any considerations such as that the recognition of the rights of a large number would fritter away the collections due under the cess.—Zabardast v. Muhammad Baksh.—(4. Punjab Record, Case No. 50.)

In a suit to compel the sonars in the village of Chokaleean to pay kamiana (a tax on menial residents) which they resisted, asserting they had never paid it, the Chief Court, after pointing out that sonars were not included among the list of castes who were mentioned in the settlement papers as paying it, directed that an enquiry should be made as to whether “by immemorial custom in this village goldsmiths had been regarded as “kamin,” and as such have paid “kamiana” in contradistinction to their share of the chaukidari tax merely”; the onus of proving the custom being on the plaintiffs.—Bhaggu v. Pir Baksh.—(2. Punjab Record, Case No. 36.)

Where the levy of attrafi had been provided for by the village papers, but the proprietary body, by reason of scarcity and subsequent disputes as to their right to collect, had not levied the cess for some years, the Chief Court held that the only ground for considering such a right to be lost by disuse would be that prolonged disuse leads in this case to the presumption of abandonment; but that here that presumption could not take place, as the circumstances attending the disuse had been explained: the limitation law therefore only prevented the recovery of old arrears, but did not bar the levying the cess itself.—Gulab Sing v. Bhuta.—(2. Punjab Record, Case No. 75.)
Haq lambardari is not recoverable from a muafidar as such, but if the muafidar happen also to be a proprietor, he must pay the due in proportion to his right of property.—*Hazari Lal v. Salig Ram.*—(2. Punjab Record, Case No. 42.)

In a suit to levy a cess, where the plaintiff relied on a previous decision in his favor, the Calcutta Court, though admitting that the judgment ought not to be impugned on the ground of being an *ex parte* one, pointed out that "it does not follow that because the defendant had been adjudged to pay a particular cess or other demand in a particular year, he should therefore be compellable to pay it for ever."—*Urjan Sahu v. Anand Singh.*—(10. W. Reporter, Civil Rulings, p. 257.)

21.—The village servants cannot claim from the proprietors any regular remuneration, nor the proprietors from the village servants any service, except fixed at the settlement.

22.—Succession to, or partnership in, the lumberdari, cannot be a matter for litigation in the Civil Courts.

Under Clause 3 Section 10 Regulation VII of 1822 the selection and appointment of lumberdars rests with Government, and the Civil Courts have therefore no jurisdiction to entertain suits to determine the validity of orders by the Revenue Authorities displacing or reinstating these headmen.—*Mahammar Baksh v. Hassa.*—(4. Punjab Record, Case No. 27.)

23.—In villages adjoining rivers it is not unusual for the holdings to be periodically re-allotted by the community, in order that relief may be given to distressed sharers, whose lands have been swept away by the floods.

24.—When the ownership of land, thrown up by the river, is contested by villages on the opposite banks, the land is generally considered to belong to that bank from which it is separated by the shallowest of the two channels. But in this
respect local customs will be followed whenever they are ascertained to exist.

The law of alluvion for the Fort William Presidency, except so far as it has been modified for Bengal Proper by more recent legislation, is contained in Reg. No. XI of 1825, and the Chief Court has expressed an opinion that the Punjab Courts should, where the usage is doubtful, follow the rules therein laid down, “both because we are bound to act according to the spirit of the Regulations, and because the rule therein laid down appears, on the whole, the most equitable.”—(2. Punjab Record, Case No. 53.) The Regulation is therefore subjoined:

REGULATION XI of 1825.

A Regulation for declaring the Rules to be observed in determining Claims to Lands gained by Alluvion, or by Dereliction of a River or the Sea: Passed by the Governor-General in Council, on the 26th May, 1825.

Preamble.

I. In consequence of the frequent changes which take place in the channel of the principal rivers that intersect the provinces immediately subject to the presidency of Fort William, and the shifting of the sands which lie in the beds of those rivers, churs or small islands are often thrown up by alluvion in the midst of the stream, or near one of the banks, and large portions of land are carried away by an encroachment of the river on one side, whilst accessions of land are at the same time, or in subsequent years, gained by dereliction of the water on the opposite side; similar instances of alluvion, encroachment, and dereliction also sometimes occur on the sea-coast which borders the southern and south-eastern limits of Bengal. The lands gained from the rivers or sea by the means
above mentioned are a frequent source of contention and affray, and although the law and custom of the country have established rules applicable to such cases, these rules not being generally known, the Courts of Justice have sometimes found it difficult to determine the rights of litigant parties claiming churs or other lands gained in the manner above described. The Court of Sudder Dewanny Adawlut, with a view to ascertain the legal provisions of the Mahammadan and Hindu laws on this subject, called for reports from their law officers of each persuasion, and on consideration of the reports furnished by the law officers in consequence, as well as of the decisions which have been passed by the Court of Sudder Dewanny Adawlut in cases brought before them in appeal which involved the rights of claimants to lands gained by alluvion, or by dereliction of rivers or the sea, the Governor-General in Council has deemed it proper to enact the following rules for the general information of individuals as well as for the guidance of the Courts of Judicature; to be in force, as soon as promulgated, throughout the whole of the provinces subject to the presidency of Fort William.

II. Whenever any clear and definite usage of shekust pywust, respecting the disjunction and junctio of land by the encroachment or recess of a river, may have been immemorially established, for determining the rights of the proprietors of two or more contiguous estates divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the

Claims and disputes relative to alluvial lands to be decided by immemorial and definite usage when such shall be clearly recognized and established.
course of the river, by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage.

In Prinsep's History of the Punjab, Vol. I., p. 153, the following passage occurs respecting Punjab riverain law:

"Claims to islands in a river flowing between two manors, and to alluvions, are determined by what is called the "kuhmuch," or "kishti bmma," which practice or rule assigns the land to the proprietor of the bank or main upon which the alluvion is thrown, and from which the water has receded. If the island be formed in the centre of the river, and there be depth of water on each side of it sufficient for boats to ply, in this case it becomes the joint property of the Chiefs on both banks. This custom, which obtains in the Sikh States, with regard to alluvion is universal in India, wherever lands are liable to such accident by an alteration in the course of rivers. In the case of lands cast by the change of the stream from one side of the river to the other, though one chief gains and another loses, yet it is customary to preserve the rights of the zemindar, if he consent to cultivate the lands."

The party who asserts the existence of a local custom of shikast paiwast must prove the custom, and proof that the custom alleged prevails on another river is no evidence that it prevails where the disputed land is situate. The language of the Regulation implies that the custom to be proved is a local custom.—Rai Manik Chand v. Madhoram.—(3. Bengal Law Reports, Privy Council Cases, 15.)

Although a custom can be abrogated by contract, yet it is essential that this agreement shall be between the parties interested and the fact of the majority of the proprietors of a number of adjacent villages having met and agreed to disregard the old river custom of the locality in the settlement of alluvion questions for the future, would not warrant the Courts in ignoring that custom in deciding a claim between two villages, neither of which had taken part in the compact: since to hold otherwise would in plain words be to assert a right for the proprietors of one village to legislate for those of another.—Sodha v. Fatah Khan.—(4. Punjab Record, Case No. 56.)

III. Where there may be no local usage of the nature referred to in the preceding section, the
general rules declared in the following section shall be applied to the determination of all claims and disputes relative to lands gained by alluvion or by dereliction either of a river or the sea.

IV. First. When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landholder, or as a subordinate tenure, by any description of under-tenant whatever. Provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation II. 1819, or of any other Regulation in force. Nor if annexed to a subordinate tenure held under a superior landholder, shall the under-tenant, whether a khudkasht ryot, holding a mourusi istimrari tenure at a fixed rate of rent per bigah, or any other description of under-tenant liable by his engagements, or by established usage, to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable.
"Gradual accession" is thus defined in the Civil law, from which the rule of the Regulation is borrowed: "Est autem alluvio incrementum latens; per alluvionem autem id videtur adjici, quod ida paulatim adjectur ut intelligere non possis quantum quoquo momento temporis adjecturat."

"The re-forming of land in a navigable river, the ownership of the soil of which is not in the riparian proprietors of its banks, after a considerable interval and frequent floods, is not præmâ facie to be ascribed to a loss from any particular portion of territory, nor is the land which has been removed by a sudden avulsion reclaimable, unless the circumstances supply evidence of identity. This re-formed land is not ascribed to avulsion, and several years elapsed between the loss of the plaintiff's land and the appearance of this chur. The title by accretion to a new formation generally is not founded on equity of compensation, but on a gradual accretion by adherence to some particular land which may be termed the nucleus of accretion. The land gained will then follow the title to that portion to which it adheres. It is obvious, therefore, that such a title is not established by mere proof of general inclusive boundaries of land, at a time long preceding the actual formation of the chur, since the lands that have such a fluctuating boundary, as a tidal river, and which are themselves subject to loss and gain of quantity by acts independent of the owner's concurrence, and which may pass from side to side of the river boundary, have not the ordinary element of fixedness, which belongs to immovable estate, in the common course of things. A detached chur, independent of usage, in such a stream, would belong to neither riparian proprietor; and the circumstances that it was sustained by the land of one, would not be enough to entitle him to it."—Ekowri Singh v. Hira Lall Seal.—(2. Bengal Law Reports, Privy Council Cases, p. 4.) See this precedent followed by the Lahore Court in 4. Punjab Record, Case No. 72.

Identification of alluvion.

Where land is carried away gradually, year by year, and no buildings, trees or pillars are left by which it can be identified, the new land subsequently formed, being incapable of identification from its physical features, must be regarded as an increment to the tenure of the person to whose estate it is thus annexed,* and the fact that a laying down of the survey boundaries might place it within the border of another estate is no reason for so assigning it.—

* If a portion of a village be cut off by the stream, so as to be on the opposite side of the river from the main village, any alluvial soil thrown up between this detached portion and the main stream will appertain to it, and not to the adjacent entire village which originally alone formed that bank of the river until the stream cut off a portion of the one on the opposite side. —Nurdin v. Salah Ali.—(4. Punjab Record, Case No. 66.)
"We think, on the true construction of Regulation No. XI of 1825," observed the Court in Maseyk v. Hedger, "that lands gained by the gradual recession of a river, and added by the operation of nature to the tenure of A, must be held to be the property of A, although it be also established by evidence that this land has re-formed on a site which was formerly part of the property of B. If it should be proved on the evidence that the river flowed over the original site, and receding left the new formation and a fordable channel between it and the defendant's mouzah, the defendant in our opinion was justified in re-taking possession of the newly formed land on the old site, and he is not to be deprived of that possession because the river should be either fordable on the plaintiff's side, or have become wholly dried up."—(Sutherland's Civil Rulings, for June 1864, p. 306.) So again, in Kattimani Dassi v. Rani Manomohini Dabi a Full Bench of the Calcutta Court held that under this clause "what is added by gradual accession must in all cases be considered an increment to the old estate without regard to the site of the increment. Whether the new land be a re-formation on an old site, or whether it be formed where no land ever previously existed, its ownership is determined, when the ownership of the adjacent land to which it has by imperceptible degrees accreted is ascertained. If therefore in the present case, the ownership of the adjacent land has been duly ascertained to be in the defendant, and the newly formed land is found to have been gradually gained from the river by accession to the defendant's adjacent land, we think that the plaintiff cannot lay claim to any portion of the latter by shewing that it occupies the site of his village." The Court, in a later portion of their judgment, carefully distinguished this case in which no recognition of the land was possible and the plaintiff relied only on identity of site, from cases of mere submersion or inundation, as governed by the Privy Council decision in Mussumat Imam Bandi v. Har Gobind Ghose, given below.—(3. W. Reporter, Civil Rulings, p. 51.) See too, p. 68 of the same Reports; Vol. 6. Civil Rulings, pp. 40, 249; Vol. 8. Civil Rulings, pp. 164, 206; and Vol. 9. Civil Rulings, p. 312. There may however be a local custom assigning newly recovered land to the original owner of the site, and such a custom appears to exist on some parts of the banks of the Chenab.—(4. Punjub Record, Case No. 72.)

This Regulation does not recognize the principle of dividing and apportioning alluvion among parties according to their previous losses by diluviation.—Kali Chandra Chowdhry v. Manikarnika Chowdhraen.—(Sutherland's Civil Rulings, for April 1864, p. 149.)
Land does not change ownership by being submerged.

Where land is inundated, and remains covered with water for some years, but ultimately again appears above the water, the party who was the owner of the land before the inundation remains the owner while the land is covered with water, and also again when it has become dry.—Mussumat Imam Bandi and Wajid Ali Khan v. Har Gobind Ghose.—(Sutherland's Privy Council Judgments, p. 208.) This case was distinguished by the Chief Court in 4. Punjab Record, p. 191, as one of overflow and recess of the stream, and not as one of diluvion in the common Indian sense.

The Regulation does not apply to waste lands rendered culturable by inundation.

So in Ramjiawan Rai v. Dip Narayan Rai, a Full Bench of the Agra Court ruled that this clause applies only to lands gained by alluvion either gradually or suddenly, and not to waste lands subject to inundation, and in one year rendered culturable by a deposit of earth from the action of the river.—(North West High Court Full Bench Rulings of March 6th, 1867.)

A piece of land in the bed of a navigable stream which in the dry season only is left exposed, and is submerged with the annual rise of the river, is not an accretion in such a sense as to become the private property of the riparian proprietor. Till the land rises beyond ordinary high-water mark in such a way as to become fit for cultivation it is part of the river bed, and as such public property. And when it does so rise as to become private property, the public will still be entitled to the same access to the river which was enjoyed before the new land was formed on the bank.*—Maharani Udhirani Narayan Kumari v. The Nawab Nazim of Bengal.—(4. W. Reporter, Civil Rulings, p. 41.)

Basing their judgment on the Roman law† on the point, the Calcutta Court, in Grey v. Anund Mohun Moitro, laid it

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* Riparum quoque unus publicus est juris gentium sicut ipsum fluminis. Itaque navem ad eas applicare, funes arboribus ibi natis retigere, unus aliquod in his reponere culturam liberum est sic ut ipsum flumen navigare, sed proprietas eorum illorum est quorum praeditas harent: qua de causa arboris quoque in iisdem natae corundem sunt.—(Inst. II. 1, 4.)

† Quod si in natura loco in unicerum derelicto, alia parte, flasker ceperit, prior aedem alius eorum est qui ipsum ripam ejus praedita possidet, modo sicclcite latitudinis ejusque agri, qua latitudo proprie ripam sit. Novus autem alius alius ejus juris esse incipit ejusque ejusque flumen, id est publicus. Quod si post aliquod tempus ad prionem alium recerum fuerit flumen, versus novus alius eorum esse incipit qui ipsum ripam ejus praedita possidet.—(Inst. II. 1. 23.) Mr. Landars adds to this the following note. "It might happen that the soil over which the river flowed was known to have belonged to a different person and not to the owners of the adjacent banks. If the river changed its channel and left the soil dry, to whom was the recovered land to belong, could its original owner claim it, or was the presumption of law so fixed in favor of the owners of the adjacent banks that nothing was admitted to rebut it. Caines says that strict law was against the original owner, but adds in such a situation, "equity would hardly allow such strictness to prevail in all cases."
down that if a river simply change its course, and there be nothing to modify the conclusion which the Court ought to draw from that simple fact, the old dry course of the river must be taken to have become private property. And as incident to and part of the same, the owner of the soil is entitled to all ponds or gulfs in which water remains, to the exclusion of any person who may have rented the fishery from Government when the public river ran there.—(Sutherland’s Civil Rulings, for March 1864, p. 708.) So where a stream forsook the bed of a canal in which it had previously flowed, the dry bed was held to appertain to the estate in which the canal had been included.—(10. W. Reporter, Civil Rulings, p. 68.)

When the stream between the new land and the plaintiff's estate is an unfordable one, the plaintiff cannot obtain a declaration that the land is an accretion to his holding, although he may have been for long in possession of it.—Nobin Kishor Roy v. Jogesh Prakash Ganguli.—(10. W. Reporter, Civil Rulings, p. 272.) See also Vol. 5. Civil Rulings, p. 140; Vol. 6. Civil Rulings, p. 123; and Vol. 7. Civil Rulings, p. 513, where with reference to the language of Clause 3, proof that the intermediate channel was fordable was held to be a vital point, and, in the absence of any admission by the opposite side, one which it was absolutely necessary for the claimant to establish, even if it were not formally put in issue by the Court.

In the absence of any custom to the contrary, under Clause 1 Section 4 Regulation XI of 1825, alluvial land formed in front of an old muafî holding, which had been resumed and settled with the ex-muafidar, becomes an increment to that holding.—Fazulddin v. Mussumat Intiazunnissa. —(4. North West High Court Reports, p. 152.)

"Alluvial acquisitions are often doubtful in their origin: they must depend much on oral testimony, which time is constantly destroying or impairing, and it is often hard to say who is the person to whom the law would ascribe the legal ownership of them. The mere cultivation of them, like that of waste or jungle lands, carries with it no prima facie character of usurpation or wrong. An undisputed possession and cultivation, even though for a few years only, would the more readily induce a purchase, and a purchaser bona fide and without notice might, with perfect honesty, and even with the favorable construction by a Court of Justice of his acts, defend his possession by insisting on strict legal proof of an adverse title."—Ekowri Singh v. Hirâ Lall Seal. —(2. Bengal Law Reports, Privy Council Cases, p. 4.) But if the plaintiff succeed in showing a title, he will be entitled to recover mesne profits from the date of the institution of
the suit, when he put forward his claim and the defendant knowingly refused to recognize it.—(6. W. Reporter, Civil Rulings, p. 76.) In Mahtab v. Hira the Chief Court held that when a party, either from the heaviness of the assessment or other cause refuses to take possession of alluvion to which he is entitled, to engage for its revenue, or in short to have anything to do with it, and by reason of his refusal the defendants are induced to bring the land under cultivation and improve it, the former owner will not be entitled after a lapse of several years, though less than twelve, to come forward and assert his former title, but will be estopped from doing so by his own acts, which have led to the defendants expending labour and expense on the property.—(3. Punjab Record, Case No. 115.)

Care however must be taken in ascertaining whether the case be one coming under the alluvion law at all. If the claiming village or proprietor have an estate with a defined boundary on the high ground, not extending into the low valley in which the Punjabi rivers usually flow, changing from side to side, but leaving the high banks unaffected, then the accident of the river having worked its way close to the permanent bank on the top of which the plaintif's boundary runs, and subsequently receded leaving new land between such bank and its present bed, will be no reason for assigning the alluvion to the plaintiff, whose estate is shown to have never reached into the alluvial valley.—Mallick Sohara v. Ghulam Mahammad.—(4. Punjab Record, Case No. 23.) But unless the principle of this ruling be warranted by the custom of the particular river in question, and therefore come under Section 2 of the Act, does it not clash with the first Clause of Section 4, which certainly appears to contemplate the possibility of cases in which the changes are all by way of increase?

Second. The above rule shall not be considered applicable to cases in which a river, by a sudden change of its course, may break through and intersect an estate, without any gradual encroachment, or may by the violence of stream separate a considerable piece of land from one estate, and join it to another estate, without destroying the identity, and preventing the recognition of the land so removed. In such cases the land, on being clearly recognized, shall remain the property of its original owner.
Third. When a chur, or island, may be thrown up in a large navigable river (the bed of which is not the property of an individual), or in the sea, and the channel of the river, or sea, between such island and the shore may not be fordable, it shall, according to established usage, be at the disposal of Government. But if the channel between such island and the shore be fordable at any season of the year, it shall be considered an accession to the land, tenure, or tenures, of the person or persons whose estate or estates may be most contiguous to it, subject to the several provisions specified in the first clause of this section, with respect to increment of land by gradual accession.

When the new land is an accretion to a chur, the ownership of the chur decides who is the owner of the accretion to the chur, and it is immaterial whether the channel between the main land and the chur be fordable or not.*—Kali Nath Roy v. Laurie—(3 W. Reporter, Civil Rulings, p. 122); or if the gradual accessions result in the aggregate in prolonging the chur in front of estates on the river bank not belonging to the owner of the chur.—(Vol. 9. Civil Rulings, p. 402.)

If the Government do not take possession of an island which is thrown up in the deep stream of a public river for a year or so, and during that time the channel between the island and the adjoining land become fordable, the right of Government to dispose of it will cease, and it becomes an increment to the tenure of the person holding the land most contiguous to it, and the person in possession of the contiguous land would have the same interest, and the same interest only, in the accretion as he had in the land to which it became an increment.—Kawar Paresh Narayan Roy v. Watson and Co.—(5 W. Reporter, Civil Rulings, p. 283.)

So if land come up as an island in a deep stream and be taken possession of by a party under a bad title, the Government asserting no claim, and subsequently by the drying up of the intermediate channel, the plaintiff claim it

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*Although this case was decided under the Bengal Act (Act IX of 1847) the principle seems applicable to the present Regulation.
a party with a good subsequently acquired title.

as an accretion to his adjacent estate; since under the circumstances it would have become his property had the other party not taken possession of it, the fact of the latter's taking possession without title cannot alter the plaintiff's right.


**Fordable channels.**

If the channel between the island and the bank be fordable at any point, the owner of the land to which the chur adjoins has a prima facie title to it under the latter part of this Clause.—Wise v. Amirunnissa Khatum.—(2 W. Reporter, Civil Rulings, p. 34.) See also Vol. 5. Civil Ruling, p. 283. But a stream which can only be crossed by going breast-deep in a zigzag direction over the higher lumps of land, which may be at the bottom of the bed of the river, and that only in the dry season, cannot be held to be fordable, especially if on the other side there be a stream with shallow water.—(3 W. Reporter, Civil Rulings, p. 95.)

The Calcutta Court, in Ghulam Ali v. Gopal Lal Tagore, thus interpreted the words "most contiguous" occurring towards the end of this Clause. "We think this somewhat vague phrase is intended to comprise only the estate or estates with which the chur comes into contact, so to speak, along the length of the fordable part of the channel. It does not embrace estates which may be on the river bank opposite some portion of the chur, but with an unfordable channel lying immediately between them and the chur. The Regulation is silent as to how the chur is to be partitioned between the estates in the event of its being an accession to more than one at once; but no difficulty on this account arises here, because the Lower Appellate Court has found as a fact that, when the annexation to the river bank took place, the fordability of the channel did not extend beyond the defendant's frontage; consequently, with the interpretation just given to the Regulation, the whole chur there became an accession to the defendant's land and part of his tenure. If this be so, no portion of it would afterwards cease to belong to him, merely by reason of the deep water between it and (say) the plaintiff's estate becoming fordable. The silting up of the channel could not have the effect of transferring the ownership from one person to the other."—(9 W. Reporter, Civil Rulings, p. 401.) See also Sutherland's Civil Rulings, for June 1864, p. 302.

**Fourth.** In small and shallow rivers, the beds of which, with the jalkar right of fishery, may have been heretofore recognized as the property of individuals, any sand-bank, or chur, that may be
thrown up, shall, as hitherto, belong to the proprietor of the bed of the river, subject to the provisions stated in the first clause of the present section.

In Mirza Saiyidullah v. Bhatan, the plaintiff contended that the words "subject to the provisions stated in the first Clause of the present Section" signified that banks or churs in shallow streams, the beds of which were private property, belonged to the estate to which they joined: the Court however rejected this contention, remarking that "it is clear from reading the latter part of the Section in question in conjunction with Clause 4, that these words do not apply to the formation or position of the newly accreted lands, but to the owner's right in them, in relation to the Government after they are formed; in fact, any other explanation would result in the contradiction that Clause 4 Section 4 of the Regulation would in one and the same sentence declare that the owner of the bed of a shallow river had right to sell sand-banks and churs thrown up in it, and that the same sand-banks and churs belonged not to him but to the riparian proprietor to whose estate they were joined."—(10. W. Reporter, Civil Rulings, p. 68.)

If in such a stream as that contemplated by this Clause the fishing rights belong to a different person from the owner of the bed of the stream, this peculiarity will have no effect in taking the right to newly formed lands out of the provisions of this Clause, but the owner of the bed will be the proprietor of the alluvion in or by the stream.—(4. W. Reporter, Civil Rulings, p. 54.)

Fifth. In all other cases, viz. in all cases of claims and disputes respecting land gained by alluvion, or by dereliction of a river, or the sea, which are not specifically provided for by the rules contained in this Regulation, the Courts of Justice, in deciding upon such claims and disputes, shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or if not, by general principles of equity and justice.

In claims for alluvion, in which the contention between the parties involves a question as to what district the disputed land may be situated in, both the Courts of first
instance and the Appellate ones must first distinctly try whether the land is, according to Section 14 Act VIII of 1859, included within the local jurisdiction of the Court wherein it was instituted or not, and if it be not the plaint should be returned to the plaintiff to refile.—Rani Surno Mayi v. Durga Mani Dassi.—(10. W. Reporter, Civil Rulings, p. 335.)

For the law of limitation in these suits, see Tremlett's Limitation Law, p. 37.)

V. Nothing in this Regulation shall be construed to justify any encroachments by individuals on the beds or channels of navigable rivers, or to prevent zillah and city magistrates, or any other officers of Government, who may be duly empowered for that purpose, from removing obstacles which appear to interfere with the safe and customary navigation of such rivers, or which shall in any respects obstruct the passage of boats by tracking on the banks of such rivers, or otherwise.
CHAPTER XXI.

PART II.

Act No. XXVIII of 1868.

An Act to define and amend the law relating to the tenancy of land in the Punjab.

Whereas it is expedient to define and amend the law relating to certain matters connected with the tenancy of land in the Punjab; It is hereby enacted as follows:

CHAPTER I.

PRELIMINARY.

I. This Act may be called "The Punjab Tenancy Act, 1868," and shall extend only to the territories for the time being under the government of the Lieutenant Governor of the Punjab.

II. Nothing contained in this Act shall affect the operation of any decree of Court under which a tenant holds or of any agreement between a landlord and a tenant, when such agreement is in writing or recorded by the proper officer in the record of a regular settlement sanctioned by the Local Government.

All entries in such record in respect of matters comprised in chapters III, IV, V and VI of this Act shall, when attested by the proper officer, be deemed to be agreements within the meaning of this section.

III. In this Act, unless there be something repugnant in the subject or context—
"Land." "Land" means immoveable property for the time being subject to a settlement, whether regular or summary, of land-revenue;

"Rent." "Rent" means whatever is payable by an occupant of land on account of the use or occupation thereof.

"Arrear of rent." Any instalment of rent which is not paid on or before the day when the same becomes due, whether under a written agreement or according to law or local usage, shall be deemed to be, for the purposes of this Act, an arrear of rent;

"Tenant." "Tenant" means any occupant of land liable to pay rent therefor, but does not include an under-proprietor;

"Landlord." "Landlord" means any person entitled to receive rent payable by a tenant;

"Grand-father," "uncle," and "grand-uncle." "Grand-father" includes the father of an adoptive father, "uncle" the brother of an adoptive father, and "grand-uncle" the adoptive father of an uncle;

"Representative." "Representative" means an heir or any other person taking by operation of law or by will a beneficial interest in the property of a deceased person.

IV. The Book Circular of the Financial Commissioner of the Punjab, No. 33 of 1860, is hereby repealed.

Under-proprietors. The following account of the status of the sub-proprietor is taken from Mr. Cuss's Revenue Manual, pp. 33 and 34. After pointing out that proprietors of this class are
found in districts far separated from each other, and that however their position may clash with certain theories regarding the village system, it is a reality notwithstanding, he continues—"The feature of their status is that they are actual owners of their own cultivated fields, with power of transfer by sale, gift or mortgage; but they have no claim to manorial rights, or to the common land, or to pre-emption, and only in very exceptional cases to the post of village head-man. Among them we find—

I. Descendants on the female side from the original locators of the village, who received a small plot of land as a marriage portion.

II. Descendants of those who assisted in the location of the village, but, not being of the same caste or tribe as the locators, were not admitted to the village community.

III. Cultivators who have not only asserted by prescription a right of occupancy, but, by lapse of time, or by permission, have freed themselves absolutely and for ever from paying rent.

IV. Owners of plots of land the revenue of which was assigned to their own use by the Native Governments, but which has been resumed by the British Government, leaving them the indulgence of a lease at reduced and fixed rates.

V. Purchasers of plots of land for houses, gardens, manufactories, &c.

VI. Purchasers of waste lands within village boundaries.

VII. Cultivators who were once tenants, but who by private purchase or auction sale have converted their occupancy into ownership.

VIII. Parties who have purchased heritable and transferable rights in the village without becoming members of the proprietary community.

IX. Parties who have been placed in possession of ownerless lands by a grant of Government.

This class can locate cultivators, but if they should themselves fall into arrears of their quota of the Government revenue, the village head-men can institute a summary suit, at once attach the holding, and collect from the cultivators; and as this intermediate tenure is transferable and heritable, he can bring it to sale by a summary decree; and there will be no hesitation in selling it on the part of the authorities, as the same political reasons which restrain the ejectment of the landowners of villages do not apply to them ** ** * The rights of the sub-proprietor are not terminable and
must be sold, while that of the tenant is cancelled in the event of balances. At first sight the agricultural inhabitants of a village seem to be all possessed of the same rights; and if during the summary settlement they all paid revenue to Government in the same mode, no practical difference existed: but on closer scrutiny, those whose ancestors located the village will be distinguished from the mere tenant, and there will often be found a class like the one now described, which possess some of the characteristics of both."

CHAPTER II.

OF RIGHTS OF OCCUPANCY.

V. Every tenant who—

(1) has heretofore paid no rent and rendered no service, in respect of the land occupied by him, to the proprietor thereof for the time being, beyond the amount of land-revenue and village-cesses for the time being chargeable thereon, and whose father and grand-father, uncle and grand-uncle occupying the same land, have paid no rent and rendered no service in respect thereof to such proprietor, beyond the amount aforesaid;

(2) or who has involuntarily parted or shall involuntarily part with proprietary rights in any land otherwise than by forfeiture to Government; and who has continuously occupied or shall continuously occupy such land or any part thereof from the time of such parting;

(3) or who is, at the date of the passing of this Act, the representative of a person who settled as a cultivator in the village in which the land occupied by such tenant is situate along with the founders of the village;
(4) or who is or has been jagirdar of the village or any part of the village in which the land occupied by him as tenant is situate, and who has continuously occupied such land for not less than twenty years—

shall be deemed to have a right of occupancy in the land so occupied.

In Shadi v. Arjan the Chief Court held that the fact of the plaintiffs claiming to be proprietors of certain lands brought their status in regard to the disputed property before the Court, and therefore there was nothing incorrect in the Court finding that though the claim to the proprietary title must be dismissed, they were entitled to the rights of hereditary cultivators.—(3. Punjab Record, Case No. 55.) See too Vol. 2. Case No. 81. But where the plaintiff is already recorded as an hereditary cultivator, and sues to establish that this entry is erroneous, and that he is in reality a proprietor, it is not competent to the Courts under colour of trying this suit to reduce the plaintiff's status below that with which he began the litigation.—Ramzani v. Aziz.—(3. Punjab Record, Case No. 102.)

Where a landlord sues to eject tenants who, he asserts, are truly tenants-at-will, as they are described in the settlement record, it is an error to attribute a greater effect to the settlement entry than should be attached to it. "The allegation is that the entry is wrong, and in trying that question nothing can be argued from the existence of the entry, while on the other hand possession for a long period after the settlement, and payment at revenue rates, supply an element in the case from which a presumption may arise and give effect to a possession anterior to the settlement, which would indicate error in the record."—Sawant v. Amar Singh.—(4. Punjab Record, Case No. 70.)

Where it appeared that the tenants came to the village along with the proprietors, and had occupied land in it for several generations, that the extent of this land had increased from time to time as the proprietary community extended their cultivation and reclaimed the waste, but that they had always had uninterrupted possession of all the land they reclaimed, that for a long time they had paid at proprietors' rates, and that when the cultivators' rates were raised to 9 annas 4 pie and upwards they were only assessed by the proprietors at 7½ annas per beegah, and that one of the village head-men had accepted a mortgage of their land, the
Chief Court held that the settlement record must be incorrect, and that the plaintiffs were entitled to the status of hereditary cultivators. The fact of the plaintiffs being Lohars and kamins of another village was held not to affect the case.—_Sukhiram v. Arjan._—(_4. Punjab Record_, Case No. 58.)

In adjudicating on the status of a cultivator the Courts cannot invent tenures recognized neither by the law or custom of the country, but must determine the class of proprietor or tenant to which the plaintiff belongs, and then his rights, whether as regards ejectment, the enhancement of rent, or the cutting down of trees, must be regulated by the law and custom applicable to that tenure for the time being.—_Chajju v. Malavali._—(_3. Punjab Record_, Case No. 33.)

The following are among the rights which by local custom cultivators with occupancy rights usually enjoy, as given by Mr. Oust in his _Revenue Manual_, pp. 40—45. In any disputed case however reference would have to be made to the special custom of the village or locality, as set forth in the administration paper, or elsewhere. The cultivator with occupancy rights is entitled to collect dry wood, dry grass and reeds for his own use; he also has a right to the use of the manure or refuse of his own house, but has no claims to that of the non-agriculturist residents, nor can he remove it beyond the confines of the village without leave of the proprietors. He has no power to sell his residence in the village without giving the pre-emption to the landowner, and if abandoned, roofless and doorless, for one whole agricultural year, the site lapses to the landowners; the materials unless it be wood grown in the village (?) may be removed by the tenant. Forfeiture of the right of occupancy of the fields does not entail forfeiture of the residence, or threshing floors, or other agricultural conveniences. Arable lands cannot be used for other than ordinary agricultural purposes, consistent with good farming, tanneries, brick-kilns, salt-petre pans, kankar pits, must not be started without leave of the landowner, nor can the latter be compelled to grant his permission. He has a right to cut trees of spontaneous growth, or trees planted by himself, for agricultural purposes, such as for making ploughs, well-gear, roof-beams, but for no other purpose, unless he can prove he has the exceptional right of general use, but he cannot cut fruit-bearing or other trees, the property of the landowner: if the trees be on the boundaries of fields the local custom must be followed. All tenants whether resident or non-resident, have a right to graze agricultural cattle, but not pastoral, on the common land, and water them from the common tanks. He may not plant gardens or trees or sink wells or cut canals
without the leave of the landlord, but that leave might be obtained by means of a suit in Court in which the tenant distinctly admitted that he had no proprietary rights and that the tenure would not be altered by the improvements. [Now, however, Sections 37 and 38 of this Act appear clearly to recognize the tenant's right to improve his holding, and by so doing, remove the reason which most usually led to objections by the landlord, viz. a fear that these improvements would sooner or later be set up as proofs of a proprietary title in the tenant.] If the fields recorded at settlement as constituting the holding be washed away by river action, and new deposits not susceptible of recognition be subsequently thrown up, the tenant has no claim, his rights have expired.

BOOK CIRCULAR No XXVII of 1868.

To

ALL COMMISSIONERS AND DEPUTY COMMISSIONERS

IN THE PUNJAB.

Dated Lahore, the 3rd December 1868.

A reference having been made to the Chief Court as to the procedure to be adopted with regard to the Punjab Tenancy Act (XXVIII of 1868), the Court is pleased to call the attention of all Subordinate Courts to Section 42 of the Act, which defines the cases cognizable by the Civil Courts.

2. The jurisdiction of the Civil Courts only commences on the institution of a suit under Sections 5, 6, 11, 14, 19, 20, and 25, and the procedure to be followed in such cases is that prescribed by the Code of Civil Procedure and the Punjab Appeals' Act (VII of 1868).

3. If, however, the district is under Settlement, and the Government, under the powers conferred by Sections 21 and 22 of Act XIX of 1865, has invested the Revenue Courts therein named with authority to try these cases, the jurisdiction of the Civil Courts is barred, and suits must be heard on the Revenue, and not on the Civil, side of the Courts—the ultimate appeal lying to the Financial Commissioner instead of to the Chief Court. The power given under this Section, however, only continues so long as Settlement operations are in progress, and ceases on the termination thereof.
VI. Every tenant whose name appears in the records of a regular or revised settlement heretofore sanctioned by the Local Government, as having a right of occupancy in land which he or the person from whom he has immediately inherited has continuously occupied from the entry of his name or the name of such person (as the case may be) in such settlement, shall be presumed to have a right of occupancy in the land so occupied, unless the landlord shall in a regular suit prove—

(1) that, within the thirty years immediately before the institution of such suit, other tenants of the same class in the same or in adjacent villages have ordinarily been ejected from their holdings at the will of the landlord; or

(2) that the tenant has voluntarily admitted, before any officer employed in making or revising a regular settlement of land-revenue or before any officer authorized to attest the entries in the record of such settlement, that he is a tenant not having a right of occupancy, and that such admission has been recorded at the time by the officer so employed or authorized.

VII. If the tenant has voluntarily exchanged the land, or any portion of the land, formerly occupied by him for other land belonging to the same landlord, the land taken in exchange shall, for the purposes of this Act, be held to be subject to the same right of occupancy as the land given in exchange would have been subject to if the exchange had not taken place.
VIII. Nothing herein contained shall be deemed to preclude any person claiming a right of occupancy on any ground other than the grounds hereinbefore specified from suing to establish such right.

IX. No tenant shall be deemed to acquire a right of occupancy by mere lapse of time.

And no right of occupancy in the common lands belonging to a pattidāri village community shall be acquired under this chapter.

"Although," observed the Court in Baldeo v. Hufiz Ali, "by lapse of years a cultivator originally tenant-at-will will not grow into an hereditary cultivator, the fact of such a lapse of years is an element of proof most weighty in his favor, upon the question whether he or his ancestor was or was not an hereditary cultivator, or such to all intents and purposes in days before the British settlement operations."

(4. Punjab Record, Case No. 15.) See also 2. Punjab Record, Case No. 81; and again, in Het Ram v. Turti, the Court remarked that "no mere length of occupancy can per se confer a status such as that claimed [hereditary cultivator-ship], but length of occupancy is certainly to be taken into consideration as a matter of evidence affording a presumption of what the status of a cultivator has been from its commencement, and of what it was, in fact, at the time of the settlement."—(3. Punjab Record, Case No. 42.) Where however it is proved that at settlement the claimant was merely a tenant-at-will, no subsequent length of occupation will, under this Section, which simply re-enacts previous Revenue law, convert his tenure into an hereditary one.—(2. Punjab Record, Case No. 91; and Vol. 3. Case No. 23.)
CHAPTER III.

OF RENT.

1.—Enhancement.

X. No tenant shall, in the absence of an agreement or decree of Court to the contrary effect, be held liable, in a suit for arrears of rent in respect of any land, to pay rent exceeding in amount the rent payable by him in respect of such land for the last preceding agricultural year, unless a decree for the enhancement of the rent has been made as hereinafter provided.

The said Lieutenant Governor shall have power, from time to time, by notification in the official Gazette, to declare for all or any of the districts under his Government the day on which the agricultural year shall, for the purposes of this section, be deemed to commence.

By Notification No. 728 of May 25th 1869 the Local Government has declared that the agricultural year in all districts in the Punjab shall be deemed to commence on the 15th day of June in each year.

XI. The Court may decree that the rent previously payable by any tenant having a right of occupancy may be enhanced on any of the following grounds:—

1st Ground.—That the quantity of land held by him as tenant exceeds the quantity for which he has previously been liable to pay rent.

Rule.—In this case the Court shall decree rent for the land in excess at the same rate as that payable in respect of the land of a similar description.
and with similar advantages held by him of the same landlord.

2nd Ground.—That the rate of rent paid by him is below the rate of rent usually paid in the same or adjoining villages by the same class of tenants having a right of occupancy for land of a similar description and with similar advantages.

Rule.—In this case the Court shall enhance his rent to the amount claimed by the plaintiff not exceeding such rate.

3rd Ground.—That the rate of rent paid by him is,

if he belong to the class described in clause I of section five, more than fifty per centum,

if he belong to any of the classes specified in clause 2, 3 or 4 of section five, more than thirty per centum,

and if he belong to the class specified in section six, more than fifteen per centum,

below the rate of rent usually paid in the neighbourhood by tenants of the same class not having a right of occupancy for land of a similar description and with similar advantages.

Rule.—In this case the Court shall enhance his rent to the amount claimed by the plaintiff not exceeding such rate, less fifty per centum, thirty per centum or fifteen per centum, as the case may be.

The right to enhance rent and the right to evict are in their nature different, the two claims ought not to be set up and determined in one and the same suit: If therefore both be asked for in the plaint, the plaintiff should be called on to elect which he will proceed on, and the other should
be struck out.—Baldeo v. Hafiz Ali.—(4, Punjab Record, Case No. 15.)

XII. If the revenue or any of the village-cesses is payable by the defendant, the rate to which his rent may be enhanced shall be reduced by the amount so payable.

XIII. After a decree has been passed under section ten, no suit shall lie against the defendant for re-enhancement of his rent until the expiration of five years from the date of such decree, unless in the meantime there has taken place a general revision of regular settlement, under which the revenue payable for the land comprised in the decree has been increased.

2.—Abatement.

XIV. Every tenant having a right of occupancy shall be entitled to claim abatement of the rent previously paid by him on either of the following grounds, and on no others:—

(1) that the area of the land in his occupation has been diminished by diluvion or otherwise, or proved to be less than the quantity for which rent has been previously paid by him; or

(2) that the productive powers of such land have been decreased by any cause beyond his control.

3.—Remission.

XV. Notwithstanding anything hereinbefore contained, it shall be lawful for the Court, in making a decree for an arrear of rent,
if the area of the land in the tenant's occupation has been diminished by diluvion or otherwise,
or if the produce of such land has been diminished by drought or hail, or other calamity beyond his control, to such an extent that the full amount of rent payable by him cannot, in the opinion of the Court, be equitably decreed,
to allow such remission from the rent payable by him as may appear equitable:

Provided that, if the tenant hold a lease for an unexpired term of not less than five years, or have a right of occupancy in a revenue-paying estate, no such remission shall be allowed to him, unless a remission of revenue has been allowed on the same ground and by competent authority in respect of the same estate.

4.—Rent in Kind.

XVI. No commutation of rent in kind into rent in money, and no commutation of rent in money into rent in kind, shall take place without the consent of both landlord and the tenant.

In Ram Singh v. Sadulha, it appeared that at settlement an agreement was recorded that the defendants should pay the plaintiffs rent by buta, or grain rates. Afterwards the parties arranged that a money rent should be paid for nine years, or eighteen harvests from kharif 1915 A. V. to 1924 A. V. For the nineteenth harvest the plaintiffs again took money rent at the previously existing rates: afterwards at the twentieth harvest, as prices were ruling high, they, without any notice of a change of system, demanded rent by buta. The Chief Court held that the plaintiffs could not, when their agreement had been for a certain number of complete years, revert to the former in the middle of an agricultural year.—(4. Punjab Record, Case No. 28.)

Where grain rates had been fixed at settlement, but the landlord had for several years realized his rent in cash, the
kind, one party cannot abandon this and revert to the former method without the assent of the opposite party.

Division and appraisement of produce taken for rent.

Financial Commissioner, in Sher Mahammad Khan v. Ilum Khan, held that he could not at pleasure revert to grain payments.—(2. Punjab Record, Revenue Cases, No. 15.)

XVII. Whenever rent is taken by division of the produce in kind, or by estimate or appraisement of the standing crop, or other procedure of a similar nature, requiring the presence of the person entitled to the rent and of the cultivator, either personally or by their recognized agents,

if either party neglects to be present at the proper period,

or if a dispute arises between the parties regarding such division, estimate or appraisement,

either party may present an application to the Court, on a paper bearing a stamp of eight annas, requesting that a proper person be deputed to make the division, estimate or appraisement.

"The original native mode of levying rent from a tenant is by division of crop (batai): when the crops are cut, they are brought into the common threshing floor, threshed out, the grain piled up into certain heaps according to established custom, and landowner and tenant carry off their shares. It would be a long story to go into all the details and petty tricks of division, which in the long run is the fairest for both, as allowance is made for the seasons. Next in order comes appraisement (kunkut): when the crops are ripe, the area is measured, and the out-turn of standing crop estimated by experts, and divided according to custom; and the value according to the price current of the landowner's share is made over to him. Next in order comes kind rates (jinswar or zabti), in which experience and the average of past years are called upon to supply data for a fixed cash demand upon ascertained areas under cultivation of a particular crop, and all reference as to the out-turn of the particular harvest is abandoned. In fact, as regards the better crops, such as poppy, cotton, and tobacco, kind rates were in full force under native rule, from the sheer inability of effecting a partition of the crop, which was not, like cereals, conveyed to the threshing floor. The cultivator had the opportunity to make away with the crop. Next in order comes the real rent rate, founded on experience of the value
and character of the soil, without reference to the crop contained in the holding of each tenant.”—(Cust’s Revenue Manual, p. 35.)

If the rent be paid in kind, and the tenant wilfully cultivate inferior crops, the landowner will be entitled to a decree on an average crop.—(Cust’s Revenue Manual, p. 44.)

XVIII. On receiving such application and such sum, to be paid in the first instance by the applicant, as the Court thinks sufficient to defray the costs of serving the notice and making the award next hereinafter mentioned, the Court shall issue a written notice to the other party requiring him to attend on the date and at the place specified in the notice, and shall depute a proper person to make the division, estimate or appraisement and to direct by whom the costs of each party are to be paid.

The award of such person in respect of the said division, estimate or appraisement and costs shall be final, unless within three months from the date thereof either party institutes a suit to set it aside.

CHAPTER IV.

OF EJECTMENT.

XIX. No tenant having a right of occupancy in any land shall be ejected therefrom otherwise than in execution of a decree.

Such decree shall not be made, unless—

(1) at the date of the decree, a decree against such tenant for an arrear of rent in respect of such land has remained unsatisfied for fifteen days or upwards; or
(2) the landlord tenders to the tenant, in addition to any compensation to which he may be entitled under sections twenty-seven and thirty-seven (but subject to deduction in respect of the arrears of rent, if any, payable by him), such compensation as the Court thinks fit, not less than fifteen, and not more than thirty, times the amount of the net annual profits receivable by the tenant in respect of such land on an average of the three years next before the date of the tender.

Nothing in the last preceding clause shall be deemed to apply to a tenant belonging to any of the classes specified in section five, or to a tenant when he or the person from whom he has inherited, has continuously occupied such land for thirty years or upwards.

XX. A tenant not having a right of occupancy may be ejected—

first, if a decree has been obtained against him for arrears of rent or for ejectment; or

second, when he is not holding under an unexpired lease, or an agreement, or a decree of Court, by notice given by the landlord in manner herein-after mentioned.

XXI. Notwithstanding anything herein contained, no tenant shall be ejected from the land in his occupation, except between the fifteenth day of April and the fifteenth day of June, unless while the rent in respect of such land is in arrear, he has failed to cultivate the land in accordance with the terms on which he holds it.
Notice of Ejectment.

XXII. The notice of ejectment shall be written in the vernacular language of the district: it shall specify the lands from which the tenant is to be ejected; and it shall inform him that, if he means to dispute the ejectment, he must institute a suit for that purpose on or before the fifteenth day of May next after the service of the notice, or quit the land on or before that date.

The said Lieutenant Governor shall determine what, for the purposes of this section, shall be deemed to be the vernacular language of each district in the territories under his government.

"For the purposes of Section 22 it is determined that Urdu shall be considered the "vernacular" of the Province, it being the language in which judicial proceedings, and Patwaris' papers are recorded." (Ruling of Local Government extracted from Financial Book Circular No. XVIII of 1868.)

XXIII. On the landlord's application to the Tahsildar or other officer authorized to serve such notices, the notice shall be served by him on or before the fifteenth day of April, and the landlord shall pay the costs of service.

The notice shall, if practicable, be served personally on the tenant.

But if he cannot be found, service may be made by affixing the notice at his usual place of residence, or, if he does not reside in the district wherein the land is situate, at some conspicuous place in the village wherein the land is situate.
XXIV. The said Lieutenant-Governor shall have power, from time to time, by notification published in the official Gazette not less than six months before such notification is to come into force, to fix, for the purposes of sections twenty-two and twenty-three, in all or any of the districts under his government, any two days other than the days fixed in the same sections:

Provided that, between the days so fixed by notification, there shall be an interval of at least one month.

XXV. If the tenant on whom such notice of ejectment has been served fails to institute, on or before the fifteenth day of May next after the service, or, in case the said Lieutenant-Governor fixes for the purposes of section twenty-two any day other than the said fifteenth day of May, then on or before the day so fixed, a suit to contest his liability to be ejected, his tenancy of the land in respect of which the notice has been served shall be held to cease on that day.

Assistance to eject.

XXVI. If no such suit be brought, or if such suit be brought and dismissed, and the landlord require the assistance of the Court to eject any person whose tenancy is alleged to have ceased under the provisions of section twenty-two, he may apply for such assistance; and if the Court be satisfied that notice of ejectment was duly served on such person, it shall, subject to the provisions of section nineteen, give such assistance accordingly.
Nothing done by the Court under this section shall affect the right of any tenant to institute a suit against his landlord on account of illegal ejectment, and to recover compensation for the same.

**Growing Crops.**

XXVII. Any tenant ejected in accordance with the provisions of this Act, shall be entitled to receive from the landlord the value of any growing crops or other ungathered products of the earth belonging to such tenant and being on the land at the time of the ejectment:

Provided that, if the land has been sown or planted by the tenant after the service on him of the notice mentioned in section twenty, he shall not be so entitled, unless after such service, the landlord has expressly authorized him to continue to occupy the land.

**CHAPTER V.**

**Of Relinquishment, Leases and Under-Leases, Alienation and Succession.**

1.—**Relinquishment.**

XXVIII. Every tenant shall be liable to pay the rent payable in respect of the land in his occupation for the ensuing agricultural year, unless, on or before the first day of January next before the commencement of that year, he gives notice to the landlord of his intention to relinquish such land before the commencement of such year, and relinquishes it accordingly, or unless the land has been let to any other person by the landlord.
XXIX. The said Lieutenant Governor shall have power, from time to time, by notification in the official Gazette, to declare, for all or any of the districts under his government, the day on which the agricultural year shall, for the purposes of section twenty-eight, be deemed to commence, and, in lieu of the said first day of January, to substitute, for the purposes of section twenty-eight, in all or any of the same districts, such day as he thinks fit.

XXX. If the tenant relinquishes the land according to his said notice, he shall be discharged from all liability to pay the rent which would otherwise have accrued due in respect of such land after the date of the relinquishment.

XXXI. If the landlord or his recognized agent refuse to receive such notice, the tenant may apply to the Tahsildar or proper officer, and written notice shall thereupon be served by him on such landlord or agent, and the tenant shall pay the costs of service.

The notice shall, if practicable, be served personally on the landlord or agent.

But if he cannot be found, service may be made by affixing the notice at his usual place of residence, or, if he does not reside in the district wherein the land is situate, at some conspicuous place in the village wherein the land is situate.
2.—Leases and Under-leases.

XXXII. Every tenant having a right of occupancy may let or under-let the land in his occupation or any part thereof:

Provided that nothing in the former part of this section shall be deemed to affect any agreement on the part of a lessee that he will not, or will not without the previous consent of the lessor or his representative, under-let or part with the possession of the said land or any portion thereof.

Under the old law, which, in this respect does not appear to be altered by the present Act, "abandonment of the tenure for one agricultural year, [by the hereditary cultivator] without provision for tillage or rent, entails forfeiture of the tenure," but such abandonment was deemed not to have taken place when he had temporarily sub-let his holding or associated strangers with himself in the cultivation, or, by leaving a friend or relation in charge, had maintained a constructive occupancy, being responsible for the tillage and rent and keeping his name on the Patwari's books.

—( Cust's Revenue Manual, pp. 43 and 41.) See also 2. Punjab Record, Cases Nos. 46 and 58.)

XXXIII. Every person to whom land is let or under-let under section thirty-two shall, in respect of such land, and so far as regards the landlord and his representative, be subject to all the liabilities under this Act to which the lessor or under-lessee would have been subject in respect of such land, and so far as regards such landlord and his representative, in case the lease or under-lease had not been made.

3.—Alienation.

XXXIV. Any tenant having a right of occupancy claimable in accordance with the terms of any of the clauses of section five, may alienate the land in his occupation, or any part thereof:
Provided that, in every such case the land or part aforesaid shall be offered for sale in the first instance to the landlord at the market value, and shall not be alienated to any other person unless the landlord shall, for the space of one month, refuse or neglect to complete the purchase.

Every other tenant may alienate the land in his occupation, or any part thereof, with his landlord’s previous consent, but not therewise.

For alienations by way of gift, see below under Section 36.

XXXV. Every person other than the landlord, to whom land is alienated under section thirty-four, shall, in respect of such land, have the same rights and be subject to the same liabilities as the tenant making the alienation.

4.—Succession.

XXXVI. When a tenant having a right of occupancy in any land dies, his right shall devolve on his male lineal descendants (if any), and, failing such descendants, the right shall go to his male collateral relatives: Provided that the common ancestor of the deceased and his said relatives shall have occupied such land.

As among descendants and collateral relatives claiming under this section, such right shall devolve and go as if it were land left by the deceased in the village in which such land is situate.

Where two brothers were joint hereditary cultivators of a plot of land, the death of one brother without heirs was held not to deprive the survivor of his rights over the whole holding.—Wazira v. Keshar Singh.—(2. Punjab Record, Case
No. 2.) See also a like ruling in Vol. 3. Case No. 57. This right arises from the holding being a joint one, and not by virtue of the claimants being heirs, as collaterals to the deceased, as in the second case it is expressly stated, and in the first it is to be inferred, that the common ancestor of the deceased and his successor was not recorded as himself holding the tenure.

Where the administration paper expressly provided for the succession of collaterals and of all near relatives, the Chief Court, in a case decided before the present Act was passed, ruled that a daughter's son who had been treated as his son by the deceased hereditary cultivator could succeed to the tenure.—Tanni v. Nabi Baksh.—(2. Punjab Record, Case No. 19.)

If the successor to a deceased hereditary cultivator have no title to the succession, but is allowed to take it and enjoy it for many years [twelve years or upwards], it will be too late then to disturb his occupation, the original defect in his title being cured by lapse of time.—Nathu v. Prem Singh.—(3. Punjab Record, Case No. 40.)

Under the old law an hereditary cultivator could confer his holding by gift on a member of his family who was dependent upon the land.—(3. Punjab Record, Case No. 18.) Under the present Act however he could probably grant it by gift even to a stranger, subject to the landlord's right to purchase it at the market-value under Section 34.

CHAPTER VI.

OF COMPENSATION FOR TENANTS' IMPROVEMENTS.

XXXVII. If any tenant, or, in the case of a tenant with a right of occupancy, the person from whom he has inherited, makes any such improvements on the land in his occupation as are herein-after mentioned, the rent payable by him or his representative in respect of such land shall not be enhanced, nor shall he or his representative be ejected from the same land, unless and until he or his representative, as the case may be, has received compensation for the money or labor, or both, expended in making such improvements by him, or
the person from whom he has inherited, or whom he represents, within thirty years next before the date of such enhancement or ejectment.

XXXVIII. The word "improvements," as used in section thirty-seven, means works by which the annual letting value of the land has been, and at the time of demanding compensation continues to be, increased, and shall comprise—

1st, the construction of works for the storage of water, for the supply of water for agricultural purposes, for drainage, and for protection against floods; the construction of wells, the reclaiming and clearing of waste lands, and other works of a like nature;

2nd, the renewal or reconstruction of any of the foregoing works, or such alterations therein, or additions thereto, as are not required for maintaining the same, and which increase durably their value.

XXXIX. Such compensation may, at the option of the landlord or his representative, be made—

(1) by payment in money;

(2) by the grant of a beneficial lease of the land by the landlord or his representative to the tenant or his representative; or

(3) partly by payment in money, and partly by the grant of such lease as aforesaid.

XL. In case of difference as to the amount or value of the compensation tendered, either party may present an application to the Court on a paper
bearing a stamp of eight annas, stating the matter in dispute, and requesting a determination thereof.

Notice of such application shall be served on the other party by the proper officer, and the applicant shall pay the costs of service.

On receiving such application, the Court, after taking such evidence as the parties or either of them may adduce, and after making such further enquiry (if any) as it may deem necessary, shall determine (as the case may be) the amount of the payment, or the terms of the lease, or both:

Provided that, in determining such amount or value, the Court shall take into account any assistance given by the landlord, either directly by money, material or labour at the time of making such improvements, or indirectly by subsequently allowing the tenant to hold at a rate of rent more favourable than the rate at which he otherwise would have held.

"It is not expressly stated in the Act, whether cases cognizable under Section 40 of the Act (Compensation for tenants' improvements) shall be heard on the Civil or Revenue side of the Courts; but seeing that in the cognate cases of compensation for ejectment (Section 9) the Civil Courts are declared to have jurisdiction, it is presumed that the Court referred to in Section 40 is the Civil Court."—(Financial Book Circular No. XVIII of 1868.)

XLI. If in any case a landlord tenders to a tenant a lease of the land in his occupation, for a term of not less than twenty years from the date of the tender, at the annual rent then paid by the tenant, or at such other annual rent as may be agreed upon, such tender, if accepted by the tenant, shall bar any claim by him or his representative in
respect of improvements previously made on such land by the tenant or the person from whom he has inherited.

CHAPTER VII.

OF PROCEDURE.

XLII. Cases cognizable under sections five, six, eleven, fourteen, nineteen, twenty and twenty-five, shall, unless otherwise provided for by any law for the time being in force, and subject to the provisions of section twenty-one of Act No. XIX of 1865 (to define the jurisdiction of the Courts of Judicature of the Punjab and its Dependencies), be heard in the Civil Courts other than the Courts of Small Causes, unless when such Courts of Small Causes shall have been specially empowered by the Local Government, under Act No. XI of 1865, section six, to hear such cases.

Applications under sections seventeen, twenty-three, twenty-six and thirty-one shall be deemed to be proceedings on the Revenue side: they shall be subject to the rules of procedure for the time being in force in such cases; and all orders on such applications shall be appealable to the Financial Commissioner of the Punjab.

To prevent misapprehension it has been explained with reference to this Section that by the language used it is not intended that appeals from Tahsildars should lie direct to the Financial Commissioner; but merely that the Financial Commissioner, and not the Chief Court, is the final appellate authority in the cases referred to. — (Financial Book Circular No. XVIII of 1668.)
XLIII. The plaint in every suit under sections five, six, eleven, fourteen and twenty-five, shall bear a stamp of eight annas.

This Section is repealed by Schedule III of the Court Fees Act, but is re-enacted in the same words in Schedule II, Clause 2, of that Act.

XLIV. The procedure now in force in the Punjab for the recovery of rent shall, except in so far as it is inconsistent with the provisions of this Act, continue to be in force.

XLV. All proceedings of officers of Government in making or revising, prior to the passing of this Act, settlements of land-revenue shall, so far as such proceedings are consistent with the provisions of this Act, and subject to appeal and revision when an appeal or a revision is provided, be deemed to have been taken in accordance with law.
CHAPTER XXII.

PUNJAB CIVIL CODE.

SECTION XXII.

Miscellaneous.

Caste.

1.—It has been already declared that degradation, or expulsion from caste, will not occasion any civil or legal disability. Nevertheless it is customary with native communities to declare such excommunication either through the heads of tribes or public assemblies, or by any mode which local custom may prescribe, and to enforce the award by social sanction, and by the influence of public opinion. The Courts have no power to enquire into or pronounce upon the merits, grounds or nature of such awards, provided that no illegal consequences are involved. An action cannot be sustained to dispute them, or to obtain reparation from those who promulgate or enforce them, but no aid will be afforded by the Courts in execution thereof. But any man who may, wilfully and maliciously, by word or deed, or through gross negligence, cause another to be degraded or excommunicated, may be sued for damages by the injured party.

An action does not lie in the Civil Court to compel the restoration of the plaintiff to the membership of a society (somaj) or to compel the other members to eat with him. "Both the English law and the Hindu law appear to me to draw," observed Markby J. "a clear distinction between in-
terference for the protection of rights of property, and of personal liberty, security, and reputation, and interference in matters of a purely social nature. Even where rights of property are involved in the membership of societies or associations, yet if the main object of the association be of a social character, the members of the association are the sole judges whether a particular individual have so conducted himself as to entitle him to continue to be a member of the body. This was so held in the case of Hopkinson v. Marquis of Exeter (37. L. J., Ch. 173) before the Master of the Rolls."—Sudharam Patta, v. Sudharam.—(3. Bengal Law Reports, Civil Appeals, p. 91.) The original report should be consulted, as the Court reviewed the other Indian cases bearing on the subject and on cognate questions.

Lien.

2.—A lien is the right of one party to detain property which may be in his possession, belonging to another, on account of labor bestowed on, or for, that property, or on account of a debt due from the owner. This remedy by detention may be permitted to all trades or professions exercised for the public benefit. But it will not extend to transactions between individuals not connected with the engagement of any particular trade or profession. Thus carriers of all kinds, by land or water, manufacturers, factors and agents, tradesmen and bankers, have a lien on goods confided to them in the way of their business. But cattle cannot be detained on account of sums due for their pasturage. In no case can the party who has the lien sell the goods on his own authority; and he may be sued by the owner for damages on account of any injury which may have accrued from improper detention. Having detained the goods, he is responsible for their safe custody in the same degree as if he had been a pawnee.
"Liens arose from the law compelling a party to receive goods; and hence it was deemed only fair that he should be allowed to retain them, until he was paid for the work which he had no power to refuse doing. Thus an inn-keeper, who is compelled to receive guests, has a lien on their goods for his bill; so, also, a carrier by land or sea: the rescuer of goods from the perils of the sea has a lien on them on account of public policy, and by usage liens have been created in various trades: they are also, of course, capable of being created by the express contract of the parties in any particular case.—Norton's Topics of Jurisprudence, p. 388.

It has been decided that an attorney has a lien for his general balance on papers of his client which come to his hands in the course of his professional employment.—(Smith's Mercantile Law, p. 538.) But wakils have no lien upon the fund in Court for payment of their fees, unless there have been a special agreement to that effect.—(Macpherson on Civil Procedure, p. 336.) And in Maw v. Neale it was decided that an attorney has no lien for costs on an estate recovered by his exertions for his client.—(Norton's Topics, p. 389.)

By English law a factor has no lien for debts which accrued before his character as such commenced (Smith's Mercantile Law, p. 538), and the Code here from its brevity and incompleteness is apparently recognizing as binding the general principles of English law on the subject; except of course so far as they may be modified by Punjab usages of trade.

Although a banker, who has advanced money to a customer, has a lien for his general balance upon securities belonging to such customer which come generally into his hands, yet he has none upon deeds pledged for a specific sum, or left casually at his shop, after his own refusal to advance money on them, or upon negotiable instruments belonging to a third person, and left in the banker's hands by his customer.—(Norton's Topics, p. 388.) The Contract Law now before the Legislative Council proposes to do away with the lien of bankers, factors and wharfingers for a general balance of account.

Whenever lost goods have been saved and preserved by the labor and skill of the finder from destruction, and the owner has received back the goods into his possession, and assented to and approved of the measures taken and the expense incurred by the finder, this subsequent assent to what has been done by the latter may be equivalent to a precedent authority or request giving rise to an implied promise to the owner to pay a reasonable compensation and remunera-
tion to the finder; but according to the decisions of the English Courts, the discoverer or saver of the property has no lien on the restored property for the expense and trouble he may have put himself to in restoring it.—(Addison on Contracts, p. 398.)

For the lien of a mortgagee for repairs and due expenditure on the mortgaged property, see above at p. 377 of this work; for that of joint owners and tenants for improvements, consult Chapter XXIII of this volume; also see the same Chapter for the law regarding the lien on real property, for the balance of the purchase money, or for a deposit.

In Somes v. The B. Empire Shipping Company, it was held that a shipwright is not entitled to be paid for the use of his dock, while he detains a ship under a lien against the will of its owner. The law gives no right to add to a lien upon a chattel a charge for keeping it till the debt be paid.—(Norton's Topics, p. 389.)

It is a general rule of Mahammadan law that the pawnee is chargeable with the expense of providing for the custody, and the pawner with the expense of providing for the support of the thing pledged; for instance, in the case of the pledge of a horse, it is necessary that the pawner should provide his food and the pawnee his stable.—(Macnaghten's Principles of Hindu and Mahammadan Law, p. 233.)

A title to hold a lien may be defeated by an agreement between the parties; either expressed or implied, which is inconsistent with such a right.—(Broom's Legal Maxims, p. 664.)

When the goods have been abandoned, the lien is gone. So too, the original possession must have been lawful, or there will be no lien; thus a creditor cannot tortiously seize his debtor's goods, and then claim a right to retain them.—(Norton's Topics, p. 300.)

In Williams v. Seaper, the landlord's relinquishment of his lien on the goods for rent was deemed a sufficient consideration to support a promise by a party, not being the owner of the goods, but who obtained possession of them by the landlord's relinquishment of his lien to pay the charge upon them for rent: and pari ratione, in Renteria v. Ruding, the master's relinquishment of his lien for freight on goods conveyed by him was a sufficient consideration to support a promise by the defendants, who obtained possession of the goods by the Captain's relinquishment of his lien, to pay the charge upon them for freight.—(1. Smith's Leading Cases, p. 463.)
Guarantee.

3.—The limits of a surety's responsibility will be decided by the terms of the agreement. In the absence of express stipulation his liability will be co-ordinate with that of the principal. On the death of the surety, his estate will be chargeable with the liability of surety-ship, and will be treated in the same manner as all other debts; but his heir cannot be held personally responsible.

The rights arising out of a contract of guarantee may be considered under three heads—first, those of the creditor against the surety; secondly, those of the surety against the principal debtor; and thirdly, those of the surety against his co-sureties.

Rights of Creditor and Surety.

Section 9 Act V of 1866 contains the following provision regarding written guarantees:

IX. No special promise to be made by any person after the passing of this Act to answer for the debt, default or miscarriage of another person, being in writing, and signed by the party to be charged therewith or some other person by him thereunto lawfully authorized, shall be deemed invalid to support a suit to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

"A verbal contract of guarantee is binding and may be enforced. It is true that by the fourth Section of the Statute of Frauds such contracts are of no legal force, if made by word of mouth only; but the Statute of Frauds does not apply to India. By para 7 Section XII of the Punjab Civil Code contracts may be verbal; a guarantee is but a form of contract, and may be verbal also. The plaintiff must make
A surety cannot be more bound than the principal.

The consideration in contracts of guarantee.

The guarantee must be based on a good consideration. According to the general rule of law, a transaction anterior to the guarantee cannot be held a good consideration for the promise. See Addison on Contracts, p. 566. Thus, if A sell and deliver goods to B, and C afterwards promise A to pay for them in default of B, this not a guarantee, as there is no consideration to support it. See also Brind v. Muthra—(3. Punjab Record, Case No. 93) where a promise by the defendant to supervise a work given on his recommendation by the plaintiff to a third party was held to be a mere gratuitous undertaking, not affording proof that he had, "for consideration given or to be given, entered into a binding contract as a surety" for the due and proper performance of the work by his nominee.

In order that a guarantee may be perfect and binding the creditor must show that he had agreed to the surety's offer of guarantee, and that his acceptance had been notified to the surety, who had thereupon finally assented to the engagement. This will be a matter of some importance when it is attempted to show a guarantee by means of letters. — (Addison on Contracts, p. 567.)

Equitable defence in an action against a nominal principal.

"By way of an equitable defence a party who has signed an obligation as a principal may show that he signed to the knowledge of the plaintiff in reality as a surety for a third party who was the true principal debtor, and on establishing this, the defendant will be entitled to avail himself of the rights of a surety against the creditor.—Mutual Loan Fund Assocn. v. Ludlow.—(5. C. B. N. S. 409; and 1. North West High Court Reports, p. 17.)
If the creditor discharge the principal,* or enter into any agreement with him, by which the surety's situation is altered for the worse or which would render a proceeding against the surety a fraud upon the principal, he discharges the surety; for instance, if he agree to give time to the principal: for then, if he forbear proceeding during the time given, he wrongs the surety by prolonging his responsibility; while, on the other hand, if he proceed against the surety, he gives him a remedy over against the principal;† and thus exposes the latter to proceedings, contrary to the faith of his agreement; so if he substitute a new agreement instead of that for the performance of which the surety was responsible. But the surety will not be discharged by mere forbearance,§ unless, indeed, there be some stipulation in the guarantee binding the party guaranteed to use due diligence against the principal.

* But where the creditor releases the principal on a representation of the surety which turns out to be founded in mistake, though not to the surety's knowledge, the surety cannot claim the benefit of this doctrine. It would be otherwise where the creditor releases the debtor through some mistake of his own. (Norton's Topics, p. 372.)

† Releasing or compounding with the debtor, renewing bills, withdrawing execution without the surety's knowledge are mentioned by Mr. Norton—(Topics of Jurisprudence, p. 371) as acts which discharge the surety; so if the creditor lose, or let securities get into the hands of the debtor, the surety will be discharged to the extent of such security. [So the beneficium cedendarum actionum of the Civil law enabled the surety before paying the creditor to compel the latter to make over to him all the actions which belonged to him.] But taking a further security from the debtor will not free the surety, unless the second be in satisfaction of the first security. Similarly in Shib Narayan Banerjees v. The Government, the fact of the Government, without the assent of the plaintiff, who was employed by them in their salt works, giving certain debtors further time to pay their outstanding accounts, was held to release the plaintiff from his guarantee to realize those outstanding or else make up the deficit from his own pocket. —(Sutherland's Civil Judgments, for March 1864, p. 138.)

‡ "But if at the time of giving the principal further grace, the creditor specially reserve his rights against the surety, the latter will not be released from his liability."—(Addison on Contracts, p. 578.)

§ "There is no obligation of active diligence against the principal debtor on the part of the creditor. It is the business of the surety to see that the principal pays, not that of the creditor. A mere promise therefore without consideration not to sue the principal debtor for a certain time will not discharge the surety, nor mere laches or forbearance, or an omission on the part of the creditor, promises or obliges to press the debtor, or the party liable to sue him for the money, without any suspension of the usual remedies."—(Addison on Contracts, p. 577.) In the case of the Delhi Bank v. Innes and others, a bond was given to the creditor by the principal and sureties stipulating for repayment of a loan by quarterly instalments, so that the whole should be liquidated in one year; but it was held on appeal that in the absence of any special agreement by the creditor to call in and demand the debt within a certain period, the omission of the Bank to sue for the instalments within the year or at the end of the year, however negligent such an omission may have been, was no breach of an agreement, or non performance of a condition, and did not, therefore release the sureties from their liabilities. It was further held that the Bank in refusing the offer of the defendant Innes to act for it in the recovery of the debt from the principal debtor, when he declared himself insolvent, did not do more than it had a right to do, and that consequently
nor by acceptance of a collateral security,* nor if he himself have agreed to the indulgence given to the principal, or have subsequently assented to it. And, even, where the creditor has altogether released and discharged the principal, still, if the surety have expressly consented to remain liable, his liability will continue. If the creditor omit to perform any condition, express or implied, imposed upon him by the guarantee, the surety will, of course, not be liable. † And fraud, ‡ for instance, the concealment of some material part of the principal's original contract from the surety, vitiates and avoids his engagement. The principle to be drawn from the cases, said Tindal O. J. delivering the judgment of the Court in Stone v. Compton, "we take to be this, that, if with the knowledge or assent of the creditor any material part of the transaction between the creditor and his debtor he misrepresented to the surety, the misrepresentation being such, that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is voidable at law on the ground of fraud."—(Smith's Mercantile Law, p. 450.)

the sureties could not claim exemption on that ground.—(1. Punjab Record, Case No. 100.) So in Black v. The Ottoman Bank (6. English Jurist. N. S. p. 801.), it was held that the mere passive inactivity of a person to whom a guarantee is given, and his neglect to call the principal debtor to account in a reasonable time, and to enforce payment against him, does not discharge the surety; the rule at law and in equity being the same, that there must be some positive act done by him to the prejudice of the surety, or such a degree of negligence as to imply connivance and to amount to fraud.

*Sc where a surety had tendered his security absolutely singly and alone, he will not be discharged because the creditor for his own greater security afterwards obtains the guarantee in addition of other sureties.—Gopla Indra Narayan Roy v. Jagan Nath (Sutherland's Privy Council Judgments, p. 93); but a contrary ruling seems to have been laid down in Whicker v. Hall;—see Addison on Contracts, p. 576.

† If a surety have contracted on the understanding that he was to be co-surety with another party, he will be wholly released in equity if the other surety do not execute his part of the engagement.—Baines v. Brombridge.—(Addison on Contracts, p. 575.) Again, where a surety contracts with A on behalf of a principal, the withdrawal by arrangement between A and the principal of funds which the surety had a right to rely on as security that the things should be done which he, as surety, had contracted with A should be done, is a prejudicial alteration of the surety's position, which discharges his liability.—(Norton's Topics, p. 371.) "So in the case of bonds and guarantees given to secure the faithful services of clerks and servants in particular offices and employments, the surety has a right to expect from the principal that he will call upon the clerk or servant, whose fidelity is guaranteed, to account in the ordinary course of business, and that there shall be no negligence in this respect on his part, and that he shall not trust his agent beyond the ordinary bounds of prudence."—(Addison on Contracts, p. 576.)

‡ Although a creditor is not bound to enquire into the circumstances under which the debtor has obtained the concurrence of a surety, yet if the circumstances be such as to lead a reasonable man to believe that fraud must have been had recourse to, an intentional refraining by the creditor from enquire will not excuse him: in such a case wilful ignorance in noway differs from knowledge.—(Addison on Contracts, p. 581.)
A release by the creditor of one of two or more co-sureties releases all.—Addison on Contracts, p. 580.) The Indian Contract Law bill proposes to do away with this rule of English law; and before applying it, at any rate in transactions among natives, it would perhaps be necessary for the Courts to ascertain if it have a place in native mercantile or general usage.

In De Cortanze v. Mercer, the Judicial Commissioner ruled that, although it is a useful and convenient practice in the Punjab to sue the principal and surety together, yet as they are separately responsible, if the creditor elect to sue the principal first, and fail to obtain satisfaction from him, he is warranted in proceeding subsequently against the surety for the amount unsatisfied.—(1.Punjab Record, Case No. 8.) Consult Punjab Civil Code, Section XIX, Clause 3, above at p. 468.

As in other suits for breach of contract, the plaintiff cannot recover damages which are too remote, and which could not have been supposed to have been in the contemplation of the defendant when he entered into the contract. Thus, in the suit quoted in the previous paragraph, where the defendant had guaranteed the honesty of one B, in consequence whereof the plaintiff had taken him into his service, the Chief Court held that, although the plaintiff was entitled to recover from the surety the loss he had sustained from B's dishonest acts, the amount he had paid as travelling expenses to enable B to join his appointment, and the costs of law proceedings against the principal debtor, which had been rendered fruitless by his insolvency, were too remote to be recoverable.—(1. Punjab Record, Civil Judgments, Case No. 1.)

In execution of a decree obtained by the creditor against the surety only, property said to have belonged to the principal debtor, who had died, and which no one would come forward and claim for fear of being made responsible for his debts, cannot be taken in satisfaction of the decree.—Kali Charan v. Sriram.—(2. Bengal Law Reports, Civil Appeals, p. 192.)

Rights of Surety against Principal.

The moment the principal has made default, and the liability of the surety has accrued, the surety may step in and discharge the liability, and then have recourse to the principal for reimbursement as for money paid for the use of the latter on his implied request. He need not wait till legal proceedings are commenced if the debt or liability have matured, but if he choose to pay before the time of
payment arrives, he will have no ground of action against the principal until the time of payment be past.—(Addison on Contracts, p. 58.)

"In cases of contracts of indemnity or suretyship, where a surety has been compelled to pay money which the principal debtor ought to have paid, and has consequently been damified by the loss of his money, he is entitled in an action on the implied contract of indemnity against the principal to recover interest on the money he has been compelled to pay."—(Addison on Contracts, p. 1068.)

If however a surety get rid of the obligation at a less sum than its full amount, he will not be allowed as against his principal to make himself a creditor for a larger sum than he has actually paid in discharge of their common obligation.—(Norton's Topics, p. 381.)

Rights of Co-Sureties against one another.

Besides a right of reimbursement against the principal debtor, a surety who has paid more than his own share of their joint liability has a right to claim contribution from his co-surety. But until he have paid the full amount of his own portion of the liability he cannot resort to the co-surety for contribution, for the latter might subsequently have to pay an equal or greater portion of the debt; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive; and it would tend to multiplicity of suits and great inconvenience, if each co-surety might sue all the others for a rateable proportion of what he had paid, the instant he had paid any part of the debt. But whenever it appears that one has paid more than his proportion of what the co-sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and that an action will lie for it. Where the plaintiff and defendant, together with the principal debtor, signed a joint and several promissory note, payable two months after date, as sureties for such principal debtor, and the latter paid only a portion of the amount of the note on its becoming due, and the plaintiff then paid the residue, although no demand had been made upon him by the creditor for payment, and subsequently brought his action against the defendant, his co-surety, for contribution, it was held that he was entitled to recover a moiety of the amount he had paid.—(Addison on Contracts, p. 584.) See a similar exposition of the law in the analogous case of one sharer suing his fellow shareholders for contribution towards an excess payment of Government revenue which he had made, in 10. W. Reporter, Civil Rulings, p. 158.
Although in a suit between the creditor and three defendants $A$, $B$ and $C$, it shall have been established that the creditor was entitled to regard $A$ as principal, and that $B$ and $C$ were sureties, it is open to $A$ in a subsequent suit against his late co-defendants to show that $B$ had received the loan and was therefore between themselves the principal debtor, while he and $C$ were only co-sureties; since the decree in favor of the creditor could not affect the liability of the principal and sureties as between themselves.—Byrne v. Macleod.—(3. Punjab Record, Case No. 86.)

"A surety cannot recover against a co-surety the costs of defending an action [brought by the creditor] unless he be authorized or induced by the latter so to do, or unless from some combination of circumstances it became necessary to defend such suit."—(3. Punjab Record, Case No. 86.)

The principle of this ruling is of course applicable to attempts by the surety to recover from the principal the costs of such suits which he may have defended without due cause.

**Insurance.**

4. In this province, it is customary to insure only such property as may be in transit by land or water. The responsibility of the insurer varies with the terms of the agreement. In some cases he is liable for any damage, partial or entire, which may befall to the property, sometimes for only one or the other, the rate of insurance varying with the degree of responsibility. The policy of the insurance generally exceeds the value of the property, and the insurer arranges the transport through his own agents. If the goods should have given in charge of the owner's servants, those servants will be responsible for ordinary care. If the property should have been destroyed or injured through their gross negligence, the insurer may refuse to pay the policy. Insurance contracts, like all other contracts, will be vitiating by fraud on either side.
Extract from the Commentary.

"The local custom has been followed in the provisions laid down in Clause 4, relative to insurance. Disputes on this head rarely arise; indeed the system almost precludes them, as the goods are usually insured above their value and given over to the insurer. The party, in whose keeping the property is, has no motive to injure it; on the contrary, he has every inducement to provide for its safety. The owner of the goods protects himself against the insurer by securing a valuable policy, and the insurer protects himself against the owner by taking charge of the goods."—(Extract from the Commentary on the Punjab Civil Code.)

As I believe experience has shown that the anticipations expressed in the foregoing extract from the Commentary are correct, and that insurance disputes seldom come before the Courts, it may suffice to observe here that the assured must have some property or interest beyond a mere expectancy exposed to loss, and some real risk to guard against; otherwise, the contract will be void as being in effect a wager.—(Addison on Contracts, p. 509.) If the assured assign away his interest in the goods, after the making of the policy, he can only maintain an action on the policy as trustee for the assignee. If however, the policy be on goods "lost or not lost" the indemnity extends to past as well as future losses, and it will be no answer to an action on such a policy to plead that the interest was not acquired till after the loss. Such a contract will not, of course, cover losses of which the assured was aware at the time of making the insurance.—(Addison on Contracts, p. 510; and Macpherson on Contracts, p. 150.) For further information the reader is referred to Addison on Contracts, Chapter XIV, Section I, and to the very interesting judgment of Lord Mansfield in Carter v. Baehin.—(1. Smith's Leading Cases, pp. 472—492.)

Copyright.

5.—Any question which may arise regarding copyright will be decided according to the provisions of Act XX of 1847. The copyright of any book, published during the life-time of the author, will belong to him, and his assigns, for the term of his life, and to his heirs or assigns for seven years after his death. But if this term of 7 years shall expire before the end of 42 years after the publication of the book, the copyright will endure for such
period of 42 years. And if a book should be published after the author's death, the copyright will endure in the manner last described for 42 years. The copyright of the articles in a periodical will belong to the proprietor or publisher of the periodical for 28 years from the time of publication, and to the author for the remaining portion of the 42 years. Any person publishing, selling, or exposing for sale, any book in infringement of these rules will be liable to be sued for damages by the aggrieved party. But before the suit can be laid, the book must have been registered in the prescribed form. An application for registration may be lodged with any district officer (accompanied with the requisite particulars,) and the Registry Fee of 2 Rs. to be forwarded to the Presidency.

The Act will be found annexed to this Chapter. It should be observed that under Section 7 of the Act, actions for damages for infringement of copyright cannot be tried in the Courts of Assistant Commissioners.

Religious Endowments.

6.—In religious institutions, Hindu or Mahommedan, the Prior, or head of the establishment (Pir, Sujada Nishin, or Mahant,) administers the entire property of all kinds, for the benefit of the endowment, and in fulfilment of the trust.

Such property cannot be alienated nor applied to any other object. The disciples (Murid, Chela, Sadh, Gurbhai) do not participate in this administration, except with the consent of the Mahant, but they are entitled to such maintenance as befits their condition. Members of these institutions cannot ordinarily become possessed of private
property; whatever they may acquire in the exercise of their vocation, is thrown into the common stock, and devoted to religious uses. The head of the establishment has authority over the disciples, to expel them, or to discontinue their allowances for gross misconduct, or for breach of the rules of their order; but such punitive measures are subject to appeal. The succession to the headship of the institution is elective, not hereditary; nor does seniority confer any positive right in this respect. The head does frequently nominate his successor; sometimes he appoints a deputy during his life-time who may succeed after his death. But such nominations on the part of a deceased Mahant require the confirmation of the disciples at large. If any dispute should arise at an election, a reference is made to the heads of neighbouring institutions, The limitation of the Civil Court's authority, as regards public endowments, has been described in Clause 11, Section I. In matters relating to private endowments, the Court can interfere if a suit should be preferred, but not otherwise.

A bare declaration in words has been held by the Chief Court, following the late Calcutta Supreme Court, on the authority of Abu Yusuf, to be sufficient to create a wakf; and no particular formality or ceremony is necessary to make the declaration binding and the appropriation complete. On the other hand, it is plain that for the protection of the rights of property the Civil Courts should require the clearest proof of such a declaration having really been made, and should be slow to infer an appropriation from casual remarks let fall by the alleged appropriator in the course of conversation, unless they were supported by his acts and conduct.* In such cases too of alleged mere verbal appropriations it is highly

*" The test of a bond fide or a nominal endowment are—how did the founder treat this property, or how have his descendants treated it; has the income of the endowed lands been continuously employed to the object of dedication. We can never assent to the doctrine that because a nominal
important to be sure of the exact words used, since while a declaration of appropriation would be sufficient to create a *wakf*, a declaration of intention to appropriate, or a declaration that the building was erected as an *Imambara*, and was intended by the owner to be used by him only as such as long as he lived, would not be enough. In such cases too, the effect of the lapse of time in impairing the witnesses' memory of casual declarations, and the fact that often from religious motives they may be insensibly biased, and infer from the purpose for which a building has been employed that it ought to be *wakf*, should be borne in mind in weighing the testimony adduced to establish the appropriation.*

—Thakur Dass v. Haji Begum.—(3. Punjab Record, Case No. 100.)

In the same case, the Lahore Court held that the rule of Mahomedan law, by which mosques, caravanserais, cemeteries, inns, reservoirs, ways and aqueducts are capable of being appropriated by use, ought not to be extended so as to include erections built as *Imambaras*, but which are capable of and have been used as ordinary sitting or dwelling places. See Baillie's Digest of Mahomedan Law, pp. 604—611. *Imambaras* indeed are not mentioned by name in Baillie and other works based on the writings of Sunni jurisconsults, but they do not appear to come within the classification of the erections which can be appropriated by user, which, speaking generally, are all susceptible of being used only by the public and only for one particular object, and in the case of which therefore it may fairly be inferred that when a person has constructed them, obviously adapted as they are only for public use, and that in a particular way, and has allowed the public so to use them, he has in reality dedicated them to the service of the public.


endowment has been once made it it to be regarded as an endowment for ever, and safe from liability of the founder or his heirs, notwithstanding that they may never have spent a penny on the idol, or have ceased to spend anything for a generation or more.”—Gunga Narayan Sircar v. Brindabun Chandra Kar.—(3. W. Reporter, Civil Rulings, p. 142.) See too Vol. 5. Civil Rulings, p. 82, where after recognizing the same tests as to the nature of an endowment, the Court added: “when the trust itself is one declared by word of mouth by a person at the point of death, and is in terms (by no means clearly indicated) an intention on the part of the donor to deprive his family of all substantial enjoyment of his property, the Court may fairly require the fullest proof in support of such a trust.”

* Neither is documentary evidence indispensable in proving an endowment among Hindus.—*Maddan Lall v. Brimati Kamal Bibi.—(8. W. Reporter, Civil Rulings, p. 42.)
Property attached to a shrine may be held as private property, and there is no law to prevent the acquisition of private property out of gifts to the heads of such institutions as a khangah, unless indeed the gifts be specially designed or declared to be for the use of the institution alone, since to render property wakf it must be specially and absolutely devoted to a religious use by the donor. The Mutawali or trustee of the temporalities, who is a character perfectly distinct from the Sajadahshin or person entrusted with the spiritual affairs of the endowment, may be bound, after defraying the sums necessary for the maintenance of the shrine, to distribute the balance of the offerings and other income appertaining to the shrine among the heirs of the former grantee according to the law of inheritance.

So in Futtu Bibi v. Bharal Lall Bhakat, the Calcutta Court recognized the possibility of land not being absolute wakf, that is to say, that the whole of the profits arising from it might not be devoted to religious purposes, but that it might be simply a heritable estate burdened with a trust, the keeping up, for instance, of a Pir's tomb; and that in such a case, the Court, following the late Sadar Dewani Adalat, held that the estate was alienable subject to the trust.

A grant of land for the maintenance of the imam of the village mosque may be simply on the footing of a grant to a village servant, and be resumable at the will of the grantors.

Successive Mahans or Mutawalis of Hindu or Mahamadan endowments are regarded by the law as a single person, or as it is technically called a "corporation sole," so that the official contract of the incumbent, not being of a nature prejudicial to the rights of his successors, will be binding on them.

Although the presumption drawn from the general practice, and recognized accordingly in the Code, is, that the administration of the estates of a religious foundation vests in his head; yet this presumption may be rebutted by proof of a different custom prevailing in any particular shrine.

* "An erroneous opinion appears to be entertained that all property destined to religious purposes necessarily partakes of the nature of an endowment; but in point of fact no property should be considered as such unless specially appropriated by the owner." (Macnaghten's Precedents, p. 338.) See too 5 W. Reporter, Civil Rulings, p. 313, where land granted at a fixed revenue free of all other charges and cesses in consideration of the grantee's pious liberality was held not to be wakf, since the deed of grant contained no dedication or endowment of the property or any terms which could be construed as creating a wakf.
Hence in *Ram Sukh Dass v. Parmeshri Dass*, evidence was received showing that the management of the shrine in question had vested equally in the four disciples of the original grantee. The Court remarked also, that from certain records to which their attention had been drawn by the respondent’s counsel, it appeared that the absence of a Mahant, and the administration of such endowments jointly by several parties was by no means unusual in these institutions in the neighbourhood of Delhi.—(2. Punjab Record, Case No. 76.)

And in *Adjudhia Dass v. Devi Dass*, the Chief Court pointed out that the lower Court had attached too much weight to the provisions of this Clause of the Code on religious endowments, since “the Chapter only lays down the general rule, and this does not obviate the necessity of enquiry into the usage of a particular institution, or of acting on such a usage when established.” Accordingly the Court directed that an investigation should be made as to whether the succession to the Dharmasala in dispute was by custom hereditary or elective.—(4. Punjab Record, Case No. 73.)

In *Jafri Moiyuddin Sahib v. Aji Moiyuddin*, which was a dispute among the descendants of one A, claiming to share in the profits of an endowment attached by their ancestor to the office of Khatib, the Madras Court held that the lands having been granted for the endowment of a religious office could not be claimed by right of inheritance: the right to the enjoyment of the returns from the lands was not separate from the office for the support of which the grant was made, and as the plaintiff was the legal holder of the office and charged with the performance of all the duties and services attached to it, he was entitled to enjoy solely the income to the exclusion of the other descendants of A.—(Madras High Court Reports, p. 19.)

The cases which, under the provisions of Act XX of 1863, require the authorization of the Court for their institution do not comprehend suits simply to establish a right to share in the management of temple lands, which can be instituted like ordinary suits.—*Agrif Sharma Embrandi v. Janardhana Embrandi*.—(3. Madras High Court Reports, p. 198.)

The proper person for the superintendence of wakf estate under Mahammadan law is one who does not seek the office, and in whom there is no known or apparent wickedness. No one should be appointed, but an Amin, or trustee, who is able to act by himself or by deputy; and in this males and females* are alike, and so are also the blind and those

* Although a woman may hold the post of Mutawali, and discharge its duties by proxy, she is not competent to take that of Gadinashin or spiritual superior, since for that peculiar personal qualifications are required—*Hussain Bibi v. Hussain Sharif*.—(4. Madras High Court Reports, p. 23.)
who are possessed of sight.—(Baillie's Digest, p. 591.)
Where the deed appointing the trustee provides for the succession, any act of a particular trustee diverting the succession in favor of a stranger is ultra vires and null.—Shah Moiyuddin Ahmad v. Ilaihi Baksh.—(6. W. Reporter, Civil Rulings, p. 277.) In the absence of any provision regulating the succession to the management of wakf property the custom of the country on the point must be followed.—(1. Stokes' Madras Reports, p. 415.)

By Mahammadan law a Mutawali is liable to dismissal; but the rule of law only applies to an office so designated who holds possession of wakf property for the purposes of management, the security of the property and the due application of its proceeds, and has no hereditary proprietary right vested in him; and further it would seem that the law makes it essential to the power of the grantor to remove such an officer that it should be specially reserved at the time of the endowment.—Ghulam Hossain Sahib v. Aji Aiam Tadallah Sahib.—(4. Madras High Court Reports, p. 44.)

Under Mahammadan law, the Mutawali cannot when wakf land is bad and uncultivated, sell a portion in order to improve the rest with the money so obtained.—(Baillie's Digest of Mahammadan Law, p. 595.) But endowed property may be sold by judicial authority, when the sale may be absolutely necessary to defray the expense of repairing its edifices, or other indispensable purposes, and where the object cannot be attained by farming and other temporary expedients.—(Macnaghten's Principles of Hindu and Mahammadan Law, p. 228.) The trust deed however may authorize the trustee to sell a portion of the trust property in order to purchase other property; and in such a case a bonâ fide purchaser for fair consideration who has satisfied himself as to the Mutawali's powers will be protected, and he is not bound to concern himself with the question whether the seller judiciously exercised the discretion the endower had entrusted him with or not.—Ghulam Ali v. Mussumat Sulatun-nissa Bibi.—(Sutherland's Civil Rulings, for May 1864, p. 242.) See also Jewan Dass Sahu v. Kabiruddin (Sutherland's Privy Council Judgments, p. 100,) on the inalienability of wakf land in general.

The specific property, which has been made wakf, cannot be exchanged for other property unless a stipulation to this effect have been made by the appropriator, or unless circumstances render it impracticable to retain possession of the particular property, or manifest advantage be derivable from the exchange; nor should wakf lands be farmed out on terms inferior to their value, nor for a longer period than three years, except when circumstances render such measure abso-
The powers of the managers of temple lands are similarly restricted.

Mortgages of wakf lands.

A stranger cannot sue to recover an endowment wrongfully alienated by the trustee.

Form of relief to which a disciple is entitled in a suit for maintenance.

ultely necessary to the preservation of the endowment.—
(Macnaghton's Principles, p. 229.) But the lease of house property ought not to be for more than a year.—(Baillie's Digest, p. 396.)

So too the paid managers of temple property are not prima facie acting within the scope of their duties in encumbering the property, or settling large outstanding demands. Their naturally limited powers should therefore put people dealing with them on enquiry, and if enquiry when made would have shown that in reality they possessed no such powers, the contracting party must be held to have had knowledge of all such facts as the enquiry which he ought to have made would have brought to his knowledge.—Sambanda Mudaliyar v. Nanasaambandapandara.—(1. Stokes' Madras Reports p. 298.) See too Sutherland's Civil Rulings, for April 1864, p. 157.)

A mortgage of lands devoted to religious purposes, whether by Hindus or Mahammadans, or of their produce, is invalid. After remarking on the different views the Calcutta and Agra Courts have taken of the validity of temporary alienations, Mr. Macpherson, adds—"probably the principle which ought to rule all such cases is, that those alienations, and those alienations only, which fall within the scope and spirit of the endowment are to be supported."—(Macpherson on Mortgages, p. 30.)

A suit will not lie to recover property wrongfully sold by a Mutavali at the instance of a plaintiff who neither states nor proves that he was entitled to partake of the benefit of the endowment, or that he was the heir or even a near relation of the person who created it. The utmost that such a person as a descendant of the endower has a right to ask is that the Mutavali who had misconducted himself should be removed, and that a new Mutavali should be appointed in his room.—(10. W. Reporter, Civil Rulings, p. 458.)

In Hassan Shakh v. Hassain Shakh, the defendant was the Gadinashin of a religious foundation, and the plaintiff, his cousin and a member of the aforementioned establishment, had sued him for maintenance: the Chief Court, on the authority of this Clause of the Code and Circular No. 23 of August 1858, (quoted at p. 31 of this work) modified the decree which he had obtained in the Lower Court of a definite annual allowance, in default of his being maintained by the defendant at the shrine, and held that he, as a disciple, could only claim a declaratory decree that he was entitled to such maintenance as befitted his condition in the institution, whereas the defendant was Gadinashin.—(1. Punjab Record, Case No. 84.) Although this decree was subsequently modified on review (3. Punjab Record, Case No. 67,) on proof that, under the peculiar circumstances of that estate,
which was not pure wakf, the ordinary laws of inheritance applied, yet the principle of this precedent would still apply to the claims of members of religious houses properly speaking.

With regard to the remark that "members of these institutions cannot ordinarily become possessed of private property," see Clause 20 Section IV of the Punjab Civil Code, p. 169.

A judgment-debtor's right to perform the service of an idol cannot be attached and sold in execution of a decree, nor can the surplus profits of the temple estate which the priest appropriates to his own use be so sold when there is nothing to show what those profits are, or that the judgment-debtor takes a beneficial interest in them, or is personally entitled thereto. A wholly vague and uncertain right, the existence of which is doubtful, and the extent of which has in no degree been ascertained, cannot be sold in execution of a decree.—Jagan Nath Roy Chowdhry v. Kishen Prasad Sarmah.—(7 W. Reporter, Civil Rulings, p. 266.)

In Gurmuck Dass v. Belas, which was an appeal (unreported) in March 1864, from a decision of the Jalandhar Commissioner, and in which the plaintiff urged that the defendant by marrying had forfeited his right to hold his Dharrsalah, and the rent-free land belonging thereto, the Judicial Commissioner observed that as several Udasi faqueers, to which fraternity the parties belonged, were proved to have married in the Jalandhar Division without subjecting themselves to the loss of their property, he agreed with the Lower Courts in finding that the marriage had not in the case in question worked a forfeiture, since such cases must be entirely governed by local law.

See also on this subject Act XX of 1863 at the end of this Chapter, and for further information in regard to the Mahammadan law of wakf, the ninth Book of Mr. Baillie's Digest.

Priests, Religious Fees, and Presents.

7.—Parohits and others who perform sacred offices, when officiating at ceremonies, usually receive fees and allowances from their employers and constituents (jijmans). The employment of the minister, and the payment of the fees, are enforced by social rather than legal sanction. No party can
be legally compelled to employ a priest nor to pay fees, unless some service may have been actually rendered, in which case the claim of the Priest for remuneration may be judicially entertained. If a dispute should arise in the family of such Parohit or Priest regarding the property thus acquired, the succession or distribution will follow the ordinary rules of inheritance and partition.

The provisions of this Clause have been somewhat extended by Judicial Book Circular No. LVI of 1861, which, by the Indian Councils Act, has the force of law, and is as follow:

With the concurrence of His Honor the Lieutenant Governor the following point is ruled:

"That no Mahammadan or Hindu religious or secular official can claim in the Civil Courts a prescriptive right to render certain services to any member of his faith or demand a remuneration without having rendered any service. It rests with the community to employ whom they like, and to pay according to actual or implied contract. This rule applies to Parohits, Qazis, Maulavis, Chumars, Sweepers, or any other practitioner of any kind."

The Punjab law on this subject is in accordance with that prevailing in the Regulation Provinces, see Macpherson on Civil Procedure, p. 40; 5. W. Reporter, Civil Rulings, p. 225.

If the alleged due be demanded from the members of a village by virtue of an averred custom, its collection will be illegal under the provisions of Section 9 Regulation VII of 1822 (see above at p. 560) if the cess in question have been duly entered in the Settlement Record.—Jagna v. Nagar Mall.—(3. Punjab Record, Case No. 12.)

A suit will not lie to compel certain persons to perform certain duties for the plaintiffs, although it may be alleged that the latter will lose caste if the services demanded be not rendered. See Raj Kisto Maji v. Nabai Seal, where the
plaintiffs sought to obtain a decree compelling the defendants, who were barbers, to pare the plaintiffs' nails, in accordance with an established custom.—(1. W. Reporter, p. 351.)

A Hindu priest cannot sue in regard to the withholding of rites and honors due to him in a religious point of view by reason of his sacred rank, such observances being based on no other claim of right than that arising from the religious feelings which the defendants in common with their co-religionists entertain for the sacred position of the plaintiff. Nor is the case altered, so far as the plaintiff is concerned, by an allegation that the withholding of these honors causes the plaintiff pecuniary loss, such a suit being still altogether different from that of a person holding an office connected with the management and regulation of a temple and for the performance of the duties of which he is entitled to remuneration by way of salary or otherwise.—Striman Sodagopa v. Krishna Tarachariyar.—(1. Stokes' Madras Reports, p. 301.)

But a suit is maintainable to obtain a binding declaration of the plaintiff's right to perform the duty of pujari in a Hindu temple, and to receive the proceeds of the shrine. Pranshankar v. Prannath Mahanund.—(Dunbar and Green's Bombay Reports, p. 12.) See too Macpherson's Civil Procedure, p. 40, for like rulings of the Agra and Calcutta Saddar Courts.* Since however each jijman has a right to select his own priest there is no office of Parohit recognized in law which can give a plaintiff a right to sue for its profits.—(2. North West High Court Reports, p. 80; and Macpherson on Civil Procedure, p. 40.)

Where the defendant was entitled to take certain idols on occasions from the plaintiff's house and to keep them for a period of five days at a time, the Calcutta Court ruled that a suit would not lie to recover damages for the loss of certain profits which the plaintiff might have obtained had not the idols been kept from his custody for more than the five days, since "damages based upon such uncertain and merely voluntary payments" are not recoverable.—Rameswar Mookerjee v. Ishan Chandra Mookerjee.—(10. W. Reporter, Civil Rulings, p. 457.)

In accordance with the law, as described in the latter part of the present Clause of the Code, the Calcutta Court, in Becharam Banerjee v. Srimati Thakurmani Debi, held that,

* So "when the parties claim the collections of a shrine, either in right of property in the place, or of lawful and established office attached to it, it is well established that the suit will lie"—Shiv Sakat Dhami v. Bhardi Muktun.—(3. W. Reporter, Civil Rulings, p. 33.)
while the obligation upon *jijmans* to employ a particular pursuit is a simple matter of conscience, and not an obligation that a Court of law can enforce, yet where the plaintiff and defendants had a joint right in the performance of the ceremonies and in the profits thereby accruing the plaintiff could recover from the defendant the fees he had received by wrongfully excluding the plaintiff from reciting the *mantras* in his turn.—(10. W. Reporter, Civil Rulings, p. 114.) So also in a case given in Sutherland's Civil Rulings for April 1864, p. 146, the Court ruled that there is “nothing against the institution of a suit for a share of offerings actually received, if there be any contract to pay over such share.” See also 5. W. Reporter, Civil Rulings, p. 222; 2. Punjab Record, Case No. 62; Macpherson on Contracts, p. 21. But where there is no subsisting contract in regard to the division of such receipts, or a joint interest in them, an action will not lie to recover offerings which are purely voluntary on the part of the giver. See 1. North West High Court Reports, p. 84; 2. Punjab Record, Case No. 94; 2. W. Reporter, Civil Rulings, p. 69.

An agreement to remain always in a particular community cannot be enforced, nor is the penalty which a person may have undertaken to pay in the event of his ever quitting such community recoverable by a suit.—Nitye Shaha v. Shubal Shaha.—(10. W. Reporter, Civil Rulings, p. 349.)

**ACT No. XX of 1847.**

*An Act for the encouragement of learning in the territories subject to the Government of the East India Company, by defining and providing for the enforcement of the right called Copyright therein.*

Whereas doubts may exist whether the right called Copyright can be enforced by the Common Law of England in those parts of the territories subject to the government of the East India Company into which the Common Law of England has been introduced:

And whereas doubts may exist whether the said right can be enforced by virtue of the principles
of equity and good conscience in the other parts of the territories subject to the government of the East India Company:

And whereas, for the encouragement of learning, it is desirable that the existence of the said right should be placed beyond doubt, and that the said right should be made capable of easy enforcement in every part of the said territories:

And whereas it is doubted whether the Act of Parliament 5 and 6, Victoria, c. 45, entitled "An Act to amend the Law of Copyright," although such Act extends to every part of the British Dominions, has made appropriate and sufficient provisions for the enforcement, in every part of the said territories subject to the government of the East India Company, of the said right by proprietors thereof: and whether the said Act of Parliament has made provision for the enforcement of the said right by or against any person not being subject to the jurisdiction of the Courts established by Her Majesty's Charter:

I. It is therefore hereby enacted, that the Copyright in every book published in the life-time of its author within the said territories, after the passing of the Act of Parliament 3 and 4 Wm. IV. c. 85, entitled "An Act for effecting an arrangement with the East India Company, and for the better government of His Majesty's Indian Territories till the 30th day of April, 1854," shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such
PUNJAB CIVIL CODE, ] COPYRIGHT ACT XX OF 1847. 627

author and his assigns: Provided always, that, if the said term of seven years shall expire before the end of forty-two years from the publication of such book, the Copyright shall in that case endure for such period of forty-two years; and that the Copyright in every book published after the death of its author, and after the passing of the Act of Parliament last aforesaid, shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript, from which such book shall be first published, and his assigns.

II. And whereas it is expedient to provide against the suppression of books of importance to the public: It is enacted that, it shall be lawful for the Governor-General in Council, on complaint made to them that the proprietor of the Copyright in any book published after the passing of this Act within the said territories, has, after the death of its author, refused to republish, or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a license to such complainant to publish such book in such manner and subject to such conditions as they may think fit, and it shall be lawful for such complainant to publish such book according to such license.

III. And it is hereby enacted, that a Book of Registry wherein may be registered, as herein-after enacted, the proprietorship in the Copyright of books and assignments thereof, and licenses affecting such Copyright, shall be kept in the office

G. G. in C. on complaint that any book may be withheld from the public by the proprietor after the author's death, may grant a license for publication thereof.
of the Secretary to the Government of India for the Home Department, and shall at all convenient times be opened to the inspection of any person on payment of eight annas for every entry which shall be searched for or inspected in the said book, and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, certified under his hand, to any person requiring the same, on payment to him of the sum of two rupees, and such copies so certified shall be received in evidence in all Courts and in all summary proceedings, and shall be _prima facie_ proof of the proprietorship or assignment of Copyright or license as therein expressed, but subject to be rebutted by other evidence.

IV. **Repealed by Act XVII. 1862.**

V. And it is enacted, that, after the passing of this Act, it shall be lawful for the proprietor of Copyright in any book published after the passing of the said Act of Parliament 3 and 4, Wm. 4, c. 85, to make entry in the Registry Book of the title of such book, the time of the first publication, and the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the Copyright of the said book, or of any portion of such Copyright, in the form in that behalf given in the Schedule to this Act annexed, upon payment of the sum of two rupees to the said Secretary, and that it shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest, therein, by making entry in the said Book of Registry of such assign-
ment, and of the name and place of abode of the assignee thereof, in the form given in that behalf in the said schedule, on payment of the like sum; and such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed.

VI. And it is enacted, that, if any person shall deem himself aggrieved by any entry made under colour of this Act in the said Book of Registry, it shall be lawful for such person to apply by motion to the Supreme Court of Calcutta, or, if the Court shall not be then sitting, to any Judge of such Court sitting in Chambers, for an order that such entry may be expunged or varied, and that upon any such application to the said Court, or to a Judge as aforesaid, such Court or Judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such Court or Judge shall seem just, and the said Secretary shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same, according to the requisitions of such order.

VII. And it is enacted, that, if any person shall after the passing of this Act print, or cause to be printed, either for sale or exportation, any book in which there shall be subsisting Copyright, without the consent in writing of the proprietor thereof, or shall have in his possession for sale or hire any such book so unlawfully printed without...
such consent as aforesaid, such offender, if he shall have so offended within the local limits of the jurisdiction of any of the Courts of Judicature established by Her Majesty's Charter, shall be liable to a special action on the case in such Court; and, if he shall have so offended in any other part of the territories subject to the government of the East India Company, to a suit in the Zillah Court within the jurisdiction of which he shall have so offended, which shall and may be prosecuted in the same manner in which any other action of damages may be brought and prosecuted there; and if he shall have so offended in any such last-mentioned part of the territories subject to the government of the East India Company in which there is no Zillah Court, to a suit in the highest local Court exercising original Civil jurisdiction in such part of the said territories.

VIII. And it is hereby enacted, that, after the passing of this Act, in any suit or action brought in any of the Courts of Judicature established by Her Majesty's Charter under the provisions of this Act against any person for printing any such book for sale, hire, or exportation, or for selling, publishing, or exposing to sale or hire, or causing to be sold, published, or exposed to sale or hire, or for having in his possession for sale or hire, any such book so unlawfully printed, the defendant, on pleading thereunto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action, and if the nature of his defence be that the plaintiff in such action was not the author or

In an action in the Supreme Court, defendant shall specify by written notice the particulars of his defence, and shall not give evidence of objections not so stated.
first publisher of the book in which he shall by such action claim Copyright, or is not the proprietor of Copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the Copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the Copyright therein, together with the title of such book, and the time when and the place where such book was first published, otherwise the defendant in such action shall not, at the trial or hearing of such action, be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such Copyright as aforesaid, or that he was not the proprietor of the Copyright therein, and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the Copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication, with the title, time and place specified in such notice.

IX. And it is hereby enacted, that, after the passing of this Act, in any such suit or action as last aforesaid brought in any Zillah Court or other local Court as aforesaid, the defendant shall state in an action in any local Court, the defendant shall specify similar particulars in his answer under similar penalty.
in his answer all such matters as he means to rely on, and which by the last preceding Section the defendant in any suit or action brought in any of the Courts of Judicature established by Her Majesty's Charter is required to give notice of in writing, otherwise such defendant shall be subject to the same consequences for any omission in his answer as a defendant is made subject to by the last preceding Section for any omission in his notice.

X. And it is hereby enacted, that when any publisher or other person shall, within the said territories, before or at the time of the passing of this Act, but after the passing of the said Act of Parliament 3 and 4, Wm. IV., c. 85, have projected, conducted, and carried on, or shall hereafter project, conduct, or carry on, or be the proprietor of any Encyclopædia, Review, Magazine, Periodical work; or work published in a series of Books or Parts, or any book whatsoever, and shall have employed or shall employ any person to compose the same, or any Volumes, Parts, Essays, Articles, or Portions thereof, for publication in or as part of the same, and such Work, Volumes, Parts, Essays, Articles, or Portions shall have been, or shall hereafter be, composed under such employment, on the terms that the Copyright therein shall belong to such Proprietor, Projector, Publisher, or Conductor, and paid for by such Proprietor, Projector, Publisher, or Conductor, the Copyright in every such Encyclopædia, Review, Magazine, Periodical work, or work published in a series of Book or Parts, and in every Volume, Part, Essay, Article and Portion so
composed and paid for, shall be the property of such Proprietor, Publisher, or Conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of Copyright therein as is given to the authors of Books by this Act, except only that in the case of Essays, Articles, or Portions forming part of and first published in Reviews, Magazines or other Periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act. Provided always, that during the term of twenty-eight years the said Proprietor, Projector, Publisher, or Conductor shall not publish any such Essay, Article or Portion separately or singly, without the consent previously obtained of the author thereof or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or shall be so employed as aforesaid, to publish any such his composition in a separate form, who, by any contract, express or implied, may have reserved or may hereafter reserve to himself such right, but every author reserving, retaining, or having such right, shall be entitled to the Copyright in such composition when published in a separate form according to this Act, without prejudice to the right of such Proprietor, Projector, Publisher, or Conductor as aforesaid.

XI. And it is hereby enacted, that the Proprietor of the Copyright in any Encyclopædia,
Review, Magazine, Periodical work, or other work published in a series of Books or Parts, shall be entitled to all the benefits of the Registration in the office of the Secretary to the Government of India for the Home Department, under this Act, on entering in the said Book of Registry the title of such Encyclopædia, Review, Periodical work or other work published in a series of Books or Parts, the time of the first publication of the first Volume, Number, or Part thereof, or of the first Volume, Number, or Part first published after the passing of this Act, in any such work which shall have been published heretofore and after the passing of the said Act of Parliament 3 and 4, William IV., c. 85, and the name and place of abode of the Proprietor thereof, and of the Publisher thereof when such Publisher shall not also be the Proprietor thereof.

XII. And it is enacted, that all copies of any Book wherein there shall be Copyright, and of which entry shall have been made in the said Registry Book, and which shall have been unlawfully printed without the consent of the Registered Proprietor of such Copyright in writing under his hand first obtained, shall be deemed to be the property of the Proprietor of such Copyright, and who shall be registered as such, and such Registered Proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same or damages for the detention thereof.

XIII. And it is enacted, that, if the case be within the jurisdiction of any of the Courts of Judicature established by Her Majesty's Charter,
such Registered Proprietor shall be entitled to sue for and recover such copies, or damages for the detention thereof, in an action of Detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of Trover; and that, if the case be within the jurisdiction of any Zillah Court or other local Court as aforesaid, the Registered Proprietor shall be entitled to sue for and recover such copies or damages for the detention or conversion thereof, in such form as is in use in the said Zillah or other local Courts for the recovery of specific personal property, or damages for the detention or conversion thereof.

XIV. And it is enacted, that no Proprietor of Copyright in any book first published after the passing of the said Act of Parliament 3 and 4 Wm. IV, c. 85, shall maintain, under the provisions of this Act, any action or suit at law or in equity, or any summary proceedings in respect of any infringement of such Copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the Book of Registry at the office of the said Secretary of such book, pursuant to this Act. Provided always, that the omission to make such entry shall not affect the Copyright in any book, nor the right to sue or proceed in respect of the infringement thereof, except the right to sue or proceed in respect of the infringement thereof under the provisions of this Act.

XV. And it is enacted, that, if any action or suit shall be commenced or brought in any of the Supreme Courts, a defendant under this Act may
Courts of Judicature established by Her Majesty's Charter against any person or persons whomsoever, for doing, or causing to be done, any thing in pursuance of this Act, the defendant or defendants in such action may plead the general issue, and give the special matter in evidence; and if upon such action a verdict shall be given for the defendant, or the plaintiff shall become non-suited, or discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath in the said last-mentioned Courts.

XVI. And it is enacted, that all actions, suits, bills, indictments, informations, and other criminal proceedings for any offence which shall be committed against the Act shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of none effect.

XVII. Provided always, and it is enacted, that nothing in this Act contained shall affect, alter, or vary any right subsisting at the time of passing this Act, except as herein expressly enacted; and all contracts, agreements and obligations made and entered into before the passing of this Act, and all remedies relating thereto, shall remain in full force, any thing herein contained to the contrary notwithstanding.
**SCHEDULE.**

**No. 1.**

Original Entry of Proprietorship of Copyright of a Book.

<table>
<thead>
<tr>
<th>Time of making the Entry.</th>
<th>Title of Book</th>
<th>Name of the Publisher and place of Publication.</th>
<th>Name and Place of abode of the Proprietor of the Copyright.</th>
<th>Date of First Publication.</th>
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**No. 2.**

Form of Entry of Assignment of Copyright in any Book previously registered.

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<th>Date of Entry.</th>
<th>Title of Book.</th>
<th>Assigner of the Copyright.</th>
<th>Assignee of the Copyright.</th>
</tr>
</thead>
<tbody>
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<td>(Set out the Title of the Book and refer to the page of the Registry Book in which the original Entry of the Copyright thereof is made.)</td>
<td></td>
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</tr>
</tbody>
</table>
Preamble.

ACT No. XX of 1863.

An Act to enable the Government to divest itself of the management of Religious Endowments.

Whereas it is expedient to relieve the Boards of Revenue, and the Local Agents, in the Presidency of Fort William in Bengal, and the Presidency of Fort Saint George, from the duties imposed on them by Regulation XIX. 1810 of the Bengal Code (for the due appropriation of the rents and produce of lands granted for the support of Mosques, Hindu Temples, Colleges, and other purposes; for the maintenance and repair of Bridges, Serais, Kuttras, and other public buildings; and for the custody and disposal of Nuzzool Property or Escheats), and Regulation VII. 1817 of the Madras Code (for the due appropriation of the rents and produce of lands granted for the support of Mosques, Hindu Temples, and Colleges or other public purposes; for the maintenance and repair of Bridges, Choultris, or Chuttrums, and other public buildings; and for the custody and disposal of Escheats), so far as those duties embrace the superintendence of lands granted for the support of Mosques or Hindu Temples, and for other religious uses; the appropriation of endowments made for the maintenance of such religious establishments: the repair and preservation of buildings connected therewith, and the appointment of Trustees or Managers thereof; or involve any connexion with the management of such religious establishments: and whereas it is expedient for that purpose to repeal so much of Regulation XIX,
1810 of the Bengal Code, and Regulation VII. 1817 of the Madras Code, as relate to endowments for the support of Mosques, Hindu Temples, or other religious purposes; It is enacted as follows:—

I. So much of Regulation XIX. 1810 of the Bengal Code, and so much of Regulation VII. 1817 of the Madras Code, as relate to endowments for the support of Mosques, Hindu Temples, or other religious purposes, are repealed.

II. In this Act words importing the singular number shall include the plural, and words importing the plural number shall include the singular.

Words importing the masculine gender shall include females.

The words "Civil Court" and "Court" shall mean the principal Court of Original Civil Jurisdiction in the District in which the Mosque, Temple, or religious establishment is situate, relating to which, or to the endowment whereof, any suit shall be instituted or application made under the provisions of this Act.

III. In the case of every Mosque, Temple or other religious establishment to which the provisions of either of the Regulations specified in Section I are applicable, and the nomination of the Trustee, Manager, or Superintendent whereof, at the time of the passing of this Act, is vested in, or may be exercised by, the Government, or any public officer; or in which the nomination of such Trustee, Manager, or Superintendent shall be subject to the confirmation of the Government, or
any public officer, the local Government shall as soon as possible after the passing of this Act, make special provision as hereinafter provided.

IV. In the case of every such Mosque, Temple, or other religious establishment which at the time of the passing of this Act, shall be under the management of any Trustee, Manager, or Superintendent, whose nomination shall not vest in, nor be exercised by, nor be subject to the confirmation of, the Government, or any public officer, the local Government shall, as soon as possible after the passing of this Act, transfer to such Trustee, Manager, or Superintendent, all the landed or other property which, at the time of the passing of this Act, shall be under the superintendence or in the possession of the Board of Revenue, or any local Agent, and belonging to such Mosque, Temple, or other religious establishment, except such property as is hereinafter provided; and the powers and responsibilities of the Board of Revenue, and the local Agents, in respect to such Mosque, Temple, or other religious establishment, and to all land and other property so transferred, except as regards acts done and liabilities incurred by the said Board of Revenue, or any local Agent, previous to such transfer, shall cease and determine.

V. Whenever from any cause a vacancy shall occur in the office of any Trustee, Manager, or Superintendent, to whom any property shall have been transferred under the last preceding Section, and any dispute shall arise respecting the right of succession to such office, it shall be lawful for
any person interested in the Mosque, Temple, or religious establishment, to which such property shall belong, or in the performance of the worship or of the service thereof, or the Trusts relating thereto, to apply to the Civil Court to appoint a Manager of such Mosque, Temple, or other religious establishment, and thereupon such Court may appoint such Manager, to act until some other person shall by suit have established his right of succession to such office. The Manager so appointed by the Civil Court shall have, and shall exercise, all the powers which, under this or any other Act, the former Trustee, Manager, or Superintendent, in whose place such Manager is appointed by the Court, had or could exercise, in relation to such Mosque, Temple or religious establishment, or the property belonging thereto.

VI. The rights, powers, and responsibilities of every Trustee, Manager, or Superintendent, to whom the land and other property of any Mosque, Temple, or other religious establishment is transferred in the manner prescribed in Section IV of this Act, as well as the conditions of their appointment, election, and removal, shall be the same as if this Act had not been passed, except in respect of the liability to be sued under this Act, and except in respect of the authority of the Board of Revenue, and local Agents, given by the Regulations hereby repealed, over such Mosque, Temple, or religious establishment, and over such Trustee, Manager, or Superintendent, which authority is hereby determined and repealed. All the powers
which might be exercised by any Board, or local Agent, for the recovery of the rent of land or other property transferred under the said Section IV of this Act may, from the date of such transfer, be exercised by any Trustee, Manager, or Superintendent to whom such transfer is made.

VII. In all cases described in Section III of this Act, the local Government shall once for all appoint one or more Committees in every Division, or District, to take the place, and to exercise the powers, of the Board of Revenue and the local Agents under the Regulations hereby repealed. Such Committee shall consist of three or more persons, and shall perform all the duties imposed on such Board and local Agents, except in respect of any property which is specially provided for under Section XXI of this Act.

VIII. The Members of the said Committee shall be appointed from among persons professing the religion for the purposes of which the Mosque, Temple, or other religious establishment, was founded, or is now maintained, and in accordance so far as can be ascertained, with the general wishes of those who are interested in the maintenance of such Mosque, Temple, or other religious establishment. The appointment of the Committee shall be notified in the Official Gazette. In order to ascertain the general wishes of such persons in respect of such appointment, the local Government may cause an election to be held, under such rules (not inconsistent with the provisions of this Act) as shall be framed by such local Government.
IX. Every Member of a Committee appointed as above shall hold his office for life, unless removed for misconduct or unfitness, and no such Member shall be removed except by an order of the Civil Court as hereinafter provided.

X. Whenever any vacancy shall occur among the Members of a Committee appointed as above, a new Member shall be elected to fill the vacancy by the persons interested as above provided. The remaining Members of the Committee shall, as soon as possible, give public notice of such vacancy, and shall fix a day, which shall not be later than three months from the date of such vacancy, for an election of a new Member by the persons interested as above provided, under rules for elections which shall be framed by the local Government, and whoever shall be then elected, under the said rules, shall be a Member of the Committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court, on the application of any person whatever may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining Members of the Committee, with which order it shall then be the duty of such remaining Members to comply, and if this order be not complied with, the Civil Court may appoint a Member to fill the said vacancy.

XI. No Member of a Committee appointed under this Act shall be capable of being, or shall act, also as a Trustee, Manager, or Superintendent,
of the Mosque, Temple, or other religious establishment, for the management of which such Committee shall have been appointed.

XII. Immediately on the appointment of a Committee as above provided, for the superintendence of any such Mosque, Temple, or religious establishment, and for the management of its affairs, the Board of Revenue, or the local Agents acting under the authority of the said Board, shall transfer to such Committee all landed or other property which at the time of appointment shall be under the superintendence, or in the possession, of the said Board or local Agents, and belonging to the said religious establishment, except as is hereinafter provided for, and thereupon the powers and responsibilities of the Board and the local Agents, in respect to such Mosque, Temple, or religious establishment, and to all land and other property so transferred, except as above, and except as regards acts done and liabilities incurred by the said Board or Agents previous to such transfer, shall cease and determine. All the powers which might be exercised by any Board or local Agent, for the recovery of the rent of land or other property transferred under this Section, may from the date of such transfer be exercised by such Committee to whom such transfer is made.

A Committee appointed under this Act has the power to dismiss temple trustees as described in Section 3 of the Act without having recourse to a suit, but the Committee can only so act on good and sufficient grounds.—Chinnan Rangaiyangar v. Subhraya Mudali.—(3. Madras High Court Reports, p. 334.) The degree and kind of misconduct which would justify the dismissal of an hereditary temple servant must depend on the particular circumstances established in
each case, and when the question whether there was a sufficient ground of dismissal happens to be one of degree and not of principle, a Court on special appeal will treat the finding of the Lower Appellate Court as conclusive on the matter of fact, unless it appear to be opposed to every reasonable view of the material evidence.—Kristnasamy Tatacharry v. Gomatum Ranyacharry.—(4. Madras High Court Reports, p. 63.)

XIII. It shall be the duty of every Trustee, Manager, and Superintendent of a Mosque, Temple, or religious establishment to which the provisions of this Act shall apply, to keep regular accounts of his receipts and disbursements, in respect of the endowments, and expenses of such Mosque, Temple or other religious establishment; and it shall be the duty of every Committee of management, appointed or acting under the authority of this Act, to require from every Trustee, Manager, and Superintendent of such Mosque, Temple, or other religious establishment, the production of such regular accounts of such receipts and disbursements at least once in every year, and every such Committee of Management shall themselves keep such accounts thereof.

XIV. Any person or persons interested in any Mosque, Temple, or religious establishment, or in the performance of the worship or of the service thereof, or the Trusts relating thereto, may, without joining as plaintiff any of the other persons interested therein, sue before the Civil Court the Trustee, Manager, or Superintendent of such Mosque, Temple, or religious establishment, or the Member of any Committee appointed under this Act, for any misfeasance, breach of trust, or neglect of duty, committed by such Trustee,
Manager, Superintendent, or Member of such Committee, in respect of the Trusts vested in, or
confided to them respectively, and the Civil Court
may direct the specific performance of any act by
such Trustee, Manager, Superintendent, or Mem-
ber of a Committee, and may decree damages and
costs against such Trustee, Manager, Superinten-
dent, or Member of a Committee, and may also
direct the removal of such Trustee, Manager,
Superintendent or Member of a Committee.

The suits to which this Act relates are only those
against trustees, managers or superintendents; or the mem-
bers of a District Committee whilst in office; and do not
comprise actions against the heirs of deceased managers to
compel them to make good out of the property inherited by
them endowment funds lost by the misfeasance, breach of
trust and misappropriation of the late manager: but inde-
pendently of the Act such suit can be brought by any
person entrusted with the supervision or care of the property
as a Dharmakarta; all the Act does being to widen the
right of suit, which existed before in some particular cases.
—Jeyangarulavaruv. Durma Dossji.—(4. Madras High Court
Reports, 11. 2.)

A suit by a mosque official to be restored to his appoint-
ment on the ground that he had been improperly dismissed
by the Mosque Committee, does not come under this Section,
as there may be a removal from office on insufficient grounds
without any misfeasance on the part of the Committee; the
sole purpose and effect of this Section being to enable
persons to sue for the protection of the property and the
proper application of the funds and affairs of the establish-
ment in which they have a common interest.—Saiyad Amin
Sahib v. Ibrahim Sahib.—(4. Madras High Court Reports,
p. 112.)

XV. The interest required in order to
entitle a person to sue under the last preceding
Section need not be a pecuniary, or a direct or
immediate, interest, or such an interest as would
entitle the person suing to take any part in the
management or superintendence of the Trusts.
Any person having a right of attendance, or having been in the habit of attending, at the performance of the worship or service of any Mosque, Temple, or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested within the meaning of the last preceding Section.

XVI. In any suit or proceeding instituted under this Act, it shall be lawful for the Court before which such suit or proceeding is pending, to order any matter in difference in such suit to be referred for decision to one or more arbitrators. Whenever any such order shall be made, the provisions of Chapter VI of the Code of Civil Procedure shall in all respects apply to such order and arbitration, in the same manner as if such order had been made on the application of the parties under Section 312 of the said Code.

XVII. Nothing in the last preceding Section shall prevent the parties from applying to the Court, or the Court from making the order of reference, under the said Section 312 of the said Code of Civil Procedure.

XVIII. No suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. The application may be made upon unstamped paper. The Court, on the perusal of the application, shall determine whether there are sufficient *prima facie* grounds for the institution of a suit, and if in the judgment of the Court there are such grounds, leave shall be given for its
institution. In calculating the costs at the termination of the suit, the stamp duty on the preliminary application shall be estimated, and shall be added to the costs of the suit. If the Court shall be of opinion that the suit has been for the benefit of the Trust, and that no party to the suit is in fault, the Court may order the costs, or such portion as it may consider just, to be paid out of the estate.


XIX. Before giving leave for institution of a suit, or after leave has been given, before any proceeding is taken, or at any time when the suit is pending, the Court may order the Trustee, Manager, or Superintendent, or any Member of a Committee, as the case may be, to file in Court the accounts of the Trust, or such part thereof as to the Court may seem necessary.

XX. No suit or proceeding before any Civil Court under the preceding Section, shall in any way affect or interfere with any proceeding in a Criminal Court for Criminal Breach of Trust.

XXI. In any case in which any land or other property has been granted for the support of an establishment party of a religious and partly of a secular character, or in which the endowment made for the support of an establishment is appropriated partly to religious and partly to secular uses, the Board of Revenue, before transferring to any Trustee, Manager, or Superintendent, or to any Committee of Management appointed under this
Act, shall determine what portion, if any, of the said land or other property shall remain under the superintendence of the said Board for application to secular uses, and what portion shall be transferred to the superintendence of the Trustee, Manager, or Superintendent, or of the Committee, and also what annual amount, if any, shall be charged on the land or other property which may be so transferred to the superintendence of the said Trustee, Manager, or Superintendent, or of the Committee, and made payable to the said Board or to the local Agents, for secular uses as aforesaid. In every such case the provisions of the Act shall take effect only in respect to such land and other property as may be so transferred.

XXII. Except as provided in this Act, it shall not be lawful after the passing of this Act, for any Government in India, or for any Officer of any Government in his official character, to undertake or resume the superintendence of any land or other property granted for the support of, or otherwise belonging to, any Mosque, Temple, or other religious establishment, or to take any part in the management or appropriation of any endowment made for the maintenance of any such Mosque, Temple, or other establishment, or to nominate or appoint any Trustee, Manager, or Superintendent thereof, or to be in any way concerned therewith.

XXIII. Nothing in this Act shall be held to affect the provisions of the Regulations mentioned in this Act, except in so far as they relate to Mosques, Hindu Temples, and other religious
establishments; or to prevent the Government from taking such steps as it may deem necessary, under the provisions of the said Regulations, to prevent injury to and preserve buildings remarkable for their antiquity, or for their historical or architectural value, or required for the convenience of the public.

"India."

XXIV. The word "India" in this Act shall denote the territories which are or may become vested in Her Majesty by the Statute 21 and 22 Vic., c. 106, entitled "An Act for the better Government of India."
CHAPTER XXIII.

PART I.

On Real Property.

In the present Chapter it is proposed to treat of the law of real property in the Punjab, under three divisions: first, the rights of proprietorship, secondly, the law relating to sale; and thirdly, that regarding letting and hiring;—omitting such portions of the subject as have appeared to fall more conveniently under Section XXI of the Punjab Civil Code, and Act XXVIII of 1868.

The Rights of Proprietorship.

Land in its legal signification extends indefinitely upwards to the sky (ejus est solum ejus est usque ad caelum), and downwards to the centre of the earth, so that the ownership of land includes not only the face of the earth, but also everything under and above it, stone and kankar beds, wood, water, and buildings.—(Broom's Legal Maxims, p. 385.)

Owing to this indefinite extension upwards it follows that a person has no right to erect a building on his own land, which interferes with the due enjoyment of adjoining premises, and occasions damage thereto, either by overhanging them, or by the flow of water from the eaves, unless he have acquired a right by grant or prescription. And this is the case whether the projecting building cause actual damage or not. So, too, an action will lie against a man if he allow the boughs of his tree to grow so as to overhang the adjacent ground in an unwonted manner (Broom's Legal Maxims, pp. 382—383); or if he lop his hedges or trees in such a way as to encumber his neighbour's premises.—(Norton's Topics, p. 154.) Under the Civil Law if a tree overhung the house of a neighbour he might cut it down, and if it overhung his land trim it up to fifteen feet from the soil.—(Dig. II. 43, 27, 1.)

Among the rights of ownership is that of water flowing through or by the estate. This right is admirably described in Chancellor Kent's Commentaries, as quoted at p. 497 of Mr. Norton's Topics of Jurisprudence. "Every proprietor of lands," he writes, "on the bank of a river has naturally an equal right to the use of the water, which flows in the stream adjacent to his lands, as it was wont to flow (currere solebat) without diminution or alteration. No proprietor
has a right to use the water to the prejudice of other proprietors above or below him, unless he have a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple use of it while it passes along. *Aqua currit et debet currere* is the language of the law. Though he may use the water while it runs over his lands, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty [in India probably twelve] years, which is evidence of it. This is the clear and settled doctrine on the subject, all the difficulty that arises consists in the application. The owner must so use and apply the water, as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water. Streams of water are intended for the use and comfort of man, and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex,* and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury and the manner of using the water. All that the law requires of the party, by and over whose land a stream passes, is that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect the application of the water by the proprietors below on the stream. He must not shut the gates of his dam, and detain the water unreasonably, or let it off in unusual quantities to the annoyance of his neighbour. Pothier lays down the rule very strictly, that 'the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do to injure the proprietor below.' But this must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become entirely useless, either for manufacturing or agricultural purposes. The just and equitable principle is given by the Roman law—*Sic enim debere quam...*
meliorem agrum summ facere, ne vicini deteriorem faciat." See too, the judgment of Mr. J. Story in Taylor v. Wilkinson, quoted at p. 495 of the Topics of Jurisprudence. Also the judgments quoted at pp. 153—165. These passages further show that the true meaning of the civilians, that flowing water is a res communis, is merely that all may drink it and apply it to the common purposes of supporting life, and that no one has any property in the water itself except in that particular portion which he has abstracted from the stream and retains in his possession. See too Broom's Legal Maxims, pp. 145 and 364; and Broom's Commentaries on the Common Law, pp. 782—784. So in Shaikh Manawar Hassein v. Kauhya Lall the law was defined thus—"The riparian proprietor may deal with the stream as freely as with any other portion of his land, provided only that he must not by so doing sensibly disturb the natural conditions of the stream as it exists within the limits of other proprietors, whether above or below, or on the opposite side."—(3. W. Reporter, Civil Rulings, p. 218.) So where a party seeks to erect a water mill on his own land, the right cannot be disallowed by reason of being likely to lead to constant quarrels among the neighbours, if it appear that the erection of the mill will not injure the landholders lower down stream who are entitled to the use of the water.—Nur Mahamud v. Khanimullah.—(2. Punjab Record, Revenue Case No. 12.) In Rum Dass Surmah v. Sonatun Goohu it was ruled that a man has no right to erect a bund on his own land so as to intercept the passage of fish in a natural stream, and thereby render the plaintiff's right of fishery less valuable.—(Sutherland's Civil Rulings, for June 1864, p. 375.)

The subject of diverting a stream by a proprietor higher up its course came before the Chief Court in Sipadar Khan v. Wazira, in which the plaintiff as manager of an estate sued to obtain the demolition of an embankment which he alleged intercepted the flow of the water from the Gaggar over his estate. The Court remarked that the depression of the ground in the defendant's village was slight, and not apparently such as to form a regular current; and therefore, under the circumstances, the Court refused to decree the demolition of the dam, if it were so constructed as to allow a reasonable course of water to pass it, and did not completely obstruct the whole flow.—(2. Punjab Record, Case No. 33.)

In a suit to restrain the defendant from increasing the height of a dam which he had erected on his land, from the height of a cubit, at which it had stood for many years, to two cubits, on the ground that to the south of the defendant's land there was a natural hollow into which the water having topped the defendant's dam at its original height could flow again. A Punjab precedent on the point.

Before a plaintiff can obtain a decree against another for interfering with the flow of water, the plaintiff must shew

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used to be discharged, and that the water so collected in this depression was wont to be used by the plaintiff for irrigation purposes, whereas now it would be diverted by the increased size of the embankment, the Calcutta Court held that the suit ought to be dismissed, as there was nothing to show that the plaintiff had any right to insist that the water on the defendant's land, when it reached the height of a cubit should pass over a bank and so escape into a reservoir, or that the defendant was bound to cause the water so to escape for the plaintiff's benefit.—Prankristo Roy v Hiro Chandri Roy.—(10. W. Reporter, Civil Rulings, p. 435.)

Where a tenant had erected a dam with the lessor's permission on his holding and thereby obstructed the natural flow of water to other lands of the lessor, the Madras Court held that mere permission to erect did not amount to a grant of a right to the use of water, derogating from the natural rights of those though whose lands, in the other portion of defendant's estate, the stream would otherwise flow; for if so on every right of way exercised merely by the permission of the grantor, an easement would be created by grant. The case then was simply one of a tenant derogating from the natural rights of the other tenants by the permission of their common landlord, and existing only by permission. Such a right might be terminated on the terms of the plaintiff paying to the tenant the expenses which he had been induced by that permission to incur. The Court however remarked that if the dominant and servient tenements had been the property of different persons, there would not have been an irrevocable license. "A man may license an act in its inception, and yet be entitled to relief when it is found to have injurious consequences which he could not have contemplated at the time of the license.—Banks v. Houghton. Whether he can or cannot revoke it is a question upon the facts of each particular case. The termination or narrowing of easements by irrevocable license, and creation of easements by such license, will probably be found to be wholly different questions; but we give no opinion now upon that subject, because the 1st section of the Statute of Frauds presents the case to the English lawyer in an aspect wholly different to that in which, if it should ever arise, it would come before us."—Kesava Pillai v. Peddu Reddi.—(1. Stokes' Madras Reports, p. 258.)

Underground waters are subject to the same law as those which appear on the surface, if they flow in regular defined subterranean channels.—(Norton's Topics, p. 166.) If however, they simply spread abroad in the strata under the soil, no action will lie if the defendant, in the exercise of his right to dig or excavate beneath the surface of his own land, casually drain off the water from the plaintiff's
land, so as to leave his well dry, except indeed the latter enjoy a prescriptive right in the water.*—(Broom's Legal Maxims, p. 365.)

The leading case on this subject is Chasemore v. Richards, the facts of which are thus given by Mr. Broom—(Commentaries on the Common Law, p. 79.) "The plaintiff, a land-owner and mill-owner, had for above sixty years enjoyed the use of a stream, which was chiefly supplied by subterranean water percolating through the substrata. Water which would otherwise have thus supplied the stream was diverted from it by the defendant, an adjoining landowner, who dug on his own ground a well for the purpose of supplying water to the inhabitants of the district. The plaintiff, having lost the use of the stream, was held to have no right of action against the defendant, for thus abstracting the water, which was of sensible value in and towards the working of the said mill." See too Norton's Topics, pp. 167—176, for a fuller account of this case, and for extracts from several of the judgments delivered in it. He observes that the following principles were established by this action:—

First.—The right to the continual flow of running water is a natural right incidental to property in adjoining land, and does not depend on prescription.

Secondly.—This right exists whenever the water flows in a known and defined course, whether it be on the surface or underground.

Thirdly.—But no such right can be claimed in respect of underground water, not proceeding in any defined course, but percolating through the soil, although it may ultimately reach a definite visible stream.

The following extract from the Digest (XXXIX. 3.) however, shows that Roman law would not allow this right to use percolating waters without being answerable for injury caused thereby to another to be a screen for intentional malevolence—"Denique Marcellus scriptis, cum eo, qui in suo fodiens vicini fontem averterat, nihil posse agi, nec de dolo actionem. Et sane non debet habere, si non animo vicini nocendi, sed suum agrum meliorem faciendi id fecit."

It follows from the principles laid down in the foregoing paragraphs that an action will lie for fouling water to the use of which the plaintiff is entitled.—(Broom's Commentaries on the Common Law, p. 784.)

* Several of the judgments in Chasemore v. Richards, incidentally, and that of Lord Wensleydale, directly, appear however to show that the principle of prescription does not apply to the case of injury caused by the diversion of percolating subterranean waters.
It would appear that a suit will lie for a wrongful use of the stream without proof on the plaintiff's part that he has as yet sustained positive damage thereby, for a legal right has been invaded, and this imports legal damage.—(Norton's Topics of Jurisprudence, pp. 165 and 503.)

Mr. Norton (Topics of Jurisprudence, p. 166,) remarks that "in this country it may happen that a man may occupy a stream and turn it to use, where there are neither occupants above or below him: for instance, a coffee planter erecting a mill upon a stream in the jungle which he has cleared, where the land above and below him is unoccupied. In such a case, I conceive, he would acquire a right as the first occupant, and by user, against those who might subsequently take up the lands either above or below him." And similarly at p. 498. But pace the learned writer, would not the Government, as proprietor of the adjacent waste lands, or any subsequent grantee of the Government, have a right to dispute an undue appropriation of the stream by the first settler at any period within twelve years of the act complained of?

It is also unlawful for a person in erecting a bund on his own land so to pen back the water as to inundate the land of his neighbour, without the license or consent of that neighbour.—Becharam Chowdhry v. Pukunbath.—(2. Bengal Law Reports, Appendix, p. 53.)

Where the defendant by cutting a water-course caused water to flow over the plaintiff's land, to the plaintiff's detriment, the fact that if the latter had raised a bund at his own expense he might have protected himself from injury, in nowise barred the plaintiff's right of action, as he was entitled to the peaceful use, occupation and profit of his land without being put to the necessity of erecting at his own cost a bund to protect himself from the illegal acts of another.—Raj Chandra Ghose v. Jai Kishen Mookerjee.—(4. W. Reporter, Civil Rulings, p. 76.)

A landlord is not answerable for acts of his cultivators by which damage accrues to neighbouring lands, if those acts were done without his order or knowledge.—Kudar Baksh Biswas v. Ram Nag Chowdhry.—(7. W. Reporter, Civil Rulings, p. 418.) But a landlord who only receives rent from his land in the event of the ryots being able to reap a crop, has a sufficient interest in the land to be able to maintain a suit against a party by whose wrongful act the land was so flooded that the crops were destroyed.—Ram Chandra Jana v. Jihan Chandra Jana.—(1. Bengal Law Reports, Civil Appeals, p. 203.)
Another natural right of property is that of having the soil supported in its natural state by the soil of the adjoining estate: hence a man may not dig so near the confines of his own ground as to endanger the falling in of the soil of his neighbour. By the Civil Law if a man dig a sepulchre or a ditch, he shall leave between it and his neighbour's land a space equal to its depth; if he dig a well, he shall leave the space of a fathom. If however, a man increase the natural lateral pressure of his soil by building upon it, he can only have a right to the increased support required, as an easement or servitude, either by express grant from his neighbour or by user.—(Norton's Topics of Jurisprudence, pp. 527 and 532.)

The right of property enables the owner to dig underneath his soil for metals, stone, &c. He must not however in the exercise of this right carry his excavations beyond his own land, under the surface of that of his neighbour, neither may he carry his digging or tunelling so near the edge of his ground as to endanger the soil or the buildings of his neighbour, when these latter have acquired a prescriptive right to support. The leading case is that of Partridge v. Scott: there the defendants were charged with having caused two of the plaintiff's houses, which had been built considerably within the plaintiff's boundary, to fall in by excavating the coal in their land, and not leaving a sufficiently thick rib of coal untouched between their excavations and the plaintiff's land; the plaintiff's suit was, however, dismissed, as it appeared that the houses were themselves erected on excavated land, which caused them to require additional support from the defendant's ground, to which additional support they had not as yet acquired a prescriptive claim, while the rib of coal left by the defendants was more than sufficient to have supported them had the ground underneath their foundations been in its normal state.—(Norton's Topics of Jurisprudence, pp. 529, 532. Also, p. 533 for the analogous case of Brown v. Robins.)

In reference to mining, it may be well to insert the following rules laid down by the Government of India with reference to the subject of Royalties:

"(1.) In permanently settled estates (the return of mines having formed a distinct item of the assets on which the settlement was made) no claim of Government to any share in the produce of mines would lie.

"(2.) In making new settlements, whether permanent or temporary the rent of mines existing definitely and tangibly at the time of settlement may be treated as an asset of the estate, and during the currency of that settlement no in—
creased demand by Government, in the shape either of rent or royalty, can be made, either on account of new mines, or of the increased value of old ones.

"(3.) As a matter of grace, Government waives its rights to include coal mines in the calculation of assets.

"It has been further ruled that in the case of waste lands, the right to work minerals may be granted by Government separately from the right to the land on either a rent or royalty." (Extract from a letter of Secretary of the Government of India, published in Financial Book Circular No. XXXV of 1864.)

The following extract from the Institutes of Justinian (II. 1. 39) gives the Roman law on the subject of treasure trove, which seems far more equitable than the Common law of England, which on principles evidently gathered from the feudal system, assigns the whole to the Crown:

"Thesaurus quos quis in loco suo invenerit, divus Hadrianus naturalem equivalentem sectus ei concessit qui invenerit: idemque statuit si quis in sacro aut religioso loco fortuito caso invenerit. At si quis in alieno loco, non data ad hoc opera, sed fortuito invenerit, dimidium inventori, dimidium domino soli concessit, et conveniet si quis in Cesaris loco invenerit, dimidium inventoris, dimidium Cesaris esse statuit. Cui conveniens est, ut si quis in fiscali loco vel publico invenerit, dimidium ipsius esse, dimidium fisci vel civitatis." For the Regulation law on this head, see Regulation No. V of 1817 at the end of this Chapter.

The owner, unless prohibited by a binding contract may build where and as he pleases on his own ground; and no action will lie against him if his erection interferes with the prospect from his neighbour’s house (Norton’s Topics, p. 519), or even shut out the light altogether from his windows, unless they happen to be ancient lights, for which see below. (Norton’s Topics, pp. 153, 519.) So a man can open a door where he pleases, and no action is maintainable if it does not open on land belonging to the plaintiff, although it may open on a pathway leading to the door of the latter. Pera v. Budha. (1. Punjab Record, Case No. 90.) Similarly in Parum Subh v. Sita Ram, the Agra Court ruled that where the defendant had opened a door in his own wall, the plaintiff had no right of action by reason of anticipating that it had been opened in order to annoy him by trespassing over his lands, though if the door on turning on its hinges disturbed the enjoyment by plaintiff of his rights in land belonging to him, a suit would lie to remove the obstruction. (2. North West High Court Reports, p. 19.) In another case
of this nature (1. Punjab Record, Case No. 28), the Chief Court, while dismissing a suit to obtain the closure of a new door on the ground that it was not shown to open on the plaintiff's land or to cause him damage, observed that if the door had been opened in the wall of the town, any person or persons with common or other rights in the wall might question the rights of the defendants to alter the state of the wall in a manner causing damage or inconvenience. Neither can an order be obtained for closing a door because it opens on a court-yard, the common property of the litigants and others, unless it be shown that it renders the yard less useful to the co-sharer, the plaintiff, or deprives him of any right which he would otherwise have had.—Hira Singh v. Tulu.—(3. Punjab Record, Case No. 46.) In Webb v. Bird, it was held that no action lay against the defendant for building a wall so near the plaintiff's windmill as to interfere with the free access of wind to it.—(Norton's Topics, p. 517.)

By English law it is not actionable for a man to open new windows in his wall, although his doing so may interfere with his neighbour's privacy, in which case the only remedy is to build on the adjoining land opposite to the offensive window.—(Broom's Legal Maxims, p. 367.) This doctrine has been followed by the Madras Court in Komathi v. Gurunada Pillai, and as the Courts of this Presidency have decided on following the continental theory of privacy I make no apology for giving the following extract from the judgment of Innes, J., as exposing the unsoundness of this so called right of privacy. “I have no hesitation in applying the principles of English law on this subject rather than those of the continental systems of law, to which my learned colleague has alluded, in which the invasion of privacy by opening windows is treated as a wrong; because, it appears to me to be the most reasonable system, as being that best adapted to the exigencies of mankind living in a state of society and in close association. The inconsistency of other systems may, I think, be illustrated in the following manner: A has a piece of ground in a street and a house upon it, and B possesses a piece of ground on one side of it (say the south) immediately adjoining the house of A. A's house faces the street to the west, but has several windows and a door open to the south. Soon after the erection of A's house, C purchases of B the ground adjoining to the south of it. He goes to examine his purchase, and, standing upon his own open ground, receives the rays of light from various directions, and among others from the direction of A's windows and door. In common parlance, he sees through A's windows and door and invades A's privacy. This is not regarded in any system of law as an actionable wrong, simply because if a man turn his eyes in
a particular direction he must perceive the object which the rays of light from that direction convey to them, and it would be too absurd to say that a man may not come upon his own ground and turn his eyes in any direction he pleases. But if C builds a house upon a portion of his ground, the right which was not denied him when he received it on a large scale, the right, that is, of looking in every direction, trespassing with his eyes upon A's privacy and viewing the interior of his room from any part of his open ground, is at once gone. True it is that the angle of vision, which was before only limited by the extent of C's ground, is now narrowed and confined to the space occupied by the few windows which C can put into the north wall of his house; yet this more limited means of reception of the rays of light by the eyes, and the more limited view which he thereby obtains of the interior of A's house, become a wrong, whereas a more complete traverse of it from the open ground was not so regarded. The English law upon this subject is in this quite consistent. It says, it is not a wrong for another to look upon you from his own ground, whether he have a house upon it or not. But you may shut out his view by building on your own ground. Nor would there seem to be any hardship in this upon the party whose privacy is interfered with. A person possessing a house and ground, with open spaces about it not belonging to him, must almost always be aware that those spaces may at any time be occupied by houses by which his privacy may be interfered with, unless he so builds his house as to render this impossible. And similarly with a person who purchases or takes a lease of a house with adjoining house grounds. He does so, or he ought to do so, with full knowledge of the probability of his being at some time or other overlooked, unless he make provision against it. And it seems to me far more convenient, and a less vexatious restriction upon the rights of property, that the owner of a house should, if he desire privacy, be compelled to build up and shut out the view into his house from the windows of his neighbour, than that that neighbour should be restricted by the will of the other in the amount of light and air he may enjoy." While Holloway J. observed that, in choosing between the views of the continental lawyers and those of England, "I confess I look with so much apprehension upon the establishment among a very litigious people of rights of a very shadowy character, that I cannot doubt that the English rule is the safer one. I cannot but think that the establishment of such a right would lead in populous neighbourhoods to a very mischievous abridgement of the liberty of property, and in a rural neighbourhood it would be difficult to say to what inordinate lengths such a claim might not extend."—(S. Madras High Court Reports, p. 141.) The Calcutta Court, in Srinath v. Nand Kishore Bose, appear to countenance the
supposed right of privacy, for in an action to compel a wall to be removed which had been built so as to deprive the plaintiff of light and air, they refused to give relief, since “even if it were shewn that light and air had long been enjoyed by the plaintiff, and have now been cut off by the defendant’s wall, still as plaintiff had no right to build an upper storey, with reference to the circumstances of domestic life in India, so as to intrude on the privacy of the females of the defendant’s family, the plaintiff would have no relief in this respect, as he was the first and greater wrong-doer.— (5. W. Reporter, Civil Rulings, p. 208.) It seems strange that the learned Judges in writing the words I have underlined did not see that a doctrine which involves such monstrous conclusions could scarcely be sound law. There is not a house of three or four storeys in any town in Upper India which does not overlook the yards and often the interiors of the humbler dwellings, and if the doctrine of privacy is a part of the customary law of India any native gentleman or wealthy trader who raises a third or fourth storey on his house is liable to an action at the suit of any neighbour however far off whose premises are overlooked in consequence of the so-called wrong-doer improving his dwelling. It seems hard to conceive a more unjustifiable interference with the right of property, and it may perhaps be questioned whether that be a good legal custom which under native rule, and indeed under British too, may safely be said never to have been enforced against the wealthy or powerful classes. The Agra Court have however ruled that a party has no right to open windows for his own convenience on his own premises, if doing so will interfere with the privacy of his neighbour.— (2. North West High Court Reports, p. 269, and Vol. 4. p. 253.) And the Chief Court, on the authority of these Agra decisions, directed, in Nanak Chand v. Lalla, that the defendant should close a door which he had opened in the upper storey of his house, because the use of it had the effect of opening the interior of the plaintiff’s private apartments to view in a manner inconsistent with his privacy; that privacy being determined with regard to the usages* and habits of the natives of this country.— (4. Punjab Record, Case No. 21.) One decision upholding this doctrine of the right of privacy will be met with in the Bombay Reports (5. Reid’s Reports, p. 42), but there it was specially based on a “recognized usage of Guzerat.”

* May not this alleged custom of the right of privacy be shown to be bad on the ground of its being unreasonable (see above at p. 125 of this work), since carried to its legitimate consequences it may easily be shown in India “to be contrary to the public good,” by placing undue restrictions in the way of the improvement of property: it should be remembered that the plan of house building on the continent of Europe is altogether different from that prevailing here.
An owner may not erect on his own land anything offensive so near the house of another as to render it useless and unfit for habitation. The doctrine upon this subject is laid down by the Court of Exchequer Chamber in *Branford v. Turley*, being that "whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the acts complained of, the annoyance is sufficiently great to amount to a nuisance according to an ordinary rule of law, an action will lie, whatever the locality may be."—(Brown's *Legal Maxims*, p. 367.) And a neighbour whose property is injured by the nuisance so erected, may remain on his soil and throw it down, or he may enter on the wrong-doer's soil and throw it down, and justify the entry in an action of trespass. In exerting this right of removal, the party injured must use no more force, or work greater damage than is sufficient to abate the nuisance, and restore things to the status quo ante.—(Norton's *Topics*, pp. 551, 552.) See further on this subject Brown's *Common Law*, pp. 221—223, which show that it is requisite that no riot be committed in the abating the nuisance, and that where the defendant has succeeded to the nuisance which had been created by his predecessor, notice to remove should be given him before the party aggrieved takes the law into his own hands.

Where a defendant had recently built a wall so near the house of his neighbour that the rain water falling within a confined space between the two walls, and, having no outlet, sunk into the ground, and undermined the plaintiff's building, the Calcutta Court ruled that he could not be allowed to thus maintain the wall to the injury of his neighbour.—*Srimith Dutt v. Nand Kishore Bose.*—(5. W. Reporter, Civil Rulings, p. 208.)

In the case of an "artificial stream" passing through a man's land, he is under an obligation to receive it under such circumstances as to quantity and quality, and generally to submit to such disadvantages in relation to the maintenance of the stream, as its beneficiaries have a right either by law or contract to impose on him; and he can only claim to be protected from any increase of these burdens at the hands either of the other proprietors, or of the owners or beneficiaries of the artificial stream. But, unlike the case of streams existing naturally, the fact that such a stream passes through the lands of two proprietors does not give them any mutual rights respecting it, but each may use* or consume it as he pleases, without transmitting even any portion of it to his neighbour's ground; provided only that his doing so

*But see Lord Denman's remarks in *Major v. Chadwick.*—(Topics of Jurisprudence, p. 507.) There however the defendants polluted the stream.
will not be at variance with his duties to the beneficiaries of the stream, or increase the burden cast on the succeeding proprietors.—(Norton’s Topics, pp. 177—179. See too, Sutherland’s Civil Rulings, for February 1864, p. 106; and 6. W. Reporter, Civil Rulings, p. 99, where the Calcutta Court remarked that “the riparian proprietors have a right to the use of the water of a natural water-course under certain restrictions. But these rights have no application to a water-course artificially constructed, and the mere fact of riparian proprietorship gives no right whatever over such a stream as against the interest of the beneficiary;” and so also Sutherland’s Civil Rulings, for June 1864, p. 319, neither can any person who has been benefited by the flow of such an artificial stream for however long a period compel those who have created the stream for their own objects to continue to keep it flowing any longer than they see good. See this clearly laid down in Lord Abinger’s judgment in Arkwright v. Gell.—(Norton’s Topics of Jurisprudence, pp. 507—512.) See too Broom’s Commentaries on the Common Law, p. 784.

In disputes regarding the proprietary rights in trees it is sufficient for the claimant to prove that the tree grows on his land, and it is unreasonable to expect him usually to be able to show that he has exerted any acts of ownership in regard to it.—Chatur Burj Tomari v. Wukyat Ali Khan.—(Sutherland’s Civil Rulings for May 1864, p. 223.)

A person may have rights of fishing in a stream or pool without having any right in the soil itself, should the water dry up or be changed to a different course.—(1. W. Reporter, p. 79.) While if the stream change its course, the right of fishing will not be affected thereby, and a person whose lands may have been submerged by the change in the channel will have no action of trespass against the person exercising his jalkar rights over the submerged lands.—(6. W. Reporter, Civil Rulings, p. 41.)

But not only has the landowner certain rights in regard to his own soil, he has also frequently a right to enjoy certain special benefits from and over adjacent estates. An “easement,” writes Norton, “strictly speaking, is merely the right to exercise a convenience over the property of a neighbour, as of light, air, water or way: while a ‘profit à prendre’ is the right to participate in the produce of the neighbouring soil. These two classes are both comprised under the name of ‘servitudes’ by the civilians. This term,” he continues, “implies a right and an obligation; the right is attached to the property which enjoys the benefit of its exercise, and is called the dominant tenement: the obligation is imposed on the property, which is compelled to submit to the exercise

Ownership of standing trees.

Rights of fishing.

Nature of easements.
of the right upon it, which is called the servient tenement. The right must always be exercised in alieno solo, upon the property of a third party: whence if two properties ever coalesce in one and the same owner, the special right merges in the general right of property, and the special right and the obligation are both extinguished. But though extinguished during unity, it will revive on subsequent separation. The easement attaches not to the person, but to the tenements; and will follow with them, notwithstanding any change in the ownership either of the dominant or servient tenements.”—(Norton’s Topics, p. 481.)

The following extract, though treating of Roman law, gives so clear a view of the nature of a servitude, that it seems worth while to add it to that given above. “Where the natural liberty that otherwise would belong to the proprietor is abridged, and his power over what belongs to him is subjected to a right existing for the benefit of another, the property so burdened is no longer free, and is therefore said in the Roman law to be servient, and the liability is called by the Roman law a servitude, and in ours an easement. The essential characters of a servitude, according to the Roman law, were, first, that it imposed no active duty. This is over and over again stated in the Pandects. Such a duty might exist, but it would not be a servitude. It compelled the owner to abstain himself from doing what otherwise would be lawful, or to allow others to do what otherwise would be unlawful. Servitutum non ea natura est ut aliquid faciat quis, sed ut aiquid patiatur vel non faciat. Secondly, it could exist only over the property of another. Nulli enim res sua servit.”—(Roman Private Law, p. 197.)

The origin of easements is either natural, or arising from contract, or created by positive law. It is a natural easement when it originates from the relative situation of the two tenements, as for instance, where land on a lower level receives the rain-fall from that on a higher. Such a right, though a right in alieno solo, is an ordinary incident of property, not acquired by long and continuous user, and in no way dependent on the consent, express or implied, of the owner of the land through which the water-course passes.—(7. W. Reporter, Civil Rulings, p. 498.) In the case of easements founded on contract, the contract may be either express or implied; express as where there is a grant, or implied as where the right is established by proof of the length of time during which it has been enjoyed as a right. (See 6. W. Reporter, Civil Rulings, p. 222.) Among easements created by positive law may be mentioned those constituted under the provisions of Act XII of 1866.

Owing to the operation of the law of specialty and the Statute of Frauds an easement by English law can only pass
by deed under seal, and the Courts have had consequently

to uphold revocations by the grantor of oral licenses, even
after the grantee has been put to expense in acting on them.
But as neither of these portions of English law prevail in
India, there is no doubt but that easement may be acquired
by verbal contract; or at any rate, when a licence has once
been obtained and acted upon, it should not be held revocable
at the option of the grantor, for nemo potest mutare con-
silium in alieni detrimentum. See Norton's Topics of Jurisprudence,
pp. 483—490; and 4. Madras High Court Reports, p. 98.

Upon the severance of a tenement mutual grants will
be implied of those easements, without which the property
cannot in its new condition be enjoyed by its several pro-
prietors.—(Norton's Topics, p. 490.)

When the easement is claimed by virtue of long usage,
it is necessary that the enjoyment of the right should have
been peaceable, open and avowed, and as of right* and not
merely permissive.—(Norton's Topics, pp. 492, 493.) Si
quis diuturno usus et longa quasi possessione jus aquæ ducendæ est
sit, non est ei necesse docere de quo aqva constituta est, veluti
ex legato vel alio modo, sed utilem habet actionem ut essetabilat per
annos forte tot usum se, non vi non clam no precario is the
language of the Civil law from which the rule is borrowed.
But if at first a person have acquired a right of easement
by a user, neither claim nor vinor precario, for the requisite
time, he does not lose his right to claim it because afterwards
he may have used it clam or precario.—(Phillimore's Prin-
ciples and Maxims of Jurisprudence, p. 85.) A user for some
time will not however suffice to establish the right, unless
it be proved to have existed from a time from which the
right would be gained, or presumed to have been gained.—
Muktaram Bhutalcharji v. Haro Chandra Roy.—(7. W. Re-
porter, Civil Rulings, p. 1.) See too Vol. 7. Civil Rulings,
p. 276, where a suit to restrain the defendant from the
use of a road which he had made across the plaintiff's lands
was held to be in time after a user of four or five years;
and there also the Court held that no consent could be
inferred from the fact that the plaintiff did not sue immedi-
ately after the commencement of the preparation or comple-
tion of the road.—Huro Sundari Debi v. Ram Dhan Bhuttar-
the same Court held that a plaintiff not having opposed the
making of a road until it had been completed was not then
titled to have it closed.—(7. W. Reporter, p. 288.) For
the period in which the right can be acquired by adverse
and uninterrupted usage see Tremlett's Limitation Law, p. 46;

* See this also laid down in 3. Bengal Law Reports, Civil Appeals, p. 291,
where it was also pointed out that this use must also be uninterrupted.
also for more recent cases, 10. W. Reporter, Civil Rulings, p. 452; 2. Bengal Law Reports, Civil Appeals, p. 323; and Vol. 3. Civil Appeals, pp. 166, 211, and 325, which cases when taken together seem to show that although there is no positive rule of law of India which requires proof of a twelve years user to establish an easement, or provides that such a finding of twelve years user would be conclusive, yet that generally the Courts will be justified in inferring an ancient user on proof of continuous enjoyment for twelve years as of right.

Presumption arising from enjoyment is rebuttable.

"The presumption arising from enjoyment may be rebutted by proof that the owner of the servient tenement was not capable of acquiescing in the easement, as for instance, that he was an infant, or that he had only a limited interest in the estate"—per Peacock, C. J. in Bagram v. Khetramnath Korformath.—(3. Bengal-Law Reports, Original Jurisdiction, p. 53.)

Proof required.

In the case of an easement alleged to have been acquired by usage and which would result in great damage to the servient tenement, proof of a very conclusive nature should be demanded. And in no case must "the right claimed be so large as to extinguish or destroy all the ordinary uses or profits of the property."—Zumir Ali v. Mussumat Durgabun.—(1. W. Reporter, p. 230.)

Licenses of pleasure.

A mere license of pleasure cannot be assigned: thus, if license be granted to me to walk in another man's garden, or to go through another man's grounds, I may not give or grant this to another; and such a permission, if not previously revoked, ceases at once on the grantor's alienating the estate, in respect of which it had been given.—(Addison on Contracts, p. 124.) The temporary use of a path by sufferance over another's land cannot create a permanent right in favor of the person who had enjoyed it.—Ashutush Chuckerbutty v. Titu Holdar.—(Sutherland's Civil Rulings, for June 1864, p. 293.) A mere license which passes no interest, nor offers or transfers property in anything, but merely makes an act lawful, which without it had been unlawful, is in its nature revocable, and thereby differs from a license coupled with the creation of an interest, which latter when it exists in a valid form operates as a contract of a gift or grant, and is subject to the same incidents and is as binding and irrevocable as any other contract, gift or grant.—Krishna v. Rayappa Shenbaga.—(4. Madras High Court Reports, p. 98.)

Rights of way.

One of the most common of all easements is that of a right of way. These rights are of various kinds. They may be limited to particular modes of passage, carriage ways, horse ways, foot passenger ways, cattle trifts. They may be for the transport of particular kinds of goods only. They
may be limited to particular seasons or occasions, as crossing fields after the crops are cut, or in order to go to market. [In such cases the right may be established by showing that it had been exercised at these certain seasons of the year only.—10. W. Reporter, Civil Rulings, p. 364; and Vol. 1. p. 218.] Though the rule *omnia majus continet in se minus* is not inapplicable, and a carriage way may include a horse or foot passenger way, yet it will be for the Judge to determine in each case the extent of the particular rights; for though a man may be presumed to have permitted or granted a right of way to one class, it by no means follows that this includes any other. Thus a right to drive sheep does not necessarily imply a right to drive horned cattle, nor a right to drive unloaded a right to drive loaded animals, since the owner of the way might be prevented planting or be obliged to lop his trees to permit the passage of loaded cattle, where he would not for unloaded. So, in the leading case of *Bullord v. Dyson*, the majority of the Court, on an application for a new trial, held that though the plaintiff had established a right of way for all manner of carriages to his premises, this did not authorize his driving oxen thither for slaughter.—*Norton's Topics*, pp. 522 to 528.) The right of way imports only a right of passing in a particular line, and not the right of varying it at pleasure, and therefore a Court has no power to establish a new track, when there is no doubt as to the old one, from any idea of convenience, except of course all parties concerned agree to the alteration.—*Keenan v. Dewan Jawahir Mull*—(2. Punjab Record, Case No. 80.) So too, in *Goluk Chandra v. Tarini Charan Chuckerbutty*, a majority of a Divisional Bench of the Calcutta Court held that a claim to a particular right of way across the defendant's land was not met by the latter allowing the plaintiff to cross in another place.*—(4. W. Reporter, Civil Rulings, p. 49.) Neither is the right defeated by proof that it is injurious to the defendant's property, and that the plaintiff would be none the worse for the right being denied him.—*Ramsundra Baral v. Wumakanth Chuckerbutty.*—(1. W. Reporter, p. 217.)

The owner of a piece of land between a public road and the village, who, so long as it lay uncultivated, had allowed the cattle of his neighbours, and occasionally the neighbours themselves, to make short cuts across it, was held not to have created thereby a right of easement over the ground, the practical effect of which would be to deprive it of all value, by rendering its cultivation impossible.—

* Conversely, it was held in *Radhanath Sugorakharji v. Baidhanath Seal Kobiraj*, on the authority of this case, that if the plaintiff fail to prove his right of way over the particular line claimed, he is not entitled to a decree because the investigation shows generally that he had a right by user to pass over the lands.—(3. Bengal Law Reports, Appendix, p. 118.)

Where the right of user of a drain or passage is incidental to a house, that right is not affected by the owner letting it to a tenant.—Missumat Amjadi Begum v. Ahmad Hossein.—(6. W. Reporter, Civil Rulings, p. 314.)

In the case of the partition of joint property it must be borne in mind that the right enjoyed by a co-sharer in passing along a particular path before partition may have been simply in virtue of his rights of joint ownership in the soil, and not be referable to a right of way which necessarily relates to the land of another person; and consequently, on a division taking place and this land becoming the sole property of another sharer, the rights of ownership of the other sharer in this land ceased, and with it any right to pass and repass along the old path based on such joint ownership.—Obhoy Charan Dutt v. Nobin Chandra Dutt.—(10. W. Reporter, Civil Rulings, p. 298.)

When land is taken up for a Railway under the provisions of Act VI of 1857, by virtue of Section 8 of the Act, the land becomes vested in the Government absolutely and free from rights of way or other interests previously existing therein, and no right of way can afterwards arise, or be continued, merely because a man has no mode of access to his land on the opposite side of the line but by crossing it. It is however open to a person to show that the Railway Company have by their representations and conduct laid themselves under a legal obligation to provide a road or crossing, and if he succeed in doing so the Courts will enforce the obligation.—The Collector of the 24 Pargunnahs v. Nobin Chandra Ghose.—(3. W. Reporter, Civil Rulings, p. 27.)

The Civil Courts have jurisdiction to set aside a Magistrate's order to open a road across another person's land.—Kadir Mahammad v. Mahammad Safer.—(1. W. Reporter, p. 277.) But in Pyari Lall v. Rooks, which was a suit to set aside an order which the defendant had obtained from the Magistrate under Section 320 Act XXV of 1861, the Calcutta Court took a different view, and held that the Civil Court had no jurisdiction to enquire into a public right per se. If any person should exceed the true right enjoyed by the public over the plaintiff's land, and the plaintiff should be damaged thereby, he would have a right of action against that person for trespass, and ancillary to such a question whether a party has been injured in his private capacity, the Civil Court might go into the question as to whether there were a public highway, but not otherwise.—(3. Bengal Law Reports, Civil Appeals, p. 305.)
Where the plaintiff sues to establish his proprietary right to land and fails to prove his case, it is an error for the Court to enter upon any question as to the plaintiff's right to an easement over the ground, that point not being raised in the plaint.—_Lalji Ratanji v. Gunga Ram._—(2. Reid's Bombay High Court Reports, p. 184.) See also 1. Stokes' Madras High Court Reports, p. 477.

On the principle that a private mischief shall be endured rather than a public inconvenience, when a highway is out of repair and impassable or under flood a passenger may lawfully go over the adjacent land; as it is for the public good that there should be at all times free passage along thoroughfares for all comers—(Brown's Loyal Maxims, p. 3.) See Phillimore's Roman Private Law, p. 138, for a like rule in Roman law.

Analogous to rights of way, are rights to water-cuts from rivers and canals for irrigation, mill-leets in the hills, water channels to and from manufactories, rights to carry drains across the premises of another. Under the Civil law a part owner of a drain on giving security had a right to enter on his neighbour's premises to repair it.—(Phillimore's Roman Private Law, p. 184.)

The easement of light to windows when acquired prevents a man building on the servient tenement so as to exclude the light (but not the view) from coming as aforetime to the dominant tenement. If however the party entitled to the ancient windows alter or enlarge them, it would seem that he does not entirely lose the right he before enjoyed of receiving light and air through such portions of the actually existing windows as formed portions of the ancient windows before the alteration. But he acquires nothing by the act of alteration in addition to his former right; and if by the alteration he have exceeded the limits of that right, and have put himself in such a position that the excess cannot be obstructed by the owner of the adjacent soil in the exercise of his lawful rights on his own land, without at the same time obstructing the former right of the owner of the dominant tenement, the party enlarging the windows must be deemed responsible for such a state of things, and must be considered to have lost his former right, at all events until, by restoring his windows to their former state, he throw on the owner of the servient tenement the necessity of so arranging his buildings as not to interfere with the right originally possessed.—(Broom's Commentaries on the Common Law, p. 778.) See too Norton's Topics, pp. 520—522. Nor does an alteration in the character of the dominant tenement give the possessor a right to increased

If the plaintiff claims proprietary right he should not be decreed a right of easement.

If the highway be blocked up, passers by may go over the adjacent land.

Analogous easements.

Easement of light.
light: * thus, for instance, where a malt-house had been converted into a dwelling, it was held that the plaintiff could only demand for it the limited light which it had previously received, and which had been adequate so long as it remained a malt-house.—(Norton's Topics, p. 519.)

It is no answer to a suit for obstructing ancient lights to plead that the party complaining has other windows on another side of his premises, since he is entitled to retain the light and air he has always had; and no arrangements are sufficient which, while leaving the light as before, yet shut out the ancient supply of air.—Puran Maddak v. Uday Chand Mallick.—(3. W. Reporter, Civil Rulings, p. 29.)

A right to enjoy uninterrupted access to a house of the breeze from a particular quarter cannot be acquired merely by a presumption arising from user; but if it exist, it must be by virtue of an express grant.—Bagram v. Khettranath Karformah.—(3. Bengal Law Reports, Original Jurisdiction, p. 18.)

Where a person chooses wilfully to obstruct the ancient light and air to which his neighbour is entitled, the Court will direct the removal of the obstruction, since money damages will be no compensation.—Mahammad Hossein v. Jafur Ali.—(4. W. Reporter, Civil Rulings, p. 23.) But where the plaintiff's rights of egress for smoke and ingress for air could be sufficiently attained by apertures being made in the wall which the defendant had already built, the Court contented itself with ordering these apertures to be made, and abstained from directing the demolition of the entire wall.—Bahari Sahu v. Mussumat Ajnas Kunvar.—(6. W. Reporter, Civil Rulings, p. 86.)

As of natural right a man is only entitled to support for his soil in its natural state, he can claim no additional support if he choose to load the border of his estate with buildings, except he have acquired additional rights by express or implied contract.—(Norton's Topics, pp. 529—533.) See above at p. 657 of this Chapter. The following extract from the digest shows the minute care with which

* In Bagram v. Khettranath Karformah the Calcutta Court ruled that "principles of general convenience, upon which the presumptions of right to light by prescription or grant depend, require that lights in a dwelling house which have been uninterruptedly used for a long time should not be darkened so as to render the house unfit for comfortable habitation, but they do not require such a presumption as would impede the erection of buildings on the servient tenement which would not deprive the dominant house of any degree of what was reasonably necessary for comfortable habitation." If therefore the light which passes to the dominant house be still sufficient for comfortable habitation, an action will not lie because the additional amount which it formerly possessed, and which was merely delectatio habitantis may have been diminished.—(3. Bengal Law Reports, Original Jurisdiction, p. 18.)
the Roman law protected a man’s ground from being unduly burdened by the acts of the owner of the neighbouring estate. “Si quis sepem ad alienum praedium fixerit infodertique, terminum no exceditio si maceriam, pedem relinquit; si vero domum, pedes duos; si sepulchrum aut scrobem foderit, quantum profunditate habernerint, tantum spatii relinquito; si puteum, passus latitudinem.—(Dig. LX. 1. 13.)

Among other easements may be mentioned:—the right of support to buildings by buildings;* a right frequently existing in towns and villages. But in this case no unnecessary burden must be cast on the servient tenement, and therefore the dominant tenement must be kept in repair.—(Norton’s Topics, p. 534.)

The right to insert a beam in an adjacent wall: but although, observes Phillimore, the Civil law did not require, as a general rule, the owner of the servient object to keep it in repair, yet, in this particular case, the owner of a wall, supporting the beam of another man, might be bound to repair it. “Evaluat servii sententia in proposita specie, ut possit quis defendere jus sibi esse cogere adversarium reficere pari tem ad onera sua sustinenda.”—(Roman Private Law, p. 199.) When the wall or pillar of one man sustained the weight of the building of another, the owner of the servient building might exonerate himself by relinquishing the property.—(Phillimore’s Roman Private Law, p. 201.)

The right of shedding the rain-fall on a neighbour’s roof or ground. With reference to this easement Mr. Norton quotes the following—“Stillicidium quoquo modo acquisitum sit, altius tolli potest, levior enim fit eo facto servitus—cum quod ex alto cadet lenius et interdum direptum, nec pervenet ad locum servientem—inferius demittit non potest, quia fit gravior servitus, id est pro stillicidio flumen. Eadem causa retro duci potest stillicidium, quia in nostro magis incipiet cadere; produci non potest, ne in alio loco cadat stillicidium quam in quo posita servitus est: lenius facere poterimus, acius non. Et omnino surnium est meliorum vicini conditionem fieri posse, deteriorem non posse, nisi aliquid nominatim servite impovenda immutatum fuerit.” In this country, where the rain-fall is frequently discharged not by a drop from the eaves (stillicidium,) but by means of water pipes, the easement would, I presume, be made more burdensome by increasing the height of the dominant tenement, as the abrasion would be proportionately increased. If

* Mr. Norton observes that “a nice observation occurs here: suppose a man to have built perfectly perpendicularly there could be no pressure on the adjacent house, and if not, though there may in fact have been long-continued pressure was it not claim, not open?”—(Topics of Jurisprudence, p. 534.) The writer expressly excludes the case where the support is open, as by the insertion of beams or rests in the contiguous wall.
without license a man build so near his neighbour's premises that his roof overhangs them and throws the water of his roof upon them, an action will lie for the nuisance, even without proof that any water has as yet fallen or been discharged.—(Broom's Commentaries on the Common Law, p. 776.)

The following rules regarding easements, though taken from Roman law, are evidently of general applicability.

A servitude may not be extended beyond reasonable limits: it is to be enjoyed "civiliter." An absolute right granted to Titius of walking at his pleasure over the lands of Caius does not authorize Titius to walk over the vines of Caius, or into his drawing room, or to inflict wanton mischief on his property.—(Phillimore's Roman Private Law, p. 199.)

It cannot exist unless it be for the benefit of somebody, quod nihil vicinorum interest non valet.—(Roman Private Law, p. 199.)

The grant of a servitude tacitly carries with it the allowance of all that is in reason necessary for its enjoyment.—(Roman Private Law, p. 199.)

An easement can probably in India be extinguished by a parol agreement. It is also destroyed by non user, whether the easement be a natural, or an acquired, right, see 7. W. Reporter, Civil Rulings, p. 498; but in cases of non-user, the Courts should try whether the interruption was merely wrongful, or acquiesced in by plaintiff, and if wrongful, the period over which it had extended—7. W. Reporter, Civil Rulings, p. 367, or by any act showing an intention to abandon the right: thus, in Moore v. Rawson, the plaintiff pulled down a wall containing ancient lights, and rebuilt it as a stable-wall without any windows; many years later he opened a window in this wall, and sought to compel the defendant to remove the building which he had raised in the meanwhile in front of the stable-wall; but the Court held that his action would not lie. The judgments delivered in this case in the Court of King's Bench are given in the Topics of Jurisprudence, and should be consulted. So where a party remained silent while the defendant built upon a site across which he had a right of way, the Calcutta Court refused to recognize his claim seven years afterwards to have the house removed, holding that his conduct was such as to warrant an inference that the defendant had the plaintiff's acquiescence in what he did, and that the latter had assented to a diverting of the right of way.—Beni Madhab Dass v. Ramjay Roch.—(1. Bengal Law Reports, Civil Appeals, p. 213.) Where the right can only be used at intervals, of
course it is not destroyed by non user, as in the case of fountains, which are dry for long periods, and then burst forth again. When there has been an encroachment by the possessor of the easement, and its amount can be ascertained and separated, it may be so, and the original easement will remain: but if reparation be impossible, the easement is lost.—(Norton’s Topics, pp. 543—550.) An easement is also destroyed, as we have seen above, by the dominant and servient tenement coming into the possession of the same person, or by the owner of the easement allowing the person affected by it to do something, which makes the exercise of the right impossible.—(Landar’s Institutes of Justinian, p. 210.)

On the subject of easement, Norton’s twenty-sixth Topic, to which I am indebted for the major part of these notes, should be carefully perused; so too, the earlier portion of the thirteenth Topic, the Institutes of Justinian, Lib. II. Tit. III. and IV. with the notes by Mr. Landars, and Chapter VIII of Phillimore's Roman Private Law.

A man must not allow his property to become so ruinous as to imperil his neighbour.

Improvements in alieno solo.

References.

A man is bound to repair his own buildings if they be in such a state as to threaten injury to his neighbour, and to remove what else may cause reasonable apprehension.—(Phillimore’s Roman Private Law, p. 149.)

We now pass on to consider the rights resulting from a man expending his means or labour in building on the soil of another. The question may present itself in four ways, according as the erection be made by a joint-owner, a workman, a tenant, or an occupier with a bad title.

Improvements effected by a joint-owner.

In the case of the joint-owner, Mr. Norton observes that “where one of several joint-owners lays out his money in repairs or improvements for the common benefit, he shall have a lien for the amount, for nemo debet locupletari, ex alterius incommodo;” and he adds in a note—“Though at common law a joint-owner is not entitled to sue his joint-owner for contribution on account of expenses, which the former has voluntarily incurred, without any express contract between them, for repairs, &c., to the common property, yet the equitable doctrine of the Roman law prevails in our Equity Courts.”—(Topics of Jurisprudence, p. 391.) In this Province however, where the custom of keeping the family immovable property undivided, while the personal estate is divided and used in trade, is so prevalent, and where, in consequence, there are frequently great differences in the wealth of the co-sharers in the immovable property, this doctrine requires to be applied with caution, and the Courts should be on their guard against allowing the wealthy co-sharer to improve his poorer brethren out of their common heritage. In Brojonath Mazundar v. Ram Kamal, where a
man erected a house on the common land though the joint tenant all along impugned his right to do so, the Calcutta High Court upheld the order of the lower Court for the demolition of the house though completely built.—(Sutherland's Civil Rulings for May 1864, p. 258. But in a suit to compel the demolition of a wall which the defendant had built on land he held jointly with the plaintiff, the Calcutta Court held "that, even if the defendant had not a strict legal right to build the wall upon the joint land, this was not a case in which a Court of Equity ought to give its assistance for the purpose of having the wall pulled down. A man may insist upon his strict rights, but a Court of Equity is not bound to give its assistance for the enforcement of such strict rights. It appears that this is a case in which apparently no injury to the plaintiff has been caused by the erection of the wall, and that, therefore, the plaintiff ought to be left to such remedy as he may have without applying to a Court of Equity for assistance in having the wall demolished. He may, if he may think fit, apply for a partition; but I do not think it would be equitable, after the defendant has gone to the expense of building the wall upon the land of which he was a joint owner, to have that wall demolished at the suit of his joint co-sharer, without showing that it causes any injury to the plaintiff."—Lalla Biswambhar Lall v. Rajaram.—(3. Bengal Law Reports, Appendix, p. 67.) Where too, a plaintiff seeks the demolition of a building on the ground that it is erected on land belonging to him alone, and the investigation shows that the land is common property, the only course is to dismiss the suit entirely.—Nobin Chandra Mitra v. Makes Chandra Mitra.—(3. Bengal Law Reports, Appendix, p. 111.)

The following passage from Mr. Addison's Work on Contracts, (p. 412.), shows the rules of English and Roman law on the subject of the right of a workman to compensation, when the erection he is employed to make on the ground of another is destroyed before completion:—"If the contract be entire for the performance of a specific work for a specified sum, so that the performance of the whole of the work bargained for and agreed to be done is a condition precedent to the right to payment for any part of it, the workman will be deprived of all legal right to remuneration if the work be destroyed by accident before it have been completed; but if the workman be entitled to payment from time to time as the work proceeds, the destruction of the work before its completion will not deprive the workman of his hire. Thus if the contract be an entire and indivisible contract for the building of a house for a specified sum to be paid on its completion, and the edifice be destroyed by lightning, fire, or tempest, during the progress of the work, the contractor must stand to the loss; and be himself at the
expense of repairing the damage. But if the contract price of the building be to be paid by instalments on the completion of certain specified portions of the work, each instalment becomes a debt due to the builder as the particular portion specified is completed, and if the house be destroyed by accident the employer would be bound to pay the instalments then due, but would not be responsible for the intermediate work and labor and materials. In the Roman law, if a builder were employed to build a house on the land of the employer, and the building were overthrown by an earthquake, or destroyed by lightning, during the progress of the work, the employer was accountable both for the materials which the undertaker of the work had furnished, and for what was due on account of the workmanship, inasmuch as the materials and the produce of the labor became the property of the employer as soon as they were fixed on the land; but if, by an express contract between the parties, the payment of the money was made conditional on the completion and approval of the building, so that nothing was due until the whole of the work had been performed, then the builder lost both the value of his materials and of his workmanship, and was bound to reconstruct the building before he called upon the employer for payment.

"The Hindu law," writes Mr. Norton, "permits the mortgagee or tenant in possession to recover the value of improvements at the termination of his estate."—(Topics of Jurisprudence, p. 391.) So in Mussumat Zuhirun v. Bansai and Hazari, the Chief Court observed that, as it was clearly established that the appellant was the owner of a fourth share of a piece of building land, she was entitled to eject the occupants who had built on the land, with the consent of one of the proprietors of a half share, on her paying them compensation.—(2. Punjab Record, Case No. 21.)

In Yar Muhammad v. Mussumat Rahman, Boulois J. delivered the following judgment:—"I think the case must be remanded at once on the first point referred to in the judgment of the Lower Appellate Court. Is it the fact that the tenant repaired, or pulled down and rebuilt the house for his own pleasure? Or is it the fact that the tenant asked to be allowed to make a few additions? The case turns mainly upon the request originally made, for the action fails altogether unless the repairs were done at the defendant's request. The plaintiff must not be permitted to improve the property out of the defendant's possession into his own; and the price or value of the work done is a secondary consideration altogether. If there were no clear request (and the judgment of the lower Appellate Court proceeds on the ground that there was not) and no subsequent ratification,
the tenant has done what tenants carefully guard against, as a
rule, that is, improved his lessor's property without the right
to be remunerated. The defendant's agent says (thereby
expressly raising the point) that she agreed only to go to
the expense of Rs. 50. If that were so, and the tenant
spent Rs. 500 or 1,500, it was, after repayment of the Rs.
50, entirely for the benefit of the defendant. It must be
clearly understood that an agent cannot admit a fact against
his client's interest, in the way that he is stated to have
done in this case. If the agent admitted the request,
while his client denied the request, he had no authority to
make such an admission. There should have been a distinct
finding by the Court on the point. The first Court seems
to have omitted this point, thereby neglecting the very
foundation of the case. A plaintiff has no kind of equitable
right to compensation, if he choose to spend money on another
person's property. A tenant moreover has peculiar oppor-
tunities of 'improving' property into his own hands,
especially when he is also a contractor. The Commissioner
seems to have taken a perfectly right view of the case, and
might have remanded it at once. The admission of the
agent entitles the appellant to the costs of the second
hearing."—(1. Punjab Record, Case No. 48.)

For improvements effected by a mortgagee in posses-
sion, see Chapter XIV of this work.

The law prevailing in this Province with reference to
improvements by one whose title is found to be bad is fully
discussed by Boulosit J., in the case of Kishen Chund v.
Kunhya Lall. "The facts of the case," he observed, "are
as follows:—On the 8th of February—Mall conveyed by
deed the house to the plaintiff. The boundaries of the
premises are defined in the deed. The shop then had one
storey, and in the south-west corner was a chabootra. A
second storey has since been added to the original shop, and
another single-storied shop has been built in place of the
chabootra. The claim is in reference to the latter shop.
There is no doubt that it was built by Boodha, son of Kunhya
Lall. The plaintiff's case is that Boodha was his agent, who
used to manage his business and collect his rents, and
occupied in consideration of his so doing the small shop free
of rent. Boodha is now dead, but, on the 19th of July 1860,
he mortgaged the small shop, without the plaintiff's know-
ledge, to Sukka. The defendant's case is that the shop was
built by Boodha at his own expense, and mortgaged to Sukka
for Rs. 150, that is to say, Rs. 125 taken by himself, and
that Rs. 25 was obtained by Kunhya Lall for the funeral
expenses of Boodha, by way of further charge on the shop.
On the occasion of the trial before the Tahsildar, arbitrators
were appointed by that officer, and the parties agreed, on
the 16th of June 1865, to abide by their award, which they gave on the 17th. Their award was that the plaintiff had not the proprietary right, but only the right of pre-emption; that plaintiff could obtain the house by paying the sum for which it was pledged to Sukka; and that if the building should be sold, plaintiff should have the refusal. The parties agreed to the award, but the plaintiff urged an objection to the amount of the alleged mortgage. The Tahsildar dismissed his claim. It is quite clear that the award between the parties was wanting in the essential requisite of every award, which is that it should be final between the parties. The award disposed of the plaintiff's claim to the proprietary right, but left him with a claim to some indefinite payment. Upon this award, the decision on appeal to the Deputy Commissioner turned. According to the judgment of that Court, the plaintiff was estopped by his own act, the submission to arbitration, and the appeal as respects his proprietary right could not be admitted. But the Court reserved for future adjustment, should occasion arise, the price at which the plaintiff could redeem the house, or if put up to sale could buy it. The Commissioner, on appeal to his Court, said—' In this case I think it must be considered that plaintiff did not understand the intent of the arbitrator's decision? I think that all he could have understood was that he was to pay the expenses which Boodha had incurred, either to his heir or to the mortgagee. This explains his attestation—that he agrees, but that the alleged mortgage is above its value. The decision will therefore now stand that the house is defendant's, but being built on plaintiff's land he is to have the right of paying the expenses incurred upon it and taking it. The expenses to be ascertained either by masons or arbitrators. The amount of the mortgage has nothing to do with it.' This decision in my opinion was quite right. There is sufficient obscurity about the award, and sufficient doubt as to the fact whether the plaintiff ought to have understood it to negative his right to do anything, but wait till such time as the occupant might choose to sell it, to justify interference with the award. In fact, the first Court of appeal, while holding the plaintiff to so much of the award as dealt with his title to the shop, left the question as to his immediate right open between the parties; consequently the entire question had been rightly, as I think, considered by the Commissioner, and he had decided it with reference to a most important principle.' In the Institutes of the Civil Law it is laid down, that if a man build with his own materials on the land of another, the building belongs to the owner of the soil; and by the same law, where buildings were erected upon, or improvements made, to property by the party in possession, bona fide and without notice of any adverse title, compensation was allowed for such buildings and improvements to the party making them, as against the rightful
owner. The reason given was *qua omne quod solo inediticatur solo cedit.* The general rule is the same in the English law, but the principle of compensation is not fully recognized by the English law, nor indeed, though it is regarded to a certain extent, by the Courts of Equity. As to the equity arising from valuable and lasting improvements, "I do not consider," said the Judge in a case cited in Broom's *Legal Maxims*, p. 389, "that a man who is conscious of a defect in his title, and, with that conviction on his mind, expends a sum of money in improvements, is entitled to avail himself of it. But the Courts in this country have laid great stress on the equity arising from the permission to erect, and have apparently ignored the general principle above referred to. In *Gungo Bibi v. Debidyal*, decided on the 30th of January 1862, it was held that a person, who was adjudged, subsequent to the erection of certain buildings on a piece of land, to be the proprietor of that land, was under the circumstances of the case not entitled to recover possession of the land, but only its value. In that case the Court said that the principle is laid down in *Pagose v. Nyanullah*, dated 21st September 1858, namely, that a suit for demolition of buildings should be brought when the infringement of right by their construction is first threatened or commenced; and if a party suffer the erection, his consent is to be implied, and he must fall back on an action for damages. On the other hand, in the case of *Kallu v. Kalut*, in 1855, where a chabutra opposite to a former closed up door of the plaintiff's house-wall and belonging to plaintiff's premises, had been occupied for many years on suf-

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* The passage from the Institutes here referred to is as follows:—" *Ex diverso si quis in alieno solo sus materiae domum adificaverit, illius fil domus ejus et solam est. Sed hoc casum materiae dominus proprietatem ejus amittit, quia voluntate ejus intelligitur alienata, utique si non ignoratam se in alieno solo adificare, et ideo licet diruta sit domus, materiam vindicaret non potest. Certa illud constat si in possessione constituto adificatore, soli dominus petat domum suam esse, nec solatium primum materiae et mercedes fabrorum posse cum per exceptionem doli mali repellit, utique si bona fidei possessor fuerit qui adificavit; nam scienti alienum solum esse potest objecti culpa, quod adificaverit temere in eo solo quod intelligeret alienum esse."— (Inst. Justiniani, Lib. II. Tit. I. 30.) Mr. Landers remarks on this that there are passages both in the Digest and Code, not quite in accordance with the rule here given in the words of Gaius, that a man, building with his own materials on what he knew to be the land of another, lost all property in them, and was held to have voluntarily alienated them, and which would make it appear, that if the owner of the materials could show that it was not his intention to give them to the owner of the land he could recover them, or their value.

† The whole passage and context, pp. 387—383 of the Maxims, deserves careful perusal. On the authority of this case apparently the Calcutta Court, in *Sriharry Roy v. Hills*, refused to allow the plaintiff to recover the value of improvements affected on property belonging to the defendant, of which the plaintiff had obtained temporary possession by legal proceedings, but to which he was aware at the time his title was denied by the defendant, the plaintiff being aware also that he was a trespasser.—(6. W. Reporter, Civil References, p. 21; and Vol. 7. Civil Rulings, p. 477.)
ferance, the Principal Sudder Ameen decreed the case in the plaintiff's favour, and the Court dismissed a special appeal, on the ground that there was a definite finding on the facts of the case in the decision that the possession has been merely permissive, and "as a depository on the part of the owner." In the Presidency towns, in cases to which the English law is applicable, by Act* XI of 1855, the value of improvements made by bona fide holders under defective titles is secured to them, and the Act at the same time gives the holders the right at the option of the person causing the eviction, to purchase the interest of such person in the lands at the value thereof, "irrespective of the value of such building or improvement." This recognizes in the Presidency towns the rule quidquid solo inauditatur solo cedit, and is not applicable to Europeans alone. At the same time, the Act provides for compensation. Accordingly, in this country it seems clear that not only has the right to compensation been well established, but the Courts have gone much the other way. The circumstances, however, in my opinion, under which the erection is suffered must partake of the nature of induce- ment on the part of the owner of the soil, and there must be more than mere permission, in my opinion, to cause an equitable transfer of the right of property from the owner of the soil to the builder of the shed. The compensation, if not agreed on, can be fixed in the manner prescribed by the decree of the Lower Appellate Court, and must be paid by the plaintiff."—(1. Punjab Record, Case No. 42.)

"We think it clear," observed a Full Bench in Thakur Chandra Paramaniok v. Ramdhan Bhuttacharji, "that according to the usages and customs of this country, buildings, and other improvements made on land do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil: and we think it should be laid down as a general rule that if he who makes the improve- ment be not a mere trespasser, but be in possession under any bona fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it be allowed to remain for the benefit of the owner of the soil—the option of taking the building or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."—(6. W. Reporter, Civil Rulings, p. 228.) This over-rulesthe previous decision in this case given in Vol. 2. Civil Rulings, p. 123, and apparently also a decision given in Vol. 1. p. 277, though the facts are not referred to as fully in that judg-

° This Act is given at the end of this Chapter.
A party standing by and allowing another to build on his land cannot afterwards demand the demolition of the building.

Ownership of a building partly erected by contributions.

But where the plaintiff had stood quietly by and allowed the defendants to build a house on his land, he was held to be estopped from subsequently demanding that the house should be pulled down, and was considered only to be entitled to rent or to compensation in a lump sum.*—Bhika Singh v. Harjus.—(1. Punjab Record, Civil Reference No. 7.) In this case however the right of the plaintiff to entry on paying the value of the house as it stood, does not seem to have come before the Courts. A like decision of the Calcutta Court will be found in Sutherland’s Civil Rulings, for April 1864, p. 166, and in 3. Bengal Law Reports, Civil Appeals, p. 15, where the Court expressed an opinion that if the legal owner stood by and allowed his land to be sold to the defendant, and then acquiesced by his silence while the latter built and planted on the land, it became a question whether the utmost to which the plaintiff was entitled was not to get a reasonable rent from the defendant. But see 7. W. Reporter, Civil Rulings, p. 276.

Where a party had built a school house on his land, the funds for the erection of which had been partly contributed by the villagers for whose benefit it was intended, but never parted with the ownership of the building, the Calcutta Court held that on his ejecting the school committee, he was bound only to pay back the amount of the contributions he had received from the other subscribers.—Srihari Roy v. Hills.—(7. W. Reporter, Civil Rulings, p. 476.)

In Ramzan v. Gul Mohammad Baksh the Chief Court observed that “the utmost which a man can acquire by planting and cultivating on the land of another without a contract express or implied, is a right to compensation. Possibly a suit might lie for that, because the defendants undoubtedly stood by, and now seek to avail themselves of what was permitted by Ullahdad. But it seems that the action should be against Ullahdad, if it all. The rule is quidquid plantatur solo solo cedit.”—(1. Punjab Record, Case No. 61.) And in a suit to recover the value of crops raised by the plaintiff on the defendant’s land and taken away by

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* “If an equitable owner of land, who is conscious of his right, will stand by, and see another improve his land without asserting his right to it, he must be satisfied to recover the value of the land, independent of improvements.”—(Phillimore’s Principles and Maxims of Jurisprudence, p. 41.)
the latter, the Calcutta Court held that "the plaintiff would have no right to recover the value of the crops from the defendant, unless he either had good right as against the defendant to occupy and cultivate the land, or that he had been led by the conduct of the defendant to suppose that he had such right. If the Court be of opinion that the plaintiff have cultivated the lands in question for two or three years, and have so cultivated them, or even for the last year have cultivated them, to the knowledge of the defendant, that will give him a right as against the defendant to the produce of the lands, even though he (the plaintiff) may not be able to make out a title to the occupation."—Ubayya Charan Sain v. Ram Hari Udikari.—

(10. W. Reporter, Civil Rulings, p. 300.)

The Institutes of Justinian thus apply the general rule, that the accessory follows the principal, in the cases of trees and crops. "Si Titius alienam plantam in solo suo posuerit, ipsius erit, et ex diverso si Titius suam plantam in Mævii solo posuerit, Mævii planta erit; si modo utroque casu radices egerit; ante enim quam radices egerit, ejus permanet cujus et fuerat. Adeo autem ex eo tempore quo radices agit planta, proprietas ejus commutatur, ut si vicini arbor ita terram. Titii presserit ut in ejus fundum radices egerit, Titii effici arborem dicamus; rationem enim non permettere ut alterius arbor esse intelligatur quam cujus in fundum radices egisset. Et ideo propo confinium arbor posita, si etiam in vicini fundum radices egerit, communis fil." And again—"Sua ratione autem plantæ quæ terra coalescunt, solo cedunt, eadem ratione frumenta quoque quæ sata sunt solo cedere intelliguntur. Ceteram sic ut is qui in alieno solo edificaverit, si ab eo dominus petat edificium, defendi potest per exceptionem doli mali secundum ea quæ diximus, ita ejusdem exceptionis auxilio titus esse potest is qui alienum fundum sua impest bonâ jide conservit."—(L. II. Tit. I. 31, 32.)
CHAPTER XXIII.

PART II.

Sale of Real Property.

In a case of sale of real property, the vendor must be prepared and able to convey to the purchaser an estate, substantially corresponding with that bargained for, both as regards tenure, situation, condition and natural advantages. Any misdescription on so material a point, that it may reasonably be supposed that but for such misdescription the contract would never have been made, at once releases the purchaser from his agreement, and even if the conditions of sale provide that errors and misdescriptions shall not avoid the sale, but that an abatement shall be made in the purchase money by way of compensation, the provision will extend only to unintentional errors and mis-statements in matters of detail, not materially altering the subject matter of the contract itself, for no man is bound to take an estate or interest materially different from that he agreed to purchase.—(Addison on Contracts, p. 83.)

The following misdescriptions have been held of sufficient importance to entitle the purchaser to refuse to complete his bargain and to recover back his deposit on the ground that the vendor had not tendered him what he bargained for, though the contract contained the provision that errors and mis-statements should not vitiate the sale:—A lease described as containing a restriction against offensive trades, whereas it contained a restriction not only against offensive trades, but also against some which were perfectly inoffensive: houses described as Nos. 3 and 4 whereas they were Nos. 2 and 3: a redeemable estate or a redeemable annuity issuing out of land described generally as "an estate" or "an annuity," no notice being taken of its being subject to redemption: a plot of ground, described generally on a plan, without notice of a right of way over it, whereas there was such right, on the part of the occupiers of an adjoining house, their servants and families: leases described as containing particular covenants on the part of the lessees, whereas no such covenants existed: a dwelling house described as a "brick-built dwelling house," whereas parts of the external walls were composed only of lath and plaster: a factory described as well supplied with water, whereas there was no natural supply, but the water was procured at a great cost from a water company: a timber estate described as containing trees of an average size of fifty feet, whereas the average size appeared to be twenty two feet only. So, if tenants in common contract for the
SALE OF REAL PROPERTY.

But not so, if the error or defect be trivial.

But if the thing tendered to the purchaser substantially correspond with the description, and some trifling defects only exist, easily measurable by a pecuniary standard, the purchaser will be bound to complete his contract, on receiving a proportionate abatement in the price; and if he must have known the true state and condition of the property, and could not have been misled or deceived by the misdescription, he will not be allowed to put it forward for the purpose of defeating the contract; or if he proceed with the treaty after he be aware of the misdescription, and make no objection, he will be considered to have waived his right to do so. If the price of an estate be not regulated by the acreage, but by its peculiar situation or adventitious value, and the quantity be stated as mere matter of description and opinion, and not as the result of actual admeasurement, the purchaser may be compelled to take the estate without an abatement in the price, even when the actual falls short of the estimated quality. If the price have been regulated by the acreage, and the quantity have been innocently misrepresented by the vendor, the purchaser has a right to what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation. This is the rule though the land be neither bought nor sold professedly by the acre, the presumption being that in fixing the price regard was had on both sides to the quantity which both supposed the estate to consist of. The words "more or less" or "thereabouts" will only cover a moderate excess or deficiency, and will never be suffered to be the instrument of fraud.—(Addison on Contracts, p. 86.)

"It is not every wilful false statement," writes Mr. Addison again, "made with full knowledge of its falsehood that will amount in judgment of law to a fraud, so as to enable a purchaser to avoid a contract of sale. The ordinary praise or commendation, for example, bestowed by a vendor on the wares he sells, though embodying statements of fact, known by the party making them to be not strictly true, does not vitiate the contract of sale. Again, de minimis non curat lex, and therefore, if a man represent his house to be in good repair, and a few tiles are off the roof, or two or three of the joists under the floor near the damp ground are rotted with the damp, or a pane of glass is broken in a garret window, such trifling defects, to use the language of Lord Kenyon, are mere bagatelles, and afford no evidence of mala fides."—(Addison on Contracts, p. 240.)
But if a vendor know that he has no right or title to property, or be cognizant of the existence of incumbrances or outgoings upon it, or of latent defects materially lowering its value in the market, and sell without disclosing such defects to the purchaser, the fraudulent concealment will be held to vitiate the bargain. [See for an application of these principles the case of Pyari Mohun Sur v. Abdul Subhan, in 7. W. Reporter, Civil Rulings, p. 258, where the bargain was held to be void, and the vendee entitled to recover the whole purchase money with interest, because the vendor had asserted that the estate was free from any incumbrance and that there was nothing to stand in the way of the purchase, whereas in reality the vendor was at the time under a binding contract, on which he had received an advance, to sell to a third party.] But in a general sale of an estate, if the seller have said or done nothing to throw the purchaser off his guard, or to conceal a defect, there is no fraudulent concealment on the part of the vendor. Thus, where parties deal for an estate, they may put each other at arm's length; the purchaser may use his own knowledge and is not bound to give the vendor information of the value of the property, even if he be aware, for instance, that there is a mine beneath it, unless the vendor enquire on the subject. So where a meadow was sold, without any notice being given to the purchaser of a public footway around it, and another across it, it was held that there was no fraudulent concealment on the part of the vendor. "Certainly," observed the Lord Chancellor, "the meadow is very much the worse for a road going through it; but I cannot help the carelessness of a purchaser, who does not choose to enquire: it is not a latent defect."—(Addison on Contracts, p. 114.) In a similar case, Wilde v. Gibson—(1. House of Lord's Cases, p. 605)—before the House of Lords, their Lordships refused to set aside a contract of purchase perfected by conveyance and possession except on the ground of actual fraud. In this case it appeared that the seller herself had no knowledge of the right of way across the property, and it was doubtful whether the agent who conducted the negotiations on her behalf had either. The Court also held that the allegation of fraudulent concealment would not have been supported by showing fraud on the part of the agent only.

A purchaser with notice of a deed has notice of all its contents, except he be deceived by an erroneous statement of its contents. Notice to an agent or attorney, when given in the course of the transaction, is constructive notice to the principal, unless the agent himself commit the fraud, in which case his knowledge would not be the knowledge of his client.—(Norton's Topics, pp. 295—298.)

"Every man," writes Story, "is presumed to be attentive to what passes in the Courts of Justice of the State or Law proceedings constitute a good legal notice.
Sovereignty where he resides: and therefore a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit. Ordinarily, it is true that the decree of a Court binds only the parties, and their privies in representation or estate. But he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired, and such purchaser need not be made a party to the suit. Where there is real and fair purchase the rule may operate very hardly. But it is a rule founded upon a great public policy; for otherwise, alienations made during a suit might defeat its whole purpose and there would be an end to litigation.* And hence arises the maxim—*Pendente lite nihil innovatur*; the effect of which is, not to annul the conveyance, but only to render it subservient to the rights of these parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them. A *litis pendens* however, being only a general notice of an equity to all the world, it does not affect any particular person with a fraud, unless such person had also special notice of the title in dispute in the suit. If therefore, the right to relieve in Equity depend upon any supposed cooperation in a fraud, it is indispensable to establish an express or direct notice of the fraudulent act.”—(Topics of Jurisprudence, p. 293.)

In a suit by a purchaser of the husband's right and interests in certain property against a party claiming to have bought the estate from the wife, the Court held that an unenquiring purchaser from a Hindu wife, whose husband is alive at the time, is in no sense a *bona fide* purchaser without notice. The position of the seller is such that it amounts to a constructive notice, which should put a purchaser on enquiry, and if he disregard such notice he must stand the

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* "Where a rule has become settled law." writes Mr. Broom, "it is to be followed, although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason for it is wanted, and although the principle and the policy of the rule may be questioned. If, as has been observed, there be a general hardship affecting a general class of cases, it is a consideration for the Legislature, not for a Court of Justice. If there be a particular hardship from the particular circumstances of the case, nothing can be more dangerous or mischievous than upon those particular circumstances to deviate from the general rule of law;" hard cases, it has repeatedly been said, are apt to make "bad law," and *misera est servanda ubi sit vacans aut incertum*"—(Broom's Legal Maxims, p. 151.) See too Norton’s Topics of Jurisprudence, p. 69; and a dictum of Holloway J. in Munda Chetti v. Timmung Hensu.—(1. Stokes' Madras Reports, p. 380.)
Similarly, the fact of the vendor being one of a Hindu family "is enough to put the purchaser on enquiry, and if he deal with a single member without obtaining proof that the property is separate property, he does so at his own risk. In the case of minor members, whose rights are sold away without such proof, and without any allegation that the transaction was for the benefit of the family jointly, the mere general practice of recording only one member will not suffice to deprive the others of their rights, even in favor of a purchaser for value, who does not exercise that care which is incumbent on persons dealing with the members of a family so circumstanced."—Shibusundari Dassi v. Rakhal Dass.—(1. W. Reporter, p. 38.) See also Pol. 1.12.316.

For the special care required from purchasers dealing with guardians, managing members of Hindu families, Hindu widows, or vendors with similarly limited interests, see the case of Hzmuman Prasad Pandi, above, at p. 232, and also p. 188.

Connected with the subject of notice is that of sales from a benami vendor, i.e., from a party who is the nominal, but not the real, owner of the property sold. The law on this subject is thus laid down in Rennie v. Gunga Narayan. "If a vendee purchase for a valuable consideration, and without notice of the benami, from one who, in the eyes of the world, is the absolute owner of a property, and who holds that property to all appearances under a good and sufficient title, he will be protected from the subsequent acts of the real owner or of his heir, both of whom were parties to the fraud, and his purchase will hold good against any subsequent sale made by them. The defect in the title was a latent one, which the special appellant (the vendee) could not by any reasonable enquiry have discovered; and the party who assisted in deceiving him cannot now take advantage of his own fraud and sell to another what has already been made over for value to the original purchaser."—(3. W. Reporter, Civil Rulings, p. 10.) And in Bhagwan Dass v. Upneh Singh, the Court laid it down that "if property be purchased in the name of a benamidar, and all the indicia of ownership be placed in his hands, the true owner can only get rid of the effect of an alienation by the benamidar, by showing that it was made without his own acquiescence, and that the purchaser took with knowledge of that fact."—(10. W. Reporter, Civil Rulings, p. 185.) See also Vol. 1. pp. 110, 115, in which latter case a party who had received neither title deeds nor possession from the benamidar was deemed not entitled to a decree for possession, as not having made out a complete title;—Vol. 2. Civil Rulings, p. 291.
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The vendor must be prepared to transfer the estate in the condition it was at the time of the agreement for sale, as otherwise the purchaser may repudiate the contract, and recover his deposit: hence, in Granger v. Worms—(4. Campb. 83)—where a vendor pulled down and removed a summer-house; and in Magennis v. Fallon—(2. Moll. 588)—where he cut down some ornamental timber, it was held that the purchaser might repudiate the bargain.—(Addison on Contracts, p. 87.)

If it turn out that the vendor’s estate was not so great as that he professed to sell, and the purchaser elect to take such an interest as the vendor may have, (subject to a fair abatement in the purchase money) he is entitled to do so, and the vendor cannot on his part object thereto.—(Addison on Contracts, p. 84; and Norton’s Topics, p. 320.) Mr. Macpherson, at page 118 of his work on Contracts, while giving this rule, adds in a note—“In the only reported Indian case which bears upon this subject a different rule was applied; A purchased a certain piece of land from Government at a revenue sale. In the detailed statement of the lands to be sold, which was exhibited, as usual, at the time of sale, for the information of persons wishing to purchase, and upon the credit of which the purchase was made, certain Mouzahs, comprised in the land in question, were described as common Malguzari lands, bearing each a jamma, or annual rent, which was specified in the particulars. Another person afterwards came forward and proved that he was entitled, under an old grant, to hold these Mouzahs at a certain istamrajamma. The Sadr Dewani Adalat decided in favour of the claimant, and also pronounced that the purchaser was at liberty to relinquish his purchase, in consequence of the error in the public statements, on the faith of which it was made. The purchaser did not avail himself of this permission, and no notice was taken of it in the decree. It is evident that this case is not a direct judicial decision, except as regards the claim of the plaintiff to the property in question: any difference between the purchaser and the vendor (Government) could be determined only in a suit brought by one of them against the other for this express purpose.”

Although by English law the conveyance of an estate must be by deed, yet in Equity the estate with the risks and rights thereto appurtenant is transferred by the mere execution of a simple contract in writing; hence there can be no doubt that in India, where the Transfer of Property Act is not in force, the risk of loss by damage to the property sold falls on the vendee, as soon as a deed of sale has been executed.—See Phillimore’s Principles and Maxims of Jurisprudence, p. 138.
In Chuni Lall Nagindass v. Siwaichand Namedass, the Privy Council held that a preparatory instrument in the nature of articles of agreement intended to be followed by the execution of a more formal conveyance was sufficient to bind the property, and to give the purchaser a right to demand a specific performance of the contract, and the execution of such further assurances as might be deemed necessary to invest him with a complete legal title.—(Sutherland’s Privy Council Judgments, p. 38.) So in Kali Charan Giri v. Maddan Kishor, the Calcutta Court held that a sale might be completed, and it still might be a condition of the contract that the purchase-money was to be paid afterwards, and the deed in evidence of the contract might be still incomplete.—(7. W. Reporter, Civil Rulings, p. 317; and Vol. 3. Civil Rulings, p. 103. But a mere agreement to sell without any consideration passing* would not bar the right of the vendor to sell to a third party, although it might make him liable to damages at the suit of the disappointed purchaser.—(Vol. 7. Civil Rulings, p. 38.) See too Vol. 5. Civil Rulings, p. 248.

Similarly, where the plaintiff had paid earnest money, and a deed of transfer of the property had been executed and registered, but not delivered, it being stipulated that the purchaser should pay the balance and then get the deed, but no time was fixed for the payment of the balance, the Court held under such circumstances the vendor was bound to wait a reasonable time for payment, and that as he resold the property within a week, the second purchaser took nothing, and the plaintiff himself was entitled to a decree for specific performance.—Muthur Ali v. Shiv Sahai Singh.—(Sutherland’s Civil Rulings for June 1864, p. 281.)

It was held by the Financial Commissioner, on appeal from the Commissioner of the Jalundhur Division, in Sumanand Singh v. Teju (unreported case), that where revenue-paying land had been sold and come into the possession of the purchaser, the sale could not be set aside because mutation of names (dahilkharij) had not been effected. This is in

* In Rajah Sahib Praklab Sen v. Babu Budhu Singh, the Privy Council held that where a party executed a deed of sale of property of which he was not then in possession, but to which he was prosecuting his title by suit, and the purchase-money was required in order that he might prosecute his suit, the bill of sale could only operate as evidence of a contract to be performed in futuro, and upon the happening of a contingency, of which the purchaser may claim a performance if he come into Court showing that he has himself done all he was bound to do; and if therefore the whole price were not duly paid, the would-be buyer would not be entitled, after the opposite party had established his title by prosecuting his suit to a successful issue, to come forward and demand to be put in possession simply on paying down the balance.—(2. Bengal Law Reports, Privy Council Cases, p. 111.)
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When a vendor delivers possession of an estate to the purchaser without receiving the purchase money, he has an equitable lien on the land for the money; and in a case quoted in Macpherson on Contracts, p. 78, where land had been sold, and the sale evidenced by the execution and deliverance of the conveyance deed and by a payment of part of the stipulated price, it was held that, although the right of property had passed to the purchaser, yet the right of possession, that is, a lien on the land, remained in the vendor until the purchase money was paid in full. And in a recent case, Prem Sundari Dassi v. Gris Chandra Bhattacharji, the Calcutta Court ruled that the vendor, after he had given over possession of the property sold, had probably the right to claim that the land should be treated as security for the unpaid purchase money; and to realize this, he should have come into Court to obtain an order for its sale, but he was not warranted in himself turning his vendee out of possession, and proceeding to pay himself from the usufruct of the estate.—(10. W. Reporter, Civil Rulings, p. 194.) On the other hand, if the vendor cannot make out a title, and any portion of the purchase money have been paid, it would seem that the purchaser has a lien on the estate for it, albeit he may have taken a distinct security for the money so advanced.* This lien for the purchase money will bind the estate in the hands of the purchaser himself, his heirs, devisees and volunteers, and all subsequent bona fide purchasers with notice of the non-payment of the purchase money.—(Addison on Contracts, p. 284.) A Divisional Bench however of the Calcutta Court have held, in Jagu Kunwar v. Parbali Kunwar, that no trust is created by a deed of sale, and that persons who allow a property to leave their possession before the purchase-money is complete cannot certainly recover from third parties, who are purchasers in good faith and for valuable consideration, even if these persons should be held to have had a notice of the amount of the consideration-money still remaining unpaid.—(3. W. Reporter, Civil Rulings, p. 139.) The facts however of this case were very peculiar, the plaintiff having rather an equitable lien on the property than being the direct vendor.

On the principle cui cumque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potint, the grantor of an estate or interest is held to grant everything, though not expressly mentioned, which is needful to the enjoyment of

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*A grant of real estate carries with it all that is necessary to its due enjoyment.

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See the case of Kenny v. The Administrator General of Bengal—(3. Bengal Law Reports, Original Jurisdiction, p. 75,)—where this lien of the intending purchaser for the amount of his deposit was held not to be taken away by reason of his having subsequently entertained proposals for a fresh contract of purchase of the estate on a new basis.
the grant. If therefore the owner of a house convey the upper storey, the grantee would have a right to claim that the walls and beams upon which the upper storey rests should be kept in due repair: if the soil be granted, but the grantor reserve the mines below them, he must so work them as to leave sufficient support to keep the soil above from falling in: by the grant of a piece of ground is granted, if needful, a right of way to it over the grantor's land,* or by the reservation of a close is reserved a right of way to it: by the grant of trees is granted power to enter on the land and cut them down and remove them: by the grant of fish in a pond is given a right to come upon the banks and fish them: if a license be given to lay pipes in another man's land to bring water to the licensee's house, the latter may enter and dig the land in order to repair the pipes. This principle only applies to such things as are incident to the grant, and directly necessary for the enjoyment of the thing granted: therefore if a man grant to another the fish in his ponds, the grantee cannot cut the banks to lay the ponds dry. A way of necessity is also limited by the necessity which created it, and when such necessity ceases, the right of way likewise ceases; therefore if at any subsequent time the party formerly entitled to such way can, by passing over his own land, approach the place to which it led by as direct a course as he would have done by using the old way, the way ceases to exist of necessity.—(Broom's Legal Maxims, pp. 463—470.) See, too, Norton's Topics of Jurisprudence, p. 491, where the reservation of fruit trees in the lease of a bungalow is said to give a right to the lessor to enter the compound to manure and water the trees, as well as to pluck the fruit.

Where the land is granted for an express purpose, the grantor will not be allowed to derogate from his own grant by doing anything in the adjacent soil which unfit the land sold for the purpose for which it was sold: and it makes no difference that the land so sold was taken under compulsory powers. Thus, to take a previous illustration, if A grant his field to B to build a house on, reserving the mines which may be under the soil, A would be bound so to work them as would leave due support, not only to the soil of the field in its natural state as granted, but to the soil when loaded with a house.—(Norton's Topics, p. 532.)

In The Manager of the Skinner Estates v. Barlow it appeared that a gateway had been opened between two houses.

* In Brojo Kishor Bilash Main, the lease of a ferry and certain bighas of land on the bank as a landing ghat was held to entitle the lessee to land or start on other land of the lessor, when owing to the demised land being submerged by a rise of the river such use of the land behind was necessary to the due plying of the ferry.—(5. W. Reporter, Civil Rulings, p. 195.)
family can be closed when one house passes to a stranger.

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houses, by an arrangement between the members of a family then jointly occupying the premises, and it was held that when the premises were subsequently separated and passed into the hands of strangers, the separation of the premises authorized the withdrawal of a permission to enter upon the part now belonging to a distinct owner, there being other reasonably sufficient approaches to the part occupied by the defendant. Being opened by agreement among the members of the Skinner family, it was clearly not a public way. Therefore the case was not one of prescription, but of the division of joint property. After division, the joint enjoyment must cease, including the use of modes of ingress and egress upon and across the property, falling into the hands of distinct owners; provided always that reasonable possibility of access to his share be not taken away from any one of the owners of the distinct parcels.—(2. Punjab Record, Case No. 44.)

Under the 27 Eliz. C. 4, which Statute is to a great degree declaratory only of the Common Law, it has been held that every voluntary conveyance or gift, and voluntary conveyance of property made without valuable consideration [not including however ante-nuptial settlements made bona fide in contemplation of marriage, since marriage is regarded as a valuable consideration—Addison on Contracts, p. 750] is void against a subsequent purchaser for value of the same property, even though he had notice of the prior voluntary conveyance or settlement; for, whenever the question is between one who has paid a valuable consideration for an estate, and another who has given nothing for it, it is a just presumption of law that such voluntary conveyance, founded only on considerations of affection and regard, if coupled with a subsequent sale, was made to defraud those who should afterwards become purchasers for a valuable consideration; and it is more fit that a voluntary grantee should be disappointed than that a fair purchaser should be defrauded.* But one voluntary conveyance cannot defeat another, and therefore a purchaser from the second voluntary grantee or donee cannot avoid the estate created by the first gift.—(Addison on Contracts, p. 115.) A voluntary settlement will, however, only be defeated by a conveyance for value to the extent necessary to give effect to the conveyance for value.—(Norton's Topics, p. 281.) The Madras Court has recently ruled however that where a case of a voluntary conveyance occurs among Hindus, the proper

* In Sudhikina Chowdhrai n v. Gopi Mohan Sein the Calcutta Court held that if the 27th Eliz. were operative in India, the case of Beaum v. Earl of Oxford showed that a judgment-creditor was not a purchaser for value within the scope of the Statute, and that his purchase consequently would not defeat a purely voluntary deed made prior to the date of his decree.—(1. W. Reporter, p. 41.)
question to be considered is whether the circumstances taken
together lead reasonably to the conclusion that the real
motive and intention of the transaction was to deprive the
creditor of the means of obtaining payment of his debt from
the debtor's property generally. If so, the disposition is
fraudulent and void to the extent of the debt due to the
creditor by whom it is impeached, but otherwise it will stand
good.—Gnanabhari v. Srinivasa Pillai.—(4. Madras High
Court Reports, p. 84.)

For the subject of alienations in fraud of creditors see
above at p. 487, under Clause 12 Section XIX of this Code.

By English law if, after a deed of conveyance has been
executed and the purchase money paid, it appear that the
vendor had no title, and the purchaser be consequently evicted,
the latter cannot recover back the purchase-money or obtain
compensation for the loss he has sustained, if the ordinary
covenants for title be not inserted in the deed and it do
not appear on the face of the conveyance that any particular
estate or interest in the land was bargained for and agreed
to be sold; although the buyer may possibly be enabled in
equity to resist the payment of any balance of purchase-
money which may happen to be unpaid. By Roman Law,
however, whenever a person sold property of which he had
the actual possession, and the visible and apparent owner-
ship at the time of sale, there was deemed to be an implied
warranty of title on the part of the vendor, even though none
were stipulated for; so that if the vendee were ejected, he
had a claim to restitution of the price, and to compensation
for all the loss and damage he had sustained by the eviction:
and in the case of sales of hereditary estates, the heir was
bound by the warranty of his ancestor. If however the
vendor were not in the actual possession of the subject
matter of the sale, and were not clothed with the visible and
apparent ownership of it, but sold only a naked right or title
to a thing, which was in the possession of a third party,
it was considered to be the duty of the purchaser to
enquire into the title of the vendor before he bought.—
(Addison on Contracts, pp. 109—112.) See too Broom's
Legal Maxims, pp. 739—744; and Phillimore's Roman
120,) says the point whether an implied warranty of title on
the part of the vendor be inherent in every contract of realty,
can scarcely be said to be finally settled in India, for
although a majority of the Saddar Judges in a recent case
adopted the English doctrine on the subject, a review of
judgment was subsequently admitted, and the decision
reversed on its being brought to the notice of the Court that
the conveyance did in fact contain words amounting to a
warranty. The following are more recent decisions on the
point. In Dwarka Dass v. Ratan Singh, the Agra Court held that although there may be no express covenant for title, a seller or mortgagor must always be held impliedly to warrant the title of the property sold or mortgaged, and if it be found to be defective, the vendee or mortgagee can sue on the breach of the implied contract.—(2. North West High Court Reports, p. 199; see also p. 264.) But in Rajah Nibman Singh Deo v. Gordon Stuart and Co., which was an action to recover a portion of the consideration by reason that the lessor's title had proved to be defective as to a part of the conveyed estate, the Calcutta Court ruled that the right of the plaintiffs to recover back a portion of the consideration-money must depend upon the establishment of one of two points; viz. either that the grantor fraudulently induced the plaintiffs to pay him that sum by a false representation that he had a good title to the land in question; or that he warranted and covenanted with them that he had a good title.*—(6. W. Reporter, Civil Rulings, p. 153.) In a later case, between the same parties, on all fours with the other, another Divisional Bench held that in such cases it is a sufficient proof of fraud to shew—first, that the fact as represented was false, and secondly, that the person making the representation had a knowledge of a fact contrary to it; and that the advertisement published by the vendor, setting forth a description of the property and calling upon intending purchasers to come forward, was substantially an implied warranty of title, and would in any case make the defendant responsible to a purchaser deceived by such representation, notwithstanding the absence of any stipulation for a refund in the conveyance. "The special appellant," the learned Judges added, "must be presumed to have known the state of his property when dealing with it with a view to lease it—a matter particularly within his own knowledge, and having that knowledge to have advertised for purchasers of what he had no right to sell." Had not fraud been substantially alleged by the plaintiffs, the Court threw out an opinion that the defendant might possibly have defeated the contract on the ground that at the time of the contract he was unaware of any defect in the estate sold, and that the maxim of caveat emptor applied.—(9. W. Reporter, Civil Rulings, p. 371.) Where a party had purchased from one L, through his son R, and on a dispute as to the purchase, the case was referred to arbitration, and it was held that R had no authority to sell, the Calcutta Court held that the maxim

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* So in Muhammad Mohidin v. Ottagil Ummache, the Madras Court held that a vendor, who had legally conveyed all the title which was in him, was not answerable to the purchaser, who after paying on the interest conveyed to him ineffectually, sought to recover the purchase-money as on a consideration which had failed; considering that the vendee ought to have protected himself by the proper covenants.—(1. Stokes' Madras Reports, p. 390.)
caveat emptor did not apply, but that the plaintiff, if there had been no fraud on his part, was entitled to recover the consideration money from R.—Kishen Mohan Shaha v. Ram Chandra Dey.—(3. W. Reporter, Civil Rulings, p. 28.) See also Vol. 6, Civil Rulings, p. 174, where a purchaser, who had taken under a conveyance executed by an agent after the death of his principal in pursuance of a power duly executed by her, was held entitled, on the sale being set aside as void by reason of the death of the principal before the completion of the transaction, to recover the purchase money from the heirs of the intending vendor, if it reached them as payment of the contract of purchase, and if it did not, then from the agent who should have paid it over. But where a person buys an estate at an auction-sale, and has at the time notice that persons other than the judgment-debtor claim rights and interests in the property, the maxim caveat emptor applies, and the buyer must stand the consequences.


By English law however there is an implied warranty that the vendor knows of no defect in his title, since if he be aware of it and sell without disclosing it the contract is vitiated ab initio by the fraudulent concealment, and the buyer is entitled to recover back his purchase money.—(Addison on Contracts, p. 113.)

If a party sell an estate which at the time is under attachment in execution of a decree against the vendor, but conceal the fact of the attachment, and consequently the buyer has to satisfy the amount of the decree in order to prevent the estate from being resold, the purchaser can recover the amount so paid from the vendor.—Mussumat Zahuran v. Tayler.—(2. Bengal Law Reports, Civil Appeals, p. 886.)

A warranty of title amounts to a contract by the seller that, in consideration of the buyer purchasing the property, and paying the consideration money, he (the seller) will make good to the buyer any loss which the buyer may incur by reason of the seller not having a good title to the property. This is an absolute contract from the moment it has been entered into, and the buyer can sue upon it at once, if he can show that the seller has not a good title in accordance with his undertaking and that he has sustained loss in consequence. Such an action is not therefore necessarily premature because a suit between the vendor and a third party as to the right to the property conveyed is not yet finally adjudicated on.—Saiyad Saif Ali v. Muhammad Jawad Ali.—(7. W. Reporter, Civil Rulings, p. 196.)

If the subject-matter of the contract had ceased to exist at the time the sale was agreed on the contract is void

Where the vendor himself knows of the defect in his title the maxim caveat emptor does not apply.

Sum paid to release an estate from an attachment fraudu- lently concealed by the vendor is recoverable from him.

Warranty of title.

If the subject mat- ter of the sale had ceased to exist when
the sale was made and the purchase money is recoverable.—Addison on Contracts, p. 112.

Law regarding deposits in the hands of a third party.

When in a contract of sale the intending purchaser pays down a portion of the price as a deposit, if the payment be made into the hands of an auctioneer, solicitor, or any third party, the receiver is responsible for the payment of the amount to the vendor, in the case of a completion of the contract, and also for the return of it to the purchaser in case of the abandonment of the contract, or the neglect of the vendor to complete his part of it. If therefore, he pay it over prematurely to the vendor, and the title turn out to be defective, he will be bound to make good the amount to the purchaser, unless it appear that it was duly paid over according to the intention of the parties themselves. If the deposit have been paid to the auctioneer, who makes away with it and becomes bankrupt, the loss will in general fall on the vendor, who selects and appoints him, and constitutes him his agent for the receipt and keeping of the money. When an action for the return of the deposit is brought against the auctioneer, interest thereon is not recoverable by the purchaser, although the money may have been invested at interest: but the case is different when the deposit has been in the vendor's hands, unless the contract have been abandoned or rescinded by mutual consent; for if so, the vendor even is only responsible for the bare deposit, without interest.—(Addison on Contracts, pp. 94 and 92.)

The vendee usually takes the estate, except when sold by the Collector for arrears of revenue, subject to all liens and incumbrances duly charged upon it prior to the sale: and if the whole property, of which the purchaser has acquired only a portion, be subjected to a charge, the creditor is at liberty to come upon the buyer for the whole sum due, leaving him to recoup himself by contribution from his co-sharers.—Prosonnio Kumar Sin v. Barbosa.—(6. W. Reporter, Civil Rulings, p. 253.) But a buyer is not affected by a fresh lien created by the vendor after the right of property had been conveyed to the vendee, but before the conveyance deed was delivered to him.—Maharajah Maheshar Baksh Singh v. Sumar Chand—(5. W. Reporter, Civil Rulings, p. 110); nor is he bound by a decree in a suit commenced against his vendors after the sale to him had taken place.—(1. W. Reporter, p. 286.)

The existing rights of tenants must be respected.

So where land is in the possession of tenants, the purchaser must respect their rights, and the mere fact of their occupation constitutes legal notice to the vendee.—(Norton's Topics, p. 294.)
The effect of a sale for arrears of revenue is widely different from that of a private sale by arrangement of the parties, or of a sale by order of a Civil Court in execution of a decree, as “an absolute Parliamentary title is given to the purchaser against all incumbrances and claimants.” As however such sales are so rare in this province that Mr. Cust is able to speak of the sale law as being considered to be in abeyance, it would be beside the practical scope of this work to enlarge on the subject here, the reader being referred to Mr. Cust’s Revenue Manual, pp. 161—163; to the Directions to Revenue Officers, pp. 365—368; to Macpherson on Contracts, pp. 33 and 122; and for the law to Act I of 1845.

For the effect of the Registration law on conveyances of land, see above at pp. 104—106, of this work.

Where A had sold land to B, reserving a right to re-purchase within a fixed period, and before that period had elapsed, B re-sold to C for valuable consideration and without notice of the stipulation, the Madras Court held, on A seeking to be allowed to re-purchase by payment of the price after the term agreed on had run out, that he had no title unless relieved on his forfeiture: and that being so, it was clear that even if such relief ought to have been given, it could not be granted against a purchaser for valuable consideration without notice.—Samakkaudan v. Perumal Chetti. —(2. Madras High Court Reports, p. 114.)

If A and B purchase an estate together, A paying the whole purchase money, and receiving possession of the property, subject to an arrangement with B that on his payment of his share in the price, he was to be admitted to joint possession, B will not be entitled to a decree for specific performance, if he let more than a reasonable time elapse without tendering payment of his share of the purchase money.—Moti Ram v. Lakshman Singh.—(3. Punjab Record, Case No. 106.)

Where a plaintiff sues for the possession of the title deeds of an estate which he avers the defendant bought with his money and in his name, the burden of proof will turn on the question as to which party has had possession since the sale: if the defendant as well as holding the title-deeds have also been in possession, it will be for the plaintiff to prove that the purchase was made from his own funds, but if the plaintiff have had possession, the onus will rest on the defendant.—Nilmani Banerjee v. Sarbo Mangula Debi.—(2. W. Reporter, Civil Rulings, p. 31.)

In Bakshan v. Mir Mahammad, it appeared that certain lands descended to three co-sharers, A, B and C. A, who was in sole possession, sold a part of the land to a bonâ fide purchaser for valuable consideration, and mortgaged another
portion; C, who, though for long absent, had been for the last few years little more than a day's journey from the place, now came forward to claim the half share in the estate to which he was entitled, and A and B, who were his near relatives, admitted his title. The Chief Court observed that the position of a tenant in common without whose consent property had been sold by the sharer in possession* is not in fact the same as that of the person entitled to property, whose right had been alienated by one not in any way entitled; and delay to object on the part of such co-proprietor gives rise to equities in favor of the bond fide purchaser which do not exist when the vendor is a stranger. Bearing in mind too the relationship between the parties, and the consequent danger of the admission of A and B being collusive, and therefore only safely to be acted on as against the makers, the Court declined to interfere with the sale, but as the land sold and mortgaged was not defined and distinguished, it might reasonably be assumed that A intended to sell that which was the property of himself and B, who was also present, and to mortgage that of which he was only in possession on behalf of C the plaintiff; and as this mortgaged portion exactly represented C's share, the equity of redemption in the mortgaged land was decreed to C, subject to the payment of the mortgage money to the mortgagee, and the amount of this mortgage money be was declared entitled to recover from A.—(1. Punjab Record, Case No. 96.)

A grant of land to a man and his heirs on condition of performing service does not in general mean that the service is to be personally performed by the grantee or his heirs; but that it is to be performed, and that the grantee is to be responsible for its performance.—Shiv Lall Singh v. Murad Khan.—(9. W. Reporter, Civil Rulings, p. 126.)

If an estate which has been agreed to be sold, have been actually conveyed to the purchaser and become his property, and the vendor sue for the non-payment of the purchase-money, the measure of damages is the price agreed to be paid with interest: but if no conveyance have been executed and the estate still remain the property of the vendor, the measure of damages is the difference between the price agreed to be paid and the marketable value of the property; and if the vendor have resold the estate within a reasonable time from the breach of contract, the price so obtained will be held to be the marketable value, and the

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* Where the Mithila law prevails, the sale of joint undivided property by one sharer is not valid without the assent of all the rest: indeed, it is not valid even for the seller's own share without such consent.—(Macpherson on Contracts, p. 116), but the co-sharers, as implied in the text, ought not to sleep over their objections, and thus lead the purchaser to believe they have virtually sanctioned the transaction.
vendor will be entitled to recover the difference between it and the agreed price, in addition to the costs, charges and expenses of re-sale. If the vendor do not re-sell the estate, but elect to keep it in his own hands, he will be allowed to recover the difference between the agreed price, and the presumed marketable value of the property, which however in many cases would be merely nominal, together with the costs and expenses he has incurred in carrying out and completing his part of the contract. If the conditions of sale provide for the payment of a deposit by the purchaser, and for its forfeiture if he fail to comply with the conditions, the deposit must, nevertheless, be brought into account by the vendor, if he seek to recover a deficiency on a re-sale of the property.—(*Addison on Contracts, p. 1055.*)

If the action be brought by the purchaser in respect of a breach of the contract by the vendor, the nature and amount of the damages will, in a measure, depend on the existence of good or bad faith on the part of the vendor. If the seller had reasonable ground for believing that he was the owner and had a right to sell, but is prevented by an unexpected defect of title from completing his engagements, and is ready to do all that he can to fulfil the contract, the purchaser will only be entitled to recover nominal damages, together with his deposit and interest (if he have paid one) and the expenses he has incurred in investigating the title. He cannot however recover in respect of the presumed or fancied value of his bargain over and above the price agreed to be paid. If he re-sell before he have investigated the title of his vendor, and the sub-contract fail by reason of a defect in that title and not from any mala fides on the part of the original vendor, he will not be entitled to recover damages in respect of any profit that he would have realized on such re-sale; for “if premises, for which a party has contracted, are by him offered for re-sale too soon, that is at his own peril, and the damage (if any) resulting from that offer arises from his own premature act, and not from the fault of his vendor.”* But if the vendor have acted with bad faith, and failed to do all that was in his power to perform and fulfil the contract, the purchaser will be entitled to full compensation for the loss of his bargain. If therefore the buyer, after satisfying himself of the goodness of his vendor’s title, enter into a sub-contract for the re-sale of the estate, which miscarries owing to the original vendor’s refusal to complete the first purchase, the buyer will be entitled to recover the profit he would have made on the re-sale, and all the costs and expenses attending it. And if the vendor have nothing at all in the shape of a title, and could have had no reason for thinking he possessed one, if he examined into his own rights, his

* Per Bayley J, in *Walker v. Moore.*
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Negligence and misconduct subject him to the payment of such damages as the purchaser has really sustained by not having that which the vendor contracted he should have.—(Addison on Contracts, p. 1054.)

If, after the purchase has been completed, it be discovered that the vendor had no title to the estate he professed to sell, and the purchaser on eviction bring his action for a breach of the covenants for title and quiet enjoyment, the measure of damages will be the amount of the purchase-money paid for the estate and all incidental damages arising from the breach of contract, such as the expense of the conveyance. "If," observes Domat, "the thing sold be diminished in value by the effect of time, or from other causes, so that it be worth less at the time of the eviction than the price paid by the purchaser, the latter is entitled to recover only from the vendor the diminished value as it existed at the time of the eviction; for it is only in that value that the purchaser's loss doth consist."—(Addison on Contracts, p. 1055.)

If between the time of the execution of the conveyance and the eviction, the purchaser have expended money upon the land, in drainage, buildings or improvements, he will not be allowed to recover the money so expended from the vendor, unless the latter have been guilty of a downright fraud in the sale of the estate. In a Court of Equity the buyer, if the land were known to have been purchased for the erection of buildings, will in certain cases have a claim upon the land for the amount of his expenditure, if he be ejected after spending money in building. And by the Civil law, the purchaser had a lien on the estate generally for the money he had expended in improvements. If however the vendor had been guilty of a fraud in effecting the sale, and had knowingly sold the property of another man, he was bound to make good to the purchaser the capital expended by the latter. But where there was no fraud, the vendor * had to indemnify the purchaser according to what the estate would have been worth at the time of the eviction, if it had not been improved, and the evicting party had to make good the improvements, or more strictly the difference between the amount of profit the purchaser has received from them and the principal with interest which he has laid out upon them. If the purchaser have not been evicted, but have entered into a fair compromise with the real owner, he will be entitled to recover as damages the whole amount so paid, together with his costs and expenses.—(Addison on Contracts, p. 1056.)

* It will be remembered that by Roman law, there was always an implied warranty of title on the part of the vendor of real property, see p. 683 of this work.
CHAPTER XXIII.

PART III.

Demise of Real Property.

In a contract of letting and hiring, according to English law, the lessor binds himself to give possession, and the lessee to accept it and pay rent. But the liability of the latter upon all express and implied covenants and agreements for the payment of rent is dependent upon his being put in possession of the demised premises or being tendered possession and afforded the power and opportunity of taking it.* The quiet enjoyment also by the lessee as against the lessor, and all that come in under him by title, and against others claiming by title paramount during the time in respect of which the rent is claimed to have accrued due is a condition precedent to the tenant's liability for the payment of such rent: but he is not released by an interruption of occupation caused by a mere wrong-doer. Such covenants for quiet enjoyment have been held to be broken by the lessor building on his own adjacent ground so as to darken the lessee's windows, or doing anything thereon which creates a nuisance, or by placing a structure on any part of the demised premises.—(Addison on Contracts, p. 325.)

In the case of a demise of realty, the lessor does not impliedly warrant that the premises are at the time of the demise, or that they shall continue to be during the term, in any particular state or condition, or fit for any particular purpose; and therefore the lessee, if the conditions detailed in the previous para have been fulfilled on the lessor's part, is bound to pay rent, albeit the subject matter of the demise be not fit for the purpose for which he required, or indeed though he may have no beneficial enjoyment of it whatever. If indeed the lessor have been guilty of any fraudulent concealment of defects, which ought in good faith to have

* See for Indian rulings to this effect, 9. W. Reporter, Civil Rulings, p 582, and 3. Bengal Law Reports, Appendix, p. 119.

† But there is no implied duty cast on the owner of a house being in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation, nor will an action for deceit lie against him for omitting to disclose the fact.—(Broom's Legal Maxims, p. 755.) But where a plaintiff hired a thatched bungalow of the defendant, and on lighting a fire in one of the fireplaces, the chimney took fire owing to its being thatched over, of which the plaintiff was unaware at the time, and the tenant's furniture was destroyed, the Calcutta Court ruled that the plaintiff was fully justified in taking it for granted that the chimney was properly constructed in the absence of notice to the contrary from the landlord, and was therefore entitled to recover damages for the loss of his property, as the fact of the tenant having occupied the house for four months without discovering the want of vent did not affect him negligence.—Radha Krishna v. Flaherty.—(3. Bengal Law Reports, Civil Appeals, p. 277.)
been disclosed, or have resorted to any misrepresentation calculated to mislead the lessee in some important particulars as to the condition of the demised premises, the contract would be void and the lessee discharged from his rent. Thus, in Sutton v. Temple, where the defendant had taken the eatage of a meadow for the term of six months at a rent of £40, and turned fifteen head of cattle into it, of whom eight died from the deleterious effects of some refuse paint, which had been inadvertently spread over the land along with manure prior to the defendant's occupation, whereupon the defendant took off his cattle, and tendered back the possession of the meadow to the plaintiff, which she refused to receive, it was held by the Court of Exchequer that the defendant was liable for the rent at the time it became due, although the eatage was wholly unfit for the defendant's purpose; as the rule of law was stated to be,* that if a person contract for the use and occupation of land for a specific time and a specific rent, he will be bound by his bargain, even though he take it for a particular purpose, and that purpose be not attained. So, in Hart v. Windsor, where in answer to an action for the rent of an unfurnished house, the defendant pleaded that it was so infested with bugs that he could obtain no beneficial enjoyment of it, but had been compelled to quit it, the Court held that this plea was no answer to the action, as the law implied no warranty on the part of the lessor that an unfurnished house was at the time of the demise, or at the beginning of the term, in a fit state for habitation, and even if such warranty could be implied, the breach of it would not give the tenant a right to abandon his lease and refuse to pay rent; but his remedy would be by a cross action to recover damages for the breach of such implied contract.—(Addison on Contracts, pp. 327—329.)

Owing to the lessee's liability for rent being thus made to depend simply on the lessor's maintaining him, or being willing and ready to maintain him, in possession of the demised premises, and not on the fitness of the said premises for the lessee's use, it follows that the lessee's liability for rent continues in every state and condition of the demised premises; and although houses become ruinous and fall down, or be burnt down by fire and remain untenantable,† and buildings, fences, and superstructures, erected upon the soil, and crops growing thereon, be destroyed by floods or be burnt by lightning, or be thrown down by enemies, yet the tenant is bound to pay the rent so long as the land remains to him, and his legal title to the occupation and use thereof

* Broom's Legal Maxims, p. 745.
† See the case of Ison v. Gorson, quoted at p. 230 Broom's Legal Maxims.
continues. If the landlord be bound by custom, or have entered into an express covenant to repair and uphold a house demised by him, and the lessee covenants to pay rent, the covenants are independent covenants, and the repairing and upholding the house by the lessor is not a condition precedent to the tenant's liability for the rent. If too the lessee have agreed to pay rent "damage by fire excepted," and a part of the demised premises be destroyed, or injured by fire, the whole of the rent is not thereby suspended, but the tenant is entitled to a reasonable abatement.—(Addison on Contracts, 1).329.) Where demised premises are destroyed by fire the landlord is not bound, in the absence of any special agreement between the parties, to rebuild, even though he may have received the value from an insurance office; although, as we have seen, the tenant is still liable for his rent.—(Broom's Legal Maxims, p. 230.)

If the tenant lose the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended, but the act must be something of a grave and permanent character, dispossessing the tenant, and not a mere temporary trespass, and there must be an actual dispossessing and not a mere constructive eviction. If the tenant be lawfully evicted by a Railway Company, taking up his land under powers conferred on it by the legislature, the tenant is discharged from the accruing rent, but not from that which was due and in arrear at the time of the eviction. Where a portion only of the demised estate is taken, the rent must be proportionably reduced.—(Addison on Contracts, pp. 330, 331.). Where part of the land demised to a tenant is totally lost to him by any casualty, as by the overflowing of the sea, he may claim an apportionment of the rent, as in a case of eviction.—(Broom's Legal Maxims, p. 229.)

The tenant may however deduct any sums from his rent, which ought to have been paid by his landlord, but which he has had to pay, owing to the former neglecting to do so, such as ground rent, land tax, or other outgoings charged on the demised premises.—(Addison on Contracts, p. 332.)

If a man be let into possession under an agreement for a lease to be granted at a future time, he is liable for a reasonable compensation to be paid to the owner for the use and enjoyment of the property. But if he take possession of the property as an intending purchaser, and the bargain come to nothing owing to the vendor's inability to complete the title, the purchaser is not in general bound to pay anything for the temporary enjoyment of the estate, unless he continue to occupy and take the rents and profits of the land, after the contract of sale has been abandoned, by the
sufferance of the party who is then entitled to immediate possession; in which case, he is bound to pay a reasonable compensation for the occupation. So if the vendor continue to reside in a house after having sold it, he is not liable to pay for this use and occupation, unless it be shown that there was an express or implied contract that the occupation was to be paid for.—(Addison on Contracts, p. 336.)

If a lessor agree to complete a house demised by him, on the faith of which the tenant enters and occupies, the landlord is entitled, even if he neglect to fulfil his agreement, to recover a reasonable sum for the use and occupation by the tenant of the incomplete house.—(Addison on Contracts, p. 337.)

The foregoing paragraphs set forth the rules of English law in respect of the lessee’s liability for rent, even under circumstances in which he has received no benefit from the demised premises; and it is presumed that this law would, in the absence of any special agreement, be held applicable in the case of European bungalows in cantonments and stations: but it certainly ought to be applied with caution to the demise of real property among natives, as a careful investigation would probably bring to light local customary law on the subject; or should this even not be the case, and the Court had to fall back on general equitable principles, it should be borne in mind that Roman jurisprudence took a widely different view of the subject. That system held that the enjoyment of the thing, for the use of which the rent was agreed to be paid, was a condition precedent to the lessor’s right to demand the rent. If therefore the tenant were evicted and kept out of possession by irresistible force, without any default on his own part, he was discharged from the rent, whether the eviction was the act of the lessor himself or of persons having title, or the act of mere wrong-doers. If a house demised to a tenant for habitation became ruinous or uninhabitable, if the windows were blocked up or darkened, and the tenant were deprived of light and air by the raising of the roof of an adjacent house, or his enjoyment was marred by a nuisance, which he had no means of abating, he might quit the demised premises, and refuse further payment of rent. If pasture land were demised for eatage, and poisonous herbs grew up and destroyed the beasts, the landlord lost his right to the rent: so too he did, if lands were granted to farm for the term of a year only, and the tenant, by reason of some inevitable accident, such as a storm, inundation, or hostile excursion, lost the whole produce of the soil. A partial loss,* such as

* "Vid major non debet condatori damnosae esse si plus quam tolerabile est, ut si casu fecerint fructus; alioquin modicum damnum aquo animo ferre debet colonus."
the crops being damaged by an extraordinary drought, entitled the tenant to a proportional abatement. But in order to sustain his claim to an abatement, the lessee was bound to show that the loss arose from some unusual occurrence, not reasonably within the contemplation of the parties at the time of making the contract, and in no way attributable to his own want of diligence or skill. And in all leases for a term of years, the good years were to be taken with the bad, so that the lessee could not demand to be excused from rent in respect of the total loss of the harvest in any one year of his tenancy, but could only claim the abatement towards the expiration of the term, upon a fair average of profit and loss.—(Addison on Contracts, p. 333.) See too Phillimore’s Roman Private Law, pp. 263—265.

In the absence of any stipulation to the contrary, the Roman law allowed the tenant to sub-let. If nothing was said at the expiration of the term, the law implied the assent of the hirer to the continuance of the original contract: but for how long this relocatio tacita was to last is a much disputed question.—(Roman Private Law, p. 264.)

Lands previously held rent free were declared at the settlement liable to assessment. No rent however was paid or claimed for more than twelve years from this period. But it was held that the right to impose rent was not barred by this delay, for as rent is a constantly recurring demand, the right to impose it cannot be defeated by lapse of time, although arrears beyond the period of limitation are of course irrecoverable.—(Macpherson on Mortgages, p. 180.)

A tenant is not safe in paying rent to a gomashlah, who cannot produce an express authority to receive rent.—(Macpherson on Contracts, p. 88.)

In Preston v. Merceau, where the rent of a house was specified in a written agreement to be £ 26 a year, and the landlord proposed to shew by parol evidence that the tenant had also agreed to pay the ground rent, the Court refused to admit the evidence.—(Brown’s Legal Maxims, p. 632.)

By English law there is no implied agreement, on the part either of the lessor or of the lessee of a house, to repair or uphold it during the term: therefore in Gott v. Gandy, the Court of Queen’s Bench held that the fact of a house falling and destroying the furniture of the tenant did not make the landlord responsible in damages.—(Addison on Contracts, p. 333.) “The burden of repairs however,” observes Mr. Broom, “has always been thrown, as much as possible, by the spirit of the Common Law upon the occupier or tenant, not only in accordance with the principle contained in the above maxim (qui sentit commodum sentire debet
Every covenant by a lessee that he will well and sufficiently repair and maintain the demised premises during the term, and deliver them up at the expiration thereof in good repair and condition, will be construed in connection with surrounding circumstances, and the extent of the liability will depend upon the age and condition of the buildings at the time of the demise, and the length of the lease. If the house be an old one, the tenant is only bound to keep it in repair as such, and to see that by the seasonable application of labor the premises do not suffer more than the operation of time and nature would effect, which natural deterioration, as it may be called, falls reasonably on the landlord.—(Addison on Contracts, p. 338.)

Where there is a general covenant by the lessee to repair, and leave repaired at the end of the term, the lessee is clearly liable to rebuild in case of the destruction of the premises by accidental fire, or by any other unavoidable contingency, as lightning, or an extraordinary flood. And the principle on which this rule depends is that if a party,
by his own contract, create a duty or charge upon himself, he is bound to make it good if he can, notwithstanding any accident by inevitable necessity; for if he had chosen to guard against any loss of this kind, he should have introduced it into the contract by way of exception.—(Broom’s Legal Maxims, p. 230.)

In the absence of any express agreement to repair, there results from the demise itself an implied promise by the lessee to use the property in a tenant-like and proper manner, to take reasonable care of it, and to restore it at the expiration of the term in the same state in which it was in when demised, subject only to the deterioration produced by ordinary wear and tear, and the reasonable use of it for the purpose for which it was hired. If a dwelling house having become old and ruinous, fall from the want of reparation, or be destroyed by fire, tempest &c, or by the folly or negligence of his own servant, the tenant for a term of years is not bound to rebuild. He must repair windows broken by the wind or hail, if the consequence of his neglect would cause injury to the building from rain, neither may he suffer a roof of thatch to remain uncovered, so as to let the timbers rot. He must cleanse the drains, and use all reasonable endeavours to keep the premises wind and water tight.—(Addison on Contracts, pp. 342, 343.)

Where by the terms of the lease the landlord was to execute the repairs, the Calcutta Court, in Zamirunnissa v. Gayer, held that the tenant was not warranted in setting off against a suit for rent the sum he had expended in repairs when he had not been authorized to make the outlay.—(6. W. Reporter, Civil References, p. 26.)

Parol evidence is always admissible to show what was, and what was not, parcel of the demise and intended to pass to the lessee by the deed; hence, where the lessee claimed a cellar under the demised messuage, on the ground that it passed to him under the general descriptive terms used in his lease, parol evidence was admitted to show that the cellar had been severed from the messuage, and used as a wine-cellar by a merchant under a distinct lease, which fact was known to the lessee at the time of his accepting the lease, and that therefore it could not have been the intention of the parties that it should pass to him under the general terms used. On the contrary, under the word “cottage or house,” land may pass, if it can be shown to be have been for a length of time used and occupied with the cottage or house at one entire rent, and to have been commonly reputed to be part and parcel thereof.—(Addison on Contracts, p. 319.)
A demise carries with it all wanted and needful appurtenances.

When a man grants a thing for hire, he grants it with all such appurtenances and accompaniments as properly belong to it, and all such rights of way as are needful to enable the hirer to have that use and enjoyment of the thing demised for which the hire is agreed to be paid. The lessee has a right consequently to the casual profits of trees, but he has no right to fell them—(Addison on Contracts, p. 319): and if he do so wrongfully fell them they will belong to the lessor.—(Broom’s Legal Maxims, p. 278.) See above at pp. 690, 691 of this Chapter; though of course the accessory rights which pass to a tenant may be less extensive than those which accrue to a purchaser.

Tenant right in house property.

“The idea of a tenant-right in house property” observed Mr. Cust when Judicial Commissioner, in Kutha and Wazeera v. Banna and others (an unreported appeal of May 1863, from the Jallundhar Division) “adverse to the right of property is repugnant to all idea of equity, and nothing but a custom made out beyond doubt extending over a long period and universally accepted, would induce me to uphold a decision which sanctioned any such trespass on property. If the appellants assert that the object of dispute is their property, their claim is clear: but if they admit the property to be that of their adversary, and claim a prescriptive right to occupy, they assert a claim contrary to public policy, and I trust that the Civil Judge will maintain this principle. This will not prevent a building lease being given by the owner of the land, because in such cases the nature of the contract will appear from the terms of the lease, but it must be understood that an adverse prescriptive occupation either gives a right of property, or it gives nothing.”

Onus probandi in suits by occupiers claiming to be owners and not tenants.

In a suit in which the plaintiff claimed a house which had been occupied for many years by a deceased relative, the Commissioner decreed his claim, on the ground that the defendant, who asserted that the deceased occupier was his tenant, had failed to prove the exercise of any right of ownership within the period of limitation. The Chief Court however reversed this decision, pointing out that although the defendant drew no rent, yet there was in evidence a written admission by the deceased occupier, through whom the plaintiff claimed, of his being the defendant’s tenant. As therefore the plaintiff had to recover on the sufficiency of his own title, and the case disclosed that the relation of tenancy originally existed, it was for the plaintiff to show how an occupation originally permissive had become adverse, and not for the defendant to establish affirmatively that he had on his part done acts showing that it had not become so.—Karim Buksh v. Karm Nawaz.—(2. Punjab Record, Case No. 97.)
Where a party, $K$, was allowed by the owner to occupy a house rent free, on condition of keeping it in repair and giving it back on demand, and on $K$'s death his heir succeeded to the occupation, and set up a plea of limitation when the owner after some years sued to recover his property,—the Court held that $K$ occupied the house as a tenant-at-will, and that such tenancy was not necessarily on $K$'s death converted into an hostile occupation by the heir in the absence of proof of the intention of the parties to that effect, or of anything to show that the plaintiff did not assent to the heir continuing to hold on the same terms on which $K$ had.—(4. Reid's Bombay High Court Reports, p. 155.)

If a man furnish a dwelling house, or an apartment in a dwelling house, and offer it to be let ready furnished, he impliedly holds it forth as fit for immediate habitation and use; and the contract for the letting and hiring it is analogous to the contract for the letting and hiring of a ship, rigged, manned and prepared for sea, or of a carriage horsed and equipped and made ready for a journey on land. Thus, where the beds of a ready furnished house, let to a tenant at a rent of eight guineas per week, were so infested and over-run with bugs that they could not be slept in, it was held that the tenant was justified in leaving the house, and resisting the landlord's demand for rent.—(Addison on Contracts, p. 875.) It will be observed that the implied guarantee on the part of the landlord varies greatly in the case of the demise of a furnished and of an unfurnished house, but the distinction would seem rather to be in regard to the suitableness of the furniture and appointments than of the house itself.

When a man lets apartments in a house, he impliedly demises them with all their proper accompaniments, and warrants to the hirer the use of all such accessory things as are necessary to enable him to enjoy the principal subject matter of demise in the manner intended. If too the landlord remain in general possession of the house, he is bound to exercise all reasonable care for the protection of the persons and property of his lodgers, and in the selection of his servants, but if, having done so, loss be sustained by the lodger in consequence of the negligence or dishonesty of the domestics, he will not be answerable.—(Addison on Contracts, p. 376.)

A contract for the letting and hiring of a vault, or store or place of deposit is a contract analogous to the letting and hiring of an apartment in a house for the occupation of a tenant or lodger.—(Addison on Contracts, p. 378.)
If a man contract to grant a good and valid lease, without having any color of title to the premises to be demised, the intended lessee may recover all the damages he has sustained by reason of the non-performance of the contract, including the loss of the lease.—(Addison on Contracts, p. 1057.)

If the demised property have been occupied by the tenant under a lease, void by reason of not being duly authenticated or stamped, the rent reserved in the lease will be the measure of damages resulting from the breach of the implied contract to pay for the actual use and occupation of the property. But when no rent has been agreed on, or the contract has been so far departed from that the stipulated rent forms no just criterion of value, the actual pecuniary value of the occupation will constitute the recoverable damages.—(Addison on Contracts, p. 1062.)

In an action for a breach of agreement to repair, the measure of damages is the amount it will cost to put the premises into repair; but in estimating this, the age and general condition of the property at the time of the demise must, as we have seen—(p. 707)—be taken into consideration. If buildings fall to the ground from the defendant neglecting to fulfil his agreement to repair, or be blown down or burnt, the damages will be the amount which it will cost to rebuild, deducting the difference in value between the old and new materials; as the landlord is not entitled to have the value of a new building in the place of an old one.—(Addison on Contracts, p. 1062.)

If the lessor have covenanted to repair a dwelling house demised by him, and the building be destroyed or become ruinous and uninhabitable, the lessee may rebuild if the lessor neglect to do so within a reasonable period after request: and the measure of damages recoverable in such a case will be the expenses of the rebuilding. If the lessee, by reason of the neglect of the lessor to rebuild, have been compelled to take another house, the rent paid for such new residence will form a part of the damages. If however the lessor be ready to fulfil his agreement, and to repair injuries as soon as he reasonably can, he will not be responsible, according to English Law—(but see p. 703 of this work)—for the rent of a house which the lessee may think fit to take for a residence, while the repairs are being executed.—(Addison on Contracts, p. 1063.)

*Mr. Addison writes—"Under a lease void as to the duration of the term by the Statute of Frauds." The illustration has however been altered as the Statute referred to is not in force in this province.
Before closing this chapter, the law regarding fixtures should be sketched. This subject is however, in the present backward state of agriculture and trade in Upper India, not likely much to occupy the attention of the Courts, and it may therefore suffice to refer the reader to Broom's Legal Maxims, pp. 403—416; to Addison on Contracts, pp. 142—144; to Addison on Torts, pp. 122—127; to Elwes v. Mawe in 2. Smith's Leading Cases.

The Regulation which is referred to at p. 658 of this Chapter is as follows:

REGULATION V OF 1817.

A Regulation for declaring the Rights of Government and of Individuals with respect to hidden Treasure, and for prescribing the Rules to be observed on the Discovery of such Treasure: Passed by the Governor-General in Council, on the 28th of February, 1817.

I. Whereas the provisions of the Mahamadan and Hindu laws respecting the discovery of hidden treasure differ materially; and whereas it is deemed expedient that an uniform principle should be established for the guidance of persons by whom hidden treasure may be discovered, the following provisions are enacted, to be in force as soon as promulgated throughout the provinces immediately subordinate to the presidency of Fort William.

II. Whenever any hidden treasure, consisting of gold or silver coin, or bullion, or of precious stones, or other valuable property, may be found buried in the earth, or otherwise concealed within any part of the territory subject to this presidency, and, after due notification, the owner thereof may
not be discoverable, such hidden treasure shall become the property of the person or persons who may have found the same, provided it shall not exceed in amount or value the sum of one lac of sicca rupees; and provided the finder or finders shall have conformed to the rules prescribed in this Regulation.

Sections III and IV are repealed by Act VIII of 1868.

V. It shall be the duty of the collectors of land revenue acting under the instructions of the Board of Commissioners, or the Commissioner in Behar and Benares, or the Board of Revenue, to bring forward and to support, in conformity with the foregoing provision, any claim of right which Government may appear to possess to such treasure.

In the event of any claim of right being preferred, either on the part of individuals or of Government, pursuant to the prescribed notification, the judge shall institute a summary inquiry into the claim preferred, and if the title of Government, or other person so claiming the treasure in deposit, or any part thereof, be clearly established, he shall adjudge the same accordingly, subject to reimbursement of all expense incurred by the finder of the treasure, as well as to such compensation for the discovery of it as may, in such case, appear just and reasonable.

VI. If no claim of right be preferred either by Government, or by an individual, within the period limited by the notification directed in Section IV of this Regulation, or if the claim or
claims so preferred shall not on a summary inquiry appear to be well founded, and the amount or value of the hidden treasure found at the same time, or in the same place, shall not exceed one lac of sicca rupees, the zillah or city judge shall adjudge the same to the person or persons who may have discovered the treasure, and deposit it in the Zillah or City Court, as required by Section II, subject only to the actual expense which may have been incurred in adopting the measures prescribed by this Regulation.

VII. If the amount or value of any hidden treasure found at the same time, or in the same place, shall exceed one lac of sicca rupees, and no claim of right thereto be established, judgment shall be given, according to the preceding section, in favour of the person or persons who may have discovered and deposited the treasure, to the amount of one lac of sicca rupees; and the excess above that sum shall be declared at the disposal of Government.

VIII. If any person discovering hidden treasure of the description specified in Section II of this Regulation shall not, within one month after finding the same, give notice to the judge of the Zillah or City Court, in conformity with Section IV, and make the deposit thereby required, he shall be considered to have forfeited all right and title to the treasure, as well as all claim to a reimbursement of expense, compensation, or reward, under the provisions of this Regulation, and the treasure so clandestinely withheld from public individuals, and the amount may not exceed one lac of sicca rupees.

Decision to be passed by the judge in cases in which the amount of treasure shall exceed one lac of sicca rupees, and no claim of right thereto be established.

Persons discovering hidden treasure, who shall neglect to give due notice within one month, shall be considered to have forfeited all right and title to the treasure, as well as all claim to a reimbursement of expense, compensation, or reward, under the provisions of this Regulation, and the treasure so clandestinely withheld from public
The summary decisions of the judges of the Zillah and City Courts shall be open to a summary appeal to the Provincial Courts.

The decision of two or more judges of the Provincial Courts on such appeals to be final.

Provision for admitting a second summary appeal before the Sudder Dewanny Adawlut.

IX. The summary decisions of the judges of the Zillah or City Courts, which may be passed under this Regulation, shall be open to a summary appeal to the Provincial Courts, under the general rules in force relative to summary appeals.

X. The decisions of two or more judges of the Provincial Courts on such appeals shall be final, unless the Court of Sudder Dewanny Adawlut should, on the face of the decree, or on inspection of any documents exhibited with it, see just and sufficient ground for admitting a second summary appeal to that court; in which case only such further appeal may be admitted, and proceeded upon under the general rules in force for summary appeals.

ACT No. XI OF 1855.

An Act relating to mesne profits and to improvements made by holders under defective titles in cases to which the English Law is applicable.

Whereas it is expedient, in cases to which the English Law is applicable, to limit the liability for mesne profits, and to secure to bonâ fide holders
under defective titles the value of improvements made by them; It is enacted as follows:—

I. No person shall be chargeable with any rents or profits of any immoveable property which he has bonâ fide paid over to any person of whom he bonâ fide held the same, notwithstanding it may afterwards appear that the person to whom such payment was made had no right to receive such rents or profits.

II. If any person shall erect any building or make an improvement upon any lands held by him bonâ fide in the belief that he had an estate in fee simple, or other absolute estate, and such person, his heirs or assigns, or his or their under-tenants, be evicted from such lands by any person having a better title, the person who erected the building or made the improvement, his heirs or assigns, shall be entitled either to have the value of the building or improvement so erected or made during such holding and in such belief, estimated and paid or secured to him or them, or, at the option of the person causing the eviction, to purchase the interest of such person in the lands at the value thereof, irrespective of the value of such building or improvement. Provided that the amount to be paid or secured in respect of such building or improvement shall be the estimated value of the same at the time of such eviction.

II. Nothing in this Act contained shall extend to any case to which the English Law is not applicable.
APPENDIX.

ACT No. V of 1844.

(Passed on 2nd March 1844.)

An Act for the suppression of all Lotteries not authorized by Government:

Whereas great mischief has been found to result from the existence of Lotteries.

I. It is hereby enacted, that in the territories subject to the Government of the East India Company, all Lotteries, not authorized by Government, shall, from and after the 31st day of March, 1844, be deemed, and are hereby declared, common and public nuisances and against Law.

On a reference as to whether this Act, and Act XXI of 1848, could be held to be in force in the Punjab Proper, since they were both passed before the proclamation of the 29th March 1849, by which the Punjab was annexed, and do not appear since to have been specifically extended to these territories, the Chief Court held that they were in force, their ruling being expressed in the following terms: — "By the Rules for the Administration of Justice in the Punjab and Cis-Sutlej Provinces, which were declared to be the Judicial Code of the Punjab in a letter of the Secretary to the Government of India, No. 418 dated the 31st March 1849, to the President and Members of the Board of Administration, it is declared in Section 12, that in all cases not specially provided for in the preceding rules, the Commissioner and his Assistants will endeavour to conform, as nearly as the circumstances of the case will admit, to the provisions of the Regulations in force in the districts subordinate to the Lieutenant Governor of the North Western Provinces. These Rules (which have obtained the force of law under the Indian Councils' Act 1861,) by the use of the word Regulations, must be taken to refer to the enactments generally of that legislative body, which, until 1849, had been making, by virtue of the Statute 3 and 4, Will. IV, C. 85, S. 43, laws and regulations for the territories held by the East India Company in trust for the Crown. And although the Rules speak only of Regulations, they must be under-
stood not to refer only to the laws called by that name made before 1834, but to refer equally to the laws made by the Governor General in Council after that date; laws which in fact were made under the same authority, and by the same power, notwithstanding that laws made after 1834 were called by a different name, not found in the Statute, viz. Acts. In 1849, Acts V of 1844 and XXI of 1848 were in force in the North-Western Provinces, and under the Rules above mentioned must be taken to give the law to the Punjab and Cis-Sutlej Provinces. Moreover, the principle declared is so wide and general in its application to the law of contract, that it must be taken to have necessarily accompanied the introduction of the existing British system of law into the Punjab in 1849.”—(3. Punjab Record, Case No. 16.)

Every transaction involving the casting of lots is not necessarily illegal under this Act.

A transaction is not necessarily a lottery within either the spirit or the letter of this Act, simply because a matter of whatever kind is agreed to be decided by lot. Where therefore twenty persons agreed to subscribe Rs. 10 monthly, and that each in his turn, as determined by lot, should take the whole subscription for one month, viz: Rs. 200, the Madras Court held the agreement not to be illegal, and that a suit would lie on a bond given by one of the subscribers, who had already obtained the subscriptions for one month, to secure the due payment of his subsequent monthly installments.—Kamakshi Achari v. Appavu Pillai.—(l. Stokes’ Madras Reports, p. 448.)

If property be sold to the knowledge of the vendor in order to be disposed of by means of a lottery, and a bond be given for the amount of the purchase money, the obligee will be unable to recover on it, as being based on, and springing out of, an illegal contract—Fisher v. Bridges.—(Broom’s Commentaries on the Common Law, p. 287.)

II. And it is hereby enacted, that from and after the day aforesaid, no person shall, in the said territories, publicly or privately, keep any office or place for the purpose of drawing any Lottery not authorized by Government, or shall have any such Lottery drawn, or shall knowingly suffer any such Lottery to be drawn in his or her house; and any person so offending shall for every such offence, upon conviction before a Justice of the Peace or Magistrate, be punished by fine not exceeding 5,000 Rupees.
III. And it is hereby enacted, that, from and after the day aforesaid no person shall under any pretence, device or description whatsoever agree to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, whether with or without consideration, on any event or contingency relative or applicable to the drawing of any ticket, lot, number, or figure in any such Lottery, or shall publish any proposal for any of the purposes aforesaid, and any person offending in any of the matters mentioned in this Section shall for every such offence, upon conviction before a Justice of the Peace or Magistrate, be punished by fine not exceeding 1,000 Rupees.

In Oram v. Hawkes and others, the Chief Court held that the general terms of this Section* applied to prevent an action lying to recover the value of shares taken in a raffle for a carriage, and that the money was equally irrecoverable, owing to the illegality of the transaction, when Promissory Notes had been given for the amount of the shares taken, the only effect of the giving the negotiable instruments being to throw on the maker the disproof of a valid consideration, which the Notes primâ facie imported. In this case the carriage was to be won by the person who made the highest throw with dice.—(3. Punjab Record, Case No. 16.)

IV. And it is hereby enacted, that every fine which shall be incurred under the provisions of this Act shall be applied, one half to the use of Government, and the other half to the use of the Informer or Informers.

* "Section 3 of Act XXI of 1848," in the report is an obvious oversight or misprint for "Section 3 of Act V of 1844."
ACT No. XXI of 1848.

(Passed on the 10th October 1848.)

An Act for avoiding Wagers.

Whereas it is expedient to discourage gaming and wagering for money,—It is enacted as follows:

I. All agreements, whether made in speaking, writing, or otherwise, by way of gaming or wagering, shall be null and void: and no suit shall be allowed in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won on any wager, or entrusted to any person to abide the event of any game, or on which any wager is made.

For the authority of this Act as law in the Punjab, see the first para of the remarks under Section 1 of Act V of 1844.

For its restricted applicability to horse racing, see Act VIII of 1867, (appended at the end of this Act.)

A colorable contract for the purchase and sale of stock, or shares, or goods, where neither party intends to deliver the stock, shares, or goods, but merely to pay or receive the difference between the price stipulated and that which may happen to rule in the market at the time agreed on for delivery, is void, as being gaming and wagering. There is however no reason for contending that a contract for the sale of shares, goods, &c., to be delivered at a future day is a gaming transaction, because the vendor neither has the articles sold in his possession, nor has entered into any contract to buy them, nor has any expectation of becoming possessed of them, otherwise than by purchasing them in the market.—(Addison on Contracts, pp. 139 and 901.) In Kishna v. Oushnak, the Judicial Commissioner pointed out that as Act XXI of 1848 is borrowed from the 8 and 9 Vic. C. 109, the interpretations put on the English Statute are applicable to the Act. The following judgment of the Agra Court in the case of Chandan v. Ajudhia Prasad, was subjoined by the Judicial Commissioner to his decision in the case just cited, as an illustration of the kind of contracts which are illegal under this Act. “The plaintiff has in his replication,” observed the Agra Court, “fully described the
nature of the transaction between himself and the appellant. He has stated that the appellant purchased of him Rs. 150 worth of Oord at 35 seers per rupee, and gave one rupee in advance as earnest money, promising to pay the balance with interest. Afterwards, on rendering accounts, Rs. 12-11 was shewn due by defendant as interest from the date when the cause of action arose; which together with the principal amounted to Rs. 161-11. Plaintiff deducted from this Rs. 87-8, the price of the grain at the rate of one maund and twenty seers per rupee (the market rate), and entered the balance Rs. 74-3 as due by the defendant. Hence it is clear that no actual purchase of grain was ever made or contemplated by either party; and that the transaction was of the nature of a wager on the market price of Oord grain on a certain day. There was no interchange of commodities between the plaintiff and defendant, and the claim as set forth in the plaint, representing a loan as the basis of the suit is obviously false. We consider such a claim not cognizable by the Courts. We accordingly reverse the order of the Lower Court, and decree the appeal with costs."—(See 1. Punjab Record, Case No. 11.)

A suit may be brought to enforce a contract of the kind called *souda putro*, by which a man actually receiving a sum of money by way of advance, engages to supply a certain quantity of an article at a time fixed, or in case of non-delivery to pay the value thereof at the price current at a stipulated period.—(*Macpherson on Contracts*, pp. 36 and 46.)

_A, in consideration of an immediate payment of Rs. 1,000, assigned to _B_ an overdue bond of _C_ for Rs. 4,000 and interest, binding himself likewise to give _B_ the means of proving the bond, and stipulating not to receive any portion of the debt himself, and, in case of failing to fulfil these conditions, he undertook to pay the amount of the bond himself. It was held that this was not a wagering transaction.—(*Macpherson on Contracts*, p. 37.)

The Act prevents the winner of a wager from recovering the money won by him from the loser, and also from recovering money deposited in the hands of a shareholder to abide the event and be paid to the winner: but it does not prevent the depositor from repudiating the contract and recovering back his deposit before the event has happened and the wager has been decided. An action too will lie to recover money paid at the defendant's request to the winner of a bet.—(*Addison on Contracts*, p. 902.)

"Held that a suit for money advanced in small sums at a gambling meeting to one of the players, who wagered and lost it as fast as it was supplied, was barred, being opposed to morality, public policy, and positive law (*Act*...
XXI of 1848, the money having been entrusted to a person to abide the event of a game and having been wagered.”—(Judicial Commissioner’s Ruling No. 68, Thornton’s Small Cause Court Manual, Addenda, p. 180.) See too the case of Fisher v. Bridges above at p. II. But this ruling would only apparently apply when the money was advanced in order that the gaming might be carried on, as the Bombay Court has held, in Tribhowandass v. Moti Lall, that this Act does not bar a person, who has paid money for the defendant as his agent to third parties, from recovering the amount from the former, because the money had been paid on account of wagers lost by the defendant.—(1. Bombay High Court Reports, p. 34.)

II. Repealed by Act VIII of 1868.

ACT No. VIII of 1867.

(Passed on 1st February, 1867.)

An Act to amend the law relating to Horse-racing in India.

Whereas it is expedient to exempt certain transactions connected with horse-racing from the operation of Act No. XXI of 1848 (for avoiding wagers); It is hereby enacted as follows:—

I. No subscription or contribution, or agreement to subscribe or contribute, made or entered into after the passing of this Act, for or toward any plate, prize, or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race, shall be deemed unlawful by reason of anything contained in the said Act No. XXI of 1848.

II. Nothing in this Act shall be deemed to legalize any transaction connected with horse-racing to which the provisions of Act No. V of 1844 (for the suppression of all lotteries not authorized by Government) apply.
ACT No. XXXV of 1858.

(Passed on 14th September 1858.)

An Act to make better provision for the care of the estates of Lunatics not subject to the jurisdiction of the Supreme Courts of Judicature.

Whereas it is expedient to make better provision for the care of the estates of lunatics not subject to the jurisdiction of the Supreme Courts of Judicature; and to prescribe general rules by which the state of mind of persons not subject to such jurisdiction, who are alleged to be lunatic, may be enquired into and ascertained; It is enacted as follows:—

I. So much of Section V Regulation X. 1793, of Section IX Regulation LII. 1803, of Regulation I. 1800, and of Section XXIX Regulation VIII. 1805 (extended to Benares by Section II Regulation VI. 1822), of the Bengal Code; and so much of Sections VI and VII Regulation V. 1804, and of Sections XX and XXII of the said Regulation (as modified by Section III Regulation X. 1831), of the Madras Code as relate to lunatics or idiots—are hereby repealed.

II. Whenever any person not subject to the jurisdiction of the Supreme Courts, who is possessed of property, is alleged to be a lunatic, the Civil Court, within whose jurisdiction such person is residing, may, upon such application as is herein-aftermentioned, institute an enquiry for the purpose of ascertaining whether such person is or is not of unsound mind and incapable of managing his affairs.
In the case of one Kullonas the Calcutta Court held that the word *residing* in this Section must be taken in its simple meaning, without any distinction as to voluntary or involuntary residence; and that, therefore, the Judge of the 24 Pergunnas had jurisdiction over a lunatic who was in the Bhowanipur Asylum at the time when an application was made for the appointment of a manager for the lunatic's estate, which was situated in another district. — (2. Bengal Law Reports, Civil Appeals, p. 246.)

Applications under Sections 2 and 3 of this Act must be verified, since Section 38 Act XXIII of 1861 enacts that "the procedure prescribed by Act VIII of 1859 shall be followed, so far as it can be, in all miscellaneous cases and proceedings which after the passing of this Act shall be instituted in any Court." If verification be neglected, the whole proceedings are liable to be quashed. — (5. W. Reporter, Miscellaneous Appeals, p. 54; and Vol. 7. Civil Rulings, p. 267.)

III. Application for such enquiry may be made by any relative of the alleged lunatic or by any Public Curator appointed under Act XIX of 1841, or by the Government Pleader, or if the property of the alleged lunatic consist in whole or in part of land or any interest in land, by the Collector of the district in which it is situate. If the property or any part thereof be of such a description as by the law in force in any Presidency where such property is situate would subject the proprietor, if disqualified, to the superintendence of the Court of Wards, the application may be made by the Collector on behalf of the Court of Wards.

IV. When the Civil Court is about to institute any such enquiry as aforesaid, it shall cause notice to be given to the alleged lunatic of the time and place at which it is proposed to hold the enquiry. If it shall appear that the alleged lunatic is in such a state that personal service on him would be ineffectual, the Court may direct such
APPENDIX. J

ACT XXXV OF 1858.

substituted service of the notice as it shall think proper. The Court may also direct a copy of such notice to be served upon any relative of the alleged lunatic.

"The object of these Sections [4 to 7]," observed Peacock, C. J., in the case of the Rajah of Chota Nagpur, "was to provide for proper notice to the lunatic or to his friends in case of necessity; and also for the personal examination of the alleged lunatic both by the Court itself and by such professional men or other persons as the Court might think fit to appoint to report upon his state of mind. Cases of this kind require the greatest care and delicacy in dealing with them, and everything should be avoided which is likely to cause unnecessary pain or excitement to the unfortunate object of the enquiry." Where the alleged patient is a person exempted by his rank from appearing in the Civil Courts, he ought from the same considerations to be exempted from personal appearance in a public Court for the enquiry into the state of his mind, and if, therefore, in such cases, a personal examination be deemed necessary the Judge should hold it at the lunatic's own residence.—(5. W. Reporter, Miscellaneous Appeals, p. 54.)

V. The Civil Court may require the alleged lunatic to attend at such convenient time and place as it may appoint for the purpose of being personally examined by the Court or by any person from whom the Court may desire to have a report of the mental capacity and condition of such alleged lunatic. The Court may likewise make an order authorizing any person or persons therein named to have access to the alleged lunatic for the purpose of a personal examination.

See the remarks under the previous Section.

"This Clause never intended that an alleged lunatic should be summoned into a public Court as a witness, and subjected to examination as a witness by the wakil of the person on whose petition the enquiry was instituted."—(7. W. Reporter, Civil Rulings, p. 246.)

A Judge ought not to strike off an application under this Act because the alleged lunatic failed to attend after notice. If the lunatic do not attend, the un-
VI. The attendance and examination of the alleged lunatic under the provisions of the last preceding Section shall, if the alleged lunatic be a woman who, according to the manners and customs of the country, ought not to be compelled to appear in public, be regulated by the rules in force for the examination of such persons in other cases.

If the alleged lunatic be a gentleman of rank the enquiry should be made at his house. See the ruling cited under Section 4 of this Act.

VII. The Civil Court, if it think fit, may appoint two or more persons to act as Assessors to the Court in the said enquiry. Upon the completion of the enquiry, the Court shall determine whether the alleged lunatic is or is not of unsound mind, and may make such order as to the payment of the costs of the enquiry by the person upon whose application it was made, or out of the estate of the alleged lunatic if he be adjudged to be of unsound mind, or otherwise, as it may think proper.

The Calcutta Court in the case of Shaikh Bashrat Ullah v. The Collector of Tipperah, set aside the order of the Judge, who had placed the estate of the appellant under management, because he had acted simply on the verified information of the Collector, without making an enquiry himself, and finding whether or not the appellant was of unsound mind. The Court held also that the burden of proving an allegation of lunacy rests with the person making the application under Section 3.—(8. W. Reporter, Civil Rulings, p. 375.)
VIII. If the alleged lunatic reside at a distance of more than fifty miles from the place where the Civil Court to which the application shall have been made is held, the said Court may issue a Commission to any subordinate Court, to make the enquiry, and thereupon the said subordinate Court shall conduct the enquiry in the manner hereinbefore provided. On the completion of the enquiry the subordinate Court shall report its proceedings with the opinions of the Assessors, if Assessors have been appointed, and its own opinion on the case; and thereupon the Civil Court shall make such order in the case as it may think proper.

IX. When a person has been adjudged to be of unsound mind and incapable of managing his affairs, if the estate of such person or any part thereof consist of property which by the law in force in any Presidency subjects the proprietor, if disqualified, to the superintendence of the Court of Wards, the Court of Wards shall be authorized to take charge of the same. In all other cases, except as otherwise hereinafter provided, the Civil Court shall appoint a manager of the estate. Any near relative of the lunatic, or the Public Curator, or, if there be no Public Curator, any other suitable person, may be appointed manager.

X. Whenever a manager of the estate of a lunatic is appointed by the Civil Court, the Court shall appoint a fit person to be guardian of the person of the lunatic. The manager, unless he be the Public Curator, may be appointed guardian. Provided always that the legal heir of the lunatic
XI. If the estate consist in whole or in part of land or any interest in land not subject to the jurisdiction of the Court of Wards, the Civil Court, instead of appointing a manager, may direct the Collector to take charge of the estate, and thereupon the Collector shall appoint a manager of the property and a guardian of the person of the lunatic. All the proceedings of the Collector in the charge of estates under this Act shall be subject to the control of the superior Revenue Authorities.

A Collector who is appointed under this Section to take charge of a lunatic’s estate cannot himself sue on behalf of the lunatic; but he must appoint a manager, who is to exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a lunatic [Section 14], including of course the right to bring actions at law.—Gourinath v. The Collector of Monghyr.—(7. W. Reporter, Civil Rulings, p. 5.)

XII. If the person appointed to be manager of the estate of a lunatic, or the person appointed to be guardian of a lunatic’s person, shall be unwilling to discharge the trust gratuitously, the Court or the Collector, as the case may be, may fix such allowance or allowances to be paid out of the estate of the lunatic as, under the circumstances of the case, may be thought suitable.

XIII. The person appointed to be guardian of a lunatic’s person shall have the care of his person and maintenance. When a distinct guardian is appointed, the manager shall pay to the guardian such allowance as shall be fixed by the Court or the Collector, as the case may be, for the maintenance of the lunatic and of his family.
XIV. Every manager of the estate of a lunatic appointed as aforesaid may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a lunatic; and may collect and pay all just claims, debts, and liabilities due to or by the estate of the lunatic. But no such manager shall have power to sell or mortgage the estate or any part thereof, or to grant a lease of any immoveable property for any period exceeding five years, without an order of the Civil Court previously obtained.

XV. Every person appointed by the Civil Court or by the Collector to be manager of the estate of a lunatic shall, within six months from the date of his appointment, deliver in Court or to the Collector, as the case may be, an inventory of the landed property belonging to the lunatic, and of all such sums of money, goods and effects, as he shall receive on account of the estate, together with a statement of all debts due by or to the same. And every such manager shall furnish to the Court or to the Collector annually, within three months of the close of the year of the era current in the district, an account of the property in his charge, exhibiting the sums received and disbursed on account of the estate and the balance remaining in his hands. If any relative of the lunatic, or any public officer by petition to the Court, shall impugn the accuracy of the said inventory and statement, or of any annual account, the Court may summon the manager and enquire summarily into the matter and make such order thereon as it shall think pro-
per; or the Court, at its discretion, may refer any such petition to any subordinate Court or to the Collector if the manager was appointed by the Collector.

XVI. All sums received by a manager on account of any estate in excess of what may be required for the current expenses of the lunatic or of the estate, shall be paid into the public treasury on account of the estate, and may be invested from time to time in the public securities.

XVII. It shall be lawful for any relative of a lunatic to sue for an account from any manager appointed under this Act, or from any such person after his removal from office or trust, or from his personal representative in case of his death, in respect of any estate then or formerly under his care or management, or of any sums of money or other property received by him on account of such estate.

XVIII. The Civil Court, for any sufficient cause, may remove any manager appointed by the Court, not being a Public Curator, and may appoint such Curator or any other fit person in his room, and may compel the person so removed to make over the property in his hands to his successor, and to account to such successor for all monies received or disbursed by him. The Court may also, for any sufficient cause, remove any guardian appointed by the Court. In like manner the Collector, for any sufficient cause, may remove any manager or guardian appointed by the Collector; and the Court, on the application of the Collector, shall compel any
manager so removed to deliver his accounts and
the property in his hands.

XIX. The Civil Court may impose a fine not
exceeding five hundred rupees on any manager of
the estate of a lunatic who wilfully neglects or
refuses to deliver his accounts or any property in
his hands within the prescribed time or a time fixed
by the Court, and may realize such fine by attach-
ment and sale of his property under the rules in
force for the execution of decrees of Court, and
may also commit the recusant to close custody
until he shall deliver such accounts or property.

XX. If it appears to the Civil Court, having
regard to the situation and condition in life of the
lunatic and his family, and the amount and des-
cription of his property, to be unnecessary to
appoint a manager of the estate as hereinbefore
provided, the Court may, instead of appointing
such manager order that the property if money, or
if of any other description the produce thereof,
when realized, be paid to such person as the Court
may think fit, to be applied for the maintenance
of the lunatic and his family.

XXI. When any person has been adjudged to
be of unsound mind and incapable of managing his
affairs, if such person or any other person acting
on his behalf or having or claiming any interest in
respect of his estate, shall represent by petition to
the Civil Court, or if the Court shall be informed
in any other manner, that the unsoundness of mind
of such person has ceased, the Court may institute
an enquiry for the purpose of ascertaining whether
such person is or is not still of unsound mind and incapable of managing his affairs. The enquiry shall be conducted in the manner provided in Section IV and the four following Sections of this Act; and if it be adjudged that such person has ceased to be of unsound mind and incapable of managing his affairs, the Court shall make an order for his estate to be delivered over to him, and such order shall be final.

XXII. Except as otherwise herein provided, all orders made by a Civil Court or by any subordinate Court under this Act, shall be open to appeal under the rules in force for appeals in miscellaneous cases.

XXIII. The word "lunatic," used in this Act, unless the contrary appears from the context, shall mean every person found by due course of law to be of unsound mind and incapable of managing his affairs. The expression "Civil Court" shall mean the principal Court of original jurisdiction in the district. Words importing the masculine gender shall include females.

\[ \text{ACT No. XL of 1858.} \]
\[ \text{(Passed on 11th December 1858.)} \]

An Act for making better provision for the care of the persons and property of Minors in the Presidency of Fort William in Bengal.

Whereas it is expedient to make better provision for the care of the persons and property of
Minors not brought under the superintendence of the Court of Wards; It is enacted as follows:

I. Regulation I. 1800, Clause 8 and the six following Clauses of Section XXIX Regulation VIII. 1805, Section V Regulation XVII. 1805, and so much of Sections II and III Regulation V. 1799, and of Clauses 2 and 3 Section XVI Regulation III. 1803, as restrict the interference of the Civil Courts in cases of inheritance by minors, are repealed.

II. Except in the case of proprietors of estates paying revenue to Government who have been or shall be taken under the protection of the Court of Wards, the care of the persons of all minors (not being European British subjects) and the charge of their property shall be subject to the jurisdiction of the Civil Court.

A Full Bench of the Calcutta Court, in Madhusudan Singh v. The Collector of Midnapur, held that the Court of Wards may at any time claim the guardianship of a minor and the management of his property, notwithstanding that a guardian may have been previously appointed by the Civil Court under the provisions of this Act—(3. W. Reporter, Civil Rulings, p. 83.)

Where under the provisions of the Mahammadan law, it was urged that a mother was entitled to the custody of her minor daughter till she arrived at puberty, the Calcutta Court ruled that, as this Act comprises the case of all minors, except the two classes of those brought under the superintendence of the Court of Wards, and those who are European British subjects, and acts altogether irrespective of the Mahammadan law, that law can be no guide in determining whether the applicant should or should not obtain a certificate under the Act.—Akima Bibi v. Azim Sarung.—(9. W. Reporter, Civil Rulings, p. 334.)

III. Every person who shall claim a right to have charge of property in trust for a minor under...
a will or deed, or by reason of nearness of kin, or otherwise, may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate. Provided that, when the property is of small value, or for any other sufficient reason, any Court having jurisdiction may allow any relative of a minor to institute or defend a suit on his behalf, although a certificate of administration has not been granted to such relative.

A certificate under this Section is purely an authority for the administration of property, and it does not appear therefore to have been the intention of the Legislature that it should be issued where there is neither present right to possession, nor even a vested right to future possession.—Nobin Chandra Shaha v. Raj Narayan Shaha. (9. W. Reporter, Civil Rulings, p. 582.) But a widow is entitled to a certificate to enable her to bring a suit on behalf of her minor son to set aside an adoption set up by the widow of his grandfather, although that widow, and not the petitioner, has the right to enjoy the grandfather's estate during the life-time of the former.—Saroda Sundari Dassi v. Tarini Charan Chowdhry. (Vol. 6. Miscellaneous Rulings, p. 28.) In this latter case, even if the minor had no other estate, his reversionary interest in his grandfather's estate might be regarded as such, and a certificate was needed to enable that interest to be protected and asserted by suit.

The certificate should be in precise conformity with the terms of this Section, viz: a certificate enabling the petitioner A to administer the property of the minor B; and if owing to the language employed in the petition, the Court is led to grant a certificate in which a certain estate is specified as the property of the minor, any person whose rights were likely to be prejudiced by this specification will be entitled to come forward and have the words struck out, recovering his costs from the applicant.—Fedal Hossein v. Rani Khajurunnissa. (9. W. Reporter, Civil Rulings, p. 459.)

A certificate granted under this Act, to administer to an estate, though it gives the right to an administrator to collect the debts due to the estate, is not sufficient to enable
the party to whom the certificate is granted to enforce that right in Court, if the debtor object to pay the debt, without his obtaining also a certificate under Act XXVII of 1860.—

In Mussumat Dhanraj Koueri v. Rajah Rudar Partab Singh, a Full Bench of the Agra Court held that a guardian without a certificate, though expecting to get one, and who had not obtained the special permission of the Court to bring an action, was not entitled to sue on behalf of the minor.—(4. North West High Court Reports, p. 300.)

In Budhmall v. Gour Shankar, which was a suit brought by the plaintiff to set aside a compromise made by his father in an action he had brought as guardian for his then minor son, the Lower Court held that, as the father had not obtained a certificate under this Act, he had no right to sue in the case in which the compromise was effected, and therefore the compromise was null. The Calcutta Court, however, pointed out that the father was the natural guardian, that a certificate would not have created his status of guardian, but would only have certified it. Without such certificate a Court might refuse to hear him, but when the Court does hear him, the discretion vested in the Court being wide, the absence of the certificate will not (in the case of a natural guardian of right), vitiate the proceedings. Nor does the law seem to vitiate the private acts of such a natural guardian.—(4. W. Reporter, Civil Rulings, p. 71.) So also in Mussumat Shughari Kouer v. Boshisht Narayan Singh, the Court remarked that this "Act nowhere says that every act of a guardian who has not such a certificate shall be null for want of it."—(Vol. 8. Civil Rulings, p. 331.) See too Vol. 10. Civil Rulings, p. 425.

It should be observed that not only "when the property is of small value" may a relative of a minor, who has not taken out a certificate of administration be admitted to institute or defend a suit on the latter's behalf; but also whenever "any other sufficient reason" is shewn, the Court has the fullest discretion to dispense with the production of a certificate.—(8. W. Reporter, Civil Rulings, p. 197.) In this case the Court expressed a doubt whether the word "suit" as employed in this Section included all proceedings of a miscellaneous character.—See also 1. W. Reporter, p. 260.

IV. Any relative or friend of a minor in respect of whose property such certificate has not been granted, or, if the property consist in whole
or in part of land or any interest in land, the Collector of the district, may apply to the Civil Court to appoint a fit person to take charge of the property and person of such minor.

V. If the property be situate in more than one district, any such application as aforesaid shall be made to the Civil Court of the district in which the minor has his residence.

VI. When application shall have been made to the Civil Court either by a person claiming a right to have charge of the property of a minor, or by any relative or friend of a minor, or by the Collector, the Court shall issue notice of the application and fix a day for hearing the same. On the day so fixed, or so soon after as may be convenient, the Court shall enquire summarily into the circumstances and pass orders in the case. Provided always that it shall be competent to the Civil Court to direct any Court subordinate to it to make such enquiry and report the result.

The enquiry the Court has to make under this Section is an enquiry as to the fitness of the person making the application to act as regards the minor; and also if necessary whether there be a minor or not; but as for the purposes of this Act minority terminates at the full age of 18 years (Section 26), a certificate should not be refused if the infant be under that age, however nearly he may attain to it. Such questions as the validity of the minor's adoption ought not to be gone into in investigations under this Section.—Brohmo Moyi Chowdhraín v. Chittra Mani Chowdhraín.—(8. W. Reporter, Civil Rulings, p. 25.) And if the case be one of disputed adoption, and the applicant be entitled from his relationship to act as guardian to the minor, the certificate ought to be granted, as it will enable the holder to bring a suit to establish the adoption of the minor, while until such adoption be proved the certificate will not enable the guardian to interfere with the estate of the alleged adoptive father.—(6. W. Reporter, Miscellaneous Rulings, p. 47.)
A party who comes forward to oppose the grant of the certificate to the applicant, not as being himself the proper person to receive it, or as a friend or well wisher of the minor, and therefore interested in seeing that an improper person be not appointed, but as one claiming adversely to the minor, ought not to be admitted as a party to the proceedings at all, but should be directed to a regular suit to establish the points he is concerned with.—Parama Sundari Dassi v. Tara Sundari Dassi.—(9. W. Reporter, Civil Rulings, p. 342.)

VII. If it shall appear that any person claiming a right to have charge of the property of a minor is entitled to such right by virtue of a will or deed, and is willing to undertake the trust, the Court shall grant a certificate of administration to such person. If there is no person so entitled, or if such person is unwilling to undertake the trust, and there is any near relative of the minor who is willing and fit to be entrusted with the charge of his property, the Court may grant a certificate to such relative. The Court may also, if it think fit (unless a guardian have been appointed by the father), appoint such person as aforesaid or such relative or any other relative or friend of the minor, to be guardian of the person of the minor.

The Judge is not only competent, but it is his duty to satisfy himself of the genuineness of the will under which the applicant claims a certificate, if there be cause for doubt; but if this be duly proved, and the person therein appointed to the trust be willing to undertake it, the language of this Section leaves the Judge no discretion, but compels him to grant the certificate to the party so appointed; albeit there may be a natural guardian of the minor alive at the time. Neither is the fact of the application being made several years after the death of the testator any cause for its being rejected.—Parama Sundari Dassi v. Tara Sundari Dassi.—(9. W. Reporter, Civil Rulings, p. 342.)

Where there is no deed or will appointing a manager, the provisions of the Section do not require the certificate to be granted to the nearest of kin to the minor; but the law looks as much to the fitness of the relative as to his pro-
VIII. The Court may call upon the Collector or Magistrate for a report on the character and qualification of any relative or friend of the minor who may be desirous or willing to be entrusted with the charge of his property or person.

IX. If no title to a certificate be established to the satisfaction of the Court by a person claiming under a will or deed, and if there be no near relative willing and fit to be entrusted with the charge of the property of the minor, and the Court shall think it to be necessary for the interest of the minor that provision should be made by the Court for the charge of his property and person, the Court may proceed to make such provision in the manner hereinafter provided.

X. If the estate of the minor consist of moveable property, or of houses, gardens, or the like, the Court may grant a certificate to the Public Curator appointed under Section XIX Act XIX of 1841 (for the protection of moveable and immovable property against wrongful possession in certain cases), or, if there be no Public Curator, to any fit person whom the Court may appoint for the purpose.
XI. Whenever the Court shall grant a certificate of administration to the estate of a minor to the Public Curator or other person as aforesaid, it shall at the same time appoint a guardian to take charge of the person and maintenance of the minor. The person to whom a certificate of administration has been granted, unless he be the Public Curator, may be appointed guardian. If the person appointed to be guardian be unwilling to discharge the trust gratuitously, the Court may assign him such allowance, to be paid out of the estate of the minor, as under the circumstances of the case it may think suitable. The Court may also fix such allowance as it may think proper for the maintenance of the minor; and such allowance and the allowance of the guardian (if any) shall be paid to the guardian by the Public Curator or other person as aforesaid.

XII. If the estate of the minor consist, in whole or in part, of land or any interest in land, the Court may direct the Collector to take charge of the estate, and thereupon the Collector shall appoint a manager of the property of the minor and a guardian of his person, in the same manner and subject to the same rules in respect of such appointments and of the duties to be performed by the manager and guardian respectively, so far as the same may be applicable, as if the property and person of the minor were subject to the jurisdiction of the Court of Wards.

Where an order has been passed by the Civil Judge under this Section, it is not competent to that officer or to his successor to interfere with and modify the order. Neither when passing an order under the Act is the Court
at liberty to pronounce on the extent of the interest taken by the minor, that is, whether he be sole heir or a sharer with others.—The Collector of Turhoot v. Raj Kumar Deo Mandan Singh.—(10. W. Reporter, Civil Rulings, p. 218.) See above, para 2 of the remarks under Section 3.

XIII. In all enquiries held by the Civil Court under this Act, the Court may make such order as to the payment of costs by the person on whose application the enquiry was made, or out of the estate of the minor, or otherwise, as it may think proper.

XIV. Whenever one or more of the proprietors of an estate, which has come under the jurisdiction of the Court of Wards on account of the disqualification of all the proprietors, ceases to be disqualified, and the estate, in consequence, ceases to be subject to the jurisdiction of the Court of Wards, notwithstanding the continued disqualification of one or more of the co-proprietors, the Collector of the district in which the estate is situate may represent the fact to the Civil Court; and the Court unless it see sufficient reason to the contrary shall direct the Collector to retain charge of the persons, and of the shares of the property of the still disqualified proprietors, during the continuance of their disqualification, or until such time as it shall be otherwise ordered by the Court. The Collector shall in such case appoint a guardian for the care of the persons, and a manager for the charge of the property of the disqualified proprietors, in the manner prescribed in Section XII. If the property be situate in more than one district, the representation shall be made by the Collector who had the general management of the property
under the Court of Wards, to the Civil Court of his own district, and the orders of the Court of that district shall have effect also in other districts in which portions of the property may be situate.

XV. The proceedings of the Collector in the charge of estates under this Act shall be subject to the control of the superior Revenue Authorities.

XVI. The Public Curator and every other Administrator to whom a certificate shall have been granted under Section X shall, within six months from the date of the certificate, deliver in Court an inventory of any immoveable property belonging to the minor, and of all such sums of money, goods, effects, and things as he shall have received on account of the estate, together with a statement of all debts due by or to the same. And the Public Curator and every such other Administrator shall furnish annually, within three months from the close of the year of the era current in the district, an account of the property in his charge, exhibiting the amounts received and disbursed on account of the estate, and the balance in hand. If any relative or friend of a minor or any public officer, by petition to the Court, shall impugn the accuracy of the said inventory and statement or of any annual account, the Court may summon the Curator or Administrator and enquire summarily into the matter, and make such order thereon as it shall think proper, or the Court at its discretion may refer such petition to any subordinate Court.

"After carefully examining the Act," observed the Court in the case of Mussumat Soukolly Kunwar, "we come to the conclusion that the law does not require a party hold.
bound to produce accounts unless sued.

Public Curator &c. to pay proceeds of estates into Treasury. Surplus funds to be invested in public securities.

Powers of person to whom certificate has been granted, in the management of a minor's estate.

Relation or friend may sue for an account.

XVII. All sums received by the Public Curator or such other Administrator on account of any estate, in excess of what may be required for the current expenses of the minor or of the estate, shall be paid into the public treasury on account of the estate, and may be invested from time to time in the public securities.

XVIII. Every person to whom a certificate shall have been granted under the provisions of this Act, may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, and may collect and pay all just claims, debts, and liabilities due to or by the estate of the minor. But no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years, without an order of the Civil Court previously obtained.

XIX. It shall be lawful for any relative or friend of a minor, at any time during the continuance of the minority, to sue for an account from any manager appointed under this Act, or from any person to whom a certificate shall have been
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granted under the provisions of this Act, or from any such manager or person after his removal from office or trust, or from his personal representative in case of his death, in respect of any estate then or formerly under his care or management, or of any sums of money or other property received by him on account of such estate.

XX. If the disqualification of a person, for whose benefit a suit shall have been instituted under this Act, cease before the final decision thereof, it shall be lawful for such person to continue the prosecution of the suit on his own behalf.

XXI. The Civil Court for any sufficient cause may recall any certificate granted under this Act, and may direct the Collector to take charge of the estate, or may grant a certificate to the Public Curator or any other person as the case may be; and may compel the person whose certificate has been recalled to make over the property in his hands to his successor, and to account to such successor for all monies received and disbursed by him. The Court may also for any sufficient cause remove any guardian appointed by the Court.

In Nanmi Bibi v. Khwajah Sarwar Hossein, a Full Bench of the Calcutta Court laid it down that the words of this Section are general, and that therefore a certificate granted under Section 7 of the Act, either to a manager appointed by will or to a near relative, can be summarily recalled on sufficient cause, in the same manner as any other certificate, notwithstanding that such a manager is not bound to render periodical accounts; the manager who is dismissed on insufficient grounds having his remedy by appeal under Section 28. The Court further held that the Civil Court possessed the power to recall the certificate without any account having been previously taken in a regular suit under Section 19, where the application for the re-call is based on charges.

Continuance of suit instituted under this Act after disqualification shall have ceased.

Removal of guardian.

The terms of this Section include managers appointed under Section 7.
of waste and mismanagement, which cannot be disposed of without the accounts being enquired into and fully taken. From the reasoning employed though it would appear that this course should only be adopted when the estate is imperilled by being allowed to remain longer in the manager's care.—(7. W. Reporter, Civil Rulings, p. 522.) See too Vol. 6. Miscellaneous Rulings, p. 123.

A party who apprehends danger to the health, wants or life of the minor should present himself in Court, and apply for its interference under the provisions of this Section.—(2. W. Reporter, Miscellaneous Appeals, p. 6.) So proof that the manager has unduly parted with ancestral property will warrant his removal.—(Vol. 2. Miscellaneous Appeals, p. 13.)

This Section does not apply to the case of a ward, who, after attaining his majority, and when consequently the certificate has been cancelled, sues the discharged guardian for an account, and the refund of those sums which may have been improperly expended. The only means of obtaining redress of this nature is by a regular suit.—Dulan Singh v. Torul Narayan Singh.—(4. W. Reporter, Miscellaneous Appeals, p. 3.)

Neither does the Section warrant a Judge in calling on the guardian to produce his accounts on an allegation of mismanagement or neglect while he still remains guardian, or in making his neglect to file them a reason for cancelling the certificate; although if waste be proved, or other sufficient cause be shewn, he is empowered to re-call the certificate summarily. The only way in which a guardian can be made to furnish his accounts is by a regular suit brought under the provisions of Section 19.—(9. W. Reporter, Civil Rulings, p. 555.) This of course does not apply to a guardian appointed under Section 70; see Section 16.

A party who anticipates injury to the person or estate of the minor should apply under this Section for the aid of the Court.

This Section does not authorize the Court to call for accounts from the guardian.

A testamentary guardian cannot be summarily removed.

A Civil Court has no power under this Act to remove summarily a guardian who was not appointed under the Act, but by the will of the minor's grandfather, and consequently the guardianship not being vacant, a certificate cannot be granted to a third party. If a testamentary guardian abuse his trust and act adversely to his ward's interest this would constitute a good cause for commencing a suit against him; when under the circumstances it is likely that the Court in which the suit might be instituted, would, under the discretion allowed under Section 3 of this Act, permit the action to be instituted without a certificate of administration.—Srimati Lakhi Priya Dassi v. Nobin Chandra Nag.—(3. Bengal Law Reports, Civil Appeals, p. 37.)
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XXII. The Civil Court may impose a fine not exceeding five hundred rupees on any person who may wilfully neglect or refuse to deliver his accounts, or any property in his hands, within the prescribed time, or a time fixed by the Court; and may realize such fine by attachment and sale of his property under the rules in force for the execution of decrees of Court; and may also commit the recusant to close custody until he shall consent to deliver such accounts or property.

XXIII. The Civil Court may permit any person to whom a certificate shall have been granted under this Act not being the Public Curator, and any guardian appointed by the Court, to resign his trust; and may give him a discharge therefrom on his accounting to his successor, duly appointed, for all monies received and disbursed by him, and making over the property in his hands.

XXIV. The Public Curator and every other Administrator to whom a certificate shall have been granted under Section X, shall be entitled to receive such commission not exceeding five per centum on the sums received and disbursed by him, or such other allowance, to be paid out of the minor's estate, as the Civil Court shall think fit.

XXV. Every guardian appointed by the Civil Court, or by the Collector under this Act, who shall have charge of any male minor, shall be bound to provide for his education in a suitable manner. The general superintendence and control of the education of all such minors shall be vested in the
Civil Court or in the Collector, as the case may be; and the provisions of Act XXVI of 1854 (for making better provision for the education of male minors subject to the superintendence of the Court of Wards) shall, so far as is consistent with the provisions herein contained, be applicable to the Civil Court, or to the Collector, as the case may be, in respect to such minors, and to every such guardian.

Act XXVI of 1854 will be found given at the end of this Act.

XXVI. For the purposes of this Act, every person shall be held to be a minor, who has not attained the age of eighteen years.

As by Clause 1 Section VIII Punjab Civil Code, eighteen years is the age of majority for all classes in this Province, it is needless to give in detail the precedents on this Section: it will suffice to mention that points connected with its provisions will be found in 2. W. Reporter, Civil Rulings, p. 217; Vol. 3. Civil Rulings, p. 50; and 1. Bengal Law Reports, Full Bench Rulings, p. 49.

XXVII. Nothing in this Act shall authorize the appointment of a guardian of the person of a female whose husband is not a minor, or the appointment of a guardian of the person of any minor whose father is living and is not a minor: and nothing in this Act shall authorize the appointment of any person other than a female as the guardian of the person of a female. If a guardian of the person of a minor be appointed during the minority of the father or husband of the minor, the guardianship shall cease as soon as the father or husband (as the case may be) shall attain the age of majority.
XXVIII. All orders passed by the Civil Court or by any subordinate Court under this Act, shall be open to appeal under the rules in force for appeals, in miscellaneous cases, from the orders of such Court and the subordinate Courts.

XXIX. The expression "Civil Court" as used in this Act shall be held to mean the principal Court of original jurisdiction in the district, and shall not include the Supreme Court; and nothing contained in this Act shall be held to affect the powers of the Supreme Court over the person or property of any minor subject to its jurisdiction. Unless the contrary appears from the context, words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number; and words importing the masculine gender shall include females.

"The title of Act XL of 1858," observes Mr. Campbell, [Non-Regulation Law, p. 320], "expresses that it is applicable to the Bengal Presidency; but there is nothing whatever in the body of the Act to imply that it is limited in its application, and the subsequent amending Act is of general application. There is a separate Act for Madras. But the principles of Act XL of 1858 seem entirely applicable to all Provinces; we have no other guide on this important subject; it has been considered to be, and I have no doubt that it may be received as, in force in Oude and other Non-Regulation Provinces." See further, on the applicability of these Acts to the Punjab, the Chief Court's judgment in the case of Charlotte Twitchen, at p. 226 of this work.
ACT No. XXVI of 1854.

(Passed on 11th November 1854.)

An Act for making better provision for the Education of Male Minors subject to the superintendence of the Court of Wards.

Whereas the existing laws are found insufficient to ensure the proper education of male minors subject to the superintendence of the Court of Wards, and it is expedient to make further and better provision for the education of such persons; It is enacted as follows:—

I. The general superintendence and control of the education of every male minor, whose property has been, or shall be brought under the management of the Court of Wards, in and for any part of the Presidency of Fort William, by virtue of any Act or Regulation, which now is, or hereafter shall be in force, is hereby vested in the Collector of Revenue, acting under the said Court of Wards, in the zillah or district wherein such minor’s estate is situate; or, if such minor is possessed of immoveable property in different districts, in such one of the Collectors of Revenue of such districts as the said Court of Wards shall select.

II. It shall be lawful for every Collector of Revenue, in whom the superintendence of the education of any minor is vested by this Act, to direct that such minor shall reside, either with or without his guardian, at the sudder station of the district, or at any other place within the said Presidency, and shall attend, for the purposes of education,
such school or college as to the said Collector may seem expedient; and to make such provision as may be necessary for the proper care and suitable maintenance of the said minor whilst attending such school or college.

III. If it shall appear to the Collector inexpedient to place any such minor at a school or college, he shall, if the proceeds of the estate are sufficient for that purpose, cause such minor to be educated by a private tutor, properly qualified, either at the family residence of such minor, or at the sudder station, or elsewhere within the said Presidency; and in that case also the Collector shall have power to determine from time to time the place of residence of such minor, and to make such provision as may be necessary for his proper tuition and maintenance during the period of his education.

IV. All charges and expenses which may be incurred on account of any male minor ward under the provisions of this Act, for college or school fees, or for other charges of tuition or education, or by reason of his residence in any place other than his own home or otherwise, shall be defrayed from the profits of his estate in the same manner as other expenses incurred under the authority, or with the sanction, of the Court of Wards.

V. It shall be lawful for the Court of Wards, on the application of a Collector, to remove from office any guardian who shall neglect or refuse to obey, or shall evade compliance with any orders passed, or directions given by such Collector under
Continued liability of guardian removed; powers and responsibilities of new guardian.

The right to the custody of the person of a male minor to be vested in guardian appointed by the Court of Wards, or, failing him, in the Collector.
VIII. All orders and proceedings of a Collector under the provisions of this Act, shall be subject to the revision of the Court of Wards, and every person aggrieved by any such order or proceeding may prefer an appeal therefrom to the Commissioner of Revenue acting as a Court of Wards in and for the Division to which such Collector belongs.

For the extension of the powers of this Act see Section 25, Act XL of 1858 (p. xxx).

The foregoing Act XL of 1858 has been amended by a more recent Act, which is here subjoined.

ACT No. IX of 1861.

(Passed on 24th April 1861.)

An Act to amend the law relating to Minors.

Whereas it is expedient to amend the law for hearing suits relative to the custody and guardianship of minors; It is enacted as follows:—

I. Any relative or friend of a minor who may desire to prefer any claim in respect of the custody or guardianship of such minor may make an application by petition, either in person or by a duly constituted agent, to the principal Civil Court of original jurisdiction in the district by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the petitioner or his agent, if he appear by agent, that there is ground for proceeding, shall give notice of
the application to the person named in the petition as having the custody or being in the possession of the person of such minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition and the determination of the right to the custody or guardianship of such minor.

In a case which came from a Non-Regulation Province in the Lieutenant Governorship of Bengal, the Calcutta Court threw out an opinion that by "the principal Civil Court of original jurisdiction in the district" must be understood the principal Court of ordinary original Civil jurisdiction; that is to say, the Deputy Commissioner's Court.—(7. W. Reporter, Civil Rulings, p. 327.)

II. The Court may direct that the person having the custody or being in possession of the person of such minor shall produce him or her in Court or in any other place appointed by the Court on the day fixed for the hearing of the petition or at any other time, and may make such order for the temporary custody and protection of such minor as may appear proper.

III. On the day appointed for the hearing of the petition or as soon after as may be practicable, the Court shall hear the statements of the parties or their agents if they appear by agents, and such evidence as they or their agents may adduce, and thereupon shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor and the costs of the case.
IV. In cases instituted under this Act, the Court shall be guided by the procedure prescribed in Act VIII of 1859 (for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter) in so far as the same shall be applicable and material; and any order made by the Court may be enforced as if such order had been made in a regular suit.

V. An appeal shall lie to the Sudder Court from any order made by a lower Court under this Act, under the rules applicable to regular appeals of such Sudder Court, except that the petition of appeal may be written on a stamp paper of the value prescribed for petitions to the Sudder Court.

VI. Any order passed under this Act in respect to the custody or guardianship of a minor, shall not be liable to be contested in a regular suit.

VII. Nothing in this Act shall be taken to interfer with the jurisdiction exercised under the Laws in force by any Supreme Court of Judicature or the Courts of Wards; or under Act XXI of 1855 (for making better provision for the education of male minors and the marriage of male and female minors, subject to the superintendence of the Court of Wards in the Presidency of Fort Saint George) and Act XL of 1858 (for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal).

VIII. The term “Sudder Court” in this Act shall denote the Highest Court of Appeal in any part of the British territories in India.
ACT No. XXVII of 1860.

(Passed on 25th June, 1860.)

An Act for facilitating the collection of debts on successions, and for the security of parties paying debts to the representatives of deceased persons.

Whereas it is expedient to consolidate and amend certain Acts now in force which provide greater security for persons paying to the representatives of deceased Hindus, Mahammadans, and others not usually designated as British subjects, debts which are payable in respect of the estates of such deceased persons, and which facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same; It is enacted as follows:—

Section 2 Act XXIV of 1867 repeals this Act, except so far as Hindus, Mahammadans, Buddhists, and persons exempted under Section 302 of the Indian Succession Act 1867, from the operation of that Act, are concerned.

I. Act XX of 1841 (for facilitating the collection of debts on successions, and for the security of parties paying debts to the representatives of deceased persons), so much of Act VIII of 1842 as relates to the said Act XX of 1841: Act X of 1851 (to amend Act XX of 1841 for the administration of personal estate of deceased persons): and Act VIII of 1854 (to explain and amend Act X of 1851 and Act XX of 1841) are hereby repealed; except as to certificates granted and acts done under the authority of the said laws before the passing of this Act.
II. No debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person or any part thereof, except on the production of a certificate to be obtained in manner hereinafter mentioned or of a probate or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled.

In Olongo Munyari Dassi v. Gobindnath Sen, the Calcutta Court, while expressing an opinion that when there was a dispute as to the right of succession to a deceased decree-holder, it was the more expedient course for the executing Court to stay proceedings until one party or the other obtained a certificate under this Act, ruled that the Court would be acting perfectly legally, if it allowed one of the disputants under the provisions of Section 208 Act VIII of 1859, to represent the deceased for the purpose of carrying on the suit. The effect of such an order would of course be confined to that particular suit, and would not prevent any adverse claimant from applying to the Judge, and obtaining, if entitled thereto, a certificate under this Act to administer to the estate of the deceased.—(Sutherland's Miscellaneous Rulings, for March 1864, p. 13.) In Tarini Prasad Ghose v. Ganga Dhar, however, another Divisional Bench insisted on the party, who was endeavouring to enforce payment of a debt, as heir of a person deceased, by process of execution, taking out a certificate of administration, "which the defendant has a right to require in order to save himself from the risk and liability of paying the debt to the wrong person."—(6. W. Reporter, Miscellaneous Rulings, p. 34.)

III. The District Court within the jurisdiction of which the deceased shall have ordinarily resided at the time of his death, or if at that time he had no fixed place of residence then within the jurisdiction of which any part of the property of the deceased may be found, shall have authority to grant a certificate under this Act. The applicant in his petition shall set forth his title. The Court
shall issue notice of application, inviting claimants, and fixing a day for hearing the petition, and upon the appointed day or as soon after as may be convenient, shall determine the right to the certificate and grant the same accordingly.

On the appeal of Mussamat Shurno Mayi Dassi, the Calcutta Court held that the applicant was not entitled to a certificate in regard to her husband's estate, on the ground that he had been absent from his home for nine years: as it was not contended that any presumption arises from this circumstance among Hindus, that he was dead, nor indeed, had his relatives as yet performed his srdh.—(8. Weekly Reporter, Civil Rulings, p. 421.)

When a certificate is applied for it is not lawful to refuse it on the ground that a long time has elapsed since the death of the deceased person, and that debts due to the estate must be barred by limitation, for it may be that there may be debtors not desirous of raising such a plea; at any rate, the duty of the Judge is restricted to simply deciding on the right of the applicant to receive the certificate; and he has nothing to do with the motives by which the applicant may be actuated in asking for it.—(8. W. Reporter, Civil Rulings, pp. 12 and 398; and 2. Bengal Law Reports, Appendix, p. 26.)

Neither is it within the competence of the Judge to enquire whether there be any debts due to the estate, but he has only to determine the title to the certificate, and to grant one accordingly, leaving the person who gets it to see whether he take anything by it or obtain an entirely barren title.—(8. IV. Reporter, Civil Rulings, p. 317.) See also Vol. 5. Miscellaneous Appeals, p. 20; Vol. 9. Civil Rulings, p. 240. In Vol. 10. Civil Rulings, p. 4, Phear J. and Hobhouse J., thus laid down the law on the subject: "We think," they observed, "that it is not necessary in order to entitle an applicant to a certificate under Act XXVII of 1860, that he should satisfy the Court that debts are actually due at the time of the application. It is quite sufficient to show that there are assets, and that circumstances exist to render it probable or possible that debts may either be due as a matter of fact, or may eventually accrue due within the jurisdiction of the Court." While in a case given in Sutherland's Miscellaneous Rulings, for January 1864, p. 6, where some very trifling property of the deceased was situated in the district where the application was made, and there was a large property in another district, the Court observed that as they did not see that any necessity for collecting debts
was made out, and the applicant probably only wished to make evidence to establish his claim to the property in the other district, the inheritance being extremely doubted and disputed, the Judge had done right in refusing the certificate. It may perhaps however be doubted whether these last two precedents are sound constructions of this Section.

If a certificate be claimed in virtue of the terms of a will, the Judge should enquire into its validity if it be contested, and if he consider it to be proved, he should give the certificate, leaving the parties dissatisfied to set it aside by a regular suit. If the will be not contested, the executor under it has an undoubted right to the certificate, although he be not the legal heir.—Bidhu Bhushan Mookerjee v. Issur Chandra Roy Chowdhry.—(Sutherland’s Miscellaneous Rulings for January 1864, p. 4.) See also 2. W. Reporter, Miscellaneous Appeals, p. 47; Vol. 8. Civil Rulings, p. 105, where an executor was held entitled to a certificate, the question whether he had complied with a certain condition in the will on which his heirship and executorship had been made to depend being left to be contested in a separate suit.—2. Bengal Law Reports, Civil Appeals, p. 129.

If a man make a will only to a portion of his property, the executor appointed by the will should be granted a certificate, in regard to the property mentioned in the will, and the legal personal representative is entitled to one in respect to the rest of the deceased’s estate.—Mirza Daud Ali v. Ganjad Nazir Hossein.—(3. Bengal Law Reports, Civil Appeals, p. 46.)

Similarly where the right to a certificate turns upon the fact of the marriage of the deceased, and the consequent legitimacy or not of his offspring, if the marriage be impugned, the Judge is bound to enquire into the point on an application for a certificate of administration.—Shaikh Rahim Ullah v. Mussumat Nandi Jan.—(Sutherland’s Miscellaneous Rulings for May 1864, p. 25.) Or if the right depend on the fact of the deceased having been a member of a joint, or of a divided, family at the time of his death, the Judge must satisfy himself as to whether he was separate in estate or not. In order to do this, the Court must enforce the attendance of witnesses if needful by every process allowed by the law.—(10. W. Reporter, Civil Rulings, p. 148.) See too Vol. 6. Civil Rulings, p. 139; and Miscellaneous Rulings, p. 33. The Agra Court, however, have held that where the title of a person claiming as adopted son of the deceased is disputed, a certificate may properly be granted to the widow of the deceased.—(1. North West High Court Reports, Miscellaneous Appeals, p. 13.)
Where the Punjab Civil Code and the Mitakshara law are at variance, the former should be followed in granting the certificate.

The widower is entitled to a certificate in preference to the mother of a deceased Hindu.

A Chela in general is entitled to a certificate to administer the estate of his Mohunt.

Rule when the certificate is claimed by different heirs with greater and less interests in the estate.

Certificate to parties who are entitled to a fractional share only in the inheritance.

Where the question between two rival claimants to the certificate turns on whether the inheritance should devolve according to the rule given in the Punjab Civil Code, or according to the Mitakshara law generally, the Civil Court in issuing the certificate should in general adhere to the Code, leaving the dissatisfied party to establish his title by a regular suit.—Atma Singh v. Mussumat Atar Kour.—(4. Punjab Record, Case No. 49.)

The husband of a deceased Hindu lady is entitled to a certificate in preference to her mother, although the latter be in possession of the landed estate of her late daughter. In such a case the mother could not be ousted from the land, or be prevented from collecting the rents thereof on the strength of the certificate for collecting the debts due to the deceased.—Mohan Sundar Kunwar v. Ramanogro Narayan.—(3. W. Reporter, Miscellaneous Appeals, p. 3.)

According to general Hindu law a chela is the heir to a deceased Mohunt, and as such entitled to a certificate under this Act, unless a contrary custom be alleged and proved on the enquiry.—Mohunt Shiv Prakash Dass v. Mohunt Jairam Dass.—(5. W. Reporter, Miscellaneous Appeals, p. 57.)

As a general rule the heir to the deceased is the person who should have a certificate to collect the debts, and manage the estate of the deceased, under Act XXVII of 1860. If he, as heir be entitled to the whole surplus of the estate, the fact of his having been in a hostile or friendly position as regards the deceased will not be material. The sole heir will be the best person to take care of his own interests. It is a different thing however where there are heirs who are contending with each other, and who have been long engaged in litigation. Where there are no such disputes, the heir who is entitled to the largest share might perhaps, in the absence of other disqualifying circumstances, be the person entitled to a certificate. But he is not entitled to it as of right under all circumstances in preference to any other heir. The Court has by law a discretion as to whom it shall entrust with this important duty, out of the several heirs who have a right to it. Large liability by the principal heir to the estate is, as well as other reasons, a cause disqualifying such a person from receiving the certificate.—Abdul Ali v. Abidunnissa Khatun.—(Sutherland's Miscellaneous Rulings, for July 1864, p. 41.)

In Waselun Haq v. Gowhumunnissa Bibi the Calcutta Court ruled that a certificate ought not to be granted for the collection of fractions of the debts of the deceased, but where two or more persons are co-heirs a certificate should be issued to them jointly.—(10. W. Reporter, Civil Rulings,
See too the precedent given in the previous para, where the Court appears not to have contemplated the issue of certificates for the realization of fractional interests in the estate. But in the case of the *Rani Raisunnissa Begun* a Divisional Bench of the same Court used the following language: “It seems to us that if the petitioner be entitled to a share, the mere fact of holding a small share will not debar her from getting a certificate entitling her to collect according to the share due to her.”—(*2. Bengal Law Reports, Civil Appeals*, p. 129.)

The Court is not at liberty to refuse the application for a certificate and to direct that the property be taken over by the Collector as an escheat to Government. It is the duty of the Judge to determine who is entitled to the certificate and to grant it, but it is not in his competence to make any order in respect of the property of the deceased.—*Khwajah Ohed Khan v. The Collector of Shahabad.*—(*9. W. Reporter, Civil Rulings*, p. 602.)

“... The granting of a certificate does not, and cannot, determine any question of title, or decide what property does or does not belong to the estate of the deceased.”—*Waselun Haq v. Gowhurunnissa Bibi.*—(*10. W. Reporter, Civil Rulings*, p. 105.) Similarly the Madras Court has laid it down that the procedure given by the Act is not intended to apply to the decision of any claims of right to succeed to the estate of a deceased party, or any part of it. Such claims must be determined by a regular suit in the ordinary way.”—(*2. Madras High Court Reports*, p. 164.)

An order ought not to be granted by the Court recognizing two wills.
BOOK CIRCULAR No. XXX of 1866.

To

ALL DEPUTY COMMISSIONERS IN THE PUNJAB.

Dated Lahore, 20th October 1866.

The annexed forms* of certificate under Act XXVII of 1860, (an Act for facilitating the collection of debts on successions, and for the security of persons paying debts to the representatives of deceased persons,) being those in use in the North Western Provinces, are circulated by the Chief Court for the guidance of district officers.

They differ only as respects the power given to the holder of the certificate in one case, and not given to him in the other, to negotiate the securities or shares described.

The words in the 2nd para can easily be modified so as to apply to the shares of any public company.

The certificate must, of course, be upon the stamp prescribed by Schedule B. Act X of 1862, Article 3.

* FORM OF CERTIFICATE.

To A. B.

Whereas, in pursuance of the orders of this Court, dated , in the matter of the estate of the late this Certificate is granted to you, agreeably to the provisions of Act XXVII of 1860. You are hereby authorised and empowered to collect all debts due to the estate of the said giving acquittances for all sums received by you.

(a) You are further empowered to receive interest on the Government Notes and dividends noted on the margin, and on the Bank shares marginally noted, or parts thereof due to the said estate, and to negotiate such securities. You are also empowered to receive any share or shares of such interest or dividends that may be due to the said estate, and to negotiate such share or shares.

You shall further adhere strictly to such laws as have been, or may be, passed by the Governor General in Council, for the guidance of persons holding certificates for the collection of debts due to the estate of deceased persons.

Seal. Deput Commissioner.

(a) N. B.—These clauses to be omitted when such power is not intended to be conferred.
IV. The certificate of the District Court shall be conclusive of the representative title against all debtors to the deceased, and shall afford full indemnity to all debtors paying their debts to the person in whose favor the certificate has been granted.

A certificate obtained under this Act is only conclusive evidence of the holder's representative character as against the debtors to the estate.—(Madras High Court Reports, p. 164.) See also 2. W. Reporter, Civil Rulings, p. 70.

In Bhagwan Dass v. Lakshmi Narayan the Court held that a widow who had obtained a certificate under this Act was competent to sell a decree which formed a part of the assets, and such sale could not be interfered with except on the score of fraud, either because she was not the heir and was selling what she had no power to transfer, or because the transaction was a mere paper one to avoid the effect of execution.—(2. W. Reporter, Miscellaneous Appeals, p. 19.)

FORM OF CERTIFICATE.

To A. B.

 Whereas, in pursuance of the orders of this Court, dated in the matter of the estate of the late , this certificate is granted to you agreeably to the provisions of Act XXVII of 1860, You are hereby authorized and empowered to collect all debts due the estate of the said giving acquittances for all sums received by you.

(a) You are further empowered to receive interest on the Government Promissory Notes No. of 18 of the , Loan for Rs. 0000 + Share Certificates. No. of 18 of the Bank, &c.

You shall further adhere strictly to such laws as have been or may be passed by the Governor General in Council, for the guidance of persons holding certificates for the collection of debts due to the estate of deceased persons.

Seal.

Deputy Commissioner.

(a) N. B.—These clauses to be omitted when such power is not intended to be conferred.
The grant of a certificate does not enable the holder to recover property from a person in possession under a faulty title.

A certificate holder is not necessarily the person to continue a suit as representative of the deceased.

On a reference from the Recorder of Moulmein the Calcutta Court ruled that—“A certificate under Act XXVII of 1860 authorizes the holder of it merely to collect debts due to the deceased. It does not entitle him to recover property, either moveable or immoveable, which belonged to the deceased, from a person wrongfully in possession. The person seeking to recover such property must prove his title independently of such certificate.—(8. W. Reporter, Civil Rulings, p. 2.)

On another reference the same Court ruled that a Hindu widow, as holding a certificate under this Act, was not thereby entitled to continue a suit as legal representative of her late husband for immoveable property under Sections 102 and 103 Act VIII of 1859; though if she happened also to be heir of the deceased she would in that capacity be the proper person to continue the suit.—(8. W. Reporter, Civil Rulings, p. 2.)

V. The Court may take such security as it shall think necessary from any person to whom it shall grant a certificate for rendering an account of debts received by him, and for indemnity of persons who may be entitled to the whole or any part of the monies received by virtue of such certificate whose right to recover the same by regular suit against the holder of the certificate is not affected by this Act.

VI. The granting of such certificate may be suspended by an appeal to the Sudder Court, which Court may declare the party to whom the certificate should be granted, or may direct such further proceedings for the investigation of the title as it shall think fit. The Court may also, upon petition after a certificate shall have been granted by the District Court grant a fresh certificate in supersession of the certificate granted by the District Court. Such fresh certificate shall not affect any payments made to the person to whom any former certificate may have been granted, without notice.
that the same has been superseded, but shall entitle the person named therein to receive all monies that may have been recovered under the first certificate from the person to whom the same may have been granted.

The District Judge having granted in his certificate a power to the holder to draw the interest on certain pieces of Government paper, without conferring a power to renew and negotiate the same, the certificate-holder sought to obtain these additional powers by an appeal to the High Court; but that Court laid it down that the Act gives no power to the certificate-holder to appeal in regard to the form of the certificate granted him. The petitioner should apply to the District Court for the amendment or alteration which he may require.—(8. W. Reporter, Civil Rulings, p. 377.) See also Vol. 3. Miscellaneous Appeals, p. 19; and Section 8 of this Act.

In Mohunt Susman Gosain v. Ramcharan Bhakat the Calcutta Court laid it down that this Section does not contemplate an application for cancellation of a certificate being made to the Judge, but rather to the superior Court.—(5. W. Reporter, Miscellaneous Appeals, p. 48.) But in Hamida Bibi v. Nur Bibi, where the Judge had ruled that it was not within his competence to cancel a certificate once given, the High Court reversed this order, remarking that the Zillah Judge had taken too contracted a view of his own powers in respect of the application made to him. It seems to be a power inherent in all Courts of Justice, on finding that an order has been obtained from the Court by fraud and misrepresentation, and that the true facts are such that if they had been known to the Court, the Court would not have acted in the matter, for the Court, on being satisfied of such fraud to recall the order made in ignorance of the true circumstances by reason of the misrepresentation alleged. It is true that Act XXVII of 1860 makes no provision for the withdrawal of a certificate granted by the Civil Judge; but if it were necessary to bring this matter within the written provisions for procedure of Courts in this country, it seems probable that the Zillah Judge, on the complaint of a person aggrieved by his order in granting this certificate, might review the order which he had made, and thereupon recall the certificate. But whether the Zillah Judge might have acted under the rules relating to review, or under the general power that I have spoken of, I entertain no doubt that he might so deal with his first order, and ought to do it on being satisfied of the fraud which had been practised.” —(9. W. Reporter, Civil Rulings, p. 394.)
With reference to the Courts which in this Province have appellate jurisdiction under the Act, see below under Section 24.

VII. Every certificate shall give authority to the person to whom the same is granted throughout the Presidency within which the same is granted, and no certificate subsequently granted in respect of the same property shall be valid or effectual, except as hereinafter mentioned.

VIII. If the estate of the deceased shall include any Government securities or bank-shares, or any shares in any public company, the certificate may empower the person certified as aforesaid to receive interest or dividends thereon, or on any of them, or to negotiate the same or any of them: in such case the certificate shall describe the securities and shares in respect of which such powers are given, and such powers shall not be vested by the certificate except by express words.

IX. In the case of disputes among persons claiming to be jointly entitled to be proprietors of any Government securities as the representatives of any deceased person, the District Court, whenever sufficient cause shall be shown, and on the request of any such claimant, may, so far as concerns the said securities, grant a certificate under this Act to such person as shall be from time to time appointed by the local Government to act as trustee under this Section, and shall specify in such certificate the several shares; and the said trustee by virtue of such certificate shall be entitled to receive and give discharges for the interest accruing due on such securities, and shall
account for and pay the sum to the several persons specified in the certificate to be thereunto entitled, according to the shares therein set forth, and shall be empowered to act in all other respects concerning the said securities as agent for such persons, and shall be entitled to receive such commission, not exceeding one per centum, on the sums received and paid by him, as the local Government shall think fit. Provided nevertheless that the right of any other person to recover the whole or any part of the money so paid by regular suit against all or any of the persons to whom the same have been paid, shall not be affected by this Act.

X. If any such disputes among persons claiming to be proprietors of Government securities are not ended within two years from the date of the certificate granted under the last preceding Section, the said trustee may apportion the principal sum of the said securities rateably among the parties appearing from the certificate to be proprietors thereof, and may apply for and receive new securities from the proper officer appointed to issue the same in the respective names of the several parties certified to be entitled thereto; provided that such new securities shall be issued only according to the rules in use for the regulation and issue of such Government securities, and the receipt of the said trustee for such new securities or otherwise shall be a legal discharge to the Government against the disputing parties claiming to be entitled to the several amounts for which such securities shall be issued. Provided always
that, if the amount of any Government securities in dispute or any part thereof shall not be sufficient to admit of their rateable division according to the rules applicable to the issue of such securities, the said trustee may sell and dispose of the disputed securities, or such part as shall be necessary under this provision, and apportion the proceeds among the parties entitled to receive the same.

XI. Every certificate granted to the trustee appointed under Section IX, shall be taken to supersede and annul any previous certificate so far as such previous certificate relates to the said Government securities.

XII. When a certificate shall have been granted, in cases in which such certificate would be valid but for the previous grant of a certificate, all payments made to the person holding the latter certificate in ignorance of the grant of the previous certificate, shall be held good against claims under such previous certificate.

XIII. With regard to the property of a deceased Hindu, Mahommadan, or other person not usually designated by the term "British subject," no certificate in respect of any such property shall be valid if made after a probate or letters of administration granted in respect of the same, provided assets belonging to the deceased were at the time of his death within the local jurisdiction of the Court granting the probate or letters of administration.
XIV. Where a certificate shall have been granted, in cases in which such certificate would be valid but for a probate or letters of administration previously granted, all payments made to the person holding the certificate in ignorance of the previous granting of the probate or letters of administration shall be held good against claims under the probate or letter of administration previously granted.

XV. No probate or letters of administration shall be valid for the purpose of the recovery of debts, or for the security of debtors, after a certificate granted in respect of the same property for which such probate or letters of administration shall have been granted, provided assets belonging to the deceased were at the time of his death within the jurisdiction of the Court granting such certificate.

XVI. Where probate or letters of administration may have been granted in cases in which such probate or letters of administration would be valid but for the previous grant of a certificate, all payments made in ignorance of the previous grant of the certificate, shall be held good against claims under such previous certificate.

XVII. Curators appointed under Act XIX of 1841 who may be invested with certain powers which are conferred on persons obtaining certificates under this Act, shall not exercise any powers which, but for that Act, would lawfully belong to persons obtaining certificates, or to executors or administrators where a certificate, probate, or letters of administration has been actually obtained;
but all persons who may have paid debts or rents to a Curator authorized by a Court to receive the same, shall be indemnified, and the Curator shall be responsible for the payment of the same to the person who has obtained a certificate, the executor or administrator as the case may be.

XVIII. All probates and letters of administration granted by any Supreme Court of Judicature in cases in which any assets belonging to deceased persons were at the time of their deaths within the local jurisdiction of the Court granting the probate or letters of administration, shall have the effect of probate and letters of administration granted in respect of the property of British subjects, but for the purpose of the recovery of debts only and the security of debtors paying the same, except so far as is in this Act provided.

XIX. A certificate of administration granted by the British Representative accredited to any Foreign Prince or State, shall, as regards the residents within the territories of such Prince or State, have the same effect in respect to Government securities as a certificate granted to a Native subject of Her Majesty under the provisions herebefore contained.

XX. Every certificate of administration granted under the last preceding Section shall, as regards the Government securities, give authority to the person to whom the same shall be granted throughout the British territories in India, and have the same effect throughout the said territories as a certificate granted under Section VII of this
Act has within the Presidency within which the same is granted.

XXI. Any Court or officer authorized to grant a certificate may from time to time extend the same to any Government security or bank-share not originally specified therein, and every such extension shall have the same effect as if the Government security or bank-share to which the certificate shall be extended had been originally specified therein.

XXII. Upon the extension of a certificate, security may be required in the same manner as upon the original grant of a certificate.

XXIII. Nothing in this Act contained shall be held to extend to the property of any person usually designated as a British subject.

XXIV. The following words and expressions in this Act shall have meaning hereby assigned to them, unless there be something in the subject or context repugnant to such construction (that is to say)—

Words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number.

Words importing the masculine gender shall include females.

The words "District Court" shall mean the principal Civil Court of original jurisdiction of a zillah or district.
"Sudder Court."

The words "Sudder Court" shall be deemed to include the highest Civil Court of Appeal in any part of the British territories in India not subject to the control and superintendence of a Sudder Court.

In a case given in 3. Punjab Record, Case No. 50, the Chief Court came to the conclusion that, under the provisions of this Section and Section 6, the appeal against an order of the Deputy Commissioner granting a certificate lay to the Chief Court, and not to the Commissioner. More recently however the following Circular has been issued by that Court, laying down that in this Province, the appeal lies under a local law to the Commissioner's Court.

BOOK CIRCULAR No. IX of 1869.

To

ALL COMMISSIONERS AND DEPUTY COMMISSIONERS
IN THE PUNJAB.

Dated Lahore, the 10th May, 1869.

The Chief Court desires to call the attention of the Subordinate Appellate Courts to the change effected by the Punjab Appeals' Act (VII of 1868) in the course of appeals from the orders of District Courts passed in the exercise of their jurisdiction under the Acts noted in the margin.*

2. By these Acts it is provided that appeals from the orders of a Deputy Commissioner, as Judge of the principal Civil Court of original jurisdiction, shall lie direct to the Sudder Court, now the Chief Court. On the other hand, appeals from the orders of a Deputy Commissioner, under the Acts noted in the margin* and other Acts of that class, are regulated by the general law relating to appeals from the orders of the District Court in the exercise of its ordinary jurisdiction.

3. From the phraseology used in Act XXVII of 1860, and the other Acts mentioned in para. 1, there can be no doubt that the Commissioner's jurisdiction to hear appeals is excluded, whereas in the Indian Companies' Act (X of 1866) and other Acts of that class, the use of general
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language shows that appeals from the orders of District Courts under these Acts must in the first instance lie to the Commissioner.

4. There being no apparent reason for this distinction, the Judges of the Chief Court brought the matter to the notice of Government when the Punjab Appeals' Act (VII of 1868) was under the consideration of the Legislature, in order that the anomaly above indicated might be removed.

5. This object has been effected by the enactment of Section 3 of that Act, which in effect provides that an appeal, unless forbidden by that Act, or by some other Act for the time being in force, shall lie to the Courts in the order of their jurisdiction as declared in Acts XIX of 1865 and IV of 1866. Accordingly, under the provisions of Act VII of 1868, Section 3, appeals from the orders of Deputy Commissioners exercising jurisdiction under any of the Acts mentioned in para. I lie to the Commissioner, and not to the Chief Court.

ACT No. III OF 1865.

(Passed on 14th February, 1865.)

An Act relating to the rights and liabilities of Common Carriers.

WHEREAS it is expedient not only to enable Common Carriers to limit their liability for loss of or damage to property delivered to them to be carried, but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants or agents; It is enacted as follows:—

I. This Act may be cited as "The Carriers' Act, 1865."

II. In this Act, unless there be something repugnant in the subject or context—

"Common Carrier" denotes a person, other than the Government, engaged in the business of...
transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately.

"Person" includes any association or body of persons, whether incorporated or not.

Words in the singular number include the plural, and words in the plural include the singular.

The definition of a "common carrier" here given is borrowed from English law, and therefore the decisions of the Home Courts on this subject will be generally applicable to India. In Aston v. Heaven and other cases it has been decided that a person who conveys passengers only is not a common carrier.—(1. Smith's Leading Cases, p. 198.) In Lewin v. Central India Dawk Carriage Company, which was a suit to recover the value of property lost by the plaintiff while travelling in a carriage of the defendants, the Judicial Commissioner ruled that the Central India Dawk Carriage Company, not being common carriers, and not undertaking or hiring for conveyance of luggage, but of passengers with a limited amount of luggage, of which the owner remains the custodian, are not liable for the loss of the plaintiff's luggage by thieves, unless special negligence, or connivance, on the part of the servants of the company can be shewn; or unless some special contract were entered into between the plaintiff and the defendant; for there is no common law underlying all contracts of the kind, by which any such stipulation of liability will be understood; and the Court will not supply a condition non-existent on the face of the contract.”—(Thornton's Small Cause Court Manual, Addenda p. 160.) There can however be very little doubt but that this decision is based on an erroneous view of the implied contract and of the carrier's consequent liability; as a diametrically opposite judgment has been arrived at by the English Courts with reference to the responsibility of cab-drivers, for in Ross v. Hill, where a traveller hired a cab for the conveyance of himself and his luggage to the Paddington railway station, and the luggage was placed on the outside of the cab, it was held that the law would imply from the acceptance of the luggage by the cabman to be carried together with the passenger for hire, a promise from him to carry it "safely and securely"; and consequently that he was responsible for a loss of a portion of it by the way. The contract in such cases, Mr. Addison adds, is "a contract to carry safely and securely as far as regards the neglect of the carrier himself and his servants, but not to insure the safety of the goods;
and the carrier therefore would not be liable for losses by robbers, or any taking by force, but he is *prima facie* responsible for a secret theft of them, and can only discharge himself from liability by proving his own care and watchfulness and blamelessness in the matter."—(Addison on Contracts, p. 484.) And if the onus of proof be thus adjusted in England, a hundred-fold more needful is it in India where luggage is generally carried on the roof of the dawk carriages, entirely out of the owner's view, whether, theoretically, he be its custodian or not, but from which position it can scarcely be stolen unless the driver be grossly careless, or, as there is much reason in many cases to believe, in collusion with the thieves.

A common carrier is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey, or is not in the habit of conveying. And in action against him for refusing to carry, it is sufficient to aver readiness and willingness to pay the hire, without a formal tender.—Wyld v. Pickford.—(1. Smith's Leading Cases, p. 199.) He must also carry the goods, if no time be stipulated, within a reasonable time—(1. Smith's Leading Cases, p. 210; and 2. North West High Court Reports, p. 132,) and can only demand a reasonable hire.—(Broom's Legal Maxims, p. 234.) On this subject, see p. 321 of this work.

When the goods have reached the end of the transit, the carrier appears bound to keep them a reasonable time at his own risk for the owner, and it would seem for the time for which he keeps them under an obligation to do so, springing out of his receipt of them as a carrier, he is subject to the same liability as during their transit. If the consignee refuse to take delivery the carrier is not warranted in immediately reconveying the goods to the consigner, but must wait a reasonable time to see if the consignee will change his mind, and receive the goods.—(1. Smith's Leading Cases, p. 211.) If when the goods have been conveyed it turn out that the addressee is not to be found, the carrier begins from that time to hold the goods as the bailee of the consignor, and must take due and ordinary care of them and deliver them to the consignor on being paid his fair and reasonable charges.—(Addison on Contracts, p. 500.)

"When a common carrier," writes Mr. Addison, "takes into his care a parcel directed to a particular place, and does not by special agreement limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place may be beyond the
limits within which he professes to carry on his trade. His responsibility, therefore, continues to the door of the address to which the goods are destined, and he cannot release himself from such responsibility by transferring the goods to another carrier, or sending them by another conveyance; and it makes no difference, whether part of the carriage be by land and part by water, or whether part of the distance be by railway, part by water and part by stage coach. If a railway company accept goods for conveyance to a particular destination, beyond the limits of its own line of railroad, and the goods be lost whilst in the hands of another railway company, to whom they have been delivered to be forwarded on their journey, the first railway company is responsible for the loss, as being the party contracting with the consignor or consignee, for the conveyance of them, and a proviso in the contract exonerating the company from all liability in respect of loss of or damage to the goods occurring beyond the limits of its own line of railway from the negligence of other companies to whom the goods have been delivered to be forwarded is repugnant and void.—Bristol and Exeter Railway v. Collins.

Where credit has not been expressly contracted for, the carrier is entitled to payment of the amount due for freight on carriage on delivery, and may retain the goods until so paid, but he has no lien on them for a general balance which may be due to him by the owners.—(Addison on Contracts, p. 500.)

For the liability of Railway Companies, see the extract from Act XVIII of 1864 given at the end of this Act.

III. No Common Carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the Schedule to this Act, unless the person delivering such property to be carried, or some person duly authorized in that behalf, shall have expressly declared to such Carrier or his agent the value and description thereof.

Section 8 of the Act must be read in connection with this Section.
In *Asa Nand and Chain Rai v. Indian Carrying Company* the plaintiffs entrusted certain goods to the defendants, who are carriers, to be conveyed to Peshawur. Part of the goods, consisting of silk, were lost on the way to Peshawur; and the plaintiffs accordingly having brought an action to recover the value of the lost goods, the Judge of the Small Cause Court dismissed the claim (subject to the opinion of the Chief Court) on the ground that silk is one of the articles specified in the schedule of this Act, and ought therefore to have been declared to the carrier, and no such declaration of the contents having been made, the carrier was not liable for the loss. The order of the Chief Court was as follows:—

"The goods being silk, and above Rs. 100 in value, ought to have been declared under Section III Act III of 1865. Not having been declared, the carrier is not, under the circumstances established in this case, liable for their loss. The only ground on which he could be held liable is that of negligence or criminal act on the part of himself or his agents, under Section VII of the Act. Although, by Section IX it is not necessary for the plaintiff to prove this negligence or criminal act, yet it is necessary that such negligence or criminal act should, in the case of loss or damage to articles included in the list, either appear or be necessarily inferred, when there has been, as in this case, no declaration."—("1. Punjab Record, Civil Reference No. 13.

IV. Every such Carrier may require payment for the risk undertaken in carrying property exceeding in value one hundred rupees and of the description aforesaid, at such rate of charge as he may fix: Provided that, to entitle such Carrier to payment at a rate higher than his ordinary rate of charge, he shall have caused to be exhibited in the place where he carries on the business of receiving property to be carried, notice of the higher rate of charge required, printed or written in English and in the vernacular language of the country wherein he carries on such business.

V. In case of the loss of or damage to property exceeding in value one hundred rupees and of the description aforesaid, delivered to such Carrier to be carried, when the value and descrip-
Although the extent of the liability of common carriers is nowhere stated in the Act totidem verbis, yet the language of this Section, when taken in connection with Sections 8 and 9, appears to show that the rule of English common law is assumed, viz. that the carrier except so far as his responsibility is limited by the Act, is an insurer of the goods entrusted to his care.

By English law, however, the common carrier is not responsible for loss or damage arising from the act of God, as storms, tempests, and the like, or from the Queen's enemies, but he must make good damage caused by an accidental fire, if the fire have not been caused by the action of God, or of the Queen's enemies.—(Broom's Legal Maxims, p. 234.) The common carrier is however only an insurer of goods, since if injury befall a passenger, he is only liable when the accident has resulted from his own want of due skill and care. In the matter of the carriage of live stock, a common carrier, in the absence of any special agreement, incurs the same liability and duty as in the case of ordinary goods: thus in Theale v. Bracky, a carrier was held liable for the loss of a dog, which had been delivered to him with a string round its neck, and which he had placed in a box, from which the dog had escaped in transit.—(Norton's Topics, pp. 445, 446.)

For the liability of carriers for hire, who are not common carriers, see above at p. LVII.

VI. The liability of any Common Carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any public notice; but any such Carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863 (to provide for
taking land for works of public utility to be constructed by private persons or Companies, and for regulating the construction and use of works on land so taken) may, by special contract, signed by the owner of such property so delivered as last afore-said or by some person duly authorized in that behalf by such owner, limit his liability in respect of the same.

If a carrier contract with the owner that any demand for short delivery or damage shall be made at a particular office or place, neglect to comply with this condition will be fatal to a suit brought for such losses.—Mahammad Ismailji Nada v. The British Indian Steam Navigation Company.—(9. W. Reporter, Civil Rulings, p. 396.)

Apparently the full and comprehensive language of Section 8 prevents a common carrier from escaping from his liability by pleading a special contract when such loss is caused by the negligence, or criminal act of the carrier or of his agents or servants. For the direction the judgments of the English Courts have taken on this point, see Norton's Topics of Jurisprudence, pp. 447—451.

VII. The liability of the owner of any railroad or tramroad constructed under the provisions of the said Act XXII of 1863, for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any special contract; but the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried only when such loss or damage shall have been caused by negligence or a criminal act on his part or on that of his agents or servants.

VIII. Notwithstanding anything hereinbefore contained every Common Carrier shall be liable to the owner for loss of or damage to any property
delivered to such Carrier to be carried where such loss or damage shall have arisen from the negligence or criminal act of the Carrier or any of his agents or servants.

Every person actually engaged in the performance of the contract of carriage and delivery is a servant of the carrier within the terms of the corresponding English Statute 11 Geo. IV and 1 Will. IV., C. 68, S. 5.—(1. Smith's Leading Cases, p. 203.)

For the measure of damages in actions against carriers, see above at p. LVI of this work.

IX. In any suit brought against a Common Carrier for the loss, damage, or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage, or non-delivery was owing to the negligence or criminal act of the Carrier, his servants or agents.

In Dawes v. Peck, it was laid down that where goods consigned to a vendee are lost through the default of the carrier, the consignee is the proper person to sue, for the consignor was his agent to retain the carrier. But it is otherwise where the goods are merely sent for approval, or the consignee is the agent of the consignor, or the carrier has contracted to be liable to the consignor in consideration of the latter's becoming responsible for the price of the carriage; or, generally, where the carrier is employed by the consignor and the goods remain at the latter's risk.—(1. Smith's Leading Cases, p. 209.)

X. Nothing in this Act shall affect the provisions contained in the ninth, tenth, and eleventh Sections of Act No. XVIII of 1854 (relating to Railways in India).

SCHEDULE.

Gold and Silver Coin.
Gold and Silver in a manufactured or unmanufactured state.
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Precious Stones and Pearls.
Jewellery.
Time Pieces of any description.
Trinkets.
Bills and Hundis.
Currency Notes of the Government of India, or
Notes of any Banks, or Securities for payment
of money, English or Foreign.
Stamps and Stamped paper.
Maps, Prints, and Works of Art.
Writings.
Title Deeds.
Gold or Silver Plate or Plated articles.
Glass.
China.
Silk in a manufactured or unmanufactured state,
and whether wrought up* or not wrought up
with other materials.
Shawls and Lace.
Cloths and tissues embroidered with the precious
metals or of which such metals form part.
Articles of ivory, ebony, or sandal wood.

* The question whether cotton goods having a fringe of
silk on them ought on that account to be treated as silk,
the Bombay Court, on the authority of Blunt v. Midland
Railway Company, held to be one of fact, to be decided by
ascertaining whether or no the silk contributed the greater
part of the value of the article.—Lakshmi Dass Hirachand v.
G. I. Peninsula Railway.—(4. Reid's Bombay High Court
Reports, Original Jurisdiction, p. 129.
ACT No. XVIII of 1854.

(Railway Act.)

Section X. No such Railway Company shall in any case be answerable for loss of or injury to any gold or silver, coined or uncoined, manufactured or unmanufactured, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, Government securities, bills of exchange, promissory notes, bank-notes, orders, or other securities for payment of money, Government stamp-paper, postage stamps, maps, writings, title-deeds, paintings, engravings, pictures, plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, shawls, lace, or any of them contained in any parcel or package which shall have been delivered to such Railway Company, either to be carried for hire or to accompany the person of any passenger, unless the value and nature of such articles shall have been declared by the person or persons sending or delivering the same, and an increased charge for the safe conveyance of the same shall have been accepted by some person specially authorized to enter into such engagements on behalf of the said Railway Company.

In Jeytu Nand v. The Punjab Railway Company, which was an action to recover the value of a bale of silk, the contents of which were fraudulently abstracted, hemp being substituted instead, while in the defendants' care, the Chief Court held that the refusal of the plaintiff to pay an increased rate of freight, named indeed "insurance," when called on by a servant of the Company to do so, was sufficient to render the Company irresponsible for the loss which followed, no
specific act of wrong being proved against them or their servants.—(3. Punjab Record, Case No. 91.) See too the case of The North Staffordshire Railway Company v. Peck (1. Smith's Leading Cases, p. 237) as an analogous case to the present one.

Section XI. The liability of such Railway Company for loss or injury to any articles or goods to be carried by them other than those specially provided for by this Act shall not be deemed or construed to be limited or in any wise affected by any public notice given, or any private contract made by them; but such Railway Company shall be answerable for such loss or injury when it shall have been caused by gross negligence or misconduct on the part of their agents or servants.

Section XII. If any person shall fail to pay on demand any sum due to any such Railway Company for the conveyance of any goods, it shall be lawful for the Company to detain all or any part of such goods, or, if the same shall have been removed from the premises of the Company, any other goods of such person which shall then be on their premises, or shall thereafter come into their possession; and also to sell by public auction sufficient of such goods to realize the sum payable as aforesaid, and all charges and expenses of such detention and sale, and out of the proceeds of the sale, to retain the sum so payable, together with the charges and expenses aforesaid, rendering the overplus, if any, of the money arising by such sale, and such of the goods as shall remain unsold, to the person entitled thereto; or the Company may recover any such sum by action at law.