The Madras La

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IMPARTIBLE ESTATES AS FAMILY PROPE

(*Continued from Page No.* 8, *Part II.*)

It will be beyond the scope of our present discussion to enter into the history of the methods adopted by the early British administrators in India in their dealings with the Zemindars, but seeing that the Permanent Settlement in this Presidency was based almost wholly on the results of the experiments made in Bengal, it is necessary to notice the net result of the Bengal system with reference to the practice of its administration and the Regulations passed in connection therewith. During the decadence of the Muhamadan rule, the Zemindars had come to assert large proprietary rights of a hereditary character and claimed powers of alienation. The British Government at first dealt with them very strictly. They were treated as mere officers of Government with no proprietary rights or powers of alienation, but "gradually,however, a larger right came to be recognised in them, and finally they were considered as something like proprietors of the land"—(Phillips, p. 271). A power of alienation also came to be allowed subject to the control of the authorities. In finally resolving upon the Permanent Settlement with the Zemindars, the Court of Directors (in September 1792) said :—" On the fullest consideration we are inclined to think that whatever doubts may exist with respect to their original character, whether as proprietors of land or collectors of revenue, or with respect to the changes which may in process of time have taken place in their situation, there can at least be little difference of opinion as to the actual condition of the Zemindars under the Moghul Government. *Custom generally gave them a certain species of hereditary occupancy.* * * * *Considered as a right of property it was very imperfect and very precarious.* Though such be our ultimate view of this question * *

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illips pp. 283-4.) The italics are ours.
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re concerned with the controversy as to the ex-
est conferred on Zemindars under this arrange-
or our present purpose, it is enough to note that one im-
nt result of it was to convert the Zemindars' interest into a *definite category of proprietary right governed by the ordinary private law*. The Regulations and the *Sanads* issued thereunder indiscriminately placed all Zemindaris on the same footing, without any regard to their nature, origin or previous history—see *Vidyapurna* v. *Vidyanidhi*.[1] Henceforth there was little room left for the further developement of the old customary incidents. As an ordinary kind of private property—which it henceforth becomes—the Zemindars' interest must have all the legal incidents of property. TheRegulations declared the Zemindaris hereditary and freely alienable—subject only to the limitation that the alienations should be valid according to the ordinary Hindu or Muhamadan law. The Bengal Legislators were thorough-going and logical. The Zemindari should also descend and be enjoyed as ordinary property, and hence Regulation XI of 1793 after reciting that by 'custom originating in considerations of financial convenience some of the most extensive Zemindaris descended by primogeniture, that such a custom is repugnant both to Hindu and Muhamadan laws and subversive of the rights of the other members of the family who would otherwise be entitled to share in these as in all other estate,' &c.,.enacted that if a Zemindar should die without a deed or will, his property shall go to his heirs, who may hold it jointly or make a division.

If these principles had been consistently maintained and fully carried out, the anomaly of impartible properties would not have come into existence at all. But Regulation XI of of 1793 was held not to be applicable to the succession to estates in the nature of a well-established Raj (see *Rajkishen Singh* v. *Ramjoy Surma*[2]) apparently on the ground that even according to the ordinary

1. I. L. R., 27 M. at p. 459. 2. (1872)I. L. R. 1 C. at 192 (P.C.).

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was also introduced by Regulation X of 1800 whi
'to exclude from the operation of Regulation XI of 1
districts in which the custom of primogeniture prevails as a
eral *local* custom and not merely as the usage of a particular e
tate or family.'—*Rajah Deedar Hossein* v. *Ranee Zupooroon Nissa.*[2]
Furthermore, after the acquisition of Orissa, Regulation XII of
1805 perpetuated the custom of impartibility in the Zillah of
Cuttack—see *Shyamanand Das* v. *Ramakanta Das.*[3] The result is,
that while the reason for the impartibility has either ceased or is,
at any rate, regarded as of very second rate significance, and
while the other incidents of the tenure which originally arose
from its very nature have been swept away, the incident of im-
partibility has been perpetuated on a supposed ground of custom.

It must, however, be said that the practical application of this theory of impartibility by custom is hardly correct. The incident of impartibility is 'a relic of public law.' It arose at a time when the subject to which it attached was not understood to be an 'estate,' when it was a very different thing from a modern Zemindari. As long as it was a Raj or a Military or Feudal fief or an official position, the practice of impartibility continued because the public law or the conditions of the tenure or the nature of the office, as the case may be, required it; and a practice thus depending on and existing only on account of the public law or the nature of the tenure can never acquire any binding force as a custom—for it is not followed as a custom *binding in itself, irrespective of the law or the tenure*— see observations in the *Pittapore Case.*[4] In the *Soosung case*[5] their Lordships said that upon the Permanent Settlement any incidents of the old tenure were *as conditions of tenure* at an end, and the Zemindari, so far as relates to tenure was thenceforth held

1. (1855) 6. Moo. I. A. 164.
2. (1841)2 Moo. I.A. 441.
3. (1904)I.L.R. 32 C. 6.
4. I. L. R. 22 M. 383.
5. (1872) I. L. R. 1 C. 186.

[redacted]s an ordinary Zemindari free from [redacted]settlement would not, however, of itself, [redacted]family usage regulating the manner of [redacted]he same case, they said that the acts of [redacted]lement showed that the family did not [redacted]succession in the light of a *family custom* [redacted] *condition of tenure.* It may well be asked [redacted]of the cases in which the plea of impartibility has [redacted], it could have been shown that *prior* to the settle[redacted]he rule of succession was regarded by the members of the [redacted]mily as a custom binding upon them by its own force, independently of the nature of the estate or the conditions of the tenure; and in no case was the decision rested—if this could be done at all—merely on the practice of the family *subsequent* to the permanent settlement. In the *Ramnad case* [1] it was observed: 'The commutation of the Military tenure cannot be taken to imply any alteration of other incidents which custom had impressed upon it either in regard to its impartibility or to its devolution' and again (at p. 633): 'When a Raj or principality belongs to a particular family and has at the same time a political character, the latter is liable to be detached from it without changing the incidents which appertain to it by custom.' It is difficult to realise exactly what the learned judge meant by a Raj without a political character. Assuming this to be possible, and even taking it that such was the intention and the effect of the Permanent Settlement Regulation, the question still remains to be decided in each case, whether the custom attached to the Raj with its political character or to the family, independently of the Raj; and it will be applying a very false test to say that the *subsqeuent* conduct of the family—very often in ignorance of the true nature of the change—shows the nature and intent of the custom in the course of the centuries prior to the settlement.

A juridical custom, in derogation of the ordinary law, can arise from a course of conduct only when but for such course of conduct the ordinary law would have applied. A course of conduct in a family in connection with an interest which was beyond the pale of the ordinary private law or was not 'property' in the ordinary sense cannot give rise to a binding family custom which

1. I.L.R. 34 M. at p. 626.

would apply as such when that inter
nary kind of private property.

The cases lay considerable stress
was the intention of the Government to
estate. But through them all there ru
the effect of a re-grant or restoration and t
nent Settlement Regulation. During the pe
and 1795 there had been numerous forfeitures,
attachments of these estates, but many of them were su
restored or re-granted, and in these cases the intention
Government at the time of the restoration or the re-grant is ce
tainly relevant—indeed it is the main question—for then, as was said in the *Shivaganga case* [1] 'Government were, no doubt, in a position to grant out the estate on other than the old terms. The question is whether they did so.' But when *after* such grant—be it on the old terms—the Permanant Settlement Regulation is passed and a question is raised as to its effect, the intention of the Government is perfectly irrelevant.

Rightly or wrongly, the rule came into vogue that all property of whatever description was *prima facie* partible, but a special custom of impartibility might be set up and proved. The process presents some parallel—though in the converse direction—to the extension of the rule of primogeniture in England. In an earlier period primogeniture spread to a certain extent by the desire of upstart families to imitate the fashion of ancient royal houses or military holdings. But after the British advent 'the land law of the people superseded the land-law of the nobles' and in many cases Zemindaris were held to be partible not because they were shown to have been partible from former times, but because such was the presumption of law, except where it was shown that the estate had been and continued to be impartible. (Cf. Pollock's Land Laws, App. D.) See *Raja Sooranainy Venkatapati Rao* v. *Ramachandra Rao*,[2] quoted in Norton's Leading Cases, p. 282.

The early practice of the Madras Administration in dealing with the Zemindars is described in the Fifth Report (Vol. II, pp. 22-5). By the closing years of the 18th century, the permanent settlement was introduced in a considerable portion of the

1. I. L. R. 8 M. at p. 305. 2. 1. M. S. D. 495.

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spects, they are not impartible.

years of the 19th century, the permanent settle-
ended to most of the Polleiems (see Fifth Report,
p. 122). The principles of the system thus introduced
re explained at length in the Instructions issued to the Collec-
tors by the Board of Revenue under the orders of the Government (see Fifth Report, Vol II, App. No. 18). It was stated 'the Zemindars hold their Zemindaries by a tenure so precarious as scarcely to convey the least idea of property in the soil. * * * * It has been resolved to adopt the form introduced some years since into the Bengal Provinces by constituting the Zemindars * * * actual proprietors of the soil or lands composing their estates. * * * The privilege will be allowed to all actual proprietors of land to transfer * * by sale, gift or otherwise their proprietary rights in the whole or any portion of their respective estates without applying to Government for its sanction to such transfer, and all such transfers will be held valid provided that they be conformable to the Muhamadan or the Hindu Laws. * * * * Proprietors of a joint undivided estate who may be desirous of dividing it * * * will be at liberty to do so on application to the Collector. * * * These principles were embodied in the Permanent Settlement Regulation XXV of 1802 as to the precise effect of which there has been some diversity of judicial opinion though the matter must now be taken as set at rest by the pronouncement of the Judicial Committee in the *Marungapuri case*.[1]

The Madras legislation contained no provision corresponding to Bengal Regulation XI of 1793—apparently because even in Bengal the policy of that regulation has been departed from in 1800. It would, however, appear that the Permanent Settlement Regulation XXV of 1802 was regarded as having the effect of placing Zemindaris on the same footing as ordinary landed property, letting in the Hindu Law of Succession and Partition.

1. (1874) L. R. 1. I. A. 282.

Writing in 1820, Sir Thomas Munro
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(Selections by Sir Alexander Arbuthnot, pp. 118—
strongly recommended an Entail Regulation to prev
sion of Zemindaris and protect them from sale for privat
In a note on p. 124, it is added by the Editor that 'owing
various circumstances the proposed Regulation was never passed into law; but its main object has been attained by the action of the Courts which have repeatedly held that ancient Zemindaris, polliems and jagirs are not subject to division because by long custom the rule of primogeniture has been introduced and prevails in them.' Sir Thomas Munro's proposal has been in a way carried out by the recent Impartible Estates Act, but the Act does not assign to impartible estates any scientific legal character. It indiscriminately declares a number of estates impartible and merely restores the law as it was understood in this presidency prior to the decision in *Sartaj Kuari's* case.[1] It lays down an artificial joint family standard to test the validity of certain dealings of the Zemindar and in the language of S. 5 this test would seem to apply even when as a matter of fact there is no family and the Zemindar is the sole member. Anyhow the Act does not in any degree help to solve the question of the true nature of the Zemindar's estate. If the Act had been passed as part of the permanent settlement measures, the result might have been different. The Legislature in recognizing the proprietary character of Zemindaris would have assimilated them to the ordinary family property known to the Mitakshara law, and the incident of impartibility being only a statutory restriction would not have furnished an argument for denying the existence of co-percenary rights in them. As it is, an interesting question may sooner or later arise with reference to the Impartible Estates Act, *viz.*, how far will the *general principles* laid down by the Judicial Committee as to the nature of Impartible Estates be applicable to Zemindaris declared impartible by the Act, without any reference to family custom.

1. (1888) I. L. R. 10 A. 272.

e last century, the impartible estates prolific source of litigation raising the ty, divisibility, liability for debts and

the various tribunals in these cases are not ith one another, and it is not possible to n any definite principle on which the Courts may ave consistently acted. It was not realised what nce the absence of any provisions corresponding to Bengal egulations XI of 1793 and X of 1800 made In the Bengal cases, the Regulations made it impossible to declare any estate impartible on the mere ground of *family* custom, so that in cases where *local* customs were not pleaded, impartibility could be rested only on the *nature of the estate*, which as in the case of a Raj, rendered it impartible, apart from any custom. In the *Devarakota case*[1] one of the arguments of Mr. Mayne, for the appellant, before the Judicial Committee, is reported to have been as follows :—'There was no evidence here that when the Government was granting the *Sanad* of 1802, there was any intention on its part to alter the rule of succession or the impartibility of the Zemindari. The Regulation which in Bengal might be said to have indicated such an intention was not applied to Madras.' Their Lordships apparently acceding to this argument say : "Ankinedu acquired a permanent property in the land at a fixed assessment, but there was no grant of the land and the rule of succession to it was not altered, * * There is no evidence of any intention of the Government to alter the nature of the tenure." Their Lordships refer to the *Hunsapore case*[2] and conclude : 'The estate continued to be impartible and the rule of succession to it was not altered.' But in the *Hunsapore case*,[2] attention was directed mainly to the intention of the Government at the time of the restoration, and their Lordships said that 'they cannot safely draw any inference concerning the intentions of Government in making a particular grant in 1790 from the passing in 1793 of a general law which confessedly does not affect the descent of the large Zemindaris held as Raj or subject to *Kulachar* or family custom.' It is difficult to see how their Lordships save 'family custom' generally, for according to their

1. I. L. R. 13 M. at pp. 416 & 417 and 422 2. (1867) 12 Moo. I. A. 1.

own decision in *Rajah Deedar Hosse* were superseded by Regulation X pointed out, the question of intention is quite different from that as to the effe ment Regulation and this latter quest their Lordships—for having regard to cert laid down that Regulation XI of 1793 had n Counsel for the appellant did not contend befor that even if the estate granted in 1790 was a Raj, family custom according to the rule of primogeniture, it character on the passing of the Regulation.'

In the *Shivaganga case*[2] also the question of fect of Regulation XXV of 1802 was not kept quite apart that of the intention of Government in the Proclamation of 1801 by which the Zemindar was put in his place. With reference to the Permanent Settlement, one of the the ingredients of whose policy was the partibility of estates as shown by Bengal Regulation XI of 1793, their Lordships said that 'if there were any general intention of introducing the principle, of partibility, it was certainly not followed in the present instance.' The reference to the *Hunsapore case*[2] does not, as already explained, really touch the present question. But their Lordships go on to add : "Though the quality of the estate might, doubtless, be altered by a law, it was not within the scope of Regulation XXV of 1802 to effect any such alteration. It was framed with a view to the land revenue and not otherwise to infringe on or limit the rights of any body. And in Regulation IV of 1812 there is a declaration to this effect." With all deference, it must be said that this misses the real point. There is no question of infringement or limitation of any body's rights. There Lordships have nowhere distinctly dealt with the question whether the Permanent Settlement Regulation had not the effect of converting interests which hitherto were either subject to no law or were in a sense governed by certain rules which were in the nature of *public* law, into estates governed by the ordinary private law, and if so, whether this result did not involve the applicability to them of all the rules of the ordinary Hindu law, including those relating to partition and succession. That such was the impression of the authorities at the time is evident from the complaints of Sir Thomas Munro already quoted.

1. (1841) 2 M. I.A. 441. 2. (1881) I. L. R. 3 M. 290.

v. *Ramjoy Surma*[1] the Judicial Committee question of fact and base their after the Settlement and the Regulations were induced to regard the former ancient tenures, whatever they were, as and treat the property as an ordinary British Government, and their acts show that so consider and treat it.' It is submitted that this have been laid down as a *rule of law.*

The question was again raised in the *Ramnad case*[2] but *Muthuswami Aiyar* J. said that to hold that the estates became partible by the Permanent Settlement would be 'at manifest variance with the course of decisions of all the Courts including the Privy Council.' His Lordship referred to the two rules given by Mr. Mayne as to the presumption in cases of re-grant and its rebuttal, but the effect of the Permanent Settlement Regulation was not considered.

If Bengal Regulation XI of 1793 can only be regarded as the natural and logical result of the conversion of Zemindaris into ordinary private property by the Permanent Settlement Regulation, it is submitted that the same result must have followed in this Presidency also, though there is no express enactment corresponding to Regulation XI of 1793. That this was in some way vaguely felt is clear from the fact that Zemindaris have always been presumed to be partible unless shown to be impartible, and much more clearly from the fact that in most cases some kind of stress is laid on the nature of the estate. But this did not fit in with any definite theory of law and a pseudo-scientific character was given to it by basing it on a theory of family custom, (see *Bhau Nanaji Utpat* v. *Sundra Bai*[3]) the antecedent nature of the estate being referred to only as raising a presumption in favour of the alleged family custom of impartibility. The Courts overlooked the fact that the custom arose in times when the estates in question were not conceived to be partible properties and that there was no custom of impartibility in the family apart from the estate—in many cases it does even appear that the family has been in the habit of dividing properties other

1 (1872) I. L. R. 1 Cal. 186 (P. C) 2. (1893) I. L. R. 24 M. at 681.
3. (1874) 11 Bom. H. C. R. 249.

than the Zemindari in question. The Judicial Committee has thereby been driven to lay down more than one questionable proportion with reference to the binding character of customs of *individual* families derogating from the general law, and these have had to be justified on the ground that the Hindu law directs 'that the usages of localities, classes and families should be upheld.' Thus arose the theory that Zemindaris etc., are governed by the ordinary personal law of the parties, except to the extent of any special custom that may be proved. Even if a custom of impartibility was proved, it involved nothing further — for everything turned on the custom proved and nothing on the nature of the estate. Alienation and succession were held to be governed by the general law, except where a custom with special reference to each head was proved. But for some time the recollection of the peculiarities of these estates continued, and it was attempted to dovetail them into the Mitakshara law and find some logical basis for these incidents there. The Mitakshara—dealing with ordinary property—has only two categories—'self-acquired' property and 'joint family property'—and the new hybrid had to fit in with either of these. Except where the conditions requisite for self-acquisition were shown, impartible property was held to be—for such was the presumption of the Mitakshara law—joint property.

The Courts have ever since striven hard to work together the theory of impartibility and the theory of a joint family—see for instance, the *Shivaganga case*,[1] the *Naraganti case*,[2] the *Totapalli case*,[3] *Muthuvadaganatha* v. *Periasami*,[4] *Subramanya Pandya* v. *Sivasubramanya*,[5] *Jogendra Bhupati* v. *Nityananand*,[6] the *Udayarpolliem case*,[7] *Tipperah case*[8], but on the observations in the *Tipperah case*,[8] this is, in the very nature of things, impossible and must give rise to anomalies. The difficulties that arose in the law of alienations are well-known (see *Vidyapurna* v. *Vidyanidhi*[9]). What about the law of succession? It is impossible to work together 'impartibility' and 'survivorship.' Elaborate attempts were

1. (1868) 9 M. I. A. 543.
2. (1881) I. L. R 4 M. 250.
3. (1868) 6 M. H. C. R. 93.
4. (1892) I. L. R. 16 M. 11 and (1896) 19 M. 451 (P. C.).
5. (1894)I. L. R. 17 M. 316.
6. (1890) I. L R. 18 C. 151.
7. (1901) I. L. R. 21 M. 562.
8. (1869) 12 M. I. A. 523.
9. (1904) I. L. R. 27 M. at 459.

made to achieve this end (see Mayne's Hindu Law, 7th Edn. pp. 742, 743). But now the fundamental question is raised: How can there be any survivorship where there is no coparcenary? The history has been forgotten, and it is answered that the rule of survivorship is the relic of a co-parcenary that once existed.

Were it allowable, at this part of the day, the true answer would be that impartible property is a third category of property by itself, and that primogeniture was and still is a peculiar kind of succession with special incidents of its own, but that the nature of the property and the rule of succession make it akin more to joint property than to self-acquired property. Judicial decisions have now conferred on the Zemindar for the time being unfettered powers of alienation, and it will be interesting, should the question ever arise, to see how the Courts would give effect to the junior members' right of maintenance against a number of *bona fide* alienees to whom the Zemindar might have piecemeal transferred the whole estate *for value*. But even these decisions stop short of giving the estate on the death of the Zemindar to the person who would under the Hindu Law be the heir to his *separate* property, and they recognise in the junior members a right of maintenance which does not exist as against his separate property. It must, however, be admitted that the devolution of an impartible estate is rather by way of inheritance than by way of survivorship, for a co-parcenary there never was, but the succeeding Zemindar—whenever he is a member of the same family—takes not merely by reason of his *relationship* to the last holder—as an *heir* ordinarily does—but by reason also of his filling a particular *place in the family*; and hence it is that sometimes a person more closely related to the deceased Zemindar is superseded by a remoter kinsman—(see the *Naraganti case*[1], approved by the Privy Council in the *Udayarpolliem case*[2]; *Subramanya Pandya* v. *Sivasubramanya*[3].

Before concluding this article, we may point out that the decision of the Judicial Committee in the Berhampore case *Virada Pratapa* v. *Brozokishore*[4] would rather support the view that the rule of *survivorship* is a reality in the case of impartible estates and not, as has sometimes been suggested,

1. (1881) I. L. R. 4 M. 250.
2. (1905) I. L. R. 28 M. 508.
3. (1894) 1. L. R. 17 M. 316.
4. (1876) I. L. R. 1 M. 69.

merely a mode of selecting the *heir*. That case did not involve the question of the selection of an heir, but recognised that a son adopted to the late Zemindar by his widow will divest the estate which had devolved on the undivided brother of the late Zemindar. This would be possible only if the two brothers be regarded as having constituted a joint family *qua* the Zemindari, the younger becoming the Zemindar by survivorship on the decease of the elder brother; for if he is to be regarded as an *heir* of his brother—taking by way of *inheritance*, though by a rule *analogous* to survivorship—the estate once vested in him cannot be divested by an adoption subsequently made by the widow of the last owner. The decision is, no doubt, anterior to *Sartaj Kuari's case*[1] in which the true nature of impartible property received a full discussion. It was suggested by Justice *Holloway* in the High Court and by respondents' Counsel before the Judicial Committee that an importible Zemindari is held in severalty and not in co-parcenary,' but the Committee abstain from saying anything on this point. It must also be admitted, that though *Chandrabulli's case*[2] was pressed on their Lordships on behalf of the appellant, the judgment makes no reference to it, and the decision is prior to the line of cases in the law of adoption in which the distinction between property taken by survivorship and property taken by inheritance has been worked out, as to what may be called the 'divestitive' effect of an adoption made by a widow to her deceased husband. But it is a binding authority, nevertheless, and must be taken into consideration in any attempt to determine the true character in which the rule of survivorship has been applied by the Judicial Committee to impartible estates.

NOTES OF INDIAN CASES.

Kandan Lal v. **Gajadhar Lal.**—I. L. R. 29 A. 728—In this case the learned judges felt constrained by the language of S. 457, C. P. C., to hold that when in a suit, certain minor defendants are represented by their mother, as guardian *ad litem*, the decree therein is a nullity as against these defendants, if the husband of the guardian *ad litem* was alive at the time though *non compos mentis*. They follow a decision of the same Court in

1. (1888) I. L. R. 10 A. 272. 2 (1865) 10 M. I. A. 279.

Sham Lal v. *Ghasita*[1] and dissent from the view taken by the Madras High Court in *Kachayi Kuttiali Haji* v. *Udumpumthala Kunhi Putha.*[2]

The question is one of some nicety. The two extremes are clear and well established. If the minor defendants are not *legally* represented, the decree is not binding on them—*Durga Persad* v. *Kesho Persad.*[3] If the defect in the representation be merely *formal*, it is a mere irregularity cured by the principle of S. 578, C. P. C., in the absence of prejudice to the interests of the minors—*Walian* v. *Banke Behari.*[4] The line between the two classes of cases is by no means easy to draw. Assuming that as a matter of fact the minors are represented by a person, what is it that constitutes *illegality* as distinguished from *irregularity* in such representation? Does the contravention of an express provision of law necessarily constitute an illegality?

In *Subramania Aiyar* v. *The King-Emperor*[5] it was said that "their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity." But it is equally well established that it is not *every* violation of an express provision of law that makes judicial proceedings a nullity—see *Ashutosh Sikdar* v. *Behari Lal.*[6] The use of *mandatory* language in the provision contravened is not conclusive. The question always is, whether the enactment is *absolute* or only *directory*. "If an absolute enactment is neglected or contravened a court of law will treat the thing which is being done as invalid and altogether void, but if an enactment is merely directory, it is immaterial, so far as relates to the validity of the thing which is being done, whether it is complied with or not."—Hardcastle's Statutory Law, 4 v. Edn p. 230. No general rule can enable us to determine whether a particular provision is absolute or directory, and it is not safe to rely on the mere use of *negative* language, though such language is often a material element.—*Ibid* p. 232. The Court must get at the real intention of the Legislature by considering the scope and object of each particular provision. —*Ashutosh Sikdar* v. *Behari Lal.*[7]

1. (1901) I. L. R. 23 A. 459.
2. (1905) I. L. R 29 M. 58.
3. (1882) I. L. R. 8. C. at p. 662 (P. C.)
4. (1903) I. L. R. 30. C. 1021 (P.C.)
5. (1901) I. L. R. 25 M. at pp. 97-8.
6. (1907) I. L. R. 35. C. at pp. 71-2.
7. (1905) I. L. R. 35 C. at p. 74.

What then is the nature of the provision in S 457, C. P. C., that neither a plaintiff nor a married woman can be so appointed? The language is, no doubt, negative, but the provision is not couched in *mandatory* language. It only negatives a possibility. There can be no doubt that if the violation is pointed out in the course of the proceeding, even if it be at a late stage (see *In re Duke of Somerset* : *Thynne* v. *St. Maur*[1]) the Court is bound to obey the Code and set the matter right (*Kali Shankar* v. *Pratab Udai Nath*[2]). But this is very different from saying that if it is overlooked, the contravention is such as "to take away the foundation for the proceeding or render it essentially defective." Again the provision is not one that strictly relates to the *jurisdiction* of the Court; it is intended for the benefit of a class of persons. Suppose the result of the suit had been favourable to the minor defendant—might he not on coming of age hold the plaintiff bound by such adjudication? It is, of course, said that the proceedings are bad only as *against* him, but this cannot be on the ground of want of jurisdiction.

The provision can hardly be said to be based on *public* policy. As pointed out by the Madras High Court the disability exists in India only in respect of a married woman's appointment as guardian *ad litem* and not in respect of her acting as next friend (*Asirun Bibi* v. *Sharip Mondul*[3]). A decision in a suit brought by her as next friend will be binding upon the plaintiff (see generally Hukm Chand's Res-Judicata S 73; *Kamaraju* v. *The Secretary of State for India*[4]).

It would thus seem that there is nothing to constrain the Courts to hold that S. 457, C. P. C., was intended to be so *absolute* as to render a contravention of it a source of nullity. Even as regards the provision contained in the same clause, preventing the appointment of a *plaintiff* as guardian *ad litem* of a minor defendant, it is hardly necessary for us to rely on it as a cause of nullity, to avoid a judgment so obtained.

There is a further circumstance in the case under notice. Seeing that the father of the minor was *non compos mentis*, the mother was their natural guardian and she might well have defended the suit in that capacity. S. 457, C. P. C., relates only

1. (1887) 34. Ch. D. 465.
2. (1906) 6 C. L. J. 36.
3. (1890) I. L. R. 17 C. 488 (F. B.)
4. (1888) I. L. R. 11 M. 309.

to the *appointment* of a guardian *ad litem*. If it has been violated why should the case be worse than where there has been *no order appointing a guardian 'ad litem'* and the mother in fact defends on behalf of her minor sons ?

Hari Ram v. **Akbar Husain**.—I. L. R. 29 A. 749—In *Balkaran Rai* v. *Gobind Nath Tewari*[1] Justice *Mahmood* referred to the observation of *Bentham* as to law taxes: the more stringent they are, the less do they achieve their aim, for they are stringent not in the interests of justice but make the administration of justice difficult and in many cases impossible; and he added:—"I do not understand that the provisions of the Court Fees Act as now interpreted can operate otherwise than to retard and in many cases obviate the possibility of justice being done." The numerous cases discussed in the judgments now under notice illustrate the way in which an ill-drawn fiscal enactment is being worked by the Indian Courts. (Cf. also *Bibi Phul Kumari* v. *Ghanshyam Misra.*[2]) The unreported decision of the Allahabad High Court in S. A. 923 of 1906, referred to in the judgment of *Richards* J. is a remarkable instance:—"In that case the plaintiff omitted to count for the purpose of the stamp on his plaint a quarter of a pie supposed to be payable to Government for Revenue. His suit was dismissed on the ground that he had made a mistake." Referring to the way in which the doctrine of *Balkaran Rai's* case[1] has since been applied and extended, *Richards* J. remarked that "the result has been a most unsatisfactory state of affairs which calls loudly for reconsideration" and he piously hopes that "an immense amount of unnecessary litigation will end with our decision in this case." In *Balkaran Rai's* case[1] *Mahmood* J. expressed the hope that the Court Fees Act would soon be considered fit to be amended. The Act has been in the Indian Statute Book now for thirty seven years, and in spite of its admitted shortcomings the Legislature has been unwilling to interfere with this thorny subject by any general amending measure. Some relief was given against the actual *ruling* in *Balkaran Rai's* case[1] by the introduction of S. 582 *A* in the Code of Civil Procedure, but the general reasoning of the Chief Justice's judgment and the numerous other points observed on in the course of it were not taken notice of, and these have since been

1. (1890) I. L. R. 12 A. 129 (F. B.) 2. (1907) 17 M. L. J. R. 618 (P. C.)

followed in spite of the enactment of S. 582 *A*. It looks somewhat the irony of fate that the very enactment of this half-hearted and tardy measure should have been relied upon as an argument to support the view that the principle of it was not to be applied to *plaints*—*Venkatramayya* v. *Krishnayya*[1] dissented from by Sir *Subramanya Aiyar* J. in *Assan* v. *Pathumma*.[2] See also *Valambal Ammal* v. *Vythilinga Mudaliar*.[3] This argument is for the future obviated by another bit of piece-meal help vouchsafed to us by the introduction of a general provision in the new Civil Procedure Code to the effect that where the whole or any part of any fee prescribed by law has not been paid the Court may *in its discretion at any stage* allow such fees to be paid and upon such payment the act in respect of which such fee is payable shall have the same force and effect as if such fee had been paid when the act was done. This affirms *generally* the principle of *nunc pro tunc*—see *Skinner* v. *Orde*[4] as to which the Full Bench in *Balkaran Rai's* case held that the second paragraph of S. 28 prevented them from applying it except when an order under that paragraph has been made and complied with. Adding that "no order could be made by a judge under this paragraph unless the document had through mistake or inadvertence been received, filed or used without being property stamped" they further held that the mistake or inadvertence must be one *on the part of the Court or its officers* and not on the part of a suitor or his advisers. The provision in the new Code imposes no such limitations; but it remains to be seen whether in the exercise of the *discretion* given by it Courts may not practically confine themselves to the cases indicated in S. 28 of the Court Fees Act, and, if so, it would be of importance to ascertain the true meaning of S. 28. The recent Full Bench rightly holds that in *Balkaran Rai's* case, the learned Chief Justice "read into S. 28, words which found no place in it" and that the section is subject to no such limitations as were suggtsted in that case. Once the plaint had been admitted, it is immaterial whether the insufficiency of the Court-fee paid was due to the mistake of the party or of the Court. The Court Fees Act is a purely fiscal enactment and its provisions cannot be held to control or affect the construction of Ss. 54 and 541 of the C. P. C. or of S. 4 of the Limitation Act.

1. (1897) I. L. R. 20 M. 319.
2. (1899) I. L. R. 22 M. 494.
3. (1902) I. L. R. 25 M. at p. 383.
4. (1879) I. L. R. 2 A. 241 (P. C.)

(See also per *Subrahmanya Aiyar* J. in *Assan* v. *Pathumma*[1]) Sir *George Knox*, A. C. J., also points out that Ss. 9 and 10 of the Court Fees Act are not controlled by S. 28 and that S. 10 is not confined to cases in which the investigation has been made by a Commissioner.

Dharam Das *v.* **Gangadevi.**—I. L. R. 29 A. 773—In this case the learned Judges of the Allahabad High Court have preferred to follow an unreported decision of their own Court holding that Art. 60 of the Limitation Act does not apply to suits arising out of the ordinary dealings between a banker and his customers in this country. This view is supported by a decision of the Bombay High Court—*Ichha Dhanji* v. *Natha*[2]—but is opposed to the decisions of the Calcutta and the Madras High Courts—*Ishan Chander* v. *Jibun Kumari*[3] and *Perundevi* v. *Nammalwar*.[4]

It is no doubt the general rule of English law that the relation between a banker and his customer is that of debtor and creditor, but the relationship is not without its own peculiarities (see per *Pollock* C. B. in *Pott* v. *Clegg*[5] and *North* J. in *In re Tidd.*[6]) It may be admitted that whether a transaction is a 'loan' or a 'deposit' must be determined with reference to the facts of each case. A 'deposit' involves some element of a fiduciary character—*Mancharji* v. *Dorabji*.[7] But what is it, and is there not something of it in the relation of banker and customer? It need not be an almost complete *trust*.

The real question is, how was the word 'deposited' *as a verb* used in Art. 60 of the Limitation Act—in its *popular* sense or in a technical or legal sense, especially coming, as it does, after Art. 59? Cases prior to the introduction of this article in the Act of 1877 cannot be of much use, and cases in the English Law as to the true nature of the relation between a banker and his customer are not the *sole* factor in determining the real scope of Art. 60. It is admitted that in the view taken by the Bombay and the Allahabad High Courts, it is difficult to suggest what case Art. 60 is to apply to. There is much to be said in favour of the view that 'deposit' was there used in a popular sense and takes in the transactions between a banker and his customer. In the new

1. (1899) I. L. R 22 M. 494.
2. (1888) I. L. R. 13. B. 338.
3. (1888) I. L. R. 16. C. 25.
4. (1895) I. L. R 18 M. 390.
5. (1847) 16. M. & W. 321.
6. (1893) 3 Ch. 154.
7. (1895) I. L. R. 19 B. 775.

Limitation Bill it was pointed out that this is the view taken by ordinary men of business in this country, and it has accordingly been proposed to expressly include in the article " the money of a customer in the hands of his banker."

Rangasami Naiken *v.* **Annamalai Mudali.**—I. L. R. 31 M. 7.—This is perhaps a somewhat hard case ; but the principles laid down by the learned judges can hardly be taken exception to. The decision is in harmony with the intentions of the Registration Law and the expectations of its staunchest advocate, Sir H. Maine. As to the decision of the Court of Appeal in England in *Northern Counties of England Fire Insurance Co.* v. *Whipp*[1] we think there is considerable force in the observations made by the learned Judges in *Shan Maun Mull* v. *Madras Building Co.*[2] To deprive a mortgagee of his priority, an element of *fraud—real* or *constructive*—is not indispensable, under a system which does not make the mortgagee the *owner* of the *legal* estate. Priority in India depends on a competition of equities and not on a competition between the legal estate and an equitable interest, with " an anomalous reverence paid to the legal estate." Loss of priority by ' misrepresentation' or ' gross neglect ' is allied more to the law of *estoppel* than to the law of fraud. The misrepresentation need not be fradulent—*Shaun Maun Mull* v. *Madras Building Co.*[2]; *Sarat Chander Dey* v. *Gopal Chunder Laha*[3]. Nor need the ' negligence ' of the prior mortgagees be such as to 'evidence fraud' or have a 'tendency to convict them of fraud.'

Jivaratnam Mudaliar v. **Srinivasa Mudaliar.**—I. L. R. 31 M. 33—We are not satisfied as to the soundness of the decision in this case. Neither the avowed policy of S. 99 of the Transfer of Property Act nor its language would seem to impose any disability on the transferee of an independent money decree from the mortgagee. As stated by the Indian Law Commissioners, the section was aimed at a ' common practice on the part of mortgagees of suing their mortgagors on the debt as such and in execution selling the mortgagors' interest in the property,' the result of which was to deprive the mortgagors of the right of redemption and also under the old practice to impose on the stranger purchasing at the auction sale an encumbrance of

1. (1884) 26. Ch. D. 482 2. (1891) I. L. R. 15. M. at p. 275.
3. (1892) I. L. R. 20. C. 296 (P. C.)

whose existence he was not aware and then defraud him by enforcing the security. As pointed out by Dr. *Ghose*, the latter is an imaginary danger. And if a stranger holding a money decree against a mortgagor can deprive him of the equity of redemption by selling it in execution, there is no hardship in a transferee of a money decree from the mortgagee doing the same.

The language of S. 99 is not such as to cover the case under consideration. It does not in terms make a money decree obtained by the mortgagee *unexecutable* against the mortgaged property. It deals with an 'attachment' made by the mortgagee. An attachment by the transferee after the transfer cannot be considered an attachment by the assignor.

It is difficult to see how Ss. 232 and 233 of the Civil Procedure Code help to solve the question. We doubt whether the prohibition contained in S. 99 of the Transfer of Property Act can properly be regarded as a 'condition' within the meaning of S. 232, C. P. C., or an 'equity' enforceable by the judgment-debtor against the decree-holder, within the meaning of S. 233. Further, these sections assume that the decree will be executable by the transferee, but the result of the decision under notice is to make it impossible for the transferee to realise the amount of the decree from the mortgaged property, for he has no mortgage to sue on under S. 67 of the Transfer of Property Act. There is no warrant in law for such an exemption, and the spirit of the decision is hardly in line with the view that the mortgagee himself can acquire the equity of redemption without a suit on the mortgage—*Khiaraj Mal* v. *Daim* [1] *Raja Kishendatt* v. *Raja Mumtaz Ali*.[2]

The case in *Chundra Nath Dey* v. *Burroda Shoondury* [3] was as pointed out by the Allahabad High Court (*Banh Bal* v. *Manni Lal* [4]) very different and did not turn merely on S. 99.

As to *Chhagan* v. *Lakshman*[5] we must, with all respect to the earned judges, observe that to apply here the well-known maxim, what cannot be done directly cannot be allowed to be done indirectly, is almost to beg the question. There is nothing *per se* illegal in a sale of the Equity of Redemption and the question is,

1. (1904) I. L. R. 32 C. at p. 816 ; (P. C.)
2. (1879) I. L. R. 5 C at 211 (P. C.)
3. (1895) I. L. R. 22 C. 813.
4. (1905) I. L. R. 27 A. at p. 451.
5. (1907) I. L. R. 31 B. 462.

what is the extent of the statutory prohibition. Sec. 99 is in the nature of a *penal* provision (*Cf. Rajchunder Chuckerbutty* v. *Dina Nath Saha*,[1]) and must be literally construed. It is safer to adhere to the words actually used than to import into the section words which are not there." It has been held that the statutory *protection* afforded to a certified purchaser by S. 317, C. P. C. does not extend to a person claiming through him (*Theyyavelan* v. *Kochan*[2] followed in *Dukhada Sundari Dasi* v. *Srimonto Joardar*[3], and recently by *Sir Arnold White* C. J. *Sankaran Nair* J. in S. A. 570 of 1905). Why should not the same principle apply to a statutory *prohibition* of the kind enacted in S. 99 of the Transfer of Property Act ?

Kripa Sindhu Mukerjee v. **Annada Sundara Debi.** —I. L. R. 35 C. 34.—Now that the Madras Estates Land Act has reproduced in Chapter V the provisions of S. 61 of the Bengal Tenancy Act, this decision of the Full Bench of the Calcutta High Court is of considerable interest for us in this Presidency also. The Rent Recovery Act (VIII of 1865) contained in Ss. 14 and 37 provisions corresponding to sections 54 (3) and 67 of the Bengal Tenancy Act ; but in spite of the stress laid by *Mitra* J. (in his dissenting judgment) on the imperative language of S. 67, we cannot help thinking that the learned Judge's conclusion is in great measure based upon the fact that S. 61 makes express provision for the contingency of the landlord refusing to receive the rent tendered (see also the order of reference and *Raja Ransgit Singha* v. *Bhagabutty Charan Roy*[4]) In the absence of S. 61, we very much doubt whether the language of S. 67, however strong, would have been considered sufficient to overrule the general rule of law as to the effect of a tender.

We are inclined to accept the view of the majority. It cannot possibly be suggested that S. 61 is obligatory ; and the mandatory language of S. 67 is sufficiently satisfied by holding that it takes away ' the discretion formerly vested in the courts ' as to allowing interest in any case. There is a strong presumption against the Legislature intending to overthrow well understood principles of justice and reason, and to give the landlord

1. (1898) 2 C. W. N. 433.
2. (1897) I. L. R. 21 Mad. 7.
3. (1899) I. L. R. 26 C. 950.
4. (1900) 7 C. W. N. 720.

interest after he has refused a proper tender of the rent would amount to allowing him to benefit by his own wrongful refusal (see Maxwell, Ch. VIII.)

Laxmana *v.* **Ramappa.**—I. L. R. 32 B. 7.—In this case, the learned Judges have rightly held that Art. 119 of the Schedule to the Limitation Act applies to a suit to have an adoption declared valid as much when the *factum* of the adoption is denied as when its validity is questioned. They then assume as a matter of course, that the six years' rule applies even though the suit by the adopted son is one for *possession*. This was, of course laid down by the Full Bench in *Shrinivasa* v. *Hanmant* [1]. But no argument appears to have been advanced in the case under notice as to the effect of the recent decision of the Judicial Committee in *Tribhuvan Singh* v. *Rajah Rameshar Bhaksh*. [2] Nor does the attention of the learned Judges appear to have been drawn to the decisions of the Madras High Court in *Mangamma* v. *Veerayya* [3] and *Rama Row* v. *Venkoba Row* [4] to the effect that this view has been overruled by the decision of the Judicial Committee.

Though the Limitation Bill is now before the Legislature, neither the Draft Bill introduced into the Council nor the Bill as amended by the Select Committee has attempted to settle this point. We think that the dissenting judgment of Sir *Bhashyam Aiyangar* J. in *Ratnamasari* v. *Akilandammal* [5] has conclusively shown the anomaly of holding that suits for possession are governed by Arts. 118 and 119. We cannot help regretting that in spite of this and in the face of the well-known conflict of views between the several High Courts, the Legislature is unwilling to amend the language of the articles to make their meaning clear.

SUMMARY OF ENGLISH CASES.

In re **Wagstaff—Wagstaff** *v.* **Jalland.**

[1908] 1 Ch. 162 (C. A.).

Will—Construction—"To dear wife during her widowhood"—Really no wife—Effect of, when known to testator.

A testator devised and bequeathed the residue of his real and personal estate to "his dear wife" D. J. Wagstaff and two

1. (1899) I. L. R. 24 B. 260.
2. (1906) I. L. R. 28 A. 727.
3. (1907) 1. L. R. 30 M. 308.
4. (1907) 17 M. L. J. R. 282.
5. (1902) I. L. R. 26 M. 291.

others upon trust for sale and to invest and pay the interest and annual produce thereof "to his said wife during her life if she shall to long continue his widow" upon or after her decease or second marriage in trust for plaintiff. The testator knew when he executed the will that this lady with whom he had gone through the ceremony of marriage was not really his wife as she then had her lawful husband living. Subsquently to the death of the testator the lady surrendered herself on a confession of bigamy and received a nominal punishment.

Held, the lady is entitled to the income of the estate until she goes through a further future ceremony of marriage. The fact that she was convicted of bigamy, that she had then to drop his name and publicly announce that she was not his wife, did not put an end to her estate. Judgment of *Kekewich* J. in (1907) 2 Ch. 35 affirmed.

Hyman *v.* **Van Den Bergh.**

[1908] 1 Ch. 167 (C. A.)

Ss. 3 *and* 4, *Prescription Act*, 1832 (2 & 3 *Will.* 4, *C.* 71)—*Enjoyment of light—Twenty years—Period before action—Agreement by tenant—Lost grant.*

It is not correct to say that a period of twenty years' enjoyment of the access and use of light to a building creates an absolute and indefeasible right immediately on the expiration of twenty years. The right does not become absolute until an action is brought in which the right is called in question. Till then, it is only an inchoate right, so that the period of twenty years is not a period in gross but a period next before the action. It is competent for the tenant in occupation during this period to give the consent or agreement mentioned in S. 3 and so prevent the acquisition of an easement. "The right to light thereunder is acquired by actual enjoyment; such enjoyment is that of the tenant in possession or, if the house is vacant, that of the owner who was in possession in law. It follows that the person who by his enjoyment creates the right to light can limit the character so as to avoid any such creation." "Rights under this section are acquired or lost as the case may be by virtue of the acts or acquiescence of the occupier, not by virtue of his title and the acts or acquiescence of a disseisor during his occupation

of the premises are as effectual as those of an owner in fee."—*Farwell* L. J.

If it is intended to rely upon any title under a lost grant, it ought to be expressly pleaded.

Farwell L. J. also held: "A plaintiff can't evade the defences given by Ss. 3 and 4 of the Act by pleading a lost grant instead of the Act, and it is only in a case where there is no express defence provided by the Act for the servient tenement that the right may still be claimed on any ground available before the Act." [*Tapling* v. *Jones*[1] explained. The judgment of *Parker* J.[2] affirmed.]

In re **Brockett—Dawe** *v.* **Miller.** [1908] 1 Ch. 185.

Will—Construction—Specific devise—Two complete descriptions—Second description whether imperfect enumeration or leading description.

A devise was in the following terms:—"I devise the real estate to which I under the codicil of my late father became entitled, namely, the residence known as Oxford House in the Parish of Oakley in the County of Essex to my sister Mary" and so on for life with remainders over, and there was also a residuary devise to the same lady for life with a different remainder over. As a matter of fact, besides the property in Essex specifically described, there was another property, No. 1, Hare Court, to which the testatrix become entitled under the codicil of her father as in her will mentioned, and the question was whether the property No. 1, Hare Court, passed under the specific devise with the Essex property, or whether it was left to pass under the residuary devise. The will was one prepared by a lawyer. It was not suggested that there was anything in the natural fitness of things to make one expect that the property in Hare Court should be comprised in either one of the two devises in preference to the other or why Hare Court and the Essex property which are far apart should go together. There was no reason to suppose any blunder in drafting or copying either. There was no evidence to shew that the testatrix knew whether no 1, Hare Court, was comprised or not in the general description or even knew of the Hare Court property at all. The probability was that the testatrix thought

1. (1865) 11 H. L. C. 290. 2. (1907) 2 Ch. 516.

and believed that the second description by name and locality did include all the real estate to which she became entitled under the codicil.

Under these circumstances, it was held by *Joyce* J. that "the specification here by name and locality introduced by the word *namely* is analogous and equivalent to a specification in a conveyance by schedule or schedule and plan and is not merely an imperfect enumeration of the properties intended to be devised; in other words, the specification by name and locality forms the leading description, and therefore No. 1, Hare Court, did not pass under the specific devise in question."

In re **United States Playing Cards Company's Application.** [1908] 1 Ch. 197.

Trade-mark—Design—Design may be a trade mark.

The application was to register as trade-mark for playing cards a pattern on the back of such playing cards. The Registrar refused the application on the ground that it was a design and not a trade-mark. *Held*, on appeal, that it is not a fatal objection to an application to register something that is claimed as a trade-mark that the subject-matter of the application is capable of being registered also as a design.

In re **Lord Townshend's Settlement—Lord Townshend** *v.* **Robins.** [1908] 1 Ch. 201.

Action by a lunatic—Committee of the estate—Rules of the Supreme Court, 1883, *Order XVI*, *r.* 17.

Where a lunatic so found by inquisition sues by the Committee under Order XVI, r. 17, the Committee must be a co-plaintiff.

[*Farnham* v. *Milward & Co.*[1] followed.]

National Phonograph Co. Ltd. *v.* **Edison-Bell Consolidated Phonograph Co.** [1908] 1 Ch. 335.

Inducing dealers to commit breach of agreement—Contractual relation—Dealers not guilty of actionable wrong—Fraud—Violation of legal right—Damage.

1. (1895) 2 Ch. 730.

Plaintiffs were dealers in Edison Phonographs, blanks and records. They sold their goods only upon certain terms called, respectively, "Factor's terms" and "Retail dealer's terms." Factors had to take an agreement (purporting to be with the Company) from every dealer to whom they sold the Plaintiffs' machines. Neither factors nor retail dealers were to sell to any dealer who was on the Plaintiffs' suspended list. One Ell a retail dealer purchased certain machines from a factor, signing the required contract which prohibited sale to dealers on the Plaintiffs' suspended list and at the instance of one of their servants supplied them to the Defendants. The Defendant Company were on the Plaintiffs' suspended list, but of this Ell was not aware. It was also alleged and proved that two servants of the Defendant Company, acting on behalf of the Company, assumed fictitious names, and, falsely representing that they were independent dealers, purchased a large number of machines from a wholesale dealer who had entered into a factor's agreement with the Plaintiff Company. These machines were in fact, though not to the knowledge of the wholesale dealers, obtained for and handed over to the Defendant Company. No direct pecuniary loss to the Plaintiffs was proved, but there was evidence as to a general falling off in the Plaintiffs' business. It was not difficult to connect it with the Defendants' action. It was not at all likely that, if it had not that effect, Defendants would have been at so much pains to secure Plaintiffs' machines. Under these circumstances Plaintiff Company sued for an injunction restraining the Defendant Company from procuring their servants to enter under false names into contracts with the Company for the purchase of their machines, and also for restraining the Defendant Company from procuring retail or wholesale dealers to sell them Plaintiffs' machines in violation of their contracts with the Plaintiffs. They also sued for damages. *Joyce* J, before whom the case was tried, ***held***—

(i) that there was no contract existing between Plaintiffs and Ell upon which Plaintiffs could have successfully sued Ell;

(ii) that the Plaintiff Company failed to prove that the Defendant Company directly procured Ell to violate the contract, if any such existed;

(iii) that the contract, if any, which subsisted between the Plaintiffs and Ell or Plaintiffs and the wholesale dealers did not

create a contractual relation such as is contemplated in *Quinn* v. *Leathem*[1] (judgment of *Lord Macnaughten*);

(iv) that the Plaintiffs failed to prove actual damage.

On appeal the dismissal of the Plaintiffs' claim as regards the transactions between Ell and the Defendant Company was upheld, their Lordships agreeing with *Joyce* J. that there was no contract in law between the Plaintiff and Ell, that Defendants had employed no fraudulent means to secure their objects, and that no damage had been proved. As regards the other branch of the case, however, their Lordships in appeal held otherwise. The claim of the Plaintiffs could be supported on three different grounds. The Defendants were liable because they had knowingly, and for their own ends, induced the factor to sell to them contrary to the duty which he owed to the Plaintiffs. In view of the decisions of the House of Lords in *Quinn* v. *Leathem*[1] and *South Wales Miners' Federation* v. *Glamorgan Coal Co.*[2] and the language of Lord *Watson* in *Allen* v. *Flood*[3] of Lords *Lindley* and *Macnaughten* in *Quinn* v. *Leathem*[4] the view of *Joyce* J. that the contractual relation contemplated in *Quinn* v. *Leathem*[4] and other cases was a more or less continuous course of dealing as, for example, of personal service could not be supported. Again, the Defendants' action in procuring their object by the use of illegal means directed against the Plaintiffs was a violation of a legal right of the Plaintiffs, because it interfered with the contractual relations subsisting between the Plaintiffs and the factors, and there was no sufficient justification for such interference. Lastly "the business of the Plaintiff Company was property, and in the words of *Bowen* L. J. in *Mogul Steamship Company* v. *Megregor*[5] "no man, whether trader or not, can justify damaging another in his commercial business by fraud or misrepresentation," or as *Rigby* L.J. puts it in *Exchange Telegraph Company* v. *Geogory & Co.*[6] "the action is maintainable because it is an attack made upon the right or interest of persons in the business which they carry on," the damage being the thing which brings the Defendant into relation with the Plaintiff.

In re **Sharp—Maddison** *v.* **Gill.** [1908] .1 Ch. 372.

Gift to six children—Only one alive—Number to be rejected as mistake.

1. (1901) A. C. 495.
2. (1905) A. C. 239.
3. (1898) A. C. 1.
4. (1901) A. C. 587.
5. (1889) 23 Q. B. D. 598.
6. (1896) 1 Q. B. 147, 156.

The testator in this case made two gifts, one to "the six children of Samuel Okey in equal shares as tenants in common. * * and the residue is given to those and five others. As a matter of fact only one child of Samuel Okey was living at the date of the testator's will. The question was (i) whether the legacies to the six children did not lapse, and (ii) whether the residue was to be divided into 11 shares of which 5 were to go to the next of kin as undisposed of, or only into 6 shares. The law is clear where the gift is to children as consisting of specified number less than the number in existence at the date of the will; the Court rejects the number on the ground of mistake and holds that the others are entitled. There is no reason why the same rule should not apply where the number mentioned is, as here, greater than the actual number. It was accordingly *held* that the surviving child should take £200, and that the balance was to be divided into six shares.

In re **Crane—Adams** *v.* **Crane.** [1908] 1 Ch. 379.

Legacy to mother subject to maintaining children—Interest, if from death.

A testator gave the income of a legacy to his daughter-in-law during her widowhood subject to the obligation of maintaining and educating her children who were the testator's grandchildren. The question was whether the legacy carried interest from the testator's death or only after the usual one year. If the income had been given directly to the infants for their maintenance, there was no question they would have been entitled to interest from the date of the testator's death. The testator would then be impliedly taken to so direct because otherwise there would be no fund for the maintenance of the children during that period. There was no precedent for extending this rule to adults. Under these circumstances—*held*: that the legacy did not carry interest from the date of the testator's death.

In re **Beard Reversionary and General Securities Co. Ltd.** *v.* **Hall—Beard** *v.* **Hall.**

[1908] 1 Ch. 383.

Condition in a will—Prohibition against entering military or naval service—Public policy.

A testator made a certain bequest to his nephew "provided he does not enter the naval or military services of the country," in

which case it was to go to another. *Held* that the condition was void as being against public policy and the legatee took absolutely. No doubt " when questions arise as to conditions or provisions being void as being against the public good or against public policy, great caution is necessary ; at different times very different views have been entertained as to what is injurious to the public. It is not for the Courts to enforce a doubtful matter of policy. All doubtful questions of policy must be settled by the Legislature." It may also be : " public policy is a very unruly horse, and when once you get astride it you never know where it will carry you." But still, if it be clearly and unquestionably established that a provision is against public policy Courts ought not to give effect to it. A condition divesting property on a devisee or legatee becoming a member of those forces which Parliament considers necessary for the safety of the kingdom has clearly a tendency to deter persons from entering those forces and is, therefore, against the welfare of, and injurious to, the community, and absolutely void and the legatee takes free of the condition.

Mayor, Aldermen and Burgesses of Tenby *v.* Mason. [1908] 1 Ch. 447.

Borough Council, Meetings of—Right of the public to attend—Right of the burgesses.

The action was by the Mayor and Aldermen of the Borough of Tenby for an injunction to restrain the Defendant so long as he was not a member of the Council from entering the Council Chamber and from being present at the meetings without permission of the Council. The Defendant put his claim to attend the meetings on three grounds; first, in his character as a burgess ; secondly, as a representative of a newspaper called *The Tenby Observer*; and lastly, as one of the public. *Kekewich* J. negatived his claim on all three grounds. As regards the second ground of claim, there was a resolution of the Council in favour of the admission of the Reporters. But the learned judge thought that the resolutions, however binding on the Council, in the absence of a contract, could not confer any right on third parties. As regards the third ground of claim, the learned judge hald that the meetings were not public meetings. The Common Law rule as to vestries

had no application to a Borough Council which was a creature of statute. The right, if at all, must be capable of being reasonably inferred from the statute which creates the Council. Nor was there anything in the character, or the constitution of the meetings, or in the nature of the business to be transacted thereat, which would justify the conclusion that they must be necessarily public. In an analogous statute (The Local Government Act) provision is specially made that parish meetings are open to the public. In appeal, this judgment of *Kekewich* J. was upheld on identically the same grounds. On the question whether the defendant as a burgess has a right to come in, the following is stated by *Kennedy* L. J. as the principle governing the case: "Where there is a governing body, a deliberative body of constituents is there, *prima facie* any right in a constituent to say 'I shall be present at the deliberations of the deliberative body? I think not. * * * It may be in the interests of the body governed that the deliberations shall not be held in public. The persons whose duty it is to determine the questions of policy and questions of government ought to be placed in such a position that they can express their views freely, without risk of their being communicated to the public to the disadvantage perhaps of the body whose affairs they have to govern"—subject of course to anything controlling it found in the statute which governs the corporation.

Tillmans and Co. *v.* S. S. Knutsford, Ltd.

[1908] 1 K. B. 185.

Ship—Bill of lading—Construction—'Any other cause'—'Error in judgment' of Master—'Inaccessible on account of ice.'

Construing a bill of lading containing the following exemptions from liability (1) for 'Error in judgment, negligence or default of * * * Master, whether in navigating the ship or otherwise'; (2) 'Should a port be inaccessible on account of ice * * *' or (3) Should entry and discharge at a port be deemed by the Master unsafe in consequence of war, disturbance or any other cause, discharge to be made at any other safe place'—

Held, that (1) 'error' in clause (1) does not include a misconstruction of the bill of lading by the Master of the ship even if a wide meaning be given to the word 'otherwise'; (2) 'inaccessible'

in clause (2) does not mean inaccessible "at the particular moment when the ship arrives off the port"; "it is clear that the Master must wait a reasonable time on reaching the port"; and (3) "in order to justify delivery at another port" on account of "any other cause" in clause (3) the 'other cause' must be one *ejusdem generis* with 'war' or disturbance, and 'ice or perils of the sea' are not *ejusdem generis* with "war or disturbance."

Morris and Bastert, Ltd. *v.* Loughborough Corporation. [1908] I. K. B. 205 (C. A.)

Statute—Construction—Contractual rights thereunder.

"On general principles, where in a statute contractual rights are given to persons, clear words are required in the statute in order to place a limitation upon those contractual rights."

Chaplin and Co., Ltd. *v.* Brammall.

[1908] 1. K. B. 233 (C. A.)

Husband and wife—Contract by husband—Guarantee by wife—Undue influence by husband—Want of independent advice—Nullity of guarantee.

P sold goods to *D's* husband *Y*, on condition of the latter getting *D's* guarantee for payment. *P* employed *Y* to get the deed of guarantee signed by *D*. *D* signed the deed without the document being sufficiently explained to her and without understanding its contents. In a suit by *P* against *D* on the guarantee on default of payment by *Y*—

Held that the plaintiff ought to fail for the following reasons:—(1) *P* was cognisant of the fact that the influence of a husband was being employed to obtain the signature of his wife to the document. (2) "No sufficient explanation was given to her, and she did not understand it" (3) "Plaintiff did not take care to see that the defendant had independent advice in the matter."

[*Turnball & Co.* v. *Duval*[1] followed.]

Williams *v.* Midland Ry. Coy. [1908] 1. K. B. 252. (C.A.)

Railway Company—'Common carrier'—Freedom from liability—Extra rates for more valuable articles—Contract 'reasonable' and enforceable.

1. (1902) A. C. 429, 434.

A contract by a Railway Company (*a*) that they will not be liable as *common carriers* in respect of carriage of an animal, *e.g.*, a dog and (*b*) that they will not be liable for negligence beyond £ 2 unless in the case of dogs of greater value a declaration of their value and payment of an additional charge of 1½ p. c. upon the extra value are made, is reasonable and enforceable.

De La Bere *v.* **Pearson, Limited.** [1908] 1. K. B. 280 (C. A.)

Contract—Consideration—Breach—Damages—Extent of liability.

While affirming the decision[1] of Lord *Alverstone* C. J. in (1907) 1 K. B. 483, the Court of Appeal decided (1) that there was a *contract* with a consideration in the shape of a tendency to increase the sale of defendants' paper, and (2) that though the plaintiff asked the defendants "to name a good stockbroker for best investing £ 800" the defendants having named a stockbroker whose dishonesty would have been apparent to them on slight enquires which they failed to make, they were liable to recoup the plaintiff, not only up to £ 800 but the whole of £ 1,400 which the plaintiff invested and lost by the misappropriation of the stockbroker, the object of the plaintiff being how to effect best "investments of a moderate type." (*Bigham* J. doubting on the question of amount of damages, but not dissenting.)

Curtice *v.* **London City and Midland Bank, Ltd.**

[1908] 1 K. B. 293. (C. A.)

Banker—Customer—Issue of cheque—Countermand by unauthenticated telegram in time—Telegram not noticed by negligence of banker—Payment of cheque—Banker not liable—Bills of Exchange Act, 1882 (45 *and* 46 *Vict. C.* 61) *S.* 75, *Sub-S.* 1.

Payment of a cheque was countermanded by means of an unauthenticated telegram to the banker, which, though it reached him in time, was not noticed by him owing to the neligence of his servants. In an action by the customer, after payment of the cheque for the amount—

Held, that the banker was not liable for the following reasons:—(1) "Countermand is really a matter of fact. It means

1. See 17 M. L. J. 101.

much more than a change of purpose on the part of the customer. It means, in addition, the notification of that change of purpose to the bank. There is no such thing as a constructive countermand in a commercial transaction of this kind." (2) The bank is not "bound as a matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque."

Obiter.—"For negligence the banker might be liable, but the measure of damages would be by no means the same as in an action for money had and received." "The plaintiff's case is not based on negligence."

The "Europa." [1908] P. 84.

Ship—Initial unseaworthiness—Damage by peril of the sea—Excepted liability—Whether unseaworthiness is a condition precedent to a contract of affreightment—Onus of proof.

The following question was decided in the negative: "Whether a shipowner, whose ship was unseaworthy at the commencement of the chartered voyage, is liable in damages to the charterer, the owner of the cargo on board, not only for injury to his cargo caused directly as the result of that unseaworthiness, but also for injury caused to other portions of the cargo, not as the result of such unseaworthiness but by a peril of the sea excepted in the bill of lading, in other words whether seaworthiness is a condition precedent in a charter of affreightment to the extent that if the ship be unseaworthy the shipowner is reduced to the position of a common carrier and liable for all damage occasioned to the cargo even if such damage be solely caused by an excepted peril and not by the unseaworthiness."

Per *Curiam.*—"Seaworthiness is not to be classed with non-deviation as a condition precedent, the non-performance of which avoids the contract affreightment."

The plaintiff must prove damage to the cargo as the *direct consequence of unseaworthiness.* He is not entitled to recover "the damage caused by the water which got into the 'tween decks through the collision between the ship and the dock-wall, which was covered by the excepted perils in the charterparty

and to the protection of which the shipowner was still entitled, notwithstanding the unseaworthiness of the vessel."

[*The Orchis*[1] explained and distinguished.]

Leslie *v.* **Leslie.** [1908] P. 99.

Wife undergoing penal servitude—Petition for permanent alimony—Not entitled to get or have it determined then.

A wife who " is in penal servitude at the cost of the State" being " boarded by the State, and having no opportunities of spending money on amusements " is not entitled, so long as she remains in prison, to have the amount of her permanent alimony paid to her " for her support, her maintenance, her clothing or the education of her children, " or even to have the amount of it then determined as that might be sometimes an unnecessary and even costly luxury for the husband.

Lord Chesterfield *v.* **Harris.** [1908] 1 Ch. 230.

Long enjoyment—Presumption of legal orgin—Presumption of Crown grant—Destruction of servient tenement, no answer.

The plaintiffs as riparian owners sued the defendants who were fishermen by trade for fishing in the waters of the Wye opposite the banks of the river owned by the plaintiffs. The defendants set up a claim of right as freeholders of the parish adjoining the river to fish in the waters of the river. The parol evidence shewed that the defendants and others had openly fished in the waters in question under a claim of right as freeholders within the manor for a period of upwards of 100 years. That particular portion of the river was known as the free-water ; the fishermen were known as free-fishermen. Their right had been recognised by the predecessor in title of one of the plaintiffs. On several occasions during the last century free fishermen had been summoned for fishing ; in each case the claim of right was raised ; once only there was a conviction, but the Magistrate, feeling doubtful, would not enforce the payment of fine without indemnity from the complainant. Even if the evidence rested here, *Neville* J. was of opinion that he was bound to attribute to the long enjoyment a legal origin if indeed the right was one which could be legally created. But there was also documentary evidence consisting of certain inquisitions *post mortem*, presentment to

1. (1907) 2 K. B. 660.

the Court leet and perambulations of the manor extending over 700 years, which confirmed the view that the modern user was in accordance with the ancient right

But it was contended that the free-holders within the manor were incapable of taking by grant, being a fluctuating body, and also that it would be invalid as destructive of the servient tenement owing to the possibility of indefinite increase in the number of persons entitled to fish. The plaintiffs were admittedly owners of the soil. But the learned Judge held that a grant of right to fish in common with the other free-holders within the manor would be a good grant to an individual and might properly be presumed to have accompanied each original grant of a free-hold, but that if necessary in this case it might be presumed (the manor being a royal manor) that there was a grant from the Crown incorporating the free-holders within the manor. He saw no reason why the right should not be granted in common to the owners of several parcels of land although the subdivision of lands may lead to an indefinite increase in the number of persons entitled to exercise the right; as for the destruction of the servient tenement, there was little difference between an exclusive grant to one and a grant in common to several.

Chesterfield *v.* **Fountaine.** [1908] 1 Ch. 243 (Note).

Custom—Prescription — Difference between — Destruction of subject-matter—unreasonableness—No objection to grant.

There is a distinction between rights which are claimed by custom and rights which are claimed by prescription. A custom must be reasonable, and a custom which destroys the subject-matter of the grant would not be reasonable. But a right claimed by prescription is subject to no limitation as far as its use and reasonableness is concerned, and the owner of the soil, that is, the owner of the bed of the river, has a perfect right if he chooses, if the fishing belongs to him, to grant a right to fish to any number of persons, although it may destroy his own right. Therefore, the fact that the right may be exercised by an unlimited number of persons is not a circumstance that is fatal to the prescription. It is a circumstance that is to be taken into consideration when one comes to consider, as a matter of fact, whether the prescription is made out by the evidence, and the fact that it is capable of

indefinite multiplication would be one of the circumstances against the probability of the grant.

Johnson *v.* **Clarke.** [1908] 1 Ch. 303.

Custom—Unreasonableness—Married woman—Alienation by deed without separate examination—Against common right.

The question in the case was, whether a local custom for a married woman to dispose of her real estate by deed made with the concurrence of her husband but without any separate examination was a good custom.

Held—that the custom could not be upheld because it was unreasonable as conflicting with the general principle of the common law that an exercise of free will was essential to alienations and contracts, and that a married woman was not in a position to exercise such free will; in other words such a custom was against "common right" and bad.

"A custom to be valid must be such that in the opinion of a trained lawyer, it is consistent, or at any rate not inconsistent with those general principles which, quite apart from particular rules or maxims, lie at the root of our legal system."—*Parker* J.

Cable *v.* **Bryant.** [1908] 1 Ch. 256.

Derogation from grant—Right to air implied—Binding against purchasers without notice—Lease outstanding on the grantor's land, no matter.

The action was for an injunction to pull down a hoarding put up by the defendant in his yard which obstructed access of air to the plaintiff's stable through a ventilator. One *H* Company were the original owners of the stable. They conveyed it to the plaintiff by the description "all that piece of land situate in * * * together with the brick-built stable standing on the said piece of land and in the occupation of the purchaser." At the time of the conveyance they were also owners of the defendant's yard subject to a lease outstanding. Subsequently they conveyed the yard to the defendant, the lessee concurring to merge the lease in the fee. The question was whether there was any oligation on the defendant not to interfere with the reasonable use of the stable for the purposes of the stable. The defendant was a *bona-fide* purchaser for value without notice.—*Held*: (i) On the principle of derogation from

grant, neither the Company nor the defendant their assignee could erect anything on the yard which prevented the use of the stable as a stable. It did not matter that at the time of the grant the defendant's yard was subject to a lease. (ii) The rule that a man may not derogate from his grant was a rule of law and bound purchasers without notice. (iii) A right to air through a particular aperture in a house or building on the dominant tenement could be acquired, though there is no defined channel over the servient tenement through which the air flows.

Coulden *v.* Coulden. [1908] 1 Ch. 320.

Will—Construction—"Then surviving children and their respective issue"—Alternative original gift of personalty.

A testator devised his estate, real and personal, in trust to two of his children as executors, directing them to divide the income into seven parts and pay a part to each of his 7 children. He also directed that on the death of either executor, the survivor should sell the estate and cause the proceeds to be equally divided amongst his "then surviving children and their respective issue." The question was as to the persons among whom the proceeds of the corpus were divisible at the period of distribution. *Held*:—that the estate was divisible into as many shares as there were children who survived the period of distribution or predeceased that period leaving issue who so survived, such surviving issue in each case taking the share which the child so dying would have taken had he or she survived the period of distribution. "In gifts of real estate the word *issue* in a gift to "*A* and his issue" is, according to the decisions, *prima facie*, a word of limitation." There is no like rule of construction in the case of personalty. "Whether it is a word of limitation or not is purely a question of construction on each particular instrument. Indeed by a gift of personalty to *A* and his issue, it seems * * * more likely that a testator means the issue to take jointly with or by substitution for *A* than that *A* should take to the exclusion of his issue, and where there are words of division, such as a gift to divide between *A* and his issue, it is * * almost conclusive that the word *issue* cannot be used as a word of limitation."

Emanuel v. **Symon.** [1908] I. K. B. 302 (C. A.)

Foreign judgment—Jurisdiction of foreign Court—Ownership of property abroad—Contract of partnership abroad—Partner residing in England—Binding character of judgment.

Reversing the judgment[1] of *Channel* J., the Court of Appeal *held* :—" To make a person who is not a subject of, nor domiciled nor resident in, a foreign country amenable to the jurisdiction of that country, there must be something more than a mere contract made or the mere possession of property in the foreign country." " In actions *in personam* there are five cases in which the Courts of this country will enforce foreign judgment : (1) where the defendant is a subject of the foreign country in which the judgment has been obtained ; (2) where he was resident in the foreign country when the action began ; (3) where the defendant in the character of plaintiff has selected the *forum* in which he is afterwards sued ; (4) where he has voluntarily appeared ; and (5) where he has contracted to submit himself to the *forum* in which the judgment was obtained." " There is no implied obligation on a foreigner to the country of that *forum* to accept the *forum loci contractus*, as having by reason of the contract acquired a conventional jurisdiction over him in a suit founded upon that contract for all future time wherever the foreigner may be domiciled or resident at the time of the institution of the suit."

Obiter.—" Where the defendant, at the time of the action in which the judgment was given against him in the foreign country, was the holder of a public office in that country, and where the cause of action arose out of or in connection with the tenure of the office, he is bound by the judgment " for " though he was in fact temporarily absent (at the time of the suit) he might, as the holder of such an office, be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction."

[*Sirdar Gurudyal* v. *Rajah of Faridkote*[2] followed ; *Becquet* v. *MacCarthy*[3] commented on.]

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1. [1907] 1. K. B. 235. See 17 M. L. J. 49.
2. [1894] A. C. 670.
3. [1831] 2 B. and Ad. 951.

Horton v. **Colvin Bay & Colvin Urban District Council.** [1908] 1 K. B. 327. (C. A.).

Exercise of Statutory powers—Land taken and not taken for public purposes—Injury by public works constructed on neighbouring lands so taken—No compensation.

Cowper-Essex v. *Acton Local Board*[1] has laid down that : if the claim is by a person from whom land has been taken compulsorily, he may have compensation for damage sustained by the injuriously affecting of other lands of his, and such damage is not confined to damage in construction, but extends to damage in user of that which is constructed on the land taken from him. But no case has been cited, and none, I think, exists in which the doctrine has been applied to damage (depreciation in value) occasioned by works (here a pumping station and reservoir at a distance of a quarter of a mile) erected upon land not taken from the claimant but from another."

In re **A debtor**—*Ex-parte* **The Debtor.**

[1908] 1 K. B. 344 (C. A.)

Bill of Exchange—Conditional payment—Endorsement for value—Suspension of original cause of action.

Though a bill of exchange acts " only as a conditional payment " yet if it is negotiated to another for value entitling him to sue on the bill the original owner's right of action for the debt covered by the bill becomes suspended so long as the bill is left outstanding, so that the latter cannot, while the bill is in currency, take proceedings to have the debtor declared an insolvent in respect of the debt.

Hastings Corporation v. **Letton and Another.**

[1908] 1. K. B. 378.

Corporation—Dissolution—Rights of Corporation—Vesting of —Whether ' bona vacantia '

Rights in favour of a Corporation cease, on its dissolution, to exist, if they have not been before dissolution validly assigned over to any body else, and they do not vest in the Crown as *bona vacantia* entitling the Crown to sue thereon. The dissolution of

1. [1889] 14 A. C. 153.

a Company cannot be likened to the death of a person, for in the case of a Company dissolution does not come upon it as death comes upon a human being, with all its contracts, liabilities and property still on its hands. * * The Companies Act * * provides that " before a Company dissolves it shall have nothing; it must first be divested of everything, and it is not permitted to dissolve until it is divested of everything."

So, where plaintiff gave a lease for seven years to a limited Company the payment of the rent being guaranteed by defendants as sureties, *held* that on the dissolution of the Company within the term without the remainder of the term having been validly assigned over to any body the lease expires and with it the liability of the sureties. The lease does not vest on the Crown as *bona vacantia*, and the result is that the reversion is accelerated. " A Corporation has no personal representatives, and when it is dissolved its lands revert to the grantors. "

JOTTINGS AND CUTTINGS.

History of Legal Education in England.—To begin at the beginning, the four Inns of Court are, as you know, private societies, formed by those laymen engaged in legal practice who fixed their abodes in what was then a region of fields and gardens, lying between London and Westminster. They acquired their property by subscription or gift; but the Middle Temple and the Inner Temple obtained a title from the Crown, and the result is that these two societies hold their property in trust for the entertainment and education of professors and students of the laws of England residing therein. There seems to be no trust affecting Lincoln's Inn and Gray's Inn. The internal government of the Inns resembled that of the City Companies. Acting, no doubt, on the best advice, they never sought to become corporations. At the same time, it is hardly reasonable to say that the Inns of Court are private societies and nothing more. At a very early date the judges permitted them to decide what persons should be called to the Bar. This is evidently a public function, and the whole community has an interest in the efficiency of the Inns of Court.

During several centuries, the members of each Inn were united by the bond of a collegiate life. The students were, for the most

part, young men of good social position, and, under the paternal supervision of the Benchers, they were trained, not only in the technicalities of their profession, but also in those exercises which, as gentlemen, they could not afford to neglect. Music was not forgotten; and in the presence of the Chief Justice I may suggest that some at least of our modern Benchers, are well qualified to revive this good and laudable custom. Moots and annual readings were followed with the keenest interest; but little or no provision was made for the systematic and historical exposition of the law; then as now, the student qualified himself for practice by copying precedents and by watching others at work. When the Inns of Court used their influence to prevent the 'reception' of the Roman Law, they may be said to have acted wisely; but, not content with excluding the classical jurists, they ignored them altogether. As the Civil Law was the basis of instruction elsewhere, England was cut off from the main stream of legal thought; the insular peculiarities of our systems were greatly overvalued, and literary presentation of the law was not studied as it should have been; nor was there any independent criticism of the law, any attempt to try it by the touchstone of reason and common sense. If you compare the legal literature of this country with that of our nearest neighbours on the continent, you will understand why it is that an appeal to the law goes home to the mind of the average Frenchman, while a similar appeal, if addressed to an Englishman, will be met with some rough sarcasm at the expense of lawyers.

When the eighteenth century came in, the Inns of Court were beginning to feel the effects of a change in social conditions. As the judges and leaders of the Bar moved away from the neighbourhood of the Inns, the old collegiate life became impossible; moots and readings ceased to have any significance; ultimately the qualification for the Bar consisted in the consumption of so many dinners and the observance of certain negative rules of etiquette. We may say of that century that it was a period during which institutions of all kinds were lapsing into hopeless discredit, and yet there never was a period during which the mind of man worked more actively or more clearly. There were giants among lawyers of those days; and, though we must not argue from Lord Hardwicke and Lord Mansfield to the ordinary practitioner, it is plain that in the student days of those two judges, the Dutch

civilians must have been read and appreciated. As the result shows, there could be no more fortifying study. But the Inns of Court have little credit in their great men. The slumber which brooded over Oxford and Cambridge was equally unbroken in the 'legal University' of London. When Blackstone began to lecture at Oxford, and when Bentham began to take notes of his lectures, a new era opened in the development of our law. One by one, the doctrines reverenced by Coke and respected by Kenyon were submitted to the test of common sense; abuses were hunted out into the open; and Parliament was induced to believe that law reform was the most urgent necessity of the time. One may admit that the old law was denounced and upset by men who did not always take the trouble to master it. Allowing for the mistakes that are made in a reforming age, it is clear that the nation took a step in advance when it realized that the law is not a professional mystery, but rather a formal embodiment of the notions of fair play and humanity by which Englishmen are governed in their politics and in their business.

It was some time before the tide of reform approached the walls of our professional citadel. In 1846 the House of Commons appointed a Committee to report on Legal Education, and the report which covered a great variety of topics is still well worth reading. Five years later the Council of Legal Education was established, at the instance of Sir. R. Bethell, and in course of time additions were made to the meagre programme of instruction. In 1855 a Royal Commission was appointed. Sir William Page-Wood was Chairman, and in the list of Commissioners are the names of Bethell, Cockburn, Coleridge, and Keating. It is very commonly represented that those who advocate large schemes of education are pedantic and unpractical persons; but in point of fact the leaders of the profession have always favoured large ideas, their efforts have been thwarted by less distinguished men. This Royal Commission was certainly bold enough; passing lightly, too lightly, over the Inns of Chancery, they suggested that Inns of Court should be formed into a University, to be governed by a senate in which each Inn should be represented by five Benchers and three Barristers. It was further proposed that their University should have power to confer the degree of Master of Laws. The scheme, if I may say so, is a little crude; it was worked out by men of great ability, but without academic

experience. It produced no direct effect, but from this time forth, the Council of Legal Education pursued a more active policy, making this and that change, lest a worst thing should happen to the Inns. The prevailing sentiment of the Benchers is, naturally, conservative; they have accepted the inevitable. A good many years have elapsed since my own Inn withdrew its objection to the Bar examination, but in a little book of reminiscences published since the death of Mr. J. G. Witt, you may see how long the objection survived in the minds of old members of our society.

Examinations, says Mr. Witt are useless and pernicious. They are useless, because practice will soon show whether a lawyer knows his business or not. I wonder what we should say if an argument of this kind were applied to the medical profession. Why should young doctors be examined? You can always wait to see how many of their patients they kill. Surely in law as in medicine the public has a right to be protected against the intrusion of men who have received no adequate training for the duties they undertake.

When Mr. Witt proceeds to argue that examinations for both branches of the profession are pernicious, I think the reasons given deserve our particular notice. His point is this, that at the critical time when a young man is turning from book to practical work, we concentrate his powers on certain papers of questions; he is in danger of supposing that he has mastered his subject because he has answered those questions. This is a real danger; and this is what Lord Cairns was thinking of when he said that professional students should not be compelled to enter upon a second college education. But what is the inference? Not, surely, that we are to dispense with examinations; the business community has a right to demand that men should be tested before they are allowed to deal with the interests of their clients. But we ought, by all means, to secure that book knowledge should be combined with practice, and that the student shall never lose sight of the responsibilities which he will shortly have to face. This very desirable combination is made a reality whenever the judges and the leaders of the Bar take a direct interest in the work of teaching and examination. I have seen it made a reality in the United States and in more than one of the Indian High Courts. An examination, for

instance, becomes much more useful when it is conducted by men of recognised authority, and under practical conditions. Almost as soon as the examination was accepted and made a condition of call to the Bar, the demand for an improved scheme of education began to make itself heard. In 1870 an Association was formed, and in 1871 Sir Roundell Palmer consented to bring the whole subject before the House of Commons. No stronger advocate could have been chosen, but Lord Selborne, if one may criticize so great a judge, was perhaps inclined to expect too much from constitutional changes. His plans for the improvement of legal teaching were accompanied by plans for the reformation of the Inns of Court. By opening two campaigns at once, Lord Selborne gave his critics an oppurtunity of which they were not slow to take advantage; in the debate of July 1871, Sir George Jossel secured a temporary victory by appealing to the conservatism of the profession. After some years of barren controversy, the *Quarterly Review* (Jan. 1875) summed up the results, and Lord Selborne, much to his dismay, was described as the unconscious instrument of those wicked attorneys who wished to break down the eternal and immutable distinction between solicitors and barristers. When, at a later date, Lord Russell of Killowen set forth in eloquent language his views in regard to legal education he was met with arguments of an equally convincing nature.

Until a recent date it was the settled policy of the Council to decline all proposals which involved co-operation with the universities. In 1894 the Law Faculty of Oxford suggested that a degree in law with honors of the first or second class, should be accepted as a certificate in certain subjects, and that the Inns of Court should institute an examination in Conveyancing and Procedure for graduates in law. The Council gave us a courteous hearing, but they did not see their way to recognize any teaching that was given outside the limits of their own rather narrow scheme.

When the University of London was reconstituted in 1898, the Commission of which Lord Davey was Chairman, made certain proposals to the Inns of Court. It was suggested that the four Inns should be named schools of the University, or that the Council should be named a school on their behalf, and the invitation was so worded as to leave them free to consider whether

and to what extent they would co-operate in the educational work of the university. This proposal was considered by a joint committee, and in the result it was curtly declined. No reasons were given and no hope was held out that the Inns would co-operate on any terms.

I venture to say that the form of their answer has put the Inns of Court entirely in the wrong. At the same time, it was hardly to be expected that these honourable societies, which are six centuries old, would welcome the proposal that they should be recognised as departments of new teaching university. I am glad to be assured, on high authority, that even in the Council itself it is felt that the position taken up in January 1900, is becoming untenable. There must, ultimately, be some understanding, some division of labour, between the Universities and the Inns, on the lines suggested by Oxford Law School. And if we can come to an agreement on certain points of principle, I believe that the co-operation would be of the greatest possible advantage to succeeding generations of law students.—*Law Quarterly Review.*

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Why a Counsel drink a pot of Porter:—A learned Counsel (*Mr. Brougham*, as some say) when the Judges had retired for a few minutes in the midst of his argument, in which, from their interruptions and objections, he did not seem likely to be successful, went out of Court too, and on his return stated he had been drinking a pot of porter. Being asked whether he was not afraid that his beverage might dull his intellect ? "That is just what I want it to do," said he, "to bring me down, if possible to the level of their Lordships' understanding.

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The Police Act by H. C. Sinha.	
Allahabad Law Journal for	March. 1908.
American Lawyer	Do.
American Law Review	Do.
Australian Law Times	Do.
Bombay Law Reporter	Do.
Burma Law Reporter	Do.
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The Lawyer	Do.
Green Bag	Do.
Michigan Law Review	Do.
Punjab Law Reporter	Do.