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ISLANDS IN NON-NAVIGABLE RIVERS.

The ownership of islands formed in non-navigable and non-tidal rivers has but rarely come into question before the Courts of this Presidency. There have been several cases in Bengal dealing with this subject and they have been decided with reference to the provisions of the Bengal Regulation XI of 1825. Though the question is one of very great importance to riparian proprietors in the Godavari and Krishna deltas, and though the ownership of such islands commonly called *lankas* has been the cause of bitter disputes among them [*vide* Godavari Manual, Ch. I., p. 5] it is somewhat surprising that there should be such a paucity of decisions upon the point. We have been able to discover only two decisions of the High Court and one decision of the Sudder Court upon the point. The earliest decision is that of the Sudder Court in the *Komarazu Lanka* case [*vide* Mad. Sud. Dec. (1858) 189]. In this case the Government was an upper riparian proprietor in the Godavari and was the owner of a *lanka* up the stream. In course of time the *lanka* extended itself down the stream beyond the limits of the Government villages on the bank. The new accretions were within the limits of a Zemindari village on both sides of the river. The new accretion was claimed by the Government on the ground that it was a longitudinal accretion to their old *lanka*, and by the Zemindar on the ground that it had been formed within the limits of his estate on the two sides of the river. The case came up before three Judges of the Sudder Court and the Zemindar's contention was unanimously upheld. It was decided that the island should be divided between the Government and the Zemindar in proportion to their frontage upon the river. The next case was *Subbaya* v. *Yerlagedda Ankinidu*, 1 M. H. C. R., 255, decided by *Holloway* and *Strange*, JJ. In this case it was held that the Zemindar was entitled to islands formed in the river Krishna within the limits of his estate. The last case upon the subject

is *Ramalakshmamma* v. *The Collector of Godavari*, 7 M. L. J. R., 246, decided by *Collins*, C. J. and *Parker*, J. In this case, the facts were very similar to the *Komarazu Lanka* case, but by some oversight no reference is made to that case either in the arguments of counsel or in the judgment. The decision of *Holloway*, J., in 1 M. H. C. R., 255, was quoted in argument, but passed over in the judgment. In this case also, the Government was the the upper riparian proprietor and the Zemindarni was the lower riparian proprietrix. It was conceded for the Government that the *lanka* in dispute fell within the boundaries of the plaintiff's estate on both sides of the river. The Government contended that the *lanka* belonged to them on the ground that it was formed in a tidal navigable part of the river, and on the ground that the *lanka* in dispute was an accretion to an existing *lanka* also within the boundaries of the Zemindarni's estate, but acquired by the Government by adverse possession against the predecessor in title of the Zemindarni. The first ground of claim set up by the Government was negatived by the High Court. But the second ground was upheld. With every deference to the learned Judges, we cannot help thinking that the decision is erroneous.

It must be stated at the outset that there is no provision of statutory law applicable to the subject. Bengal Regulation XI of 1825 does not apply to this Presidency. The case, therefore, has to be decided in accordance with the general principles of equity and justice which have on numerous occasions been held by the Judicial Committee to be identical with the principles of the English Law, unless there is anything in such principles which by reason of its purely local or historical origin renders them unsuitable for application to India, or unless different principles have been specially laid down for this country by the Judicial Committee or the Courts of this country.

The reasoning of the High Court may be summarized as follows :—

(1) That great caution should be exercised in applying to India the rule of English Law that a riparian proprietor is *primâ facie* the owner of the bed of a non-tidal navigable stream *ad medium filum*, that rivers of the type of the Godavari and the Krishna resemble the American rather than the English rivers and that as some of the American States have not adopted the

Common Law rule in its entirety, the Courts in India also may hesitate to adopt it.

(2) That the rule of English Law about river-beds is a presumption which may be rebutted by showing that the soil of land covered with water has been conveyed and specially appropriated to a third person, whether or not he is a riparian proprietor.

(3) That the Government had admittedly acquired a right to the Lanka of Tatapudi which had thrust itself as a wedge into the area of the bed claimed by the plaintiff. The title of the Government to this wedge of land within the limits of the plaintiff's bed displaced the presumption of the plaintiff's ownership not merely to that wedge, but also to all formations which had grown by contact with, or adherence to, that wedge of land.

(4) That the suit *lanka* being a gradual accretion to the Tatapudi Lanka was not a sudden vertical accretion in the bed of the river.

(5) That the doctrine of alluvion must be applied even to vertical accretions in the bed of a river or in mid-stream, unless they were sudden.

(6) That for the purpose of applying the doctrine of alluvion, it made no difference whether the accretion adjoined the bank or was in mid-stream.

The first and most important question to be discussed in the case related to the ownership of the bed of the Godavari at the place in dispute. The river had been found to be at this point not tidal and navigable. Under the English Law (1) there can be no doubt that the ownership of the bed of a river which is not tidal and navigable vests in the riparian proprietors on the two sides of the river. In some of the American States (2) the rule of the English

(1) See Coulson and Forbes on "The Law of Waters," pp. 92, 95; *Bickett* v. *Morris*, L. R. I. H. L. Sc. Ap. 47; Hale's De Jure Maris, p. 1, ch. 1; Hargrave's Law Tracts, 1.

(2) The rule of E. L. was not adopted in *Barney* v. *Keokuk* (1876) 4. U. S. Rep., pp. 324, 338; *St. Louis, etc. R. Co.* v. *Ramsey* (1890) 22 Amer. St. Rep. 195; *Notes to Miller* v. *Mendenhall* (1890) 19 Amer. St. Rep. 226; *Willes* v. *Bailey* (1887) 3 Amer. St. Rep. 48.

The rule of E. L. was adopted in the following cases: Notes to *Arnold* v. *Mundy* (1821) 10 Amer. Dec. 385; *Deerfield* v. *Arms* (1835) 28 Amer. Dec. 276, 277; *McCollough* v. *Wall* (1850) 53 Amer. Dec. 715; *Walker* v. *Shepardson* (1855) 65 Amer. Dec. 325; *City of Grand Rapids* v. *Powers* (1891) 28 Amer. St. Rep. 276.

Common Law has not been adopted in its entirety, while in the majority of jurisdictions it has been so adopted. While the English Courts apply the two tests of tidality and navigability, the Courts of some of the States have dispensed with the test of tidality and held that navigability is sufficient to vest the ownership of the bed in the State. The reasons for this departure are said to be

(1) That while tidality and navigability co-exist in England, many of the great rivers in America are navigable for a considerable part of their course without being at the same time tidal.

(2) That the same necessity for public control over the highways of commerce and navigation should lead to the recognition of the right of the State to the beds of all rivers which are navigable, whether they are above or below the ebb and flow of the tide.

The origin of the doctrine according to which the ownership of the beds of tidal and navigable rivers is vested in the Crown is involved in some obscurity and doubt. If the doctrine originated in considerations of public policy, in the expediency of exercising public control over the passage-ways of commerce and navigation, the rule may perhaps be applied to navigable waters above the ebb and flow of the tide. But notwithstanding the fact that these considerations of public policy have been emphasized in several of the cases declaring the right of the State to the ownership of the bed, it does not seem to be necessary for the protection of the interests of the public, that the State should be regarded as the owner of the bed. Even in the case of rivers which are not navigable in any sense of the term, the rights of the riparian proprietors to the bed of the stream would undoubtedly be subject to the exercise of public rights.(1) The Courts of those States in America which have adopted the rule of the Common Law have, therefore, felt no difficulty in recognising a servitude in favour of the public, even in the case of rivers whose beds are vested in riparian proprietors. Where a rule of law is already established, an inquiry into the

(1) *Bickett* v. *Morris*, L. R. I. H. L. Sc. Ap. 47; *Coulson and Forbes*, p. 95.

reasons which led to its adoption may not be very necessary or useful. But when a question arises as to the modification or extension of the rule, it is necessary to consider whether any suggested departure from the rule is justified by the reasons advanced in support of it. The importance of securing to the public a right of user over the great water-courses for purposes of irrigation or navigation has led many people to suppose that the object can only be secured by declaring the right of the State to the ownership of the bed. On the other hand, the public purposes to be served can be equally well served by declaring the right of the State to a servitude merely, as against the riparian proprietors for all such purposes.

If, as we have shown, the interests of the public can be effectually protected even under a rule which regards the riparian proprietor as the owner, and if it is probable that the ownership of the Crown in the beds of tidal and navigable rivers was based upon the fact that they were regarded as the arms of the sea and the King was regarded as the owner of 'the great waste' the sea,(1) there is no reason for extending the doctrine of the proprietorship of the State to rivers above the influence of the tide.

There is thus no reason for refusing to extend to this country the rule of the English Common Law. The Courts of this country have in all cases in which they could find no special rule of statutory law or custom freely applied the rules adopted by the English Courts. And in regard to the question of alluvion and the respective rights of the Crown and of riparian proprietors, it was held by the Madras High Court that the rules of English Law were applicable in British India.(2) In *Nogender Chunder Ghose* v. *Mahomed Esof*, 10 B. L. R., 406, the Judicial Committee observe that the law of alluvion in America seemed to be less favourable to riparian proprietors than that of India or England, thereby implying that the law in America, in so far as it was against the riparian proprietor and at variance with the English Law, should not be applied to India. In the particular case before them their Lordships no doubt observe that in India there is no distinction between tidal and non-tidal but navigable rivers, as regards the proprietor-

(1) Hale's De Jure Maris Hargrave's Law Tracts, 10.

(2) See *Secretary of State* v. *Kadirikutti*, I. L. R., 13 M., 369.

ship of the river. But the case was one from Bengal and their Lordships evidently had in their minds the provisions of Regulation XI of 1825 which recognised no such distinction.

This distinction between a tidal and a non-tidal but navigable river was one which did not arise in this case.

To constitute a river navigable(1) it must be so at all times and seasons for vessels of fairly large size, and must be a continued highway over which commerce is or may be carried on in the customary mode in which commerce is conducted by water. It was clear from the evidence of the Port Officer that the river could not be regarded at the point in question as navigable in fact, within the meaning of the expression as defined by the authorities. If it was not navigable in fact, there could be no doubt the ownership of the bed belonged to the riparian proprietors, whether according to English Law or American Law.(2)

It follows from what has been said before that the bed of the river at the disputed locality was the property of the plaintiff as the riparian proprietor on both sides of the river.

If the bed of the river, in so far as it was comprised within the limits of the plaintiff's estate belonged to her, who was entitled to the suit *lanka* which had been formed in mid-stream on the portion of the bed belonging to her? All formations on the portion of the bed belonging to her were also the plaintiff's property and her right to them could not be in any way affected by the fact that at some previous time her predecessor allowed the defendant to acquire by adverse possession a particular strip of land within her portion of the bed. The fact that the defendant had held adverse possession of that strip for the statutory period could confer ownership only of the specific extent of land which had been held adversely. It could not by any means confer upon the defendant any right to the

(1) See *Chunder Jalee* v. *Ram Chunder Mookerjea*, 15 W. R. 212 and 215; *Mohini Mohun Das* v. *Khajah Ahsanoollah*, 17 W. R. 73; *Rex* v. *Montague*, 4 B. & C. 598; *Mayor of Lynn* v. *Turner*, 1 Cowper, 35; *Miles* v. *Rose*, 5 Taunton 705; *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339.

(2) *Welles* v. *Bailey* (1837) 3 Amer. St. Rep. 48; *Wiggenhorne* v. *Kauntz* (1838) 8 Amer. St. Rep. 150 *Arnold* v. *Mundy* (1821) 10 Amer. Dec. 350; *Brown* v. *Chadbourne* (1849) 50 Amer. Dec. 641; *Ingraham* v. *Wilkinson* (1826) 16 Amer. Dec. 342; *Walker* v. *Shepardson* (1855) 65 Amer. Dec. 325; *Kalee Kishen Tagore* v. *Judoo Lall Mullick*, 5 C. L. R. 97; *Chagendra Narain* v. *Matangini*, 17 I. A. 62.

remaining portion of the bed vested in the plaintiff or to any formations upon the same. Suppose the plaintiff had granted a conveyance of this particular strip of land in the middle of the river to the defendant. Could it be doubted for a moment that the ownership of the remainder of the bed would be reserved to, and vested in, the plaintiff? For the purpose of this question, there cannot possibly be any difference between the operation of limitation and the operation of a grant. In either case what is acquired is only a specific extent of land and the owner of the remaining portion of the bed cannot be deprived of his right thereto or to any part thereof except by a fresh assumption of adverse possession continued for the statutory period, or a fresh grant or some other act of a similar description.*

The claim of the Government to the suit *lanka* could not thus be supported on the ground of any right to the ownership of the bed on which the new *lanka* was formed. The decision of the High Court in favour of the Government was based upon the theory of lateral accretion to the old *lanka* belonging to the Government. The theory of lateral accretion, however, has been affirmed by the highest authority to have no applicability to formations on beds belonging to private owners.

In regard to formations in the beds of rivers whether adjacent to the bank or detached from it, there are two principles of law laid down by the authorities.

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*The formation of an island in mid-stream will in no way affect the rights of the riparian proprietors on either side of the river. If an island is formed on one side of the median line of a river, the owner of the nearer bank who will also be the owner of the island, is not entitled as the owner of such island to a moiety of the bed of the river intervening between the island and the opposite bank. The right of the opposite proprietor to a moiety of the bed of the whole river, which he possessed before the formation of the island cannot be affected by such formation.

If the owner of the island makes a grant of it to a stranger it is certain that the right of the opposite proprietor cannot be affected any more than in the last case. If the grantee of the island cannot be regarded as a riparian proprietor so as to enable him to claim a moiety of the bed between the island and the opposite bank, there is no reason

One is the doctrine of lateral accretion and the other the doctrine of re-formation, or, to speak more correctly, the doctrine of vertical accretion. So far as this country is concerned, it has been established by the Privy Council in a series of decisions based upon the principles of natural law and justice, that in cases of conflict the doctrine of lateral accretion must give way to the doctrine of vertical accretion. In many cases the application of the two doctrines would lead to the same result, as, for instance, where a riparian proprietor is owner of half the bed and an accretion is made adjoining his bank. He would be entitled to the accretion, whether on the ground that it is formed on his portion of the bed, or on the ground that it has adhered to his bank. There are other cases, however, in which the application of the two doctrines would lead to different results. And in such cases, the Courts in India are now bound to follow the decisions of the Privy Council.

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why he should be regarded as such on the side of the island nearer to the grantor. But if there is any difference at all between his rights on one side of the island or the other, it must depend upon the fact that the grantor being the owner of the whole bed between his bank and the island would have been competent to transfer any portion of it and might have intended to transfer a moiety of the bed between his bank and the island. Whether such an intention could be ascribed in the absence of express words in the grant would be a question of fact. In the absence of any circumstances to indicate the grantor's intention it may perhaps be presumed by the Court that he intended to transfer a moiety of the bed separating the island from his bank. Any rule, however, to this effect can be based upon nothing more than the presumable intention of the parties. Such an intention cannot be suggested in the case of a person who allows his title to a part of the land to be extinguished by adverse possession. It would be preposterous to suggest that a person who allows a portion of his land to be acquired by limitation by a stranger entertains the intention of forfeiting or abandoning his claim to the other portion also.

Assuming for a moment that a person who is the owner of an island can be regarded as the riparian proprietor for the purpose of laying a claim to the bed *ad medium filum* he cannot clearly be treated as such lower down than the length of his island any more than a riparian proprietor on the main bank of a river can be regarded as the riparian proprietor at any point lower than the length of his estate.

In *Felix Lopez* v. *Maldun Thakoor*, 13 M. I. A., 467, the plaintiff owned an estate on the banks of the Ganges. It was wholly submerged by the continued encroachment of the river and the defendant's land became the river boundary. After the lapse of some years, the river ultimately retired and the land became capable of cultivation. The defendant claimed the land as a gradual lateral accretion to his land, while the plaintiff claimed it as a re-formation on his site. The Bengal High Court rejected the plaintiff's claim, but it was upheld by the Judicial Committee. It must not be imagined that there is any magic in the word re-formation or that, to render the ruling of the Privy Council applicable, it is necessary that a person's land should be first above water, then be submerged and then re-appear above the surface of the water. The reasoning and language of their Lordships are just as much applicable to the case of land always under water and ascertained to belong to a definite owner and for the first time rising above the surface of the water by the addition of deposits. The reason why the word "re-formation" is used in these cases is that the Ganges being a navigable river, there could be no private ownership in the bed under the law in Bengal, and the person who invoked the doctrine of vertical accretion could have claimed the new formation not upon the ground that the bed belonged to him, but only upon the ground that the site which was not originally included in the bed belonged to him before it was submerged.

So long as the ownership of the site can be ascertained and so long as there is nothing to indicate any intention on the part of the owner to abandon it, any formation upon the site must belong to the owner of the site. The doctrine of lateral accretion can not be applied so as to take away one man's property and give it to another, simply because the land of the former happened to be under water. The principle is thus put by their Lordships:— "This principle is a principle not merely of English, not a principle peculiar to any Municipal law, but a principle founded on universal law and justice; that is to say, that whoever has land, *wherever* it is, whatever may be the accident to which it is exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property remains in the original, owner." The

doctrine of lateral accretion laid down by S. 4 of the Bengal Regulation was held not to justify the confiscation or destruction of a private person's property and not to be applicable to the case of a formation on a site ascertained to belong to a third person. Their Lordships point out that the doctrine could be applied only to the gain which an individual proprietor might make in this way from that which was part of the public domain not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State. And if the term accretion is to be applied to the formation in question, their Lordships ask "why a deposit of alluvion directly upon a site should not be regarded at least as much an accretion and annexation vertically to the site, as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property." The case, it must be remembered, was decided by their Lordships not upon the provisions of the Bengal Regulation XI of 1825 which was held inapplicable, but upon general principles of equity and justice.

The next case before their Lordships was *Pahalwan Singh* v. *Maharaja Mahessur*, 9. B. L. R., 150. In this case the question was whether the disputed lands had been gradually washed away and had accreted to the estate of the plaintiff by obliteration of its former marks, or whether by the sudden change of the Ganges they had accreted with a continuance of the former marks. Their Lordships point out that it would be an error to hold that the complete obliteration of all marks was conclusive of accretion. If any marks of the old channel, houses, or trees could have been found, it would, of course, have been conclusive against the plaintiff, but the absence of such marks would not have been conclusive in his favour. The parties chose to go to trial upon the issue whether the accretion was gradual or sudden, and did not raise the issue whether the formation was upon the old ascertainable land of the defendant. Their Lordships, therefore, did not feel themselves justified in going into any other question than the one upon which the parties staked their case (see particularly, pp. 164 and 166.)

The next case on the subject is *Nogender Chunder Ghose* v. *Mahomed Esof*, 10 B. L. R., 406. In this case the river was a

navigable tidal one and a *chur* formed in the middle of a river and a settlement was made by the Government in respect of it with defendant. Subsequently, by the recession of the river new land appeared which was really a deposit on the ancient site of plaintiff's land, though adhering to the *chur* belonging to the defendant under the settlement with Government. The new formation was adjudged by the Privy Council to belong to the plaintiff. The facts of this case are similar to those of the present. The fact that the river was a tidal navigable one does not make much difference. The *chur* when originally formed would no doubt have been at the disposal of the Government, as being formed in the bed of a tidal navigable river. As the doctrine of lateral accretion is applicable to tidal navigable rivers, the owner of the *chur* was in a position to acquire land by accretion. If, notwithstanding this position and notwithstanding the fact that the new formation adhered to his *chur*, he was held to have no right as against the owner of the site on which the suit formation took place, it must *a fortiori* be held in the principal case that the Government could not, by reason of the ownership of the Tatapudi *lanka*, claim the suit *lanka* as an accretion to the Tatapudi *lanka* and the suit *lanka* should have been adjudged to belong to the plaintiff as the owner of the site. It has been already pointed out that the real question in these cases is not whether the site was formerly above water and then submerged, but whether the site belongs to the plaintiff and can be ascertained. The ascertainment of the site offered no difficulty in the Madras case, for the plaintiff's estate bounding both sides of the river, she was entitled to the whole bed of the river between the limits of her estate. Speaking of the conflicting claims of the parties in *Nogender Chunder's Case*, their Lordships observed "It is not easy to see upon what principle a title to alluvion by gradual accretion should prevail against the original ownership established by identification of site, unless it be that where the accretion is so gradual as to be latent and imperceptible during its progress, the law on grounds of convenience presumes incontrovertibly that no other ownership can be shown to exist and so bars inquiry. In the present case, it appears to their Lordships that such a gradual and imperceptible accretion as the law contemplates is not proved and that there are peculiar reasons why the title of the plaintiffs should be preferred to that of the defendants. The latter do not claim the land as an accre-

tion to their original estate. They claim it as an accretion to *chur* cast up by the river and settled with them by the Government. Let it be granted that the first retrocession of the river was to leave bare this *chur* in the midst of the stream and that the land then cast up was beyond the confines of the plaintiff's estate, the river continues to recede, more land appears and new land *though adherent to that first discovered is really a deposit on the ancient site of the plaintiff's land. Why should the ownership of that which was thus regained be altered by the fact that by some accidental cause land joining the outer edge of it first emerged as an island?"* It may be argued on the other side with reference to the first sentence of the passage we have quoted that title by gradual and imperceptible accretion must prevail against ownership established by identification of the site. Such a construction, however, cannot be put upon the language of the Privy Council and would be inconsistent with the earlier decisions. In all the cases in which the contending parties set up title by accretion, the accretion alleged was, and must have been, gradual. For there could have been no possible doubt that a sudden accretion would not affect the existing ownership and the contrary proposition would have been unwarranted under any system of law. Again, in all these cases the party claiming by accretion claimed under Section 4 of the Bengal Regulation which refers to *gradual* accession. See the comment on this section by the Privy Council in 10 B. L. R., 429. Their Lordships emphatically lay it down in the clearest terms in *Lopez's Case* that the doctrine of lateral accretion is inapplicable except in the case of the sea or public rivers whose beds belong to the Crown. In the passage we have quoted from *Nogender Chunder's Case* there is no indication that their Lordships intended to go back upon any portion of their statement of the law in *Lopez's Case*. It may well be that in the case of public navigable rivers the beds of which are vested in the Crown, land belonging to a private owner on the bank of the river may by gradual encroachment be washed away and become part of the public domain and that if such land be as gradually restored by the recession of the river it may be the subject of a subsequent acquisition by lateral accretion and it may be that under these circumstances, title by original ownership of the site may not prevail against title by lateral accretion. But we do not think that their Lordships intend-

ed to make even this concession in favour of the doctrine. This was in fact the argument put forward by Mr. Pontifex, but it was expressly disallowed by their Lordships. See p. 431-432. Their Lordships refer to the argument of Mr. Pontifex and observe that the decisions of the Privy Council are direct authorities against Mr. Pontifex's proposition. Their Lordships accede to *"what is said in *Lopez* v. *Muddun Thakoor* to the effect that proprietor may in certain cases be taken to have abandoned his right in the diluviated soil. It is unnecessary to consider whether this might not be the result of a successful application for remission of revenue under Act IX of 1847. Sec. 5; for in the present case there is nothing from which an abandonment can be inferred."

The drift, therefore of the first passage we have quoted from *Nogender Chunder's Case,* appears to be this.

"The only possible contention which you can put forward in opposition to the title by original ownership of the site is title by gradual accretion. We do not agree in your contention. But even if your contention is sound, there is no evidence in support of it and there is thus no foundation for it in fact."

The doctrine that title by re-formation prevails against title by accretion was again affirmed in the case of *Sarat Sundari Debya* v. *Soorjyakant Achargi,* 25 W. R. 242.[1]

It will be clear from the foregoing authorities that the title to the *lanka* should have been decided according to the doctrine of vertical accretion as laid down in *Lopez's Case* and not by the doctrine of lateral accretion.

For the purpose of applying the doctrine of vertical accretion, it is absolutely immaterial, whether the accretion is slow or sudden.

* This is what their Lordships said in *Lopez's Case.* "Their Lordships, however, desire it to be understood that they do not hold that property absorbed by the sea or a river is under all circumstances and after any lapse of time to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again like any other derelict land into the public domain as part of the sea or river of the State and so liable to the written law as to accretion and annexation."

(1) See also *Mani Lal Sahoo* v. *Collector of Sarun,* B. L. R. Appx. 93, *Collector of Rajshahye* v. *Rani Shamasoondari Debea,* 14 B. L. R. 219, *Court of Wards* v. *Radha Pershad Singh,* 22 W. R. 238; *Budduchunder Shaha* v. *Bepin Behari Roy,* 23 W. R. 110.

The slowness or suddenness of the accretion may be important in cases where a person gains by lateral accretion from the sea or a river the bed of which is vested in the State. The doctrine of of vertical accretion, however, depends upon the previous ownership of the bed or site and the owner of the site will be entitled to the vertical deposit thereupon, whether they are formed slowly or suddenly. The observation of the High Court that the suit *lanka* was not a sudden vertical accretion in the bed of the river was therefore irrelevant.

We shall now proceed to consider the question with reference to the English and other laws. The rule of English law as to accretion was laid down in the recent case of *Foster* v. *Wright* (1878), L. R. 4 C. P. D. 438. In that case the plaintiff was lord of a manor under grants giving him the right of fishery in all the waters of the manor and consequently in the river Lune running through it. The lands adjoining the river on both sides belonged to the lord. The river was at the point in question neither tidal nor navigable. The defendant's land did not originally abut upon the river but by gradual encroachment the river wore away the plaintiff's land on one bank and part of the defendant's land also, so that a part of the defendant's land became part of the river-bed. This part could still be identified and its boundary ascertained. The question was whether the plaintiff's exclusive right of fishing extended over so much of the water as flowed over land which was formerly part of the defendant's property. It was held by *Coleridge*, L. C. J., that the language of the grants as to the fishery conveyed a right to take fish irrespective of the ownership of the soil over which the water flowed. The *Chief Justice* was not satisfied that the soil of the river Lune as it varied gradually from time to time passed to the plaintiff irrespective of the *medium filum*. On the other hand, *Lindley*, J., rested his decision not merely upon this ground but also upon the ground that the plaintiff was the owner of the river-bed. He held that just as gradual accretions of land from water belonged to the owner of the land gradually added to, land gradually encroached upon by the water ceased to belong to the former owner and that there was no difference in this respect between tidal and non-tidal, or navigable and non-navigable rivers. In the case before his Lordship the plaintiff was the owner of the old bed of the river and

day by day and week by week he became the owner of that which gradually and imperceptibly became its subsequent bed. His Lordship accordingly held that the title so gradually and imperceptibly acquired could not be defeated by proof that a portion of the bed then capable of identification was formerly land belonging to the defendant or his predecessors in title. It is somewhat difficult to understand this part of the decision of *Lindley*, J. Apparently, according to his Lordship, the lord was entitled to the whole of the soil covered by water of the river wherever the river might run. It is not easy to reconcile this position with the well-established proposition of English Law that the riparian proprietors are entitled to the bed of a non-tidal river *ad medium filum*. By the encroachment of the river the defendant became a riparian owner and should therefore have been entitled to half the bed of the river.* It is strange that while the the defendant could derive none of the advantages of a riparian owner, he should be considered liable to the disadvantage of losing a part of what was admittedly his land by the encroachment of the river. In so far however, as *Lindley*, J., held the doctrine of lateral accretion applicable to the banks of non-tidal rivers, his decision appears to be in accordance with the trend of American authority. The doctrine laid down by the Privy Council in *Lopez's Case* that re-formations upon ascertainable sites belonged to the original owner appears to be far more consonant with the principles of natural justice than the rule laid down by *Lindley*, J.

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* It cannot be said that a person who was not originally a riparian proprietor can never become one by any change in the course of the river. On this point we cannot do better than quote the following lucid and able exposition of the law from *Wells* v. *Bailey* (3 Amer. St. Rep. 48; S. C. 55 Connecticut 292). "They (the defendants) say, in the first place, that the law of accretion applies only to the case of riparian land, and that as the plaintiff's lot did not originally bound upon the river, but was conveyed to him by distinct lines and boundaries at least upon the sides affected by the present question, it cannot become by any changes of the river riparian land.

"We cannot accede to this claim. If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had

Even supposing that the doctrine of lateral accretion is applicable to non-tidal and non-navigable rivers, it can be applied only to formations accreting to the bank and not to insular formations in mid-stream. The doctrine that riparian proprietors are entitled to the soil of the bed *ad medium filum* is a well-established rule of English Law. By the doctrine of accretion and encroachment laid down by *Lindley*, J., a person who was entitled to the bed as riparian owner may cease to be so entitled and a person who was not a riparian owner may become a riparian owner and entitled to the bed. Whoever may be the riparian owners, there can be no doubt that the riparian owners for the time being would, according

been originally such. This follows necessarily from the ordinary application of the principle. All original lines submerged by the river have ceased to exist; the river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation, and is not affected in any manner by the relations of the river and the land at any former period. If after washing away the intervening lot it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that it had taken from the intervening lot the whole, by the law of accretion would belong to the remoter, but now proximate lot. Having become riparian it has all riparian rights. This general principle is recognized by all the text writers, and by numerous decisions of the English and American Courts. The river boundary is treated in all cases as the natural boundary and the rights of the parties as changing with the change of its bed.

"The defendants claim, in the next place, that though a riparian owner may take by accretion to the middle of a stream, or in the case of a navigable river to high-water mark, yet, that that being the limit of his original title, and in the case of a non-navigable river the line of the adjoining owner, he cannot take such accretions beyond that line. This claim is utterly without support. This dividing line between owners of the opposite sides of a non-navigable river is the middle of the river but the middle line is merely an imaginary one, and changes with every change in the bed of the stream. Thus in Gould on Waters, Section 159, it is said that 'If an unnavigable stream in which the title of the riparian owner extends *ad filum aquæ*, slowly and imperceptibly changes its course, the boundary line is the centre of the new channel.' And numerous cases are cited in support of the position."

to the law of England, be entitled to share the bed of a non-tidal stream. The ownership of any island formed in such stream cannot be determined by any principles of the law of lateral accretion, but can only be decided upon considerations based upon the proprietorship of the bed. Nor can it be said, that inapplicable, as the doctrine of lateral accretion may be, to an island newly formed in mid-stream, it may be applicable to an island formed in contact with one already in existence, for the right of the riparian proprietors to all that part of the bed of the stream which is not covered by the original island cannot be affected by the existence of the island. The right to islands formed in a stream must therefore be decided by the doctrine of vertical accretion which is based upon a recognition of the ownership of the site. The conclusion we have reached is consistent with the provisions of the Civil Law and is fully supported by the English and American text-books and decisions.

"If an island rises in a river and it lies in the middle of a stream, it belongs in common to the landowners on either bank in proportion to the extent of their riparian interests; but if it lies nearer to one bank than to the other, it belongs to the landowners on that bank only." *Justinian's Inst. II. 1. 22.*

The rule, however, is not here laid down correctly. The ownership of *insula nata* belonged exclusively to the owner or owners on one side, only when a line drawn down the centre of the river-bed would pass wholly to the right or left of it. If such a line cut it at all, the ownership was divided even though it was far from the exact middle. (See Professor Moyle's notes on the above section). The learned professor rightly observes in his note that an island formed in a river is acquired by *accessio* only when the *flumen* is *publicum,* and that if the stream is not *publicum,* its bed already belongs to the riparian owners. The same rule is given in Coulson and Forbes, p. 95.

"If an island is formed by natural causes, the property in it remains apportioned in the same manner, as was before its appearance the property in the soil on which it stands."

The rule of Civil Law has been adopted in the Code Napoleon.

"Islands and accumulations of mud formed in rivers and streams not navigable and not admitting floats belong to the proprietors of the shore on that side where the island is formed. If the island be not formed on one side only, it belongs to the proprietors of the shores on the two sides divided by an imaginary line drawn through the middle of the river." Code Napoleon, Sec. 561.

The rules of Civil Law have been adopted in America also (1). The Code of Louisiana (2) lays down definite rules upon the subject.

"If an island be formed in the middle of a stream it belongs to the riparian proprietors whose lands are situated opposite the island. If they wish to divide, it must be divided by a line supposed to be drawn along the middle of the river. The riparian proprietors then severally take the portion of the island which is opposite their land in proportion to the front they respectively have on the stream opposite the island. If, on the contrary, the island lies on one side of the line thus supposed to be drawn, it belongs to the riparian proprietors on the side on which the island is, and must be divided among them in proportion to the front they respectively have on the stream opposite the island."

These rules have been adopted by the American Courts generally and the principles upon which insular formations should be apportioned have been worked out in great detail in many of the American decisions.(3) In all these decisions and in all others bearing upon the subject, the American Courts treat the ownership of islands in rivers as determined by the ownership of the bed. For instance in *McCullough* v. *Wall*, the Court observes that islands in rivers fall under the same rule concerning ownership which apply to beds under water. The most recent case is that of *St. Louis* v. *Rutz* decided in 1890 by the Supreme Court of the United States. (138 United States Reports, 226). The Court observes on page 245 "It is laid down by all the authorities that if an island or dry land forms upon that part of the bed of the river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. He

(1) See Angell on Water-courses, 7th ed., S. 44.

(2) Civil Code of Louisiana, Arts. 505—7.

(3) *See Ingraham* v. *Wilkinson* (1826) in Amer. Dec. 342, S. C. 4, Pickering 268; *Deerfield* v. *Arms* (1335) 28 Amer. Dec. 276 S. C. 17 Pickering 41; *McCullough* v. *Wall* (1850) 53 Amer. Dec. 715, 719, S C. 4, Richardson's South Carolina Rep. 68.; *Trustees of Hopkin's Academy* v. *Dickinson*, 9 Cush, 548.

retains the title to the land previously owned by him with the new deposits thereon." The doctrine of accretion whether lateral or longitudinal is altogether incapable of application to an island. The rules framed by the Courts to regulate the ownership and appropriation of islands all proceed upon the assumption of its inapplicability. Islands are not formed in a day, but only gradually. If by a lucky accident the nucleus of an island happens first to be formed in the portion of the bed belonging to a riparian proprietor, and it subsequently extends itself across the median line, or up or down the river, this accident may lead to the destruction of the rights of ownership of the opposite, the upper, or the lower, riparian proprietors. The theory of nuclear islands and of lateral and longitudinal accretions thereto which found favour with the High Court will thus be seen to be utterly baseless and unjustifiable.(1)

ESCHEAT UNDER THE HINDU LAW.

The Hindu Law of Escheat is a subject for writing on which one need make no apology. Of the various departments of Hindu Law which the Courts in India have been called upon to administer, the Law of Escheat has received, perhaps, the smallest measure of judicial consideration. The only case where the question of escheat came up before the Indian Courts in any shape or form is that reported at *Collector of Masulipatam* v. *Cavaly Vencata*, 8 M. I. A., 500. In that case the Collector of Masulipatam representing the Crown claimed by escheat the estate of a Brahmin who died without heirs. The defendant contended against this claim that under the Hindu Law the estate of a Brahmin could, under no circumstances, escheat to the Crown so long as there was *any* Brahmin living, and in support of this contention relied upon the following text among others:—"The property of a Brahmin shall never be taken by a king." (Manu, ix. 189). The Privy Council, however, relied on the following passage of Narada: "If there be no heir to the wealth of a Brahmin, it must, on his death, be given to a Brahmin; otherwise the king is tainted with sin," (Narada xiii. 51) and held that, by necessary implication from this text, the property of a Brahmin dying

(1) *Sree Rajah Ooppalapaty Jogee Jagannadharauze* v. *Sub-Collector of Rajahmundry*, Mad. Sud. Dec. (1858), p. 189.

without heirs vests in the Crown, and that it was not necessary in the circumstances of the particular case before them to decide whether property so escheating to the Crown vested in it absolutely, or was subject in its hands to a trust in favor of Brahmins as a class. Thus in the only case where the Crown claimed an estate by escheat and where its right was questioned, the Courts found it unnecessary under the circumstances to grapple with the difficult questions bearing on the Law of Escheat and were content with brushing aside an argument raised against the Crown's right to take by escheat. The question of the right of the Crown to take by escheat is exactly where it was before the establishment of British judicial tribunals to determine questions of Hindu Law.

It is, indeed, easy to understand the broad proposition of law known almost to everybody that heirless property goes to the king. This doctrine is not peculiar to the Hindu system of jurisprudence and requires no true understanding of the genius of the Hindu Law to know it. But the real difficulty consists in recognizing the conditions under which a given property can be said to be "heirless." Is the list of possible heirs succeeding in a given order the same for all castes, or does it vary with the different castes? This is the question which we mean to discuss in this article.

It may here be objected that the text of Yajnavalkya: "The wife, the daughters, also the parents, brothers likewise, their sons, gentiles (*gotrajas*), cognates (*bandhus*), the pupil and the fellow-student; of these, the next in order in default of those previously mentioned takes the wealth of the sonless deceased. This law applies to all castes," (Yajnavalkya, Chap. II, 136), and the commentary thereon are conclusive authorities for the position, accepted and followed by a long and undisturbed course of judicial decisions, that this list enumerates the possible heirs or classes of heirs to the wealth of the sonless deceased, belong to what caste he may. Before, therefore, proceeding to discuss the main question it is only proper to see if we are precluded from considering the question with any practical utility, and if the doctrine of *stare decisis* does not apply to the question before us.

There have indeed been numerous cases where *sapindas* removed five or six degrees from the deceased in the Brahmin, Kshatriya, Vaisya, or Sudra caste have claimed the estate of the deceased as his reversioners and succeeded in obtaining the relief they

asked for, on the strength of *that title*. But it should be remembered that in none of these cases the defendant impeached the legal right of the plaintiff to succeed on proof of his *sapindaship*. The presiding judges, the legal practitioners and the parties concerned all tacitly assumed that the plaintiff was entitled to succeed on proof of the relationship alleged. The fact of the relationship was disputed or other defences were set up; but it has never apparently entered the head of the parties or their counsel that, granted the plaintiff was related to the deceased in the manner alleged, he could not *by reason of the caste to which he and the deceased belonged*, claim to be heir to the wealth of the deceased. The question which forms the subject of the present article was therefore *never* litigated in Courts, and the fact that judges, lawyers and parties *assumed* the law to be what it was not and did not, therefore, question it, does not and ought not, in our opinion, to preclude the discussion of the question when it is raised for the very first time in the annals of litigation. If an erroneous decision on a point of law has not force enough to preclude the parties to the suit in which such decision was passed from questioning the soundness of that decision in a subsequent proceeding, we need little logic to shew that a tacit assumption on a point of law, however strengthened by repeated acquiescence, cannot acquire such force as to preclude any person from questioning the correctness thereof for all time to come. Again, it is not desirable to apply the doctrine of *stare decisis* where the question is one of construction. The under-lying principles of the various departments of Hindu Law cannot be easily gathered by any straggling gleaner. From a voluminous and apparently confused and conflicting mass of textual authorities, the principles of the law have to be deduced by the careful application of exegetic rules to which the writers of the different codes of law owed allegiance. Texts of the different writers bearing on the same subject have to be patiently collected and collated, and they have next to be construed in a manner which explains away, if possible, any apparent inconsistencies and makes no text altogether superfluous or purposeless. Under such circumstances, errors of law when it is administered in most cases by judges who have no access to the originals and who depend upon faithless translations of stray texts must be numerous. It is, therefore, of the utmost importance that the doctrine of *stare decisis* should not be applied so as to perpetuate

errors of construction which must be more than occasional under the circumstances above set out.

Again, the great immobility of the Indian legislative machinery is another circumstance which makes it highly undesirable to apply the doctrine of *stare decisis* to the case before us. Where the legislative machinery of a country is highly active, as is the case in England, the evil consequences of applying the doctrine in the case of erroneous decisions are considerably short-lived, as the Legislature can at any short notice be moved to amend the existing law so as to give no room for the perpetuation of errors. But whereas in this country the machinery is dull and there is, therefore, little prospect of any legislation amending the existing law on which the erroneous decisions are based, the application of the doctrine must continue to cause mischief. There is even now little prospect of the codification of Hindu Law and of the erroneous decisions on questions of Hindu Law being corrected by legislation; and the only preventive against the perpetuation of errors here is to allow the judges absolute freedom from undue regard to precedents where they are manifestly traceable to a wrong interpretation or ignorance of the texts of ancient Hindu Law-books.

Nor can it be urged that it would cause considerable hardship to unearth a few old texts, to perceive the fallacy in the law as we have so long assumed it to be, and to accept a more correct construction of the texts. Nobody can be disappointed in his reasonable expectations by the proposed change in the constructions of the texts. If to-day the people are informed that a certain class of persons standing in a particular degree of relationship to the sonless deceased in the Brahmins, Kshatriya, Vaisya or Sudra caste are not in the line of heirs, where is the hardship? Could they have done anything, or entered into any transaction on the faith of the law as hithertofore administered, and could their expectations regarding the consequences of such transactions be defeated by a change in the law? None has a right to expect that another to whom he stands in a particular degree of relationship would die issueless leaving his estate undisposed of and that he would succeed to it as heir, and if he entertain such expectations, they are certainly not reasonable. Even if they are, the disappointment cannot be an injury in the proper sense of

that term. The hardship, the consideration of which could justify the perpetuation of an error in the construction of the law, relates more to violent divesting of vested interests than to the deprivation of mere possibilities of succession.

Having thus briefly pointed out why the doctrine of *stare decisis* should not be applied to the present case, we now proceed to discuss the main question, whether the text of Yajnavalkya furnishes a list of heirs or classes of heirs applicable in its entirety to all castes. Yajnavalkya after defining the various sorts of sons and discussing their relative importance lays down the order of succession to the wealth of a sonless deceased Hindu in the following text: "The wife, the daughters also, parents, brothers likewise, their sons, gentiles (*gotrajas*), cognates (*bandhus*), the pupil and the fellow-student, of these, the next in order, in default of all the preceding, takes the wealth of one who has departed for heaven without leaving male issue (*putra*). This law applies *to all castes*" (Yajnavalkya, Ch. II, 135, 136). Does this text lay down two propositions,—(1) that the wife, daughters, &c., are among the heirs of every deceased sonless Hindu, and (2) that they succeed in the order specified herein, or does the text simply lay down the order of succession, leaving the question of the heirship of persons and classes of persons therein named to be determined *aliunde*? We shall presently show the latter of the alternatives is the correct one.

The gloss of the Mitakshara too upon this text of Yajnavalkya does not enlighten us materially on the question about which we feel some real difficulty. The opening words of Vijnanesvara's commentary on this text are: "That sons, principal and secondary, take the heritage has been shewn. The order of succession among all (tribes and classes) on failure of them is next declared . . . . . "He who has no son of any among the twelve descriptions above stated is one having 'no male issue.' Of a man thus leaving no progeny and going to heaven or departing for another world, the heir or successor is that person among such as have been enumerated, *i.e.*, the wife and the rest, who is next in order on failure of the first-mentioned respectively. Such is the construction of the sentence. This rule or order of succession in the taking of an inheritance must be understood as extending to all tribes, whether the *murdhavasiktha* and others in the direct series of

the classes or *suta* and the rest in the inverse order and as comprehending the several classes the sacerdotal and the rest." (Cole. Mit, Chap. II, Sec. 1, 1—4). On the real question at issue this gloss does not make one a bit the wiser; but this gloss serves one purpose, *viz.*, that the term *all* in '*all castes*' is used rather to include the *anuloma* and *pratiloma* classes (not included in the general acceptation of the word in the Sanskrit original *varna*) than to bar the exclusion of any of the four well-known castes denoted by the term *varna*.

There is thus nothing in the text of Yajnavalkya or Vijnanesvara's commentary thereon to shew that the long list of possible heirs applies in its *entirety* to every one of the four castes—Brahmin, &c. We now proceed to shew that the list cannot possibly apply in its entirety to every one of the four castes.

Now the last three heirs mentioned in the list are the *áchárya* the pupil and the fellow-student. Yajnavalkya defines an *áchárya* thus:—"He who invests (another) with the sacred cord and teaches him the Vedas." (Yajnavalkya, Chap. I, 34). Manu defines an *àchàrya* thus: "They call that Brahmin who initiates a pupil and teaches the Veda together with Kalpa and Rahasya the *áchárya* (of the latter)." (S. B. E. series, Manu, Chap. II, 140). The definition of a pupil follows from that of the *áchárya*. As for the fellow-student, Vijnanesvara about the close of his commentary on the above text defines him as "he who received his investiture, the Veda and knowledge of its meaning from the same preceptor." (Cole., Mit. Ch. II, S. 7-2). Is it possible for a Brahmin, a Kshatriya, a Vaisya and a Sudra to succeed to the wealth of another as his *áchárya* as his pupil and as his fellow student? The occupations permitted to men of the different castes are thus enumerated in Manu: "To Brahmins, he assigned teaching and studying the Veda, sacrificing for their own benefit and for others, giving and accepting of alms. The Kshatriya, he commanded to protect the people, to bestow gifts, to offer sacrifices, to study the Veda and to abstain from attaching himself to sensual pleasures; the Vaisya to tend cattle, to bestow gifts, to offer sacrifices, to study the Veda, to trade, and to cultivate land. One occupation only the Lord prescribed to the Sudra to serve meekly even these three castes." (Manu. I. 88—91). It is needless to quote other authorities to the same effect. This makes it

abundantly clear that the Brahmin alone is eligible as an *áchárya*. It is, therefore, the Brahmin alone that can succeed as *áchárya* and not one of any other caste. The Brahmin can evidently succeed as pupil and as a fellow-student. The Kshatriya and the Vaisya can succeed as pupil and as fellow-student-but not as an *áchárya*. The Sudra cannot succeed as an *áchárya*, because he is not authorized to teach the Veda, nor could he succeed as a pupil, because he could not study the Veda, also because he is not a twice-born and is not entitled to be initiated. As he cannot be a pupil, it follows he cannot succeed as a fellow-student either. Thus it is beyond all doubt clear that while Brahmins can succeed as *ácháryas*, as pupils and as fellow-students, the Kshatriya and the Vaisya can succeed only as pupils and as fellow-students, and the Sudras cannot succeed as *ácháryas* or as pupils or as fellow-students. As the list of heirs mentioned in Yajnavalkya's text does not apply in its entirety to every one of the four castes, we must ascertain the varying lists of possible heirs to the estate of the sonless deceased belonging to the different castes.

In the case of the Brahmin, he can possibly take as an heir of any of the descriptions given in the list.

In the case of the Kshatriya and the Vaisya (for they may be classed together for the purposes of the article) we find some difficulty when we consider if they can succeed as *gotrajas* or *bandhus* of the sonless deceased. In regard to adoption of a son, Saunaka having laid down the rule in the case of Brahmins adds "Of Kshatriyas in their own class positively and (in default of a *sapinda* kinsman) even in the general family following the same primitive spiritual guide (*guru*)" (Dat. Mim., Sec. II, 74). Commenting upon the clause "even in the family following the same primitive spiritual guide", the Dattaka Mimámsá says, "Since there are no distinct and peculiar general families of the primeval Kshatriyas, the primitive spiritual guide is mentioned to particularise the class from which the adoption is to be made" (*Ibid* 76.) The Dattaka Mimámsá makes the same observations in respect of the Vaisyas. A text from the Vedas is also quoted to show that though the Kshatriyas and Vaisyas have no *gotra* of their own, they are for all purpose of sacraments and sacrifices considered to belong to the *gotras* of their *gurus*. Thus it can fairly be argued that for

purposes of inheritance also, the Kshatriya and the Vaisya should be considered to belong to the *gotras* of their different *gurus*. And as '*bandhus*' according to Vijnanesvara denotes '*sapinda* relations of a different *gotra* from that of the sonless deceased' it follows that the Kshatriya and the Vaisya could succeed as a *gotraja* and as a *bandhu*. Though a Kshatriya could not succeed as an *áchárya*, a Brahmin can succeed as an *áchárya* to the wealth of a sonless deceased belonging either to the Kshatriya or to the Vaisya class. Therefore, the long list of heirs exclusive of the pupil can possibly apply in the case of the estate of a deceased sonless Hindu belonging either to the Kshatriya or to the Vaisya caste.

As regards a Sudra, we have proved that he cannot succeed to such an estate as an *áchárya*, or a pupil, or a fellow-student. It, therefore, obviously follows that none of any other caste can succeed to the estate of a deceased sonless Sudra as an *áchárya*, or a pupil, or a fellow-student. Nor could a Sudra succeed as a *gotraja* or a *bandhu*; nor could any of the other castes succeed to his estate as a *gotraja* or a *bandhu*. Saunaka regarding an adoption by a Sudra says that he must adopt 'from amongst those of the Sudra caste.' The absence of any other restrictions, such as are laid down in the case of adoptions by persons of other castes, is a clear indication that the Sudras have no *gotra*. Again, Manu says, "A damsel who is neither a *sapinda* on the mother's side nor belongs to the same *gotra* as the father's is recommended *to twice-born men* for wedlock and conjugal union." (Manu, Ch. III, 5). Similar passages to the same effect may be quoted from other Smriti-writers, but it is hardly necessary. The *gotra* regarding restrictions in the choice of a wife do not by clear implication bind the Sudras, the same having been formulated only with respect to the twice-born. If the words '*gotraja*' and '*bandhu*' in the text of Yajnavalkya were intended mainly to denote the existence of mere *sapinda* relationship irrespective of the question of *gotra*, all those can succeed who stand within the limits of this relationship. But the commentary of Vijnanesvara says: 'On failure of the paternal grandmother, the *sapindas* sprung from the same general family with the deceased, *viz.*, the paternal grandfather and the rest inherit the estate; for *sapindas* sprung from a different family are indicated by the term *bandhu*." (Mitákshará Chap. II, Sec. V.

3 Stokes's H. L. B., p. 446.) It is thus clear that to succeed as a *gotraja* the heir should belong to the same *gotra* with the deceased, and to succeed as a *bandhu* he must belong to a different *gotra* from that of the *deceased*. The Sudra having no *gotra* cannot succeed as either, for otherwise he will be entitled to succeed indiscriminately as either—a position which cannot be seriously maintained.

Some contend that the word *gotra* denotes simply the descent from a common ancestor through an unbroken line of males and that, therefore, the Sudras can succeed as *gotrajas* as well as persons of other castes. But it should be remembered that the primary acceptation of the word *gotra* is descent from a common Rishi through an unbroken line of males, and that a word should not be understood in its secondary sense unless the context proves the absurdity of giving the word its primary meaning. That the word *gotra* cannot have the meaning contended for is also clear from the Vedic text which says that as the Kshatriyas and the Vaisyas have no *gotras* of their own, they must be regarded as belonging to the different *gotras* of their *purohits*. If *gotra* means descent from an ancestor through an unbroken line of males surely the Kshatriyas have *gotras* as well as Brahmins and the Vedic text will be inexplicable.

We are bound in passing to refer to a note made by Whitley Stokes at p. 564 of his edition of Hindu Law Books to the effect that the Sudras are all supposed to belong to the *gotra* of Kasyapa. Whitley Stokes quotes no authority for this supposition; nor have we come across any. But were the supposition well-founded, it would follow that any Sudra can lay claim to the estate of any other Sudra as his *gotraja*, and what is equally reasonable, can succeed to the estate of a sonless deceased Hindu of any other caste belonging to the Kasyapa *gotra* as his *gotraja*. It would also follow that the estate of a Sudra cannot escheat to the king for want of heirs so long as there is any Sudra living—a privilege apparently denied even in the case of Brahmins who are supposed to be highly favoured by the Codes of Law.

These are the conclusions at which one would arrive by strictly following the process of logical reasoning deduced from the pronouncements of the Smriti-writers on the occupations permitted to

the different castes and on the restrictions laid down in respect of adoption and marriage. We shall now proceed to discuss texts which bear directly on the question of escheat and necessarily disprove the theory that property escheats to the king in *all* cases in the absence of *all* heirs enumerated in Yajnavalkya's text.

Brihaspati after stating "In default of the daughter and her son, uterine brothers or brother's sons, agnates (*sakulyas*), and cognates (*bandhus*), pupils or learned Brahmins are entitled to the inheritance." (Brihaspati, Ch. XXV, 59) says: "Should a Kshatriya, Vaisya or Sudra die without leaving male issue or wife or brother, their property shall be taken as escheat by the king; for he is the lord of all" (Brihaspati Ch. XXV, 67). According to a well-known rule of interpretation formulated in the Mimámsá the rule embodied in the former passage applies only to cases not covered by the rule stated in the latter. The former rule, therefore, applies to the case of the estate of a Brahmin alone. This text of Brihaspati is quoted at p. 572, Vol. II, Colebrooke's Digest as sloka, CCCCXLVI, in para. 49, Sec. 1, Chap. XI, Dayabhaga (Stokes's H. L. B.), Mandlik's translation of Vyavahara Mayukha, page 83, and Vivada Chintamani, page 298. Sangrahakara (author of the well-known Digest of the Codes of Law) says: "If the father be not alive, the wealth goes to the issue of his father. If there be none as such, it goes to the issue of the great-grandfather. In this manner alone do the remoter *sapindas* take the wealth. In default of them, the *sakulyas*, the preceptor or the pupil, the fellow-student or virtuous Brahmins, the next in order in default of the preceding. In the case of Sudras, the king shall take their wealth in default of the brother of the full blood; and, similarly, even in the case of Kshatriyas and Vaisyas in default of the *áchárya* (preceptor). (Dr. Burnell's Dayavibhaga, page 30). This Digest is regarded as a book of authority and is quoted as such by Nilakantha in his Vyavahara Mayukha, Colebrooke's Digest and Stokes's Hindu Law Books. These two texts are clear authorities for holding that the list of possible heirs given in Yajnavalkya's text does not apply in its entirety to every one of the castes, and that it is merely intended to lay down the order of succession, the heirship of claimants being otherwise ascertained. The king, therefore, takes by escheat the estate of a sonless deceased Brahmin in default of all heirs down to the fellow-student and the estate of a Kshatriya, Vaisya and Sudra

in default of heirs mentioned in Sangrahakara's text just above quoted.

Whether a valid custom has now grown up under which a Sudra can claim the estate of a deceased Sudra as any one of the heirs mentioned in Yajnavalkya's text, has not been discussed in this article for want of space.

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Suryanarayana Pandarathar *v.* **Gurunada Pillai**, I. L. R., 21 M. 257. There had been a number of conflicting decisions as to the period of limitation provided by the Act in cases where an application for execution becomes infructuous by reason of claims being allowed or other cause. Whether execution is stayed by injunction or the fresh suit the result of which entitles a party to fresh execution is determined more than three years after the previous application, a new application is regarded sometimes as reviving the old one and, therefore, in time, or as barred by time. No very satisfactory rule could be laid down where the Act is silent. The Legislature ought to step in and make a provision for the deduction of time during which any injunction or suit, as above referred to, is pending. Compare *Sasivarna Tevar* v. *Arulanandham Pillai*, I. L. R., 21 M. 261.

Venkatasubramaniam Chetti *v.* **Thayarammah**, I. L. R., 21 M. 263. Yet another step has been taken in adding to the list of female *bandhus*. We cannot describe this as really extending the principle, for once you do not confine yourself to cases of special mention in a text and base *bandhushíp* upon *bhinna gotra sapindaship*, it follows that the brother's daughter is as much a *bandhu* as the sister or the father's sister or the son's daughter. But we cannot, of course, understand the proposition of the *Chief Justice* and Mr. Justice *Davies* that a daughter's daughter is a *bandhu* because a son's daughter is a *bandhu*. It might seem to be common sense to a person unacquainted with Hindu Law. For it is based on what you call parity of reasoning. The son's daughter is born in the *gotra*, the daughter's daughter is not. Mr. Justice *Muthuswami Aiyar* declined to treat the sister's daughter as a *bandhu* in *Subba Ayyar* v. *Ganesa Ayya* I. L. R., 18 M. 183, a case that will stand upon the same footing as that of the daughter's daughter.

Kasturi Chetti *v.* **Deputy Collector of Bellary**, I. L. R., 21 M. 269. Section 582-A has created a great amount of mischief, as we anticipated, at the time it was passed into law. A section which was brought in

to counteract the evil effects of the extremely rigid interpretation placed by the Allahabad High Court upon the Court Fees' Act has been the source of much injustice in provinces where the Allahabad rule had not found favor. A learned Judge seems to have remarked that the Court Fees' Act is the ruin of many a cause in this country. While there is great truth in this observation it would be even more correct of section 582-A. So far as the law of limitation is concerned, it had nothing to do with the sufficiency or otherwise of the stamp on the appeal memorandum. The time was computed up to the date of presentation. But when section 582-A provides that time runs up to the date of the payment of the deficient duty unless the deficiency of the duty was due to mistake, every appeal presented with an insufficient stamp (and it is impossible for any fairly qualified practitioner to determine the stamp so as to satisfy the taxing officer in 50 *per cent.* of the cases) is liable to be dismissed. Judges have not shown themselves very liberal in their treatment of such cases. We noticed sometime ago in the *Calcutta Weekly Notes* a case where a revision petition heard many months after it was presented was allowed to be changed into an appeal upon payment of the proper stamp and allowed. Such a thing we feel to be impossible in Madras. In the case under notice the Judges were certainly more lenient than *Shephard* and *Boddam*, JJ. in Appeal 90 of 1897, where it was said that the deficiency was not due to mistake, because the vakil believed and persisted in arguing there was no deficiency.

Jagapathy Mudaliar *v.* **Ekambra Mudaliar,** I. L. R., 21 M. 274. The decision in this case is important as laying down the rule that it is not competent to a pleader to enter into a compromise for his client without his previous authority. It may be a salutary rule, but we cannot see whether in this matter any distinction should be made between one class of professional men and another. It will be open to the Legislature to make such a distinction. It will be the duty of the Courts to lay down an uniform rule whether the practitioner is a barrister or vakil or attorney or pleader. They can all plead and act in the Moffusil Courts; and if express authority is needed in the case of one class, it should also be in the case of the rest. If the circumstances of this country are any justification for a departure from the English rule, there will be no reason for any distinction as regards special authority between one professional body and another.

SUMMARY OF RECENT CASES.

Mortgagor and mortgagee—Fetter on Equity of Redemption—Collateral advantage.

Hoddinott *v.* **Biggs** [1808, II, Ch., 307, C. A.]

It is generally supposed that the case *of Jennings* v. *Ward* (2 Vern., page 520), has laid down a rule to the effect that as between mortgagor and mortgagee, there cannot be any other transaction entered into at the time of the mortgage, which can possibly benefit the mortgagee, and that any such transaction to be valid must be either before or after the mortgage and be independent of it. The Court of Appeal, after a careful consideration of that case and the other cases following it, has laid down that the proposition, as above stated, is too wide and has added certain qualifications to it, so as to make it good law and good sense. The proposition is qualified by the Court of Appeal may be thus stated. The mortgagee, may enter into any collateral agreement beneficial to him with the mortgagor at the time of the mortgage, and such agreement will be upheld provided it does not impose a direct clog on the right to redeem and is otherwise not an unconscionable bargain.

The Plaintiff had a mortgage of a hotel belonging to the defendants. The mortgage-deed contained a covenant by the defendant that during the continuance of the security he would deal exclusively with the mortgagee for beer and malt liquor sold on the mortgaged premises. The deed further contained a covenant that the security and the loan were to continue for five years. The mortgagor having ceased to purchase beer of the mortgagee, the latter sued for an injunction to restrain the breach of the covenant; on the other hand, the mortgagor claimed to redeem before the expiration of the five years. *Romer*, J., who originally heard the case, decreed for the plaintiff and held that both the covenants were valid. The decision of *Romer*, J., with regard to the injunction alone was appealed against, and the Court of Appeal confirmed the decision of *Romer*, J., and upheld the covenant of mortgage for the purchase of beer during the continuance of the case on the ground that it was one which did not in any way affect the right to redeem and was fair and reasonable and did not give the mortgagee any undue advantage.

Equitable mortgages by deposit of title-deeds—Notice—Priority.

Hopkins *v.* **Hemsworth** [1898, II, Ch.—347,] *per Kekewich, J.*

The legal mortgagee of certain land created a sub-mortgage on it to the plaintiff by depositing with him his title-deeds. Subsquently, however, the legal mortgagee, obtained possession by fraudulent means of the

deeds so deposited and created a second equitable sub-mortgage in favor of the defendant to whom the title-deeds were handed over. The defendant had no notice of the equitable mortgage in favour of the plaintiff and immediately after his own mortgage was executed, he gave notice of it to the mortgagor. The plaintiff brought an action against the defendant and the representative of the legal mortgagee for the declaration that he was entitled to a first charge for his money on the legal mortgage in preference to the defendant Hemsworth.

Kekewich, J., held that both the mortgages by deposit of title-deeds created equitable estates in land in the respective mortgagees and were not mere choses in action, and as the plaintiff was not guilty of any negligence or improper conduct in parting with the title-deeds, he was entitled to priority as his mortgage was prior in date, and that the defendant did not acquire any *preferential right by his notice to the mortgagor.*

Gaming contracts—Recovery of "money desposted to abide the event." Gaming Act, 1845 (8 *and* 9 *Vict. C.* 109) *S.* 18.

In re-Cronmire ex-parte Waud. Section 18 of the Gaming Act of 1845, precludes the recovery of sums "which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." A long course of decisions on this section has settled that "it was meant to apply only to the non-recovery by the winner of a sum deposited by the other party to abide the event and not to the right of the depositor to recover back his deposit if demanded before the money was paid over." In the present case one Waud had entered into certain contracts with Cronmire, a stock-broker, which purported to be sales and purchases of shares and stocks and resulted in a balance in favor of Waud to the sum of £375. These contracts were void as being gaming contracts. After the adjustment of accounts it was agreed that Cronmire was to sell certain stock to Waud in reality in payment of the balance due to him. The stock was not delivered and Waud sued the representatives of Cronmire for damages for non-delivery of the stock. Waud had also deposited money with Cronmire as cover to secure him against any loss that might accrue on the gaming transaction, but which, however, had resulted in a balance in favor of Waud. On the first part of the claim the Court of Appeal held, reversing the judgment of *Wright*, J., that as the balance in favor of Waud resulted from gaming transaction, it could not have been recovered from Cronmire and that, consequently, the contract to deliver the stock had no consideration for it and was void. On the second part of the claim they held, affirming the decision of *Wright*, J., that the deposit can be recovered on the ground that it

was never used or wanted to be used for the purpose for which it was deposited.

Breach of Statutory duty, action for—Master and Servant—Common employment.

Groves *v.* **Wimborne (Lord)** [1898, II Q. B. D., 402 C. A.]

The plaintiff was a boy employed by the defendant at the Dowlais Iron Works, of which he was the proprietor. Amongst the machinery in the works there were some dangerous portions which had been left unfenced. While the plaintiff was employed in his duties, his right arm was caught by some cog-wheels forming part of the dangerous portion of the machinery, and he was very seriously injured. The Factory and Workshop Act of 1878, S. 5, imposed a duty on the proprietors of factories to provide proper fencing to all the dangerous parts of the machinery. The plaintiff sued the defendant for damages for the injury. The Court of Appeal reversing the judgment of *Grantham*, J., held that the plaintiff was entitled to judgment.

The defendant raised two pleas to the plaintiff's claim. One of them was that the statute itself provided for a fine to be imposed upon the employer not exceeding £100, and that the plaintiff's only remedy was to proceed before a court of summary jurisdiction for that fine. The other objection was that of "*Volenti non fit injuria*". Their Lordships held that the first objection did not hold good, and upon a consideration of the whole purview of the Act, they arrived at the conclusion, that the fine provided for in the Act was not the only remedy open to the plaintiff. There are some Acts of the Legistature which impose an absolute unqualified duty on individuals, enjoining a particular course of conduct imperative, and provide for a penalty in case of deviation in the general interest of the public at large, but do not intend that an indivudual shall have a private right of action for the injury occasioned to him by breach of its provisions. There are certain other Acts which create a new duty in the interests of a particular class of people, and having provided for a remedy intend that that shall be the only remedy available. Their Lordships held that the present case did not fall under either of the two kinds of Acts. They held that the duty imposed was an absolute unqualified duty in favor of a particular class of persons alone, but that the fine provided for in the Act was not intended to be the only remedy available for the injured person. The second plea raised by the defendant was to the effect that he had discharged the duty imposed upon him by the Statute because he

had originally provided proper fencing for the machinery, but that it had been subsequently removed by some person and that the removal had not been brought to his notice, that the removal of the fence and the fact that it was not replaced must be taken to have occurred through the negligence of some fellow-servant of the plaintiff and that, consequently, the defendant was not liable. Their Lordships overruled this plea also. Where a servant is doing some business on behalf of his master and in the doing of that business, the servant is guilty of negligence which is the proximate cause of injury to a third person, the master is liable for that injury and he cannot plead that the injury was not occasioned by his fault but by the fault of his servant. It is not necessary for us to go into the various reasons which have been given by various Judges in support of this proposition. Suffice it to say that the rule is too well established to be doubted at the present day. The case of *Priestly* v. *Fowler* [3 M. & W., 1.] has established an exception to this rule, which also is well settled law, to the effect that where a number of servants are employed in the doing of the same business of their master, the master is not responsible for any injury caused to one of such servants by the negligence of his fellow-servant; because he is assumed to have made a bargain with the master that he will not look to him for compensation in respect of such injury. The business in which the servant goes to be employed has certain risks and the servant takes up the employment with his eyes open to these risks. It has to be remembered that this doctrine of "*Volenti non fit injuria*" can be pleaded as an exception to the liability of the master, where that liability is based upon negligence of the servant. But where the master is sought to be made liable not on the ground of negligence, but for breach of an absolute duty either in Common Law or created by a Statute or for violation of an absolute right in Common Law, the exception has no application whatever. In such cases the master cannot escape the liability by pleading that the injury was caused by the neligence of an independent contractor or of some fellow-servant. It was on this ground that their Lordships overruled the second plea of the defendant.

The cases of *Dalton* v. *Argus* [6 App. C. 740] and *Hughes* v. *Percival* [L. R. 3 H. L. 330] establish that where an absolute right such as a right of support is infringed, it is not necessary on the part of the plaintiff to prove negligence, but that the right is violated at the peril of the person infringing it.

Breach of absolute duty—Negligence—Landlord and tenant.

Blake *v.* **Woolf** [1898, 2 Q. B. D., 426, per Wright, J.]

The defendant was the owner of certain premises on the fourth floor of which he had a cistern filled with water for supplying his tenant with water. After the water had thus been laid on, the plaintiff became a tenant of the ground floor of the premises and received his water-supply from the defendant's cistern. On a certain day, it was discovered that there was a leakage in the cistern and the defendant on being informed of this instructed a competent plumber to put the cistern to right. The plumber was negligent in doing so, and water escaped from the cistern and damaged plaintiff's goods which were in the portion of the premises occupied by him. The plaintiff thereupon sued the defendant for damage. *Wright*, J. dismissed the plaintiff's suit on the ground that the damage was caused by the negligence of the plumber and not of the defendant.

The case of *Rylands* v. *Fletcher* has no doubt laid down a general rule that an owner or occupier of land is under an absolute duty not to bring on to his premises dangerous things, such as large quantities of water and that if he do so, he does it at his peril. This general rule is subject to some exceptions, and the present case falls under two of these exceptions. One of them is, where a person uses his land in the ordinary way in which it is generally used and damage happens to adjoining property without any negligence on his part, no liability attaches to him. The storing of water in the cistern in the present case was held by his Lordship to be an ordinary and reasonable use of the premises. The second exception is that, if the person who complains of the injury has consented to the dangerous matter being on the defendant's premises, the plaintiff cannot recover. His Lordship held that the plaintiff by taking up the premises with the water on, and accepting his supply of water from the cistern, had brought his case within the second exception also. There being thus no breach of an absolute duty or violation of an absolute right, the plaintiff cannot succeed except by showing negligence on the part of the defendant. And as the defendant had discharged his (relative) duty, by engaging a competent plumber to do the work, he was not responsible for damages caused to the plaintiff by the negligence of that plumber, inasmuch as he was an independent contractor and not a servant of the defendant in the doing of the work entrusted to him.

Hindu Law as to adoption by widow of predeceased son or by mother-in-law where son dies after father leaving no issue—Adoption under Hindu Law by widow of full owner, qualifications to the rule of—Adoption by person in whom an estate does not rest, not valid without consent of those in whom it has vested—Exceptions to the rule as to adoption by widow of full owner.

Payapa Akkapa Patel *v.* Appanna bin Bhimappa.

As a general rule of strict Hindu Law as settled by judicial decisions it is only the widow of the last full owner, who has a right to take a son in adoption to such owner, and that a person in whom the estate does not vest cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights. Four qualifications have however been recognised to this rule. The first is in the case of co-widows where on the death of the husband without male issue the elder widow can, by adopting a son with the express or implied permission of her husband, divest the co-widow or widows of their vested rights, the estate of the deceased vesting on his death in all his widows. The second qualification has been recognised in the case of a mother who succeeds as heir to an unmarried son, legitimate or adopted, who dies after his father. In such a case the right of the widow to take a son in adoption to her husband has been conceded to her, though such a son cannot properly be described as being the heir of the last full owner, the principle of the recognition being that the act of adoption is derogatory of no other rights than those of the adopting mother. The third qualification is to the effect that when the adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent, the consent of kinsmen being in such cases limited to those who are by their union interested in the family property. When such consent is proved to have been given by the party in whom the estate vested, the adoption is upheld, though it has the effect of divesting the party giving such consent of his rights. The fourth qualification is allied to the third and is based on the principle of ratification by conduct or acquiescence :—*Printed Judgments of the B. H. C. for* 1898 p. 244.

San-Mortgage assignment—Conveyance for a term of years—Covenant to repay debt or balance due, makes a document not a conveyance but a mortgage only —Mortgage—Document, construction of—Construction of document, whether mortgage or conveyance.

Amratlal Ramdas *v.* Bavaji Monji.

Held by Ranade J.—The name given to a document does not necessarily determine its character. An instrument, which is ostensibly

a sale, may be intended to operate as a mortgage and not as a sale. It is the intention of the parties, so far as it can be gathered from the provisions and covenants contained in the instrument or from their subsequent conduct, which determines its real character. When it is a question whether a document is a conveyance for a term of years of the property to which it relates or is a *san*-mortgage assignment, the document is not a conveyance if it contains a covenant to repay the debt or to pay the balance that may be due :—*Printed Judgments of the B. H. C. for* 1898, p. 239.

Bai Jasoda *v.* Bamanshah Mancherji.

The High Court in its extraordinary jurisdiction would interfere to assist a party under the provisions of S. 25 of the Provincial Small Cause Courts' Act in cases where there is a substantial failure of justice and the decree of the lower Court is not according to law.

Per Fulton J.—A decree founded on a judgment not containing the decision on the points required by S. 203 of the Civil Procedure Code is not according to law. Where an error under S. 203 brings a case within the jurisdiction of the High Court, and the case is thus before it, it is entitled on feeling convinced that a failure of justice has occurred to pass an order which will rectify the mistake :—*Printed Judgments of the B. H. C. for* 1898, p. 251.

Limitation Act (XV of 1877), *Article* 134, *Schedule II—Mortgage by plaintiff—Subsequent mortgage by mortgagees—Subsequent mortgage when binding on plaintiff to be redeemed independently of original mortgage—Equities between original mortgagors and his mortgagee—Equitable adjustment, mortgagor's right to.*

Bhaskar Vishnu Phadke, *v.* Sakharam Narayan Pethe.

The suit was brought by plaintiff against eight defendants to redeem a mortgage passed in 1853 by the uncle of plaintiff to defendants 1 to 5, while defendants 6 to 8 were sued as holding mortgages passed to them in 1865 by defendants 1 to 5 who represented themselves as owners. It was found that Rs. 205 were due to defendants 1 to 5 on their mortgage and that Rs. 348-6-10 were due to defendant 6 upon his mortgage passed by defendants 1 to 5.

Held that the plaintiff was, on payment of Rs. 205 to defendants 1 to 5, entitled to redeem the lands mortgaged to them except the portion

of the lands mortgaged by them to defendant 6, that the mortgage to defendant 6 was valid and binding on the plaintiff under the ruling in *Maluji* v. *Fakirchand* (I. L. R., 22 B., 225), it having been passed more than 12 years before suit, and that the plaintiff was entitled to redeem that mortgage also on payment of Rs. 348-6-10 to defendant 6.

It having been contended on behalf of plaintiff-respondent that it is the defendants 1 to 5 who should be ordered to pay Rs. 348-6-10 as they had improperly mortgaged the plaintiff's property and should therefore account to him for the profits they had obtained—and in no case could the plaintiff be ordered to pay more than Rs. 205, the amount due on the original mortgage.

Held by Parsons, J:—

(1). In the ordinary case of a sub-mortgage, when all the parties are before the Court, the Court could and would order an account to be taken and settle the amount payable to the mortgagee and sub-mortgagee respectively, and the mortgagor would not be liable for more than the amount found due on the original mortgage.

(2). The mortgage held by defendant 6 was not a sub-mortgage or derivative mortgage, but by prescription has acquired a force and validity of its own and stood precisely on the same footing as if it had been passed by the plaintiff himself to that defendant. It must, therefore, be redeemed independently of the original mortgage and the sum due under it must be determined by an account taken under it alone. The amount to be paid for redemption was, therefore, not limited to the amount due under the original mortgage, but would be the amount found due on both the mortgages and would have to be paid separately to each of the mortgagees unless an account could be taken as between the mortgagees. Whether this could be done in the redemption suit so that the original mortgagee could be held liable in it to the plaintiff for the amount found due on the mortgage imposed by him on plaintiff's property was a question that could not be determined in this case, because the original mortgagees, defendants 1 to 5, are not parties to the appeal.

Held by Ranade, J:—

The plaintiff-respondent was bound to pay off the debts charged on the portion of the property by the mortgagees, but the amount so paid was really a payment made by him on behalf of the mortgagees and the plaintiff was entitled to claim an equitable adjustment by setting-off the smaller sum due by him to the mortgagees against the larger debt to be paid by him on mortgagees' account. The mortgagor's strict legal

liability is confined to his own mortgage. Any payment he has to make in excess to the sub-mortgagee is a payment on account of the mortgagee. The equitable adjustment would have been made in this case if the mortgagees, defendants 1 to 5, had been parties to this appeal:—*Printed Judgments of the B. H. C. for* 1898, p. 258.

Court of Small Causes, meaning of—Courts invested with jurisdiction of Courts of Small Causes—Civil Procedure Code, Act XIV of 1882, *Ss.* 5 *and* 25, *last clause—Bombay Civil Courts Act XIV of* 1869, *S.* 28—*Provincial Small Cause Courts Act IX of* 1887, *Ss.* 32, 35—*Act XI of* 1865.

Ramchandra Krishna Rajwade *v.* Ganesh Bapuji Dhavale.

A Court invested with the jurisdiction of a Court of Small Causes is not a Court of Small Causes within the meaning of S. 25, last clause, of the Civil Procedure Code. The expression "Courts of Small Causes" in the section means Courts properly and strictly so called, and does not include Courts only invested with the jurisdiction of Courts of Small Causes:—*Printed Judgments of the B. H. C. for* 1898, p. 266.

Hindu Law—Widow's right of maintenance—Widow's maintenance charged on property left by testator—Limited power of sale or mortgage conferred upon executrix—Sale in fraud of widow's right—Purchaser aware of fraud—Transfer of Property Act (IV of 1882), *S.* 39—*Probate and administration Act (V of* 1881, *amended by Act VI of* 1889), *S.* 90.

Shri Beharilalji Bhagwatprasadji *v.* Bai Rajbai, Widow.

A testator by his will, gave his widows a right to receive maintenance from the profits of his immoveable estate subject to the limited power of sale or mortgage conferred upon his executrix for a special purpose. It was found that a large part of the property was sold with the object of defeating the claim to maintenance of plaintiff, one of the widows, and that the purchaser was aware of the fraud practised upon the widow.

Held that the widows were under the terms of the will in a position exactly analogous to, if not more favourable than, that of a widow entitled, under the general Hindu Law, to maintenance out of the family property in the hands of one of the surviving members of such family, and that plaintiff's right to maintenance remained unaffected against the property in the hands of the purchaser, whether under Section 39 of the Transfer of Property Act (IV of 1882) or the law prevailing in force,

irrespectively of the possibility of her claim being satisfied from other property. What was honestly purchased was free from her claim for ever. What was purchased in furtherance of a fraud upon her or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first.

Held also, that S. 90 of the Probate and Administration Act (V of 1881 as amended by Act VI of 1889 , does not preclude the application of the equitable principle on which the decision in *Lakshman* v. *Satyabhamabai* (I. L. R., 2 B., 494) is based and which has been embodied in S. 39 of the Transfer of Property Act. S. 90 gives the executor merely the ordinary powers of sale that an ordinary owner would have in so far as they are not limited by the will, and as such those powers would be subject to the usual rules of equity :—*Printed Judgments of the B. H. C. for* 1898, p. 270.

Hindu Law, liability of other members of family when manager sued alone—Manager, suit against, of Hindu family for debt incurred as manager and for family purpose, binds other members of family—Hindu family—Debt incurred by manager binding against other members in what cases—Decree—Court-sale—Property of Hindu family.

Sakharam bin Ranoji *v.* **Devji Antoba.**

Where a debt is incurred by a Hindu as the manager of the family and for a family purpose, the other members of the family as well as the sons of the debtor, though not parties to the suit are bound by the decree passed against him, and the whole interest of the family in the properties of the family passes at a Court-sale held in pursuance of such decree :—*Printed Judgments of the B. H. C. for* 1898, p. 282.

JOTTINGS AND CUTTINGS.

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

The Code of Criminal Procedure with Notes by Chintaman, H. Sohoni and *Published by Thacker Spink and Co., Calcutta* :—Price Rs. 13.

General and American Digest, Quarterly Advance Sheets for July 1898. *Published by the Lawyers' Co-operative Publishing Company, Rochester, New York* :— Price $. 1

The Albany Law Journal for September (*in exchange*).
The Calcutta Weekly Notes for September (*in exchange*).
The Allahabad Weekly Notes for September (*in exchange*).
The Green Bag for September (*in exchange*).
The Canadian Law Times for September (*in exchange*).
The Canada Law Journal for September (*in exchange*).
The Educational Review for September (*in exchange*).
The Indian Journal of Education for September (*in exchange*).

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Petheram on the Privy Council:—There is an interesting article in the Law Quarterly for October upon the administration of the Hindu Law by the Privy Council from the pen of *Sir Comer Petheram*, ex Chief Justice of Calcutta. The tenor of his observations is to show that the Privy Council often decides in ignorance of the Hindu Law. There is considerable force in the argument, but the implication contained in the article that the decisions of High Courts in India are satisfactory does not appear to be warranted. After the establishment of the High Courts in India under the Queen's Charter, there have been no doubt several eminent Judges whose knowledge both of Indian and English law was such as to make them ornaments of any judiciary. But the deterioration in the quality of judicial appointments has been very marked in recent years. The Civil Service has not shown very much partiality for law so as to produce men of the calibre and attainments of a *Holloway* or a *West*. How few are the English Judges administering Hindu Law in India who can claim to have read Colebrooke's Translation of the Mitakshara from beginning to end, not to speak of other works upon Hindu Law? It may be said that the department of Hindu Law is not the only field where justice is administered in ignorance, but that judges often show ignorance of the fundamental principles of other departments of law. There are judges whom one would have no difficulty in naming who have not studied the leading text books upon the leading topics of law. But all this only makes the argument for the better training of our judges more complete. Unless Civil Servants are posted as Assistant Judges without the chance of reverting to the executive line, it would be impossible to expect any improvement in the quality of civilians available for the High Court Bench. As for the barrister judges, we think, the Secretary of State ought to exercise more judgment in the selection of men. *Sir Comer Petheram* himself was no brilliant specimen, though there are judges who are decidedly his inferiors. It is essential that confidence in the capacity of the highest tribunals in the land should not suffer. With

the steady improvement in the capacity of the indigenous bar on the one side and the growing deterioration of the quality of our judges on the other, the short comings of the Bench are increasingly felt. It is time for the Government to look into the matter and devise a proper remedy.

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Statistics of Law Schools in America :—The statistics of law schools, collected annually for the bureau of education at Washington, for a synopsis of which we are indebted to Mr. A. Erskine Miller, statistician of the department, show a very rapid increase in the number of students of law, an increase twice as great as that in medicine, and still greater than that in theology. The table furnished by the American Bar Association showed an increase in 1898 of more than a thousand law students over the number in 1897. During the ten years ending in 1897 the number of students in theology increased only 30 per cent., not quite as fast as the whole population at the last census. Students in medicine increased 108 per cent., while the students in law increased 228 per cent. Dental students increased faster than any other class, viz., 284 per cent. in ten years. In 1897 the number of medical students was 24,000, law students 10,449, theological 8,000, and dental 6,500. But in 1898 the number of law students has increased to 11,600. This rapid increase in the number of law students continues from year to year. The committee on education of the American Bar Association, of which Judge George M. Sharp, of Baltimore, is a member, endeavored to ascertain the cause of this seemingly abnormal increase. But the cause seems hard to find, possibly because there is no one cause, but a combination of causes. Is it not probable that the increased number of law students reported is attributable to this: that young men are no longer contented with the desultory instruction furnished them in the offices of practising attorneys, but rather seek the regular and systematic instruction of a law school, where they receive the stimulating influence of a large number of young men interested in the same subject and vieing with one another in the acquirement of such knowledge? That this is probably the true explanation is indicated by the fact that in 1887 there were only 50 law schools, but in 1897 there were 77. If this be the true explanation, future attorneys will have about the usual number of competitors, but they will find a victory in the court-room harder to win :—*The Albany Law Journal.*

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Constitutionality of Anti-Ticket Scalping Laws :—In New York, as well as in several other States of the Union, laws forbidding the

sale or barter of railway tickets by scalpers and unauthorized brokers have been sustained. Recently, however, Judge Gibbons, of Illinois, held the Anti-Scalping Law of that State to be unconstitutional, basing his decision on the fact that a railway ticket is not a receipt for the money paid for transportation, but is personal property or a chattel or a contract, and as such may be sold, transferred or given away. A ticket, says Judge Gibbons, like a promissory note, is evidence of an obligation incurred and a right earned. "It is evidence of the holder's right to travel over the roads specified thereon, and where not limited to any particular person, may be sold, transferred or given away the same as the owner of a promissory note may make a gift, sale or transfer thereof." While conceding that railroads and other common carriers, impressed as they are with a public duty, may be the subject of legislative control and regulation, Judge Gibbons holds that when, from this premise, the conclusion is drawn that the legislature under its police power may enact any law which is not directly barred by some constitutional provision, a dangerous and fallacious principle is sought to be established. The police power, says the Judge, is simply that power and dominion inherent in every government over the individual which may be exercised in case of necessity for the protection of the general public. Whether any necessity really exists it is for the legislature to decide, but the reasonableness of any law enacted to meet it is always open to inquiry by the judiciary. The legislature, concludes Judge Gibbons, cannot, under the guise of the police power, prohibit the sale of wholesome food or declare that to be criminal which in its nature cannot be destructive of morals or detrimental to the well-being of the people. The case will, of course, go up to the highest court, Judge Gibbons himself being desirous that the important questions presented should be passed upon by the tribunal of last resort;—*The Albany Law Journal.*

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Legal Laugh:—At dinner, at Bolliol, the master's guests were discussing the careers of two Bolliol men, one of whom had just been made a judge and the other a bishop. "Oh," said Henry Smith, "I think the bishop is the greater man. A judge at the most, can only say 'You be hanged,' but a bishop can say 'You be damned.'" 'Yes," characteristically twittered the master; "but if the judge says 'You be hanged,' you *are* hanged.":—*The Albany Law Journal.*

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Notes of American Cases.

Payment of a cheque after the maker has been declared to be insane, and is so, is held, in *American Trust & B. Co.* v. *Boone* (Ga.) 40 L. R. A. 250, to be at the peril of the bank, although it does not know of the insanity of the drawer, and although the adjudication of insanity was made in another state.

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Interference with ownership of land by advertising and selling it under a fraudulent mortgage and notifying the tenants not to pay rent to the owner is held, in *Gore* v. *Condon* (Md.) 40 L. R. A. 382, to constitute an actionable wrong so far as it damages the interest in the real property, but not on account of the disgrace and disrepute into which the owner is thereby brought.

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The union of a fire for which no responsible cause can be ascertained, with one which was due to the negligence of a known person, is held, in *Cook* v. *Minneapolis, St. P. & S Ste. M. R. Co.* (Wis.) 40 L. R. A. 457, to preclude any recovery against the latter, where it is found that either fire alone would have been sufficient to cause the damage.

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The hypnotism of an accused person is held in *People* v. *Ebanks* (Cal.) 40 L. R. A., 269, insufficient to render evidence of statements made by him while under the influence admissible in his favor at his trial. With this case is a note collecting the judicial decisions, and also the opinions of the writers on the subject, concerning hypnotism.

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An insane delusion of an aged woman as to the superhuman powers of a man much younger than herself, and whose character for morality was notoriously the opposite of her own, is held, in *Orchardson* v. *Cofield* (III.) 40 L. R. A. 256, to render her incapable of contracting a valid marriage with him or making a will in his favor.

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Allegations that a child less than two years old was capable of rendering and did render valuable services to the parents by doing errands and performing services about the house, such as bringing fuel and caring for a younger child, are held, in *Southern R. Co.* v. *Covenia* (Ga.) 40. L. R. A. 253, to be insufficient to state a cause of action for the loss of the child's services, as the court will take judicial cognizance of the fact that such a child is incapable of rendering valuable services.

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Counsel as Witnesses.—The *Indian Daily News*, quoting the *Weekly Notes*, says: "A question of some interest to the legal profession came under discussion last Thursday during the course of the trial of the

Queen Empress v. *D. M. Gasper*, which is proceeding before Mr. Justice Jenkins and a common jury. The prosecution desired to prove that the report, which had appeared in a certain newspaper of the address of the counsel for the defence in the case of the *Queen Empress* v. *O'Connell* was incorrect and for that purpose they called Mr. R. Allen, the counsel in question. Mr. Allen who is a member of the Irish Bar and an advocate of the Calcutta High Court, pleaded privilege on the ground that he was not a compellable witness and the case of *Curry* v. *Walter* (1 Espinasse 456) was cited in support of his contention. Mr. Barrow, on behalf of the prosecution, contended that, under Sec. 118 of the Evidence Act, persons are declared to be competent witnesses except such as are wanting in intellectual capacity, and that all persons were compellable witnesses with the exception of those dealt with by name in sections 121 to 132 and then only under the circumstances indicated in those sections. His Lordship observed that the point was no doubt an interesting one, but was of opinion that he was precluded from deciding it in as much as Mr. Allen had entered into a bond before the Police Magistrate to attend at the sessions and give his evidence, and must on that account be considered to have waived his privilege, if such there was. Mr. Allen accordingly entered the witness box, and was examined and cross-examined as to the accuracy of the report in question. 'It is to be regretted that the provision of Section 217 of the Criminal Procedure Code under which Mr. Allen appeared to give his evidence stood in the way of a ruling from the learned judge on a point which is as important as it is novel in this country. In England the case of *Curry* v. *Walter*, to which reference was made in the argument, has clearly laid it down that a barrister cannot be called as a witness without his consent to prove what was stated by him on a motion before the Court. In that case Mr. Erskine was subpœnaed to prove that he had moved the Court in a certain matter, and that he had in fact, stated on that application what the newspaper had reported him to have said. On Mr. Erskine's coming into Court, Sir James Eyre, L. C. J. said that he was of opinion that a barrister should not be called as a witness to prove such a circumstance, but that the party should prove it by other means or by other witnesses who were present at the time of the motion; but that it should be at the option of the counsel whether he would give his testimony or not. Mr. Erskine thereupon said that he would not volunteer the giving of evidence on such an occasion and retired. The case, it is to be observed is cited as an authority for the proposition it lays down in the latest edition (1895) of "Taylor on Evidence" (9th edit. vol. 1, p. 611) and in "Best on Evidence" (8th edit. p. 171) the learned authors say with regard to the general principle: "There can be no doubt that to call an advocate in the cause as a witness is most objectionable, and should be avoided wherever possible, but we apprehend that a judge has no right in point of law, to reject him."

The Indian Evidence Act is however silent on the point, and it may be argued therefore that under that Act a barrister except under the special circumstances mentioned in Sections 126 to 129, is a compellable witness, and is not entitled to plead privilege. But it is a question whether in the capacity as members of the English, Irish or Scotch Bar, (as the case may be) counsel do not possess special privileges, and whether in connection with the particular point under consideration, they are not governed by the principle laid down in *Curry* v. *Walter*. In *The Queen Empress* v. *Ghulet* (1884) I. L. R., 7 A. 44 it was held by *Mr. Justice Straight* and *Mr. Justice Duthoit* that where the Indian Legislature has not followed the law o England, English cases are irrelevant, but in the present case there is no dissent from but merely silence in regard to the rule in *Curry* v. *Walter*. It is well worth considering whether, in the interests of public policy section 121 of the Evidence Act, which privileges judges and magistrates from answering any questions as to their conduct in Court as judge or magistrate, should be extended to counsel and that they should not be compellable witnesses except of course with regard to matters unconnected with their appearance in a professional capacity:—*The English Law Journal.*

REVIEWS.

Quarterly Advance Sheets for July 1898, *of the General Digest American and English*, published by the Lawyers' Co-operative Publishing Company, Rochester, New York—*Price* $ 1. We have already recommended this publication to our readers as the best of English and American Law Digests. It fulfils the ideal of what a law digest ought to be. The present number maintains the standard of excellence attained in the previous issues.

The Code of Criminal Procedure with Notes, by Mr. C. H. Sohoni, published by *Messrs. Thacker Spink & Co., Calcutta*:—*Price, Rs.* 13. This is perhaps the most useful commentary on the Code of Criminal Procedure. Mr. Sohoni has incorporated in this edition all the changes introduced by Act V. of 1898, the amendments being indicated in italics. The arrangement of the notes under distinct headings is a valuable feature of the book and a merit which is not possessed by the Commentaries of Prinsep or Henderson.