The Madras Law Journal.

PART IV.] APRIL 1899. [VOL. IX.

TOPICS OF MALABAR LAW.

I.—Joint Family.

There is, perhaps, no district which contains such a miscellaneous collection of communities, that have not coalesced into a single body, as Malabar. Outsiders regard the District as full of mystery, and have no very definite conception of it or of the people that inhabit it. Even Judges are afraid to grapple with any question which arises for solution with regard to succession or the land-tenures of the District. With the single exception of Mr. H. Wigram, a distinguished Judge who presided over the District Court of South Malabar for a number of years, hardly one of the numerous writers who have treated of Malabar and of its usages, has attempted to make any scientific study of the rules that govern the various communities constituting the people of Malabar.

On the surface, the customs of the District appear to be very dissimilar to what obtain elsewhere, and exercise a strong fascination over those who visit Malabar. And this apparent dissimilarity has led to a notion that Malabar is a world by itself, and that Malabar Law is a body of usages and customs that have very little in common with the Hindu Law that prevails elsewhere in Southern India, although it is admitted that the inhabitants of Malabar are as much Hindus as people elsewhere and are in their religious and social life governed by the same Sastras that rule the Hindus of the East Coast. We propose to treat of certain important topics of Malabar Law and to show that, in so far as the law of the joint family life is concerned, the law of the Nayars and the law of the Nambudiries differ but very slightly from the Hindu Law according to the Mitakshara that governs the province of Madras generally except with regard to the rule of Partibility

of joint-family property. We shall attempt to point out that there is no justification for supposing that questions of Malabar Law are *sui generis*, bearing no analogy to the Mitakshara Law and incapable of being illuminated by the light that has long been thrown on questions arising under the Mitakshara Law. The variances, in fact, between the Mitakshara Law and Malabar Law will (on close examination) be traceable to a few fundamental differences which we shall indicate more clearly at once. The real difficulty, in Malabar Law is that it presents a considerable admixture of the rules obtaining amongst the communities that originally occupied Malabar and those that migrated to it from other countries. We must at the outset remember that of the people of Malabar a considerable fraction consists of emigrants from various other parts of Southern India. The indigenous inhabitants are supposed to be those governed by Marumakkattayam Law or the Law of Succession through nephews instead of sons. These are the Nayars or Sudras, and some other classes below them.

The Nambudiries or ancient Brahmins of Malabar, it is believed, are not really an indigenous sect, but emigrants of a very early date. According to the opinion of Justice *Muthusamy Iyer* in *Vasudevan* v. *Secretary of State for India*, they migrated to Malabar about 12 or 15 hundred years ago. (See I. L. R., 11 M. 181.) We have heard a tradition that their original place was on the banks of the Godavari in the Telugu country. A good deal may be urged in support of this tradition; but whether it is true or not is a matter of little importance for our purposes. The Nambudiries carried their law with them, that is, the law according to the Mitakshara as it was understood at the time of their migration. But in some respects they adopted the usages of the Marumakkattayam community and the law governing the Nambudiries is now, therefore, the Mitakshara law modified by some rules of the law which obtains amongst the Marumakkattayam Nayars. And in the persent day the law of the Nambudiries is as peculiar as Marumakkattayam law, and in many cases more difficult of ascertainment and definition. But the Nambudiries were only the first batch of immigrants. Various classes have from time to time migrated to Malabar from various parts of Southern India, and

in course of time they have in greater or less degree allowed their own personal law to be modified by the Marumakkattayam law of property and succession. And in cases arising between members of various communities it would be important to ascertain whether they were immigrants of a recent or early date in order to be able to decide what the law governing them is. We may at once mention that one large and important class of immigrants have remained absolutely untouched by the customs of Malabar, namely, the Tamilian Brahmins, sometimes known as Pattars, whose chief settlement at first was in the Taluq of Palghat. It will be unnecessary to speak of this class again in treating of questions connected with Malabar Law, as they in no way differ from the Tamilian Brahmins in other districts of the Presidency. But the Sudras and the other lower castes that immigrated to Malabar early have, as we have already indicated, scarcely remained untouched; and have, in many cases, become closely assimilated to the indigenous Sudras. But still it will be found that they have rarely adopted intact all the usages governing the Marumakkattayam Nayars; and especially have they shown disinclination to follow them in matters relating to marriage. It will, therefore, be found (what at first strikes a foreigner as curious) that while amongst the indigenous high class Marumakkattayam Sudras, there is absence of a legal marriage, such is not the case amongst several classes that are far below them in the social scale. In the case of many communities the chief difficulty is to find out what rules of their ancient personal law they retain, and wherein they have adopted the rules they found to obtain in the Marumakkatayam community that occupied the country of their adoption. We may mention amongst them the industrious and thriving community of Tiyas or Eluvas, whose home is by many supposed to have been the island of Ceylon. In South Malabar, the Tiyas generally retain their own law of succession in the line of sons modified to some extent by peculiar customs which are often due to the inferior development of the idea of peculiar or separate property and to the influence of the Marumakkattayam Law which obtains around them. In North Malabar, the Tiyas show far greater resemblance to the Marumakkattayam Nayars, and their law is the Marumakkattayam Law itself. And to us it seems a moot point whether the Tiyas of North Malabar were immigrants at all from foreign lands. In Travancore, and we

believe also in Cochin, the law governing Tiyas or Eluvans is a hybrid of Makkattayam and Marumakkatayam rules. We should also mention that the Marumakkattayam Law obtains not only amongst Hindus but also amongst Muhammadans in North Malabar. This is due to the fact that they were converts from Hinduism and did not change their law of property when they changed their religion. While, therefore, the religion of Mahomet and the ordinances of his followers governed their religious and social life, it is strangely intermingled with the rules of property and of succession that govern the Nayars. Their rules of marriage are exactly identical with those that govern other Muhammadans; but their rules of property are regulated according to Marumakkattayam Law. Sometimes we find that the rules of Muhammadan law modify those of Marumakkattayam Law, especially with regard to self-acquired property. And we shall find certain curious problems arising out of the admixture of these two diverse elements. But we shall not stop to examine them now. With these preliminary observations we shall proceed to consider the nature of the joint-family in Malabar; and in treating of this question as of other questions hereafter, we shall deal separately with the Marumakkattayam Law of the Nayars and the Makkattayam Law of the Nambudiries. The law of those Tiyas and Muhammadans who are governed by Marumakkattayam Law being identical with that governing the Nayars generally, it will not be necessary to notice them separately.

The joint-family in a Marumakkatayam Nayar Tarwad consists of a mother and her male and female children, and the children of her female children, and so on. The issue of male children do not belong to their Tarwad, but to the Tarwad of their consorts. The property belonging to the Tarwad is the property of all the males and females that compose it. Everybody has equal rights, whether male or female. Supposing there are three daughters with an unequal number of children each, the children by one daughter cannot, as a body, claim an equality of rights with the children of another daughter. In fact, the family consists of individuals with equal rights and does not recognise any rights in branches as such. Supposing a division takes place with the consent of all, everybody, whether male or female, adult or infant, would be entitled to an equal share. A Tarwad, no doubt, is said to consist of so many

Tavalis, *i.e.*, lines of mothers, and when a division takes place, it is generally split up according to Tavalis; that is, those descended from the same mother, or it may be from the same grandmother, while separating themselves from the Tarwad as a whole form themselves into a new Tarwad instead of living separately as individuals. But this is only for 'convenience' sake, and it is not the fact that children by one mother are given as much as children by those of any of her sisters, irrespective of the number of children that each has. Division in other words is made, not *per stirpes*, but *per capita*. Nor is it always the case that the children of one mother or the members of one Tavali cling together after a division. Sometimes members of different Tavalis remain together undivided after division while some members of a Tavali prefer to be separated from the other members of it. The question whether every individual has equal rights, however, has never been definitely decided judicially. Inasmuch as the Courts have laid down that there can be no division in a Marumakkattayam Tarwad, except with the consent of all the members, the question has not arisen directly for decision. The extent of the shares of the individual has, of course, to be determined by mutual consent, inasmuch as otherwise there could be no division at all. But suppose there are minors in a family, and the adult members acting together on behalf of themselves and the minors divide the properties, the question would then arise 'in what manner they should effect a division, so that it may be binding on the minors too?' We have no doubt that division is usually made *per capita*, though the Tarwad is separated according to the Tavalis, *i.e.*, after the division, it is generally the members of the same Tavali that continue to live together as members of one Tarwad. It seems to stand to reason that every member should have an equal right. For suppose the common ancestor had one daughter and five sons, and the daughter has a number of children, some of whom are daughters, and the females amongst these latter again have a number of children each, what would be the effect of effecting a division *per stirpes*? The five sons of the common ancestor would be entitled to five-sixth of the property, with power each to alienate it as he pleases, and only a sixth of the family property would remain available for division amongst those who continue the Tarwad. And if the males amongst the children of the daughter again each take away as much as each of their

sisters with their children with powers to alienate it, only a very small fraction indeed of the property would descend to those who can continue the Tarwad. This is probably the reason why the understanding amongst the people always has been that every individual born in the Tarwad has an equal right with every other individual.

Mr. Wigram says (see page 6 of his Malabar Law and Custom) that in 1810 the Provincial Court of the Western Division held that "if partition was made, it must be *per stirpes* and not *per capita.*" Mr. Strange in his Manual of Hindu Law, page 389, observes that division would be according to Tavalis or branches of the family, that is, the property would be primarily divided among the sisters of the common ancestor, these giving rise to branches, and afterwards among their progeny. Mr. Strange does not mention brothers. Should they not get as much as the sisters, or what are their rights? Mr. Strange himself in speaking of the necessity of the consent of the Anandravans to validate a sale of Tarwad property says: "That the reason of the rule is that all the Anandravans are held to have a common interest in the family possessions." See page 67 of Wigram's Commentary. Mr. Holloway, as Sub-Judge, speaking on the same subject, observed thus: "The principle upon which restriction is placed upon the right of a Jenmi to *dispose* is that, in fact, the law regards all the descendants of the common ancestor in the female line as joint-tenants of the property whose assent must be procured to the alienation of the property." Here, Mr. Holloway is, of course, speaking of the males also, because the rule has been supposed to be that the consent of the male Anandravans also should be taken before a sale is made. See *Edathil Itti* v. *Kopashan Nayar*, 1 *M. H. C.*, 222; *Kondi Menon* v. *Sranginreagatta Ahammada*, *Ib.* 248; *Kaipreta Ramen* v. *Makkaiyil Mutoren*, *Ib.* 359; *Koran Nair* v. *Chandu Nayar*, 3. *M. H. C. R.* 294; *Kunhamod Hajee* v. *Kuttiath Hajee*, I.L.R., 3. M. 170; *Krishnan* v. *Appu*, 6 Travancore Law Reports, p. 49. We are not aware that the High Court has ever laid down the law in the way that the Provincial Court or Mr. Strange understand it.

In *Subbu Heggady* v. *Thongu An Aliyasantana Case*, 4 M. H. C. R. 196 at page 201, the Madras High Court observes that "the legal right to the family property is vested in the female members

of the family jointly but for little other practical purpose than regulating the course of succession." This observation is based upon a text of Bhutala Pandia, a now discredited work, and is intended only to show that no single female member has a right to live apart from the family and claim a separate allowance for maintenance from the income of the family property. The question whether males have an equal right of ownership with females did not arise, and we do not think that the Court intended in any way to negative the right of males to an equal right of ownership with females. Anyhow, the remark founded, as it is on Bhutala Pandya, is not applicable to Malabar. The position of women has been sometimes supposed to be somewhat higher than that of males in the Aliyasantana system, though in our opinion it refers only to their being the perpetuators of the line, and does not indicate any higher rights of ownership in them than in their uncles or brothers who constitute the male members of the family.

In *Todd* v. *P. P. Kunhamod Haju*, I. L. R. 3, M. 174, the Madras High Court (*Turner*, C. J., and *Muthusamy Iyer*, J.) say: "The law governing the property of a Tarwad has not reached the same stage of development as the law regulating the joint property of the Hindu family. Not only in the former case is succession traced to females, but the properties is indissoluble; so that the members of the family may be said to have rather rights out of the family than rights to the family. . . . . The family and not the individual is what we term the social unit. . . . . The individual right of the members of the Tarwad is so feeble that it is not competent to any one of them to insist on a partition. The males take interests in the Tarwad property which endure only for their lives, but do not pass to their offspring, nor available for their private debts." The learned Judges are evidently of opinion that males like females are owners and the interests of both are only for their lives. The difference between the two is that while the children of the females become co-owners by birth, the children of the males being members of different Tarwads derive no interest in the property of their fathers.

Dr. Ormsby in his Outlines of Murumakkattayam Law as administered by the High Court of Travancore says (see page 2): "That where a division takes place, it will usually be according to

Tavalis or number of females of the original ancestor, each Tavali may similarly be sub-divided should the members consent thereto, and so on, until individual proprietorship is arrived at." The learned author says: "I am not aware if this rule has ever been questioned." He does not cite, however, any authority for his position, and we are not in a position to say whether he is not merely accepting Mr. Strange's proposition as laying down correctly the law on the subject.

He observes (see page 2 of the introduction): "The descent is to nephews, that is, a man's heirs are not his sons, his grandchildren, &c., his father, his father's son's, &c., but his sisters, sister's daughters, mothers' daughters' daughters, mother, mother's sisters, and so on, male descendants of these being entitled to maintenance and to management of family possessions, but not, strictly speaking, being entitled to inherit." It will be observed that while the author begins with saying that the descent is to nephews, he really excludes nephews and all other males from inheritance, and says they are entitled only to maintenance. We fail to see what authority there is for the exclusion of males, or on what reasoning the author would support it. See *Varnakode Narayan Nambudri* v. *Varnakode Narayan Nambudri*, I. L. R., 2 M., 329. It is conceded that the right of management is in the males, and so long as there is any male of adult age, no female, however old, is entitled to manage. Whence this right of management, if they are not co-owners along with the female members of the property they are entitled to manage? A mere right to maintenance cannot give a right to manage as against those who are owners. It will be remembered that the right to manage is one which the senior male cannot be deprived of, except for grave mismanagement or gross incompetence and by decree of Court. Now, can such a right be traced to a right to maintenance? We do not rest the equal ownership of males on their right to manage. We are aware that until recently, at any rate, the right to manage or *ejamanship* was believed to be vested in the senior female amongst the followers of the Aliyasantana or Marumakkattayam system in S. Canara; and in the Kovilagoms of the Zamorin's family in S. Malabar and of some other families, the management is vested in senior females. The right of ownership does not necessarily give a right to management. Females though they admittedly

have the right of ownership in the Tarwad property are excluded from management while there are adult males on account of their inferior capacity to manage. But we think that the existence of the right to manage is a strong argument in favour of the right of ownership. It has been held both by the Madras and Travancore High Courts that the last member of a Tarwad, whether male or female, has power to alienate the Tarwad property, (*Alami* v. *Komu*, I. L. R., 12 M., 126; *Narayani* v. *Sirkar*, 1 Travancore Law Reports, p. 92). The only basis for the view that males have no right of ownership is that they do not become a stock of descent as their children do not belong to their Tarwad. But this, in our opinion, is no reason for concluding that the males are not co-owners with females, and such a view is altogether opposed to the accepted notions of ownership among the followers of the Marumakkattayam system.

Mr. Grady also seems of the same opinion, Hindu Law, p. 310. It will be observed that he, like Mr. Strange, takes no note of the sons, but says that division will take place according to the number of daughters. With all respect to Mr. Strange and Dr. Ormsby, we cannot help saying that their view is not in accordance with the accepted conceptions of the community to whom the law applies and according to which division is ordinarily carried on by them. And we also think that in the interests of the Tarwad, the safer rule to lay down is, every one, male or female, has an equal share in the property.

It has now been taken as fairly established both in the Native States of Travancore and Cochin and in British Courts that no member of a Marumakkattayam Tarwad can claim division as a matter of right, and every member can resist partition if he does not like it. In other words the unanimous vote of the members is necessary to effect a partition. See Ormsby's Outlines of Marumakkattayam law, page 1; Wigram, pp. 6 and 7. It seems to us to be doubtful whether the rule in its strict form is not really due to the British Courts. It seems extremely unlikely that a single member should have been given the right to resist the will of the majority of the Tarwad to resist a partition. Where there is a general consensus of opinion among members that division would be expedient or beneficent, a division was, we think, generally

allowed, notwithstanding the dissent of a small minority. Mr. Wigram refers (see page 6) to a case decided in 1810, in which the individual share of a member of a Marumakkattayam family was held liable to be sold for debts contracted by him. This necessarily presupposes the right in the purchaser to enforce his right by a division of the property so as to separate the share belonging to his judgment-debtor. He refers also to an opinion given by Sudder Court Pandits in 1854 that where a junior member of a Nambudri family marries, he may enforce a division of the family property.

It seems to us that the English Judges after the establishment of the British Courts conceiving that a non-division is the logical consequence of a system of law "which vests the property in the females of a family" rigidly enforced the rule of impartibility contrary to the common practice among the people. In *Munda Chetty* v. *Thimmaju Hensu*, 1 M. H. C. 380 at p. 383, which was a case under the Aliyasantana system, Mr. Justice *Holloway* observed as follows:—

"It has not been disputed, as indeed it could not be, that the compulsory division of the family property is wholly opposed to the authorities on which the Aliyasantana system of inheritance rests." The reference is to Bhutala Pandya's Kuttu whose authority has been now considerably shaken, and it has no application to Malabar. "It is equally opposed to the principle of that system which vests the property in the females of the family. . . . If this indisputable rule has been abrogated by the decision of the highest Court of Appeal upon the question distinctly raised before it, however much I should have lamented that Judges have overstepped their proper duty of declaring law, I should as in the case of Hindu wills have followed them. Here, however, the only decisions produced are those of inferior Courts influenced by their views of expediency with particular cases before them, and still more singularly decisions in which while violating the law, those Courts have admitted its existence. Decisions dividing family property have also been passed in Malabar. And it is one of the claims of our late colleague, Mr. Justice *Strange*, upon that respect which we all feel for him, that he successfully resisted the attempts of Lower Courts, also acting upon their views of expediency to introduce foreign admixtures into a law, of which whatever may be thought of its

policy, none can deny the consistency with the theory upon which it is based."

The above quotation indicates the spirit in which the law was laid down by the learned Judge. He took it that succession through females involves impartibility of the property, and was resolved to prevent foreign admixtures into the system. It may be noted that in the case referred to, that both the District Munsif and the Sudder Ameen who were probably gentlemen acquainted with the practice among the followers of the Aliyasantana law, had allowed division; and on remand, the Civil Judge observed that division of family property had been allowed in numerous suits since the year 1825, and submitted those decrees for the information of the High Court. We suspect that as pointed out by *Holloway*, J., division was equally common in Malabar; we do not see that non-divisibility follows logically from succession through females. And if it did, the question would still be not what would make the system logically perfect, but what were the usages amongst the communities who are governed by it. Before the British Courts, the Native Rajahs or the local Panchayets used to decide all the disputes. It is extremely unlikely that they would have allowed a single factious member to insist on the Tarwad remaining joint in opposition to the general will of the Tarwad. And as a rule, the majority of the members might enter into a family Karar and lay down rules for the management of the family property. It seems to us that this is one of those cases where the beneficial growth of the customary law was arrested by courts that were not altogether well-informed as to conditions of the society to which the law applied. The law of property amongst the followers of Marumakkattayam is based completely on usage, and it would have been well if the British exponents of that law had allowed more weight to the views of the people than to their notions of a perfect system of Marumakkattayam law which is nowhere expounded in writing. This is the more to be regretted as experience is making it manifest every day that compulsory non-division by no means helps the economical or social progress of a people. But, we must admit that so far as Malabar is concerned the law of impartibility has been laid down by the highest court ever since the year 1814 (See 1 S. D. 118), and this is the view upon which the Marumakkattayam people

have acted for a long time. There has been no express decision during recent years on the question. But this is no doubt due to the fact that no one has thought it worth while raising the question and the people have acquiesced in the law as laid down by the courts. We are afraid that it is now too late for the courts to go back, although, perhaps, reasons may be adduced for holding that the law of *Stare decis* is not applicable to a case of this kind.

Notwithstanding a division it is open to the members who have divided to re-unite and live together again as members of an undivided family. The rights of the members after such reunion would, we believe, be precisely the same as they were before division. Where divided members throw their property together and live in commensality, the presumption will be that they have reunited to form an undivided Tarwad again in the absence of circumstances to show that they intended merely to become tenants-in-common. The result will be, we think, that they cannot divide again except with the unanimous assent of all. Sometimes Tavalis that were never undivided within their memory may unite together and form an undivided Tarwad. We believe that persons who are not descended from a common ancestor, who belong to different Tarwads and who have no *attaladakkam* rights whatever cannot unite so as to form a single Tarwad with the rights and disabilities attaching to such a combination. This would be exactly the same as if individuals governed by Mitakshara law try to form a joint Hindu family by living together. Such a combination would be similar to a partnership and the members would be at liberty to put an end to it at any time they please. In a recent case from North Malabar (S. A. 1372 of 1897) it was contended that the children of a Nayar by different consorts belonging to different Tarwads were living together as one Tarwad, and that, therefore, the rights and disabilities of the position of an undivided member of a Tarwad would attach to them. The Court (*Davies* and *Benson*, J. J.) sent down for trial an issue whether there was any usage allowing the formation of a Tarwad in this manner. The point was not ultimately decided by the court as the parties compromised the dispute after the remand. We think there will be no doubt that descent from at least a common female ancestor is essential to the

construction of a Tarwad. The combination of individuals unconnected by any such relationship would be absolutely illegal, and we have no doubt unwarranted by any usage.

BANDHUS—III.

We shall now see how far judicial decisions have recognised the persons comprised in our tables. Of course, it can scarcely be expected that the judicial dicta should give us any definite and universal principle to guide us in finding out the persons comprised in the term *bandhus*. In our resume of the authorities, our more immediate concern is to see whether the decisions conflict with the principles we have already set forth, as underlying the law of succession among *bandhus*.

In *Ratna Subba Chetty* v. *Ponnappa Chetty*, I. L. R., 5 M., 69, the respondent, Ponnappa Chetty, sued to recover certain property as heir of one Subbaraya Chetty, deceased, as being the grandson of the maternal uncle of Subbaraya Chetty's mother.

Their Lordships, *Turner*, C.J., and *Muttusami Aiyar*, J., held that Ponnappa was a *bandhu*, and as such entitled to succeed. After holding that the Mitakshara list was not exhaustive but merely illustrative, their Lordships observed: "The author of the Mitak-"shara, chapter II, section 5, § 3, declares that *kinsmen sprung* "*from a different* family but connected by funeral oblations (1) are "indicated by the term cognate, *Bhinna gotra sapindanam bandhu* "*sabda grahanat*; and in section 6 that cognates (*bandhus*) are of "three kinds,—related to the person himself, to his father or to his "mother. The great-grandson of the mother's maternal grand-"father is a *sapinda* of that common ancestor, and, therefore, a "cognate related to the mother, *matri bandhu*. The mother's "maternal uncle, though less remote, succeeds in virtue of a similar "affinity." This decision recognizes the three different classes of *bandhus* and also the mode of computation of degrees. For it says, if the claimant is the *sapinda* of the common ancestor, who him-

(1) This is erroneous; it must be 'connected by particles of the (same body)'.

self is the *sapinda* of the propositus, then heritable right exists. The common ancestor need alone be reached. This is the mode of computation peculiar to Hindu Law.

In *Krishnayya* v. *Pichamma*, I. L. R., 11 M., 187., their Lordships, *Collins*, C. J., and *Muttusami Aiyar*, J., held that the *daughter's son's son* of the deceased (*viz.*, the daughter's grandson) is a *bandhu*. The reasoning upon which this decision proceeds, though in some respects faulty as will be presently noticed, affirms the proposition that where a remoter person is a *sapinda*, his ancestor through whom he must trace the relationship must necessarily be also a *sapinda*. It also substantially affirms the theory of mutuality of *sapindaship*. For their Lordships observed: "The father's maternal uncle and "his son are the father's cognates, because the father's maternal "grandfather is the person to whom they and the father offer "funeral oblations, and though they belong to different families, "they are, on that ground, *bhinna-gotra sapindas*. It follows, "then, that the father's maternal grandfather, who is nearer to "the father than his maternal uncle, is a *bhinna-gotra sapinda* "or *bandhu* as explained in Mitakshara, chapter II., section V, § 4." There can be no doubt that the decision is correct. But the reasoning of the learned Judges does not appear to be sound as it ignores the principles of Mitakshara. The computation of degrees in Mitakshara is based, not upon the theory of offering funeral oblations, but upon the theory of affinity or consanguinity. The father, the father's maternal grandfather, the father's maternal uncle and his son are connected with each other, not because the father, his maternal uncle and his maternal uncle's son offer funeral oblations to the father's maternal grandfather, but because they are connected by blood within the meaning of the texts of the Mitakshara. That the Mitakshara has ascribed to the word "*sapinda*" a different meaning to that given to the same word by the author of the Dayabhaga cannot now be gainsaid as I have already pointed out *Lakshmanammal* v. *Tiruvengada Mudaliar*, (I. L. R., 5 M., p. 241 at pp. 247 248, following I. L. R., 6 C., 119, and I. L. R., 2 B., 423, and other cases already cited in my former article). Of course, it may be that the person who is connected by consanguinity or affinity may also offer funeral oblations, but the offering of the funeral oblations is not the test of heredity under the Mitakshara law and does not involve a mutuality of succession.

In *Sethurama* v. *Ponnammal*, I. L. R., 12 M., 155, their Lordships, *Collins*, C. J., and *Shephard*, J., held that the *paternal great-grandfather's daughter's son's son* of the deceased is a *bandhu*.

The Court observed: "Deceased Karpora is the great-grandson "in the male line of the common ancestor Namasivaya, while the "appellant is the daughter's grandson (son's son) of the same person. "The Subordinate Judge has held that standing in this relation to "the deceased, he is not his *bandhu*. We are of opinion that the "appellant, being within seven degrees of the deceased on his "father's side, was his *sapinda*. He does not belong to the same "*gotra*, because a female intervenes, *viz.*, the appellant's grandmother, "but he is what is called a *bhinnagotra sapinda* or *bandhu*. It is "now clearly established that the assumption (that the Mitakshara "list is exhaustive) is erroneous, and that if any one comes within "the definition of *bandhu*, though not specially named, he is entitled "to succeed as such." There is a general observation that seven degrees ought to be computed on the father's side. But this, as I have already observed, will not universally be true. If we were to apply it generally, the seventh ancestor's daughter's son will be an heir. This could not be; for the seventh ancestor's daughter's son will not be the *sapinda* of the propositus, as I have already pointed out, although the propositus may be the *sapinda* of the seventh ancestor's daughter's son. This violates the rule of mutual *sapindaship*, which is the governing feature of the Mitakshara law of succession.

We may take it, however, that their Lordships did not address themselves to a decisive consideration of the question, *viz.*, within what limits are the heritable *bandhus* to be found. The decision in the particular case is, no doubt, correct, for the claimant there is an undoubted *bandhu*.

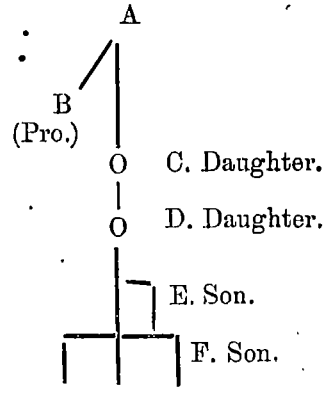
In *Umaid Bahadur* v. *Udoi Chand*, I. L. R., 6 C., 119, a Full Bench of the Calcutta High Court held that a *sister's daughter's son* is a *bandhu*, and as such entitled to succeed.

Their Lordships observed:—

"The defendant in this case is a descendant three degrees "removed from Mukhtab Bahadur's father, the common ancestor;

"Mukhtab Bahadur, is the son of the maternal grandfather of the "defendant's mother. Therefore, they are related as '*sapindas*' to "each other. The defendant is a '*sapinda*' of Mukhtab Bahadur, "because he is within six degrees from the common ancessor, *viz.*, "Mukhtab Bahadur's father; and Mukhtab Bahadur, of the defendant, "because he is the son of the defendant's mother's maternal grand- "father. In order to determine whether a person is a *sapinda* of the "propositus within the meaning of the definition, it is necessary "to see whether they are related as *sapindas* to each other, "*either directly through themselves or through their mothers and* "*fathers.*

"Take for example the following table for illustration :—



"A. is the common ancestor; B., his son, is the propositus; C., a daughter of A.; D., her daughter, both dead; E. is the son of D., "and has a son F.

"Now B. and E. are *sapindas* to each other, but not B. and "F. Although F. is within six degrees from the common an- "cestor, yet B, not being a descendant of the line of the maternal "grandfather, either of F., or of his father and mother, they are "not *sapindas* to each other; but B., being a *sapinda* of E., "through his mother, they are *sapindas* of each other. The defen- "dant stands in the same relationship to Mukhtab Bahadur as E. "does to B. Therefore, the question referred to us (whether the "defendant is a *sapinda* of the deceased) should be answered in "the affirmative."

We cannot understand the exact meaning and the force of the passage—'*directly through themselves, their fathers or mothers*' (the *italics* in the above quotation are ours). In one sense (and this is the only sense we know of) it is always the case that *sapindaship* is traced through oneself or through the father or mother. *Sapindaship* is traced through oneself when the given person is a descendant. It is traced through the father and mother when the given person is either a descendant of the father or the maternal grandfather, etc., and their ancestors. There is no such thing as indirect relationship through oneself, one's father and mother. There is no warrant for saying that one should be a descendant of the line of the maternal grandfather either of the propositus or of his father or of his mother. This is due to a mistaken notion that the Mitakshara only introduces these three foreign families. I have already pointed out the error underlying this notion. B. is the son of the mother's maternal grandfather of the father of F. The mother's maternal grandfather's son is a *matri bandhu* and the father's mother's maternal grandfather's son is the father's *matri bandhu*, and is, therefore, a *pitri bandhu* to the deceased. B. and F. are therefore mutual *sapindas*.

In *Babu Lal* v. *Nanku Ram and another*, I. L. R., 22 C., 339, the Calcutta High Court (*Norris* and *Bannerjee*, J. J.) held that *the mother's mother's father's son's daughter's sons* of the propositus were entitled to succeed as *bandhu*. Their Lordships after pointing out the mistake which Mr. Colebrooke fell into, when he rendered the word '*sapinda*' as a 'person connected by funeral oblation', observed:

"The plaintiffs are *bhinnagotras* of Ram Saran (propositus), "*i.e.*, they are sprung from a *gotra* or family different from his.

"The question is: whether they are heritable *sapindas*? Now "the term '*sapinda*' is explained in an earlier part of the Mitak- "shara in the section relating to marriage, when commenting on "verses 52 and 53 of Chapter I of Yajnavalkya's institutes (See "6 C., 119).

"According to that explanation or definition a *sapinda* of a "man means and includes—

"(1) any descendant within the 7th degree reckoned from and "inclusive of himself, *i.e.*, any of his first six descendants;*

"(2) any ascendant within the 7th degree reckoned from and "inclusive of himself in his paternal line;*

"(3) any collateral descendant within the 7th degree reckoned "from and inclusive of any of the six paternal ascendants, *i.e.*, any "of the first six descendants of any of the first six ascendants in the "paternal line;

"(4) any ascendants within the 5th degree reckoned from and "inclusive of himself in the maternal line, *i.e.*, any of the 4 maternal "ancestors, *viz.*, the mother, her father, her grandfather and the "rest;

"(5) any collateral descendant within the 5th degree from and "inclusive of any of the 3 maternal ancestors, beginning with the "mother's father, *i.e.*, any of the first four descendants of any of "3 maternal ancestors, beginning with the mother's father. The "mother's descendants are not here included as they, being ordi-"narily also the descendants of the father, are included among "collaterals on the paternal side."

Here is some attempt at a generalisation, and we have been therefore tempted to quote passages from the judgment rather *in extenso*. But it has the fault both of improper inclusion as well as of omission. It has the further fault of vagueness. For instance, as was pointed out in the note below it includes many descendants who would clearly not be in the line of heirs at all. No reference is made to the mother's mother's family. It may be doubted whether that by the term 'paternal ascendants' their Lordships intended to include any beyond the agnatic ascendants. At any rate as regards the mother's mother's family (even assuming the term

* This is very broadly stated. It is true of all male agnates. Of course, by the rule of mutuality of *sapindaship* recognized by their Lordships in a subsequent passage, only certain of these will succeed. When the descendant traces through a daughter of the propositus or his 6 ascendants, this rule will not, as already observed, hold good, nor does the rule universally hold good where a female ancestor intervenes.

'maternal line' is meant to include both the mother's paternal and maternal lines), the collateral descendants are not referred to at all. (See rule 5 in the above quotation). Further, it does not say what the lines are we have to take and what foreign families have to be taken.

After laying down the rule of mutual *sapindaship*, their Lordships proceed to apply the rules they enunciated to the particular case and say: "We find that plaintiffs are descended "in the 3rd degree from Mangru Ram, who was Ram Saran's "mother's maternal grandfather, and so they are Ram Saran's "*sapindas* through his *mother*. We also find that Ram Saran was "the 3rd in descent from Mangru Ram, who was the plaintiff's "maternal great-grandfather, and so he was their *sapinda directly*. "Thus we find that the plaintiffs and Ram Saran are mutually "related as *sapindas*, the former through the mother and the latter "directly. The plaintiffs are therefore *sapindas* and *bandhus* of "Ram Saran, *ex parte* materna, and are his heirs." We cannot understand why in the case where *one's mother's paternal grandfather* intervenes, there should be *sapindaship directly*, and why where the *mother's maternal grandfather* intervenes, there should be *sapindaship through the mother*. In both cases *sapindaship* is through the mother, and both are *matri bandhus* according to the Mitakshara. The distinction is unsound and is not warranted by the authorities.

In *Parot Bapa Lal Sevakram* v. *Mehta Harilal Surajram*, I. L. R., 19 B., 631, *Bayley*, Ag. C. J., and *Fulton*, J., held the father's sister's daughter's son is a *bandhu* and is entitled to succeed. Their Lordships observed: "In regard to the succession of cognates there seems no difference in the rules laid down in the Mayukha, which, as pointed out in *Lallubhai* v. *Mankuverbai* (I.L.R., 2 B., 388), has on most questions of inheritance adopted the principles of the Mitakshara. . . . . The remarks of *West* and *Buhler* at p. 498 appear to question the correctness of the decision in *Umaid Bahadur* v. *Udoi Chand*, I. L. R., 6 C. 119, that the intervention of two females in the line of descent is no bar to inheritance, for, as stated by Mr. Mayne in his note to S. 472 of the 4th Edition of his Treatise, the principle that succession under Mitakshara Law depends upon propinquity and not upon religious

efficacy has been settled by distinct rulings, (see *Lallubhai* v. *Mankavarbai*, I. L. R., 2 B., 388; 7 I. A., p. 212; *Nallanna* v. *Ponnal*, *Ib.* 14 M. 149; *Ramappa Udayan* v. *Arumugath Udayan*, *Ib.* 17 M., 182). Accepting this principle we can see no ground for rejecting the claim of the plaintiff who is within four degrees of the common ancestor who was the maternal grandfather of the plaintiff's mother."

The claims of the sister's son have been recognized in *Amrita* v. *Lakhinarayan*, 2. B. L. R. (F. B.), p. 28; *Chelikani Tirupati* v. *Rajah Surneni*, 6. M. H. C., p. 278; *Gunesh Chunder Roy* v. *Nil Komul Roy*, 22 W. R. 264; *Naraini Kuar* v. *Chandi Din*, 9, A. 467; *Lakshmanammal* v. *Tiruvengada Mudali*, I. L. R., 5 M., 241. In *Subbaraja* v. *Kylasa*, I. L. R., 15 M., 300, the step-sister's son's claims have been recognized.

The maternal uncle's claims are upheld in 12. M. I. A., p. 448; *Mohan Das* v. *Krishna Bai*, I. L. R., 5 B., p. 597; *Narsimma* v. *Mangammal*, I.L.R., 13. M., 10. A maternal uncle by the half-blood is given a decree in *Muthusami* v. *Muthukumarasami*, *Ib.* 16 M., 23. S. C., on appeal to the Privy Council; *Muthusami Mudalliar* v. *Sunambedu Muthukumarasami Mudaliar*, 23 I. A., 83. The father's maternal uncle is given a decree in *Giridhari Lall Roy* v. *Bengal Government*, 12 M. I. A., 448. The claims of the maternal grandfather are upheld in *Chinnammal* v. *Venkatachala*, *Ib.* 15 M., 421.

The claims of the sons of sons of daughters born in the family were upheld in the following cases:—*Sheobarat Kuari* v. *Bhagwati Prasad*, I. L. R., 17 A., 523 (Propositus); *Krishnayya* v. *Pichamma*, *Ib.* 11 M. 187, *Sethurama* v. *Ponnammal*, *Ib.* 12 M., 155 (great-grand-father's).

The claims of the sons of daughters of sons born in the family were upheld in the following cases:—*Mussamut Doorga Bibee* v. *Janaki Pershad*, 18 W. R., 331 (father's); *Sundrammal* v. *Rangasami Mudaliar*, I. L. R., 18. M., 193 (grandfather's).

The claims of the sons of daughters of daughters born in the family are upheld in the following cases:—I.L.R., 6 C., 119 (F. B.'s (father's); *Ib.* 19 B., 631 (grandfather's); *Babu Lal* v. *Nanku Ram*, I L.R., 22 C., 339 (mother's maternal grandfather's).

The claims of the sons of daughters of sons of sons born in the family are considered in *Manik Chand* v. *Jagat Settani*, I. L. R., 17 C., 518.

In *Ananda Bibee* v. *Nownit Lal*, I. L. R., 9 C. at p. 327, the right of a great-grandson of the maternal grandfather of the father of the propositus is recognized.

We shall now consider the order of succession. We are in a position here to formulate the same under the following rules :—

I. The *atma bandhus* take first; then *pitri bandhus;* then *matri bandhus.*

There is express authority for this in the Mitakshara itself. For the author in chapter II, section 6, placitum 3 says: "Here by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance; on failure of them his father's cognate kindred, or, if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended." This is approved by all the other commentators, and we have further the decision of the Judicial Committee in *E. C., Muttusami Mudalliar* v. *Sunambedu Muttukumarasami Mudalliar*, 23 I. A., p. 83. Their Lordships there held that the order of succession was as mentioned in the above-cited text of Mitakshara, and that the father's paternal aunt's son being merely a *pitri bandhu* must be postponed to the maternal uncle, though of the half-blood who is an *atma bandhu.*

II. The 2nd rule which is deducible from the authorities is that among persons of the same class, the *bandhus ex parte paterna* will take to the exclusion of the *bandhus* of the same class *ex parte materna.* Thus the *atma bandhus ex parte materna* will be postponed to the *atma bandhus ex parte paterna.* Similarly among the *pitri bandhus* those who trace through the father or his father take precedence to those who are related through the father's mother, *i.e.*, the father's *bandhus ex parte paterna* should have precedence over the father's *bandhus ex parte materna.*

On the same principle the *matri bandhus ex parte paterna* will have precedence over the *matri bandhus ex parte materna, i.e.,* the *matri bandhus* who trace through the mother's father have precedence over the *matri bandhus* who are related through the mother's mother merely.

This is consistent with the general principle of Mitakshara that the father's line should have precedence over the mother's line (*vide* Mayne, paras. 471 and 535).

In *Sundarammal* v. *Ranggsami Moodelliar*, I. L. R., 18 M. 193, their Lordships, Mr. Justice *Muthusami Aiyar* and Mr. Justice *Best* in postponing the claims of the mother's sister's son, to those of the paternal uncle's daughter's sons observed: "As between plaintiffs (paternal uncle's daughter's son) and 3rd defendant (mother's sister's son), the latter is a *bandhu ex parte materna* whilst the former are *bandhus ex parte paterna.*" (See also 20 M., p. 342 at page 349).

III. *The nearer line must be preferred to the more remote, i.e.*:

The *bandhus* of one line (as for instance the father) should be exhausted before a *bandhu* in the next line could be let in. This is based upon the first principles of the Mitakshara itself.

The Mitakshara in the *sagotra* succession says that the sons, grandsons and great-grandsons should be exhausted before we ascend to the parents and the line of the father. The parents and the father's line must be exhausted before the grand parents and their line can be let in. Similarly the *bandhus* tracing through the propositus himself must have precedence over the *bandhus* in the father's line. This is but consistent with the general principles of computation of degrees recognized by the Hindu Law. For the Hindu Law treats the descendants of an ancestor having heritable rights not *interse*, but as regards the remoter ancestor and his descendants, as having superior rights over the latter. For when it is said that *sapinda* relationship ceases with the 7th person or the 5th (as the case may be), it is enough if a given person reaches the common ancestor within seven or five degrees, though the given person may not be within the 7th (or 5th) degree from the propositus himself.

This rule has been expressly recognized by their Lordships, Mr. Justice *Subrahmania Aiyar* and Mr. Justice *Benson* in the recent case of *Balusami Panditha*r v. *Narayana Row*, I. L. R., 20 M., p. 342, where they held that the sister's grandson is a nearer *bandhu* than the maternal uncle's son. Their Lordships observed: "There need be no hesitation whatever in saying that the doctrine (of spiritual benefits) ought not to be resorted to in

derogation of the great principles pervading the Law of Inheritance under the Mitakshara system. The first of such principles is that the nearer line excludes the more remote. Applying it here, the plaintiff must doubtless fail, since he traces his right as a *bandhu* through Vasudev's grandfather (maternal), while the 3rd defendant makes out his right through a nearer ancestor of Vasudev, *viz.*, his father. The learned vakil for the plaintiff laid considerable stress on the fact that the plaintiff is the *grandson* of Vasudev's maternal grandfather, whereas the 3rd defendant is the *great-grandson* of Vasudev's father. But it is not easy to see how this difference in the respective relationship affects the question under consideration. For the competition here is not between persons *descended from the same man*, but between those who are seeking to establish their right through different persons, *one of whom is unquestionably a nearer ancestor of the propositus than the other* and whose line consequently must take precedence."

IV. We have next to see whether the theory of spiritual oblations has any, and if so, what place in the Mitakshara succession of *bandhus*. Of course, as I have already pointed out, this theory has no place in determining whether a given person is a *sapinda* or not, and this seems now to be admitted on all hands.

There is, however, some difference of opinion, where the dispute is as to whether this or that *sapinda* or this or that *bandhu* succeeds.

In our opinion, the Mitakshara on the point is very clear. It rejects the theory of spiritual benefits by the offering of funeral oblations and adopts the rule of propinquity. For in chapter II, sec. iii, the author says:

"Besides the father is a common parent to other sons, but the mother is not so; and, since her *propinquity* is consequently greatest, it is fit, that she should take the estate in the first instance conformably with the text: To the nearest *sapinda* the inheritance next belongs" (verse 3).

"Nor is the claim in virtue of propinquity restricted to *sapindas*, but on the contrary, it appears from this very text, that the *rule of propinquity* is effectual, without any exception, in the case of *samanodakas* as well as other relatives, when they appear to have a claim to the succession" (verse 4).

If the fact of offering or acceptance of oblations does not create *sapindaship*, much less can it be a test as to the right of precedence over another, when a question arises as to the order of succession. The Mitakshara is essentially a system based upon consanguinity or affinity, and the question of heredity, as the question of the order of succession, should equally be decided by the above test of consanguinity or affinity.

From the illustrations given in the text of Vriddha Satatapa, it will be seen that there are cases of persons who do succeed as *bandhus*, though they do not offer funeral oblations either to the propositus or to persons to whom the propositus was bound to offer. It cannot, therefore, be pretended, that under the Mitakshara system of succession, the theory of superior religious efficacy has any place whatever.

When treating of the order of succession among the different classes of *bandhus*, Vijnanesvara says: "Here, by reason of *near affinity*, the cognate kindred of the deceased himself are his successors in the first instance: on failure of them, his father's cognate kindred: or if there be none, his mother's cognate kindred."

It might be noted that what is stated here as the ground of preference is the *nearness of affinity*. The theory of funeral oblations has no place at all. (*Vide* the observations of *Knox*, J., in *Subba Singh* v. *Sarafroy Kunwar*, I.L.R., 19 A., 223, at pp. 224 and 226, and Mayne, paras. 471, 472 and 535).

The observations of the Judicial Committee in *Lallubhai Bapubhai* v. *Cossibhai* I.L.R., 5 B., p. 110 at pp. 118 and 121, though made in a case arising in (and limited to) Western India, are also useful in determining what the law ought to be in the other Presidencies which are governed by the Mitakshara law. Their Lordships declare themselves, "prepared to assent to the conclusions "to which the Judges of the High Court, upon consideration of the "authorities, arrived that, by the law of the Mitakshara as interpreted and accepted in Western India, the preferential right to "inherit in the classes of *sapindas* is to be determined by family "relationship or the community of corporeal particles; and not alone "by the capacity of performing funeral rites. It may happen in

"some instances, the same person would be the preferential heir, "whichever of these tests was adopted."

A Full Bench of the Madras High Court in *Mari* v. *Chinnama*, I. L. R., 8 M., p. 107, observes at p. 125, that "the right to perform "the funeral ceremony does not involve a mutuality of right of "succession."

Against this view, however, we have the text of Viramitrodaya, a leading authority of the Mitakshara school and a respectable body of decisions which it would be difficult to overlook. For at p. 158 (Golapchandra Sirkar's Translation) Viramitrodaya says: "Hence "it is indicated that he alone is entitled to get the estate on whom "the estate being devolved conduces to the greatest amount of "spiritual benefit of the deceased owner, and that proximity in this "way is to be accepted as a general rule and reasonable." But as observed by *Bannerji*, J., in the case of *Suba Singh* v. *Sarafray Kunvar*, I. L. R., 19 A., p. 215 (at p. 231) there are other passages "where the author lays down the rule that, where the question "concerning the order (of succession) arises, there propinquity "determines the order (p. 186) and that 'greatness of propinquity "is alone the criterion of succession' (p. 194). Upon a careful "consideration of the Viramitrodaya, it appears that the rule of "propinquity is, according to Mitra Misra, the rule of preferable "succession, and that the capacity to confer spiritual benefit is, "as Dr. Jolly remarks, referred to, as an additional reason for the "right to succeed. According to the ruling of their Lordships of "the Privy Council in *Girdhari Lall Roy* v. *The Bengal Govern-"ment*, the Viramitrodaya is receivable as an exposition of what "may have been left doubtful by the Mitakshara; but where the "Mitakshara itself is clear and its meaning and intention are not "open to doubt, the Viramitrodaya cannot be accepted in pre-"ference to the Mitakshara. As I have shewn above, the Mitak-"shara enjoins in very distinct terms, in chapter II, section iii, pl. 4, "that for the purpose of determining the order of succession among "relatives of all descriptions, including *samanodakas*, the rule of "propinquity is to be applied without any exception."

But in the next passage (p. 232), the same Judge observes: "It may be that, where two *sapindas* stand, with reference to

"propinquity in the same degree of nearness to the propositus, the "capacity to confer the highest amount of spiritual benefit should be "applied as a test to determine the order of priority. But where "the degrees of propinquity are different, the rule of religious "efficacy has according to the Mitakshara no application."

The observations of the Judicial Committee in *Bhyah Ram Singh* v. *Bhyah Ugursing*, 13 M. I. A., p. 373, are, however, important. No doubt, no question of precedence arose, and the remarks are only *obiter dictum*. But still as a dictum of the highest tribunal in the land, it is entitled to great weight. Their Lordships say:—"The question of preference is distinct from that of entire exclusion when a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty." This is begging the very question (*vide* also *Muthusami* v. *Muthukumaraswami* I. L. R., 16 M. 23 at p. 30, following Viramitrodaya; *Sri Raja Rau Lakhmi Kantaiyamma* v. *Sri Raja Innganti Rajagopal Rau Ib.*, 21 M. 342 at p. 348).

The case of *Ganesh Chunder* v. *Nil Komu*, 22 W. R. 264, also recognises the principle of preference being given by reason of greater spiritual benefits conferred on the deceased by a claimant. But the decision itself in this particular case is right, as the sister's son being an *atma bandhu ex parte paterna* is to be preferred to the mother's sister's son who is only an *atma bandhu ex parte materna*.

In *Mohan Das* v. *Krishna Bai* I. L. R., 5 B. 597, the mother's brother's son is preferred to the mother's sister's son (the learned Judges, following 22 W. R. 264,) on the ground of superior religious benefits conferred by the mother's brother's son. On the analogy of the principle that the male line should be preferred to the female, which is the basis of the Mitakshara system (*vide* Mayne, paras. 471 and 535, 5th Edn.,) the mother's brother's son being descended from the agnate line of the maternal grandfather is to be preferred to the latter's cognate line.

V. The order of succession among the classes would therefore be as follows:—

(i) *Atma Bandhus.*

(*a*) Atma bandhus *ex parte paterna.*

(*b*) Do. do. *ex parte materna.*

(ii) *Pitra Bandhus.*

(*c*) Pitri atma bandhus *ex parte paterna.*

(*d*) Do. do. *ex parte materna.*

(*e*) Pitri pitri atma bandhus *ex parte paterna.*

(*f*) Do. do. *ex parte materna.*

(*g*) Pitri matri atma bandhus *ex parte paterna.*

(*h*) Do. do. *ex parte materna.*

(iii) *Matri Bandhus.*

(*i*) Matri atma bandhus *ex parte paterna.*

(*j*) Do. do. *ex parte materna.*

(*k*) Matri pitri atma bandhus *ex parte paterna.*

(*l*) Do. do. *ex parte materna.*

(*m*) Matri matri atma bandhus *ex parte paterna.*

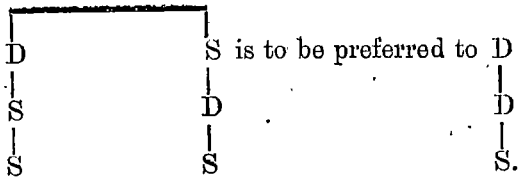
(*n*) Do. do. *ex parte materna.*

VI. Some other subsidiary rules may be laid down—

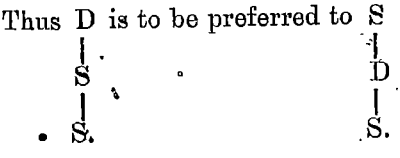
1*st*—Every female introduces a foreign element.

2*nd*—Where the degree is equal, the male descendants with a single foreign element are to be preferred to those with a double foreign element.

Thus:—

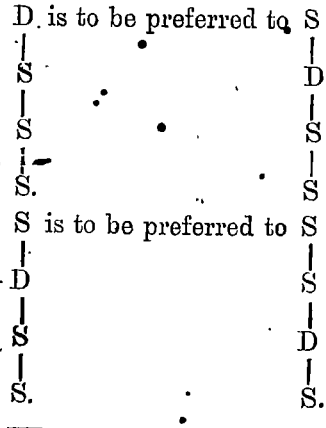


3*rd*—Where the degree is equal, and the foreign element is single, he is to be preferred who has a female (ancestor) immediately near the propositus or other ancestor above him.

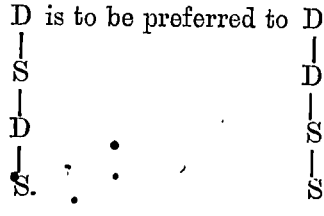


Here the grandson's son is preferred to are granddaughter's son. This is but natural.

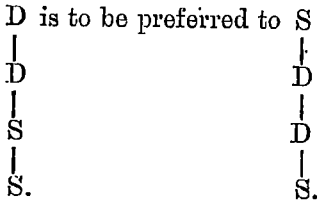
Similarly



4th—Where the foreign element is double, the descendants of unbroken line of females must be postponed to the descendants of the line that is broken by the intervention of a female.



Of course, if the two unbroken lines of females are near to the propositus or the ancestor above him, their line is to be preferred to the line of those who are not so near.



5th—The descendants who have three foreign elements come last.

6th—Those who are of the whole blood are preferred to those who are only of the half blood (*Subba Singh* v. *Sarafrory Kunwar*, I. L. R., 19 A. 215).

We have now seen who one's bandhus are and what the order of succession is among them. It will be noted that we have not made reference at all to the females and to their rights of inheritance. Excluding Western India, where females are generally admitted, the Mitakshara does not recognise any other females than those referred to in the *sagotra* succession. These are the widow, daughter, mother, grandmother, &c. But the right to succession of the widow, &c., depends upon express texts. Beyond these, it may be stated generally that females as such have no rights of inheritance. In Southern India, however, there are decisions to the effect that females may succeed as *bandhus* after all the male *bandhus*. We do not wish to discuss the subject any further, as the subject is vast and distinct by itself.

P. R. GANAPATI AIYAR.

NOTES OF INDIAN CASES.

Abdul Aziz Khan Sahib *v.* **Appayasami Naickar**, I. L. R., 22 M. 110. This is an interesting case which raises an important question. We do not know whether any attempt has been made to carry it up to the Privy Council. The decision of the High Court cannot be regarded as altogether convincing. An impartible zamindary was seized in execution and sold in 1873 and 1876. The question arose in 1893 whether the sale was of the whole zamindary or only of the life-interest of the then zamindar. The High Court holds that as the decision in *Sartaj Kuari* v. *Deoraj Kuari*, I. L. R., 10 A., 272, had not been passed, and the view then prevalent was that the holders of impartible zamindaries under the Mitakshara Law had only a limited estate, the purchaser took only the life-interest of the then zamindar. They rely upon the analogy of cases where upon a sale in execution of a decree against the father of a Hindu family, the question is raised whether the interest of the father alone or of the whole family passes to the purchaser. The analogy seems, however, to be questionable. In the latter case, there are two rights in question—the right of the father to sell his own share and secondly, the right of the father to sell the entire interest in the family property under certain circumstances. The Privy Council have treated it as a question of fact or of mixed fact and law whether in the particular case the limited interest or a larger interest was intended to be sold. But it has been settled in the case of an impartible zamindary governed by the Mitakshara Law that the holder

has an absolute estate, and this law having been laid down by the Privy Council, not for any particular period, but as a true principle of law always in force and the documents of sale passing the entire property to the zamindar it seems doubtful whether it is competent to the court to hold that only a limited interest passed to the purchaser, because the parties were under the misconception as regards the law relating to the alienability of impartible estates. We must, however, admit that in the case in *Pettachi Chettiar* v. *Sangili Vira Pandia Chinnatambiar*, I.L.R., 10 M., 241, the Privy Council without reference to the circumstance that the sale was of an impartible estate held following the findings of the Courts below that the documents of sale purported to convey only the zamindar's life-interest. In *Meenakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan*, 12 M., 241, the Privy Council did not rely upon the sale being that of an impartible estate to show that the whole interest passed, but upon the documents in the case. The report of the latter case does not show whether the zemindary was partible or impartible.

Ramasami Ayyar *v.* **Vengidusami Ayyar**, I. L. R., 22 M., 113. We congratulate Mr. Justice *Subrahmania Aiyar* and Mr. Justice *Moore* upon their decision in this case. The question raised was a novel one and their Lordships have understood the Hindu Law liberally. It is not after all a hide-bound system of rules but consists of principles which are capable of adaptation to the circumstances of modern life. The mother who succeeded to her son's estate gave a small portion of her property to her son-in-law on the occasion of her daughter's marriage. This was held to be within the competency of the holder of the life-estate.

Srinivasa Swami *v.* **Ramanujachariar**, I. L. R., 22 M. 117. It is to be regretted that the error committed by the court in *Strinivasa Ayyangar* v. *Strinivasa Swami*, I.L.R., 16 M., 31, has been re-affirmed in this case. There seems no reason why persons interested in making a valid appointment to the office of trustee should not sue for a declaration if they are so entitled. The Chief Justice and Mr. Justice *Parker* said in the earlier case that the plaintiffs should ask for appointment of a proper trustee and for possession of the trust properties being delivered to him. We can see no justification for this position. We do not, of course, mean to suggest that the decision in the case under notice is questionable. For the principle upon which it rests is simply this. That where the plaintiffs say they have the power of appointment and ask for possession to be given to a person to be appointed by them under the order of the court, they are asking the court to do a thing which is perfectly unnecessary, for they may appoint and their appointee may sue for possession.

Groves *v.* **Administrator-General of Madras**, I.L.R., 22 M., 119. We welcome this decision as it seems, if we remember aright, to be almost the first judgment of Mr. Justice *Boddam* of any length upon a question of law excepting, perhaps, his singular judgment in the Full Bench case upon the effect of S. 588 upon appeals from a single Judge under the Letters Patent, all the more so because his Lordship happens to be right. Execution proceedings taken after the death of the judgment-debtor without the representative being brought upon the record are a nullity. We cannot see how they can be otherwise. The proceedings are entirely judicial and they presuppose the existence of the opposite party and notice to him. A suit cannot proceed to judgment after the death of the defendant, nor can execution proceedings go on.

Subba Reddy *v.* **Chengalamma**, I. L. R., 22 M., 126. This case raises a question of some degree of novelty. Supposing a Hindu widow permits quarrying on her estate, is it such dealing with the substance of the property as to give rise to a cause of action on the part of the reversioners? If the stones quarried are regarded as the produce of the estate, the widow being at perfect liberty to deal with the annual income, her action is perfectly legal.

But are the stones merely the annual income of the estate? If the estate which descends from the husband is a quarry having regard to the mode in which it was enjoyed in the husband's time, it cannot be supposed that a continuance of that mode of enjoyment in the widow's time is an interference with the *corpus* of the estate. But where the quarrying is first done by the widow the question is more difficult. The powers of a Hindu widow are larger than those of a life-owner for certain purposes. But in the absence of any such purposes her rights are not in excess of those of the holder of a life-estate. In the enjoyment of the estate, we have nothing to do with the special purposes for which the whole estate could be dealt with by a Hindu widow. The question, therefore, is narrowed to this, whether a tenant-for-life is at liberty to allow quarrying upon the estate, the effect of which is to remove the substance of the soil and thereby to diminish the value of the *corpus* at the termination of the life-estate. We doubt, however, whether the question is capable of an inflexible answer. It is easy to imagine the estate is of such a character that the continuance of quarrying operations may have no appreciable effect upon the substance of the estate, but may give it an additional value. In the absence, however, of such special circumstances, if the burden of proof will be upon the widow or her alienees, we should imagine the act will be waste entitling the reversioner to interfere.

Vibhudapriya Thirthasami *v.* **Vidianidhi Tirthasami**, I. L. R., 22 M., 131. We are unable to see the distinction between the case under notice and the decision in *Nagamuthu* v. *Savirimuthu*, I.L.R., 15 M., 226. This was a decree by consent against two defendants for possession of land, and the suit is dismissed against others and those others object to execution on the ground they are in possession. In the case in 15 M., a mortgage decree was executed by sale of the judgment-debtor's interest and the plaintiff purchaser sues for possession of the share purchased against those who are exonerated from the decree. The question was raised whether a separate suit will lie in the face of S. 244; and the court held that it was a matter relating to the execution of the decree, for there was no decree relating to those others from whom possession was sought. In the case under notice if the possession was with the person as against whom the suit was dismissed, the decree could not be enforced. The question cannot be said to relate to execution in this case any more than the question as to possession.

Zamindar of Tuni *v.* **Bennayya**, I.L.R., 22 M. 155. We are by no means clear about the right of appeal in a case of rejection of the appeal memorandum. An order rejecting a plaint is specially included in the definition of a decree, although there is no reason why an order rejecting an appeal should not be put on the same footing. It seems, however, clear that it has not been. A decree has been defined as an adjudication of a right claimed or defence set up which decides the suit or *appeal*. An order rejecting a plaint is also specially enumerated. As the definition of a decree makes reference to appeals also, the absence of reference to the appeal memorandum in relation to the order of rejection is, it seems to us, conclusive against its being regarded as a decree. S. 582 cannot extend the definition, because it simply says the procedure in appeals shall be the same as in suits; and the definition of "decree" is no part of the procedure in suits. It may, however, be that a dismissal of the appeal which does amount to a decree is wrongly called a rejection as in the case in *Ayyanna* v. *Nagabhooshanam*, I. L. R., 16 M., 285. The erroneous description cannot prevent an appeal.

There is, however, a more important question as regards the inherent power of a court to reject a memorandum of appeal containing scandalous matter. There is no provision in the code authorizing rejection of the plaint or memorandum of appeal, because it contains scandalous matter. It does not follow that because a party is in contempt his suit should be dismissed. But it seems to us that the court may refuse to receive a plaint or memorandum of appeal which is

scandalous. It would be quite otherwise if there was a suit pending whether for some disobedience the suit may be dismissed. But the court, it seems to us, is not bound to take the plaint or appeal memorandum which initiates judicial proceedings. Such a refusal is not a dismissal of the suit or appeal but a refusal to accept the preliminary step as a *bonâ fide* step.

The judgment of Mr. Justice *Subrahmania Aiyâr* as regards the grounds upon which the decision of a lower court can be impeached on account of bias or interest is highly instructive.

Chelamayya *v.* **Varadayya,** I. L. R., 22 M., 166. Mr. Chamier will do well to take better care of his head-notes. We have not come across cases where three members are managing members of a joint Hindu family, although there is nothing impossible in it. In the case under notice there were three brothers who borrowed a debt, but it does not appear that they were all managers.

The judgment is a very important one. It lays down almost for the first time, we can say, in distinct terms, that a debt borrowed by the manager for a family purpose is recoverable from him personally and from the family estate, but not personally as against the other members of the family. Where the borrower acts merely as the agent, express or implied, the principal would, of course, be liable personally. But the mere ground of managership and family purpose is not sufficient to create a personal liability. We have not examined the matter sufficiently to express our full concurrence, but we suppose the decision is right.

Vias Ram Shankar *v.* **Ralla Ram Misir,** I.L.R., 21 A., 89. We see no warrant for the Allahabad Court limiting the scope of S. 25 of the Provincial Small Cause Courts Act to the class of cases covered by S. 622 of the Code of Civil Procedure. The two sections form part of different enactments, and the language used is entirely different. Nor can we see any justification for taking S. 622 as a guide to the interpretation of S. 25 of the Small Cause Act. It may be that S. 25 only confers a discretionary power which should be exercised in cases wherein justice has not been done and not merely where there is a technical error of law. But the judicial idea of substantial injustice should be regulated by the substantive law of the country, and a court is not at liberty to suppose that justice has been done where the clear provision of the law has been violated.

Rameswar Koer *v.* **Mahomed Mehdi Hossein Khan,** I. L. R., 26 C., 39. A question of some importance has been debated in some

decisions in the Indian High Courts, as to whether S. 209, Civil Procedure Code, is abrogated by the provisions of Ss. 86 and 88 of the Transfer of Property Act with regard to the rate of interest upon mortgages for the period subsequent to the institution of the suit. The decision of the Privy Council in the case under notice does not deal with that question generally, but points out that the discretion to award what interest the court pleases is controlled by the provision to award the contract rate up to the period of six months from the date of the decree in the case of mortgages. The Allahabad High Court is of opinion that there is no power to award interest beyond the six months from the date of the decree while the Calcutta High Court holds the discretion under S. 209 to be unfettered after that period. The head-note in the case under notice would seem to suggest that the contract rate should be awarded down to the date of realization. But the Privy Council were only dealing with interest up to the date fixed for realization, namely, six months from the date of the decree. There is no question raised about interest beyond that date, which is the point of conflict between the Allahabad and Calcutta High Courts.

Chhato Ram *v.* **Bilto Ali**, I. L. R., 26 C., 51. It has been held in several Calcutta cases that an acknowledgment by a guardian of an infant cannot give a fresh starting point against the infant. The Bombay High Court is of the same opinion, *Maharana Shri Ranmal Singji* v. *Vadelal Vakhatchand*, I. L. R., 20 B., 61. The Madras High Court seems to think otherwise, See *Sobhanadri Appa Rau* v. *Sriramulu*, I. L. R., 17 M., 221; *Kailasa Padiachi* v. *Ponnukonnu Achi*, *Ib.* 18 M. 456. In the case of a manager of a Hindu family, however, the power to acknowledge a debt seems to be accepted, *Chinnaya Nayudu* v. *Gurunatham Chetti*, I.L.R., 5 M., 169; *Bhasker Tatya Shet* v. *Vijalal Nathu*, *Ib.* 17 B., 512. The question in the case of a guardian is whether the acknowledgment is a necessary part of the management of the estate; or a step which is beneficial in the interests of the minor. The question is not capable of one and the same answer under all circumstances. Circumstances may well be conceived where a guardian in order to avert costly litigation or pressure upon the estate may give an acknowledgment which may stay the hand of the creditor. Such acknowledgment would then be a prudential act of management and ought to be within the power of the guardian.

Kameshwar Pershad *v.* **Amanutulla**, I. L. R., 26 C., 53. There is a point raised in the judgments of *Banerjee* and *Rampini*, J. J., in this case, that, where secondary evidence has been improperly received without objection, it may be rejected on appeal. We doubt whether this view is correct.

If relevant evidence were admitted without objection, the want of objection cannot cure the defect. But as regards the mode of proof, the silence of the opposite party must be deemed to amount to a waiver of the objection if the reception of the evidence cannot be objected to on appeal. See *Luchmeedhur Pattuck* v. *Rughoobhur Singh*, 24 W. R., 285; *Bommarauze Bahadur* v. *Rangasamy Mudaly*, 6 M. I. A., 232, and other cases cited, Ameer Ali's Evidence, pp. 41 and 42. See also Field on Evidence, p. 668.

Hudson *v.* **Bosdeo Bajpye**, I.L.R., 26 C., 109. It is to be regretted that the question which is the question of importance in the case has not been considered by the learned Judges who took part in it. A. sues B. and C. and obtains a decree against B. B. appeals against A.; and C. is not made a party to the appeal. The Courts have always held that under S. 559 the appellate court has the power to make C. a respondent even after the period of limitation for preferring the appeal has expired. But does the making of C. a party respondent enable the court to pass a decree in favor of A, the original respondent upon the record, as against the added respondent C. Such a power can only exist in case there is a memorandum of objections preferred by A. But under the Code of Civil Procedure as amended by Act VI of 1888, there is a provision authorizing one respondent to prefer a memorandum of objections against another. The matter was, perhaps, doubtful under the Code as it stood before. At all events the Madras High Court in *Timmayya Mada* v. *Lakshmana Bhakta*, I. L. R., 7 M., 215, differing from certain rulings of the Calcutta High Court in the Weekly Reporter, *Pitambur Pyne* v. *Toolse Dossee*, 7 W. R., 39; and *Goonomonee Dossia* v. *Parbutty Dossia*, 10 W. R., 326, held, that one respondent might prefer a memorandum of objections against another. But that view appears to us to be no longer tenable under the amended language of the Code which speaks of notice of the memorandum of objections by the respondent to be given to the appellant and not to the co-respondent. Even in the case of *Bhishanchurn Roy Chowdhry* v. *Jogendra Nath Roy*, I. L. R., 26 C., 114, the matter is not fully discussed with reference to the language of the Code.

Shyama Charan Mandal *v.* **Heras Mollah**, I. L. R., 26 C., 160. S. 92 of the Evidence Act and its provisoes are a difficult study; and the decisions upon them are not always intelligible or harmonious. Proviso 4 excludes evidence of a subsequent oral agreement where the contract is required by law to be in writing or has been registered. Evidence of conduct has been held admissible under this section to show that what is an apparent sale is a mortgage; and such evidence has been held

admissible on the ground that it is not evidence of an oral agreement. If this is a correct principle, there is no reason why it should not apply to other contracts and apparent sales. In *Mayandi Chetti* v. *Mrs. Oliver*, 8 M. L. J. R., p. 196, the Court was unable to hold that conduct was not oral agreement within the meaning of the proviso. We have no doubt the sounder view is that taken in the case under notice. But we have no difficulty in saying that the proviso requires to be re-drafted in a more intelligible form with reference to the decisions.

Sheodeni Tewari *v.* **Ram Saran Singh**, I. L. R., 26 C., 164. A mortgagee purchased the mortgage property in execution of a money-decree contrary to the provisions of S. 99 of the Transfer of Property Act. He sues for possession. S. 244, we should imagine, is no bar to the suit. The purchaser's right to possession is not a question relating to execution though the parties are parties to the suit. But we think if the sale was contrary to S. 99, the judgment-debtor should have objected to it under S. 244 and had the sale set aside. If the sale were not so set aside, the judgment-debtor is precluded by S. 244 from questioning it. The learned Judges who decided the case under notice have apparently overlooked this in refusing plaintiff possession; and we do not think there is any such unanimity in the decisions of the courts as to warrant the court in the conclusion arrived at.

Pardhan Bhukhan Lal *v.* **Narsing Dyal**, I. L. R., 25 C., 300. Enhanced interest from the date of default cannot be relieved against under S. 74 of the Contract Act. It is, of course, possible to relieve against a contract, the terms of which are unconscionable on equitable considerations. It has been settled law that prospective enhancement is not a penalty. It is, of course, possible that the enhancement may be evidence taken in conjunction with other circumstances of the bargain being such as to entitle the debtor to relief. We think the judgment of *Rampini*, J., accepting the summary of the law from Shephard and Conninghan's Contract Act lays down the law aright. It must be remembered, however, that the enhanced rate being of itself not sufficient to entitle the debtor to equitable relief, fraud or oppression, improper dealing with an ignorant person must be shown before relief can be obtained.

SUMMARY OF RECENT CASES.

Civil Procedure Code, Chapter XX—Insolvency—Holder of decree on mortgage not entered amongst the scheduled creditors—Decree-holder not debarred from executing his decree.

Sheoraj Singh *v.* Gauri Sahai.

Held that a judgment-creditor holding a decree for sale upon a mortgage against an insolvent judgment-debtor will not, by reason of his debt not having been scheduled in the insolvency proceedings, lose his right to execute his decree. *Haro Pria Dabia* v. *Shama Charan Sen* (I. L. R., 16 C., 592), and *Shridhar Narayan* v. *Atmaram Govind* (I. L. R., 7 B., 455), referred :—*Allahabad Weekly Notes for* 1899, *p.* 45.

Civil Procedure Code, S. 53—*Plaintiff—Amendment—Plaint not signed by plaintiff or by any one authorized by him in that behalf.*

Marghub Ahmad *v.* Nihal Ahmad.

Held, where a document which purported to be a plaint was found not to have been signed by the plaintiff or by any one duly authorized by him in that behalf, that it was not competent to a Court before which such document came in appeal, to allow the so-called plaintiff to sign or affix his mark to the said document, and thereby to convert it into a valid plaint. The document was *ab initio* invalid, and the only order possible in respect of it was an order of rejection. *Kateser Nath* v. *Aggyan* (Weekly Notes, 1894, page 95), followed. :—*Allahabad Weekly Notes for* 1899, *p.* 55.

Civil Procedure Code, s. 108—*Decree ex parte—Death of judgment-debtor—Application by legal representative to have the decree set aside.*

Janki Prasad *v.* Sukhrani.

Held that where a judgment-debtor, against whom a decree has been passed *ex parte* for default of appearance, dies, his legal representative is not competent to apply under S. 108 of the Code of Civil Procedure to have the *ex parte* decree set aside. :—*Allahabad Weekly Notes for* 1899, *p.* 58.

Rachappa Nilkanthappa *v.* Mangesh Mahadaji Sharaff.

Although, as a general rule, *lis pendens*, except in certain classes of suits, ends with the decree, yet where a plaintiff actively seeks to bring

the mortgaged property to sale in execution of his decree, he is entitled to be protected from the effects of any alienation by his judgment-debtor, and, in such a case, the execution proceedings revive or give continuance to the *lis pendens*.

The mere fact of obtaining a decree on an unregistered mortgage will not sweep away the rights of, and give priority over, intermediate mortgagees who hold registered deeds and are in possession and are not parties to the litigation which ended in the decree :—*Printed Judgments of the B. H. C. for* 1898, *p.* 386.

Section 4—*Easements Act* (*V of* 1882), *Section* 7, *explanation, illustration* (*h*)—*Water-course—Natural stream—Water-course not restricted to artificial channels—Obstruction to use of water.*

Narayan Hari Deval *v.* Keshav Shivram Deval.

When the water flows in a defined channel or course it fulfils the definition of "a natural stream" given in the explanation of Section 7 of the Easements Act (V of 1882), and the channel of such a stream would be a water-course.

The law as to riparian proprietors is the same in India as in England and is stated in illustration (*h*) of Section 7 of the Easements Act (V of 1882). Each proprietor has a right to a reasonable use of the water as it passes his land, but in the absence of some special custom or easement, he has no right to dam it back or exhaust it so as to deprive other riparian owners of like use :—*Printed Judgments of the B. H. C. for* 1898, *p.* 390.

Limitation Act XV of 1877, *Schedule* 2, *Article* 127, *applicability of, to Mahomedans—Mahomedans living joint as Hindus—Mahomedans adopting Hindu manners and customs.*

Sayadalli valad Kasimsha *v.* Aminibi kom Sayad Khadirsaheb.

Article 127 of the Second Schedule of the Limitation Act, XV of 1877 applies to Mahomedans who have so far adopted Hindu manners and customs as to live joint and to keep their property undivided :—*Printed Judgments of the B. H. C. for* 1898, *p.* 393.

Limitation—Sale in execution of decree—Formal possession given to purchaser—Suit by purchaser—Hindu Law—Undivided family—Attachment of member's share in execution—Sale after member's death—Right of survivorship—Purchaser's title.

Antaji Yeshwant Rajadhyaksh *v.* **Lakshmibai Kom Balaji.**

A suit by an auction-purchaser against the judgment-debtor, if brought more than 12 years after he took symbolical possession, would be time-barred.

The attachment of an undivided share of a member of a Hindu family, if levied during his lifetime, in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of the member's interest in the estate or a sale under the execution. The fact that the sale took place after the member's death would be immaterial, and a suit brought by the purchaser within 12 years of the sale would not be time-barred. *Mudho Parshad* v. *Meherban Singh* (I. L. R., 18 C., p. 157) referred to:—*Printed Judgments of the B. H. C.* 1898, *p.* 400.

Mahomedan Law—Gift—Donor and donee in joint possession.

Gahirmal Umaram *v.* **Maktambi kom Husein.**

Under Mahomedan Law if the donor and donee remain in joint possession of the property given, sufficient delivery of possession has not been made, except in the cases of gifts (*a*) from a wife to her husband and (*b*) from a father or other guardian to his ward:—*Printed Judgments of the B. H. C. for* 1898, *p.* 402.

Act to make better provision for the case of the estates of lunatic not subject to the jurisdiction of the Courts of Judicature (Act XXXV of 1858)—*Unsoundness of mind—Suit by a next friend—Next friend—Equity, principles of, to be observed and applied—Procedure—Practice.*

Pransukhram Dinanath *v.* **Bai Ladkor.**

Where a person of unsound mind, who is not adjudged to be so under Act XXXV of 1858 or any other law for the time being in force, is incapable of acting for himself he should be allowed to sue by a next friend on his behalf as regards that which is *primâ facie* for his benefit. The Court ought to be satisfied of the title of the next friend to intervene, and it ought to be satisfied that the person is of unsound mind and

that he stands in need of protection as regards his property, and it ought to be shown that it would be for his true interest that the Court should exercise its jurisdiction.

Held, also, that the principles of Equity as applied in the practice of the Courts of England should be observed in the Courts of this country in cases in which there was no law existent which laid down a different procedure :—1 *Bombay Law Reporter*, *p.* 88.

Hindu Law—Maintenance, right of—Daughter-in-law can claim maintenance from mother-in-law out of the self-acquired property of her father-in-law—Property, self-acquired or ancestral, distinction in.

Yamunabai kom Babaji Kavade *v.* **Manubai kom Tatya Kavade.**

The widow of a predeceased son, who lived in union with his father, has a legal right to claim maintenance from her mother-in-law when the latter succeeds as heir to her husband, who left only self-acquired property at the time of his death :—1 *Bombay Law Reporter*, *p.* 95.

Civil Procedure Code, *s.* 244—*Execution of decree—Jurisdiction of Court executing the decree.*

Liladhar *v.* **Chaterbhuj.**

Held, that when a decree for the sale of specific mortgaged property is being executed, a person who does not claim through the mortgagor cannot in execution contend that the mortgagor was not competent to make the mortgage, and that the decree was one which ought not to have been passed. *Maluji* v. *Fakir Chand* (I. L. R., 22 B., 225) ; *Seth Chand Mal* v. *Durga Dei* (I. L. R., 12 A., 313) ; *Sanwal Das* v. *Bismillah Begam* (I. L. R., 19 A., 480); and *Lochan Singh* v. *Sant Chandar Mukerji* (Weekly Notes, 1899, p. 24), referred to :—*Allahabad Weekly Notes for* 1899, *p.* 46.

Act No. I of 1872 (*Indian Evidence Act*), *s.* 115—*Admission—Estoppel—Admission of point of law no estoppel.*

Jagwant Singh *v.* **Silan Singh.**

An admission on a point of law is not an admission of a 'thing' so as to make the admission matter of estoppel within the meaning of S. 115 of the Evidence Act. *Jottendro Mohan Tagore* v. *Gnanendro Mohun*

Tagore (L. R., Sup., I. A., 47), and *Gopee Lal* v. *Mussamut Sree Chunlraolee Budhojee* (11 B. L. R., 391) referred to :—*Allahabad Weekly Notes for* 1899, *p.* 66.

Civil Procedure Code, s. 108—*Decree ex parte—Suit to set aside as fraudulently obtained a decree ex parte—Application to set aside ex parte decree.*

Dwarka Prasad *v.* **Lachhoman Das.**

An *ex parte* decree was passed against a defendant. The defendant—judgment-debtor—applied under S. 108 of the Code of Civil Procedure to have such *ex parte* decree set aside, but his application was dismissed as barred by limitation. *Held*, that the defendant was not thereafter precluded from bringing a suit to set aside the *ex parte* decree as having been obtained by fraud. *Pran Nath Roy* v. *Mohesh Chandra Moitra* (I. L. R., 24 C., 546) followed :—*Allahabad Weekly Notes for* 1899, *p.* 67.

Civil Procedure Code, S. 588 (25)—*Appeal from order—Remand—Appeal from order of remand* (*Civil Procedure Code*), *S.* 562.

Jhanday Lal *v.* **Sarman Lal.**

Held, that no appeal will lie from an order made under S. 562 of the Code of Civil Procedure in an appeal under S. 583 from an order under S. 485 of the Code. *Athura Nath Ghose* v. *Nobin Chandra Kundu Biswas* (I. L. R., 24 C., 774) followed :—*Allahabad Weekly Notes for* 1899, *p.* 68.

Act No. IV of 1882 (*Transfer of Property Act*), *s.* 90—*Balance "legally recoverable"—Limitation—Act No. XV of* 1877 (*Indian Limitation Act*), *sch. ii, art.* 116.

Badri Man *v.* **Raja Ram.**

Every suit on a mortgage containing an express or implied covenant to pay the mortgage-money otherwise than out of the mortgaged property must be regarded as impliedly, if not expressly, a suit claiming such relief, the point being that the plaintiff, instead of being obliged to include a prayer for such relief in the plaint, may wait until it appears that the sale-proceeds are insufficient, and then make the prayer in an application under S. 90 of the Transfer of Property Act. *Musaheb Zaman Khan* v. *Inayat-ullah* (I. L. R., 14 A., 513); *Bageshri Dyal* v.

Muhammad Naqi (I. L. R., 15 A., 331); *Hamid-ud-din* v. *Kedar Nath* (I. L. R., 20 A., 386); and *Chattar Mal.* v. *Thakuri* (Weekly Notes, 1898, p. 138) referred to;—*Allahabad Weekly Notss for* 1899, *p.* 22.

Land-holder and tenant—Trees—Property in trees growing on tenant's holding—Burden of proof—Civil Procedure Code, S. 561—*Appeal—Objections by respondents—Letters Patent, S.* 10.

Kausalia *v.* **Gulab Kunwar.**

Held, that the property in trees growing on a tenant's holding is, by the general law, vested in the zamindar, and a tenant is not entitled, in the absence of special custom, the burden of proving which is on him, to cut down and sell such trees. *Imdad Khan* v. *Bhagirath* (I. L. R., 10 A., 159); *Nafar Chandra Lal Chaudhuri* v. *Ram Lal Pal* (I. L. R., 22 C., 742); and *Ruttonjee Edulji Shet* v. *The Collector of Thanna* (11 M. I. A., 295), referred to.

Held, also, that S. 560 of the Code of Civil Procedure is not appliable to appeals under S. 10 of the Letters Patent:—*Allahabad Weekly Notes for* 1899, *p.* 72.

Criminal Procedure Code, S. 556—*Meaning of the expression "personally interested"—Magistrate initiating proceedings against an octroi moharrir on information by the Secretary of the Municipal Board.*

In the matter of the petition of Inayat Husain.

The words "try any case" in S. 556 of the Code of Criminal Procedure include the hearing of an appeal. *Nistarini Debi* v. *Ghose* (I. L. R., 23 C. 44), followed.

Where a Magistrate has in some extra magisterial capacity, for example, as Collector or as Chairman of a Municipal Board, initiated proceedings against an accused person, he will be debarred by S. 556 of the Code of Civil Procedure from trying the case. But if he has merely initiated proceedings under S. 190 of the Code in his magisterial capacity, S. 556 can have no application:—*Allahabad Weekly Notes for* 1899, *p.* 74.

Act No. XLV of 1860 (*Indian Penal Code*), *Ss.* 34, 397—*Dacoity—Commission of grievous hurt in the course of a dacoity —Persons liable under S.* 34, *liable also under S.* 397.

Queen-Empress *v.* **Mahabir Tiwari.**

Held, that the words "such offender" in S. 397 of the Indian Penal Code includes any person who, though he may not himself have caused the grievous hurt, is nevertheless liable for it by reason of S. 34 of the Code:—*Allahabad Weekly Notes for* 1899, *p.* 76.

Act No. XLV of 1860 (*Indian Penal Code*), *S.* 148—*Rioting armed with deadly weapons—Persons who are liable to be convicted under S.* 148.

Queen-Empress *v.* **Ram Saran Rai.**

Where a number of persons, some of whom had been armed with deadly weapons and others not, had been tried and convicted under S. 148 of the Indian Penal Code, it was *held* on appeal to the High Court that only those who were shown to have been armed could properly be convicted under S. 148:—*Allahabad Weekly Notes for* 1899, *p.* 77.

Hindu Law—Joint Hindu family—Liability of sons to pay debts incurred by father—Creditor's remedy against sons not barred by reason of his having sued the father separately—Mortgage—Act No. IV of 1882 (*Transfer of Property Act*), *S.* 85.

Dharam Singh *v.* **Angan Lal.**

Although a decree may have been obtained against the father of a joint Hindu family for a debt incurred by him, a subsequent suit is maintainable against the son in respect of the same debt for the enforcement of the son's liability for it, such debt being one which the son is legally bound to pay.

The creditor may in his original suit implead the son, but his omitting to do so will not deprive him of his subsequent remedy against the son.

There is no difference in principle as regards the subsequent remedy of the creditor against the son between the case of a debt secured by a mortgage and a simple money debt.

Lachmi Narayan v. *Kunji Lal* (I. L. R., 16 A., 449); *Balmakund* v. *Sangari* (I. L. R., 19 A., 379); *Bhawani Prasad* v. *Kallu* (I. L. R., 17 A., 537); *Ramasami Nadan* v. *Ulaganatha Goundan* (I. L. R., 22 M., 49); *Arabudra* v. *Dora Sami* (I. L. R., 11 M., 413); and *Nanomi Babuasin* v. *Modhun Mohun* (I. L. R., 13 C., 21), referred to.

The obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father, and the creditor's cause of action is not a single cause of action which is exhausted upon a decree being obtained against one of them only. *Hemendro Coomar Mullick* v. *Rajendro Lall Moonshee* (I. L. R., 3 C., 353); *Dhumput Sing* v. *Sham Soonder Mitter* (I. L. R., 5 C., 292); and *Hoare* v. *Niblett* (L. R., 1891, 1 Q. B., 781), referred to:—*Allahabad Weekly Notes for* 1899, *p.* 78.

Assignment of mortgage to one surety—Giving time to principal—Suit for contribution against a co-surety.

Greenwood *v.* **Francis** [1899], 1 Q. B. 312 C. A.

Three persons, directors of a company, jointly and severally guaranteed re-payment of a sum of money advanced to the company upon a mortgage-deed and it was expressly agreed between them that although as between the company and the directors, the latter were to be simply sureties, yet as regards the creditors they were to be principal debtors and should not be exonerated by the creditors giving time to the principal debtor, or by any other forbearance, act, or omission of the creditors towards the debtor. The plaintiffs, two of the sureties, paid the money due on demand made by the creditor and obtained an assignment of the mortgage. They now brought this suit against the co-surety for the recovery of one-third of the amount they paid to the creditor. The question was whether the co-surety was not exonerated from liability to pay contribution, by reason of the fact that the assignees of the mortgage had given time to the company that had purchased the good will, premises and stock-in-trade of the debtor company. It was held by the Court of Appeal (*A. L. Smith*, *Rigby*, and *Collins*, L.JJ.) that the principle of law whereby a surety was discharged by the principal creditor giving time to the principal debtor should not be extended to the case of a surety sued for contribution by a co-surety who had given time to the principal debtor, and that even supposing that the plaintiffs in the case were not simply sureties who had paid the creditor but had come to occupy the position of principal creditors by

reason of the assignment, the principal creditors themselves having had express power to give time to the principal debtor, their assignees had lost no rights by giving time to the debtor.

Bankruptcy—Proof of creditors—Claim of a dissolved Corporation—Right of Crown—Bone vacantia.

In re **Higginson and Dean** [1899], 1 Q. B. 325.

Where a trading firm became bankrupt and a Corporation proved in the bankruptcy and after the dissolution of this Corporation the Official Assignee discovered that the bankrupt firm had certain railway shares and recovered the value of the same, a question was raised as to whether the Crown had the right to stand in the place of the dissolved Corporation and receive the dividend to which the Corporation would, but for its dissolution, have been entitled. It was contended by the other creditors, that with the dissolution of the Corporation the debt ceased to exist, that, therefore, the fund should be distributed among the other creditors, and that even if the debt did not cease to exist, the money due to the dissolved Corporation should be distributed among the other creditors as unclaimed dividend.

It was decided by *Wright*, J., that there was little or no authority for the position that the debt ceased to exist on the dissolution of the Corporation, that, therefore, the Crown was entitled to the dividend due to the dissolved Corporation as *bona vacantia;* that even supposing that the debt would cease to exist on dissolution, the debt in the present instance had ceased to be a simple debt and had passed to the stage of equitable execution and the equitable interest so created passed to the Crown as *bona vacantia;* (or putting the same thing in another form) that the assignees in bankruptcy held the shares in trust to the bank and the other creditors, that on the dissolution of the Corporation their title as trustees did not cease to exist as it did not depend upon the continued existence of any particular debt or any particular creditor and that the Crown was entitled to step into the shoes of any *cestui que trust* who might cease to exist; and that either the Crown or the creditors were entitled to claim, and in either case the dividend cannot be said to be unclaimed.

Principal and Agent—Contract to be binding on the certificate of Agent—Bribe accepted by Agent—Certificate, invalidity of —Avoidance of contract.

Shipway *v.* **Broadwood** [1899], 1 Q. B. 369 C. A.

The defendant agreed to purchase of the plaintiff, a horse-dealer, a pair of horses, if a veterinary surgeon certified them as sound, and deputed the surgeon to examine the horses for him. The surgeon having certified, the defendant took delivery of the horses and sent a cheque for the price. Soon after finding the horses to be unsound, he returned the horses and stopped the cheque. An action was brought upon the cheque and it was found that the surgeon had accepted money from the plaintiff on a promise to have the horses sold for him. It was held by the Court of Appeal (*A. L. Smith*, *Chitty*, and *Collins*, L.JJ.) in confirmation of the decision of *Day*, J., that the money paid to the surgeon was really a bribe to induce him to certify the horses as sound, that it was immaterial to inquire to what extent the bribe or the offer of it influenced the person to whom it was given or offered, that the certificate was invalid and that the plaintiff could not recover upon a contract which depended upon the validity of the certificate.

Bond—Condition—Breach of Injunction—List of acts prohibited—Liquidated damages—Order XIV Rules.

Strickland *v.* **Williams** [1899], 1 Q. B., 382.

An injunction had been obtained in the High Court, to restrain the defendant from trespassing upon the land of the plaintiff; and for breach of this injunction the defendant was lodged in gaol. The defendant while in gaol executed a bond for £100 to the plaintiff. The condition in the bond ran thus: "If the said . . . . Williams (defendant) shall from time to time or at all times hereafter (in obedience to a perpetual injunction granted by the High Court of Justice . . . .) refrain from trespassing upon . . . . Strickland's land . . . . or garden . . . . or walls, gates or fences thereof or inclosing the same and from pulling down or removing or otherwise injuring the same or any part thereof . . . . then the above written bond or obligation shall be void". On a subsequent breach of the injunction, this suit was brought to recover the money upon the bond. The Master having allowed the plaintiff to enter judgment for £100 under Order XIV, it was contended that various prohibited acts having been mentioned in the bond, the suit fell within the scope of 8 and 9 Will. III., C. 11, and the question of damages was

one for jury and ought to be assessed on the breaches assigned and that the sum mentioned in the bond being a penalty judgment could not be entered under Order XIV.

The Court of Appeal (*A. L. Smith*, *Rigby*, and *Collins*, L.JJ.) held that the bond not being one for non-performance of a covenant, the suit on the bond did not come within the scope of the statute of Will. III, and that though various acts were prohibited, the payment of money being really conditioned on one event, that is, disobedience to the injunction, was really in the nature of liquidated damages and therefore judgment was rightly allowed to be entered under Order XIV.

Action for malicious prosecution against a Corporation—Liability of a Corporation.

Cornford *v.* **Carlton Bank, Ld.** [1899], I Q. B., 392.

In the eye of the Law, a Corporation is capable of malice and consequently an action for malicious prosecution will lie against a corporation.

Edwards v. *Midland Ry. Co.* [1880], 6 Q. B. D., 287, followed.

The dicta of Alderson, B., in Stevens v. *Midland Counties Railway*, 10 Ex., 352 *and of Lord Bramwell* in *Abrath* v. *North Eastern Railway Co.*, 11 Ap. Cas. 247, dissented from.

Mortgage—Notice—Advances after notice—Subsequent Mortgage—Trust over on alienation—Words of Futurity—Retrospective operation.

West *v.* **Williams.** [1899], 1 Ch. 132, C. A.

The facts of this case are shortly as follows: On the 24th of December 1895, the defendant, Walter Williams, borrowed £600 of the plaintiff and executed a mortgage of his life-interest under the will of his father, also a policy of insurance upon his own life. This mortgage-deed contained a covenant that until the 24th December 1896, or until the said Williams during the continuance of the mortgage should charge, assign or incumber the estate, notice of the mortgage should not be given to the trustees of the will. On the same date, another mortgage was executed to one Temple to secure an advance of £150, but this mortgage was made expressly subject to the plaintiff's mortgage. On the 2nd of April 1896 the defendant executed a further mortgage of the

same estate to his uncles to secure an advance of £2,297 immediately made and also the further advances of £200 per annum agreed to be made for five years from the 15th February 1896. As a part of this transaction and in consideration of the aforesaid annual payment of £200 for 5 years the defendant made a settlement of his life-estate by which he assigned it to defendants, Taylor and Miere, to be held in trust for himself for life or until he should assign charge or incumber. . . . . and after determination of the trust during his life, the trustees might in their discretion apply the income to the maintenance of the settlor, his wife, children, or remoter issue or his sister, her children or remoter issue. On the 7th July 1896, notice of this mortgage and settlement was given to the trustees of the will and at the time when such notice was given none of the parties to the last mentioned transactions had any notice of the prior mortgages. In fact, notice of the plaintiff's mortgage was given to the trustees of the will on the 8th June 1897, and on the 15th February, 1897, he wrote to the uncles offering to redeem their mortgage, but they refused to be redeemed. This action was then brought by the plaintiff to enforce his security by foreclosure or sale; for a declaration of the priority of the several mortgages; for redemption if necessary; and for consequential relief. The plaintiff admitted the priority of the mortgage to the uncles as regards all advances made by them before the 15th February 1897 when they for the first time became aware of the plaintiff's mortgage.

Kekewich, J., decided that the doctrine of *Hopkinson* v. *Rolt* was not applicable to the case since there was a covenant to make further advances and that therefore the uncles were entitled to priority not only in respect of advances made before notice, but also in respect of subsequent advances; that the settlement had priority over the mortgage, and that notwithstanding that the clause relating to the determination of the trust was grammatically applicable only to future alienations, yet by the ruling in *Metcalfe* v. *Metcalfe*, [1891] 3 ch. 1, the plaintiff's mortgage had the effect of determining the trust in favour of the settlor and that the discretionary trust had come into operation.

The Court of Appeal (*Lindley*, M. R., *Chitty* and *Williams*, *L.J.J.*) in reversal of the decision of *Kekewich*, J., decided as follows:—

1. A covenant to make future advances does not exclude the doctrine of *Hopkinson* v. *Rolt*, because the mortgagor is free to deal with the equity of redemption, notwithstanding this covenant and because on the discovery of a second mortgage in favour of somebody else the uncles could have

lawfully refused to make any further advances. Therefore, in spite of the covenant to make further advances, a prior mortgagee cannot as against a subsequent incumbrancer tack to his mortgage-debt money advanced to the mortgagor after notice of the second mortgage.

2. The clause in the settlement which provides for the subsistence of the trust in favour of the settlor "until he shall assign charge or incumber," refers only to future alienations and not to past ones. The plaintiff's mortgage, therefore, does not determine the trust in favour of the settlor.

The plaintiff's mortgage has priority over the settlement though notice of the settlement was given earlier, the reason being that, though the settlement was made in consideration of the annual payment of £200 by the uncles, the uncles themselves took no interest under it and the nephew in making a voluntary settlement in favour of persons who were *bonâ fide* purchasers for consideration, could not defeat a mortgage which he himself *had created*.

Chose in Action—Assignment—Priority—Notice to all trustees existing at that date—New trustees after death or re-treatment of them all.

In re **Wadsdate Britton** *v.* **Partridge**, [1899] 1 Ch., 163.

Where an assignee of an interest in a trust fund has perfected his title by notice to the trustees for the time being, he does not lose his right to priority over a subsequent assignee by reason of the fact that the prior assignee had given no notice to the new trustees appointed on death or retirement of the old trustees, while the subsequent assignee had so given notice. The decisions in *Timson* v. *Ramsbottam* [1837] 2 Keen 35 and *In re* Hall, [1880], 7, L. R., Ir. 180, distinguished on the ground that there the prior assignee had given notice to one only of several trustees and was postponed to a subsequent assignee who took his assignment after the death of that trustee and gave notice of it to the other trustees in existence at the *time*.

Mortgage of real estate and life policy—Mortgagee taking possession of real estate—Redemption of real estate barred by Real Property—Limitation Act, 1874, S. 7.—Right to redeem policy—Analogy of the Statute.

Charter *v.* **Watson,** [1899], 1., Ch., 175.

Where real estate and a policy of insurance had been mortgaged to secure a debt and the mortgage deed provided for the re-conveyance of the whole security on payment of the whole debt, it was held that there was one indivisible debt and one indivisible security, and that when the right to demand a re-conveyance of the real estate was lost under S. 7 of the Real Property Limitation Act, 1874, by reason of the continued possession of the mortgagee for more than 12 years without any acknowledgment of the mortgagor's title, the right to redeem and have a re-conveyance of the policy of insurance was also lost not on the analogy of the Statute, but because the unity of the security being granted it was impossible to separate the claim in respect of the policy from the claim in respect of the real estate as to which S. 7 of the Act of 1874 operated as a bar.

JOTTINGS AND CUTTINGS.

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

The Indian Stamp Laws, by Mr. Desai Narotam, published by *The Talva Vivechaka Press, Bombay.*—Price Rs. 5-8.

Common Form Draftsman, by Wild and Cooper, published by *Messrs. Butterworth and Co., 7 Fleet Street, London, E. C.*—Price S. 7/6 net.

The Bombay Law Reporter for April (*in exchange*).
The Albany Law Journal for April (*in exchange*).
The Calcutta Weekly Notes for April (*in exchange*).
The Allahabad Weekly Notes for April (*in exchange*).
The Green Bag for April (*in exchange*).
The Canadian Law Times for April (*in exchange*).
The Canada Law Journal for April (*in exchange*).
The Harvard Law Review for April (*in exchange*).
The Ceylon Law Review, Vol. I, No. 1 (*in exchange*).

***

The Glass Eye Case:—Judge Davis, at Cincinnati, on the 25th, decided the divorce case of Katherine Kraus against Charles Kraus, or the "glass-eye case," as it has come to be known, in favor of the wife.

The court holds that it is legal for women to attract mankind with "devices and attachments used to improve the work of nature," as the following excerpts from the decision will show: "It is not necessary for a woman, during courtship, to inform her intended husband of any device or attachment used to improve the work of nature in the construction of her face, form or figure. If a glass eye, purposely concealed before marriage, be fraudulent representation and a ground for divorce, why are not false teeth, false hair, or any other false article peculiar to the fair sex also be a ground for divorce?"—*Chicago Law Journal.*

***

Nebraska Legislation:—Nebraska has enacted that no female shall be employed in any manufacturing or mercantile establishment longer than ten hours per day; and that no child under the age of ten shall be employed in any such establishment, and no child under the age of fourteen except during the school vacation. It has also voted to create a commission to examine and license barbers, who must be above the age of eighteen, of good moral character, free from contagious disease, and with a record of two years' apprenticeship or one year in an approved school for barbers. All this will cost each barber five dollars, and his certificate may be evoked if he should be convicted of crime, become a drunkard, show gross incompetency, or become afflicted with a contagious disease:—*The Albany Law Journal.*

***

Legal Laugh:—An English pleader before Lord Ellenborough was inclined to be flowery. "My lord," he began, "it is written in the Book of Nature—" "What book?" inquired his lordship, taking up a pen. "The Book of Nature." "Name the page," said his lordship, dipping his pen in the ink to note it down:—*The Albany Law Journal.*

***

Barker, J.] RE JEWETT ARBITRATION. [Dec. 12, 1898.

Arbitrator's fees.

A man who chooses to act as an arbitrator cannot fix his fees upon the basis of the value of his services in his own special business for the time given to the arbitration. He need not act as an arbitrator unless he chooses, or he may stipulate as a condition to his consenting to act that his remuneration shall be at a fixed rate, but in the absence of that, if he chooses to act as an arbitrator, he must be contented with an arbitrator's pay. What that pay is depends upon the particular circum-

stances of each case. The expert, the professional man, the lawyer, surgeon or engineer as the case may be, who has been selected as arbitrator because the matters in controversy were such as his special training and education enabled him the more intelligently to determine, cannot be rated the same as one who has no such exceptional qualification. It is obvious also that in determining as to the reasonableness of the compensation regard must be had to the nature and importance of the matter in dispute, the amount of money involved, and the time necessarily occupied in the work.—*Canada Law Journal.*

***

The following are taken from an article "*Echoes of the Four Courts*," No. 4, that appeared in the April issue of the *Lawyer and Magistrate*:—

In a sheep-stealing case tried before a judge, the offence was plainly proved, but a number of witnesses were called to depose to the good character of the accused. He summed up in a single sentence.

"In this case, gentlemen, the result of the evidence appears to be that the sheep were stolen by a man of most excellent character."

***

When the Judge of whom the writer is speaking was an advocate, a somewhat irritable judge on one occasion cut him short in the middle of a law argument, thickly interwoven with flowers of speech, by the impatient exclamation—"I have done my best, but I fail to understand a single word of your notice of motion."

"Not a single word, my lord; that is really most lamentable. Will you be pleased to permit me to the extent of my limited ability to endeavour to explain?"

He read the notice over slowly, and with laborious expression.

"Sir - Take notice that on the 20th day of May, or on the first opportunity afterwards, counsel on behalf of the plaintiff in this action will apply to this honourable Court for an order that," etc., etc.

"Now, my lord, to proceed with my explanation. '*Sir.*' That, my lord, is the mode of monosyllabic address adopted by the solicitor for the plaintiff to the solicitor for the other side. It is curt, my lord, as the form provides, and indicates that the parties are now at arm's length; but not necessarily discourteous nor precluding the possibility of friendly private relations between the solicitors. '*Take notice.*' This, your lordship will observe, is in the nature of a warning. The object is that

the solicitor shall be prepared for the application, and, above all, that he shall have an opportunity to instruct and fee counsel to resist the motion if he considers it possible or advisable, or otherwise to appear on consent. '*On the 20th day of May*,' a day now passed, my lord, and, therefore unavailable for the making of this motion; '*or the first opportunity afterwards*;' that, my lord, is the present occasion. *Counsel on behalf of the plaintiff*.' That is the humble individual who appears before your lordship. '*Shall apply to this honourable Court*.' That is the learned and courteous judge whom I have the honour to address. '*For an order*.' That, my lord—

But the judge could not refrain any longer. "Go on with your motion," he said, joining in the general laughter, "I have learned my lesson."

Notes of American Cases.

A condition on the delivery of a note to the payee or his agent, that it shall take effect only when signed by another person, is held, in *Hurt* v. *Ford* (Mo.) 41 L. R. A. 823, in-effectual, but the delivery is deemed absolute.

***

Mere advertisers who place advertisements upon a signboard set up upon the roof of a building, by virtue of what is called a lease of part of the roof, but which does not give them possession of any part of the building, although they are required to keep in repair the portion of roof which they use, are held, in *Reynolds* v. *Van Bouren* (N. Y.) 42 L. R. A. 129, to be mere licensees who are not liable to a stranger for the falling of the signboard from the building during a high wind.

***

A judge who owns real estate in a city, that is taxable for the city's bonded indebtedness, is held, in *Meyer* v. *San Diego* (Cal.) 41 L. R. A. 762, to be disqualified to sit on a contest of the validity of a contract which will involve the creatain of a bonded debt of the city to a large amount, necessitating a special tax for forty years.

***

A grant of the exclusive privilege of entering station grounds to solicit passengers or baggage is held valid in *New York, N. H. & H. R. Co.* v. *Scovil* (Conn.) 42 L. R. A. 157, if its terms are not inconsistent

with the reasonable accommodation of the public. But the authorities on this subject are in conflict, as appears from the note to *Cole* v. *Rowen* (Mich.) 13 L. R. A. 848.

***

A provision that a life insurance policy shall not take effect until the payment of the first premium is held, in *Stewart* v. *Union Mut. L. Ins. Co.* (N. Y.) 42 L. R. A. 147, not to defeat the insurance, where a note for the premium was accepted and, at its maturity, a check taken, with the understanding that it would be satisfactory if it was paid the next week, although the insured died before the check was paid.

***

Condemnation of leased premises, without actual eviction, is held, in *Rhode Island Hospital Trust Co.* v. *Hayden* (R. I.) 42 L. R. A. 107, insufficient to relieve the tenant from liability.

***

Negligence in storing oil upon a station platform in violation of statue is held, in *Stone* v. *Boston & A. R. Co.* (Mass.) 41 L. R. A. 794, not to be the proximate cause of damage by fire caused by the dropping of match by a person delivering goods at the depôt, and who is not employed by the carrier.

***

The discretion of a receiver in respect to details in the management of a street railroad is held, in *Morley* v. *Snow* (Mich.) 41 L. R. A. 817, to extent to the adoption of metal safes for receiving fares into which the passengers are required to put the fare, while the conductor presses a button which rings a bell and registers the fare.

***

The offer of a reward for "the arrest and conviction" of an unknown perpetrator of a crime, is construed, in *Haskell* v. *Davidson* (Me.) 42 L. R. A. 155, so as to entitle a person to the reward when he obtains the facts to secure the arrest and conviction, without personally making the arrest.

***

The intention to make no provision for a child already born is held, in *Carpenter* v. *Snow* (Mich.) 41 L. R. A. 820, not necessary to be shown by the will itself, under a statute giving a child a right to share as in case of intestacy, if it appears that the omission was not intentional

But as to a child afterwards born the statute provides that such intention must "be apparent from the will," and this is not shown by merely giving all testator's property to his wife.

***

The novel question whether a bank holding certificates of deposit issued by another bank is a depositor is decided in *State Savings Bank* v. *Foster* (Mich.) 42 L. R. A. 404, holding that, when such certificate does not represent any actual deposit, but only a credit on the books, against which checks or drafts may be drawn, the holder is not a depositor in the other bank within the meaning of a statute creating an individual liability of stockholders to the depositors.

***

Starting a train without waiting for a passenger to reach a seat after entering the vehicle is held, in *Louisville & N. R. Co. Hale* (Ky). 42 L. R. A. 293, to give no cause of action to a passenger who is injured thereby, unless there was some other reason for waiting than the fact that the passenger was a fleshy woman encumbered with a number of children,—at least when she had an escort with her. With this case is a note reviewing the other authorities on starting a car before a passenger obtains a seat.

***

A promissory note payable six months after date if the promisor is elected to a certain office is held, in *Specht* v. *Beindorff* (Neb.) 42 L. R. A. 429, to be lacking in the certainty necessary for a negotiable instrument, and also void on grounds of public policy as a wager on the result of the election.

***

A proprietor of a public resort who employed an independent contractor to make a balloon ascension to attract visitors is held, in *Smith* v. *Benick* (Md.) 42 L. R. A. 277, not to be liable for an injury to a visitor by a pole which fell because of the negligence of the balloonist while he was endeavoring to raise the pole for use in inflating the balloon.

***

The authorities which deny a right of action for mere fright or nervous shock are reinforced by *Braun* v. *Craven* (I. L. L.) 42 L. R. A. 199, which was a case of fright resulting in St. Vitus' dance, caused by violent conduct of a landlord suddenly appearing at the door of a room in which a woman was packing goods for moving.

***

Marriage on the high seas, where there is no law regulating the matter, entered into by persons who went there with the avowed purpose of evading the laws of their residence, is held, in *Norman* v. *Norman* (Cal.) 42 L. R. A. 343 to be invalid.

***

The right of a wife to an injunction against her husband's entering her dwelling house and eating and sleeping there is granted in *Lyon* v. *Lyon* (Ga.) 42 L. R. A. 194, in a case in which she had a pending suit for divorce from him on the ground of cruelty and habitual intoxication.

***

Death resulting from hernia which was caused by accident is held, in *Atlanta Accident Association* v. *Alexander* (Ga.) 42 L. R. A. 188, to give a right of action on a policy against accidents, although there was a provision against liability for injuries or death resulting from hernia or other disease.

***

A contract by an insurance agent to keep a person's property insured in his company is held, in *Ramspeck* v. *Patillo* (Ga.) 42 L. R. A. 197, to be invalid unless the company consents, because the agent cannot act in a double capacity, and this contract would require him to perform inconsistent duties and require the consent of both parties.

***

A provision that a life insurance policy shall be incontestable after one year is held, in *Clement* v. *New York Life Ins. Co.* (Tenn.) 42 L. R. A. 247, to be neither unreasonable nor contrary to public policy, but, while it is held applicable to fraud in procuring the policy, it is held inapplicable to the defense that the plaintiffs had procured the issue of the policy and its transfer to them as a speculation, and that it was therefore a gambling or wagering contract. With this case is an extensive note on incontestable life policies.

***

A policy omitting the usual suicide clause, and containing an "absolutely incontestable" clause is held, in *Patterson* v. *Natural Premium Mut. L. Ins. Co.* (Wis.) 42 L. R. A. 253, to cover a case of death by suicide.

***

A stipulation that a life policy is incontestable after three years from date and the payment of three full yearly premiums is held, in *Massachusetts Ben. L. Asso.* v. *Robinson* (Ga.) 42 L. R. A. 261, to be valid and applicable to a defense based upon misrepresentations or warranties, whether fraudulent or otherwise.

***

A municipal corporation enforcing a valid ordinance for vaccination is held, in *Wyatt* v. *Rome* (Ga.) 42 L. R. A. 180, to be exercising a governmental function, and therefore not liable for any damages caused by impure vaccine matter.

***

An ordinance forbidding the business of collecting, storing, and dealing in rags within thickly settled portions of a city is held, in *Com.* v. *Hubley* (Mass.) 42 L. R. A. 403, to be not unreasonable or in excess of the police power of the city.

***

Failure to fence or otherwise guard an open excavation or pond is held, in *Stendal* v. *Boyd* (Minn.) 42 L. R. A. 288, to give no right of action against the landowner for injury to children coming thereon without right or invitation, although they are attracted by the excavation or pond.

***

A theosophical corporation is held, in *New England Theosophical Corp.* v. *Boston* (Mass.) 42 L. R. A. 281, to be neither a scientific, benevolent, nor charitable institution, within the meaning of a statute respecting taxation.

***

Patent rights granted by the United States for an invention are held, in *People ex rel. Edison Elec. Illum. Board of Assessors* (N. Y.) 42 L. R. A. 290, to be exempt from the taxing power of a state.

***

A view by the jury of the premises where a crime was committed is held, in *Peopel* v. *Thorn* (N. Y.) 42 L. R. A. 368, to constitute no part of the trail, nor a taking of evidence; and therefore it is held lawful to permit the jury to make such view in the absence of the accused,—at least when he waives his right to be present. With this case is a very

extensive note marshalling the authorities on the subject of view by jury, and showing that there are several different theories entertained by the courts.

***

The right of a political convention to delegate its powor to a committee for the nomination of candidates is sustained in *White* v. *Sanderson* (Minn.) 42 L. R. A. 231, and the certificates of nominations are held properly executed by the chairman and secretary of the committee.

***

A conveyance bound by a river is held, in *Goff* v. *Cougle* (Mich.) 42 L. R. A. 161, to give title to the middle of the main channel, so as to include islands lying between that and the shore, in the absence of anything to show that the islands belong to the government. With this case is a note on the subject of title to land under water.

***

An unmeandered river of sufficient capacity to float logs, and down which logs are driven from time to time, is held, in *Willow River Club* v. *Wade* (Wis.) 42 L. R. A. 305, to be a public navigable streem. With this case is an extensive note on the question what waters are navigable.

REVIEWS.

Common Form Draftsman, by Wild and Cooper, published by *Messrs. Butterworth & Co., 7 Fleet Street, E. C., London* :—Price S. 7/6 net.

We have received from that enterprising firm of Law Publishers—Butterworth & Co.—a copy of a new book entitled "The Common Form Draftsman." The forms contained in the book must be of great use in the every-day practice of a solicitor. We noticed sometime ago a book published by the same firm entitled "Kelly's Draftsman" containing numerous forms of conveyancing in a handy volume. The forms in this book, which relate to the practice of the Courts, may be regarded as a companion volume. The book cannot fail to be of use even in India where the practice in the Original Side of the High Court is modelled very much on that of the Supreme Court in England.

The Law of Partnership, by Arthur Underhill, M.A., LL.D., published by *Messrs. Butterworth & Co., 7 Fleet Street, E. C., London.*

We acknowledge with thanks the receipt of a small book on the Law of Partnership containing six lectures by Dr. Underhill issued by Butterworth & Co. These lectures contain the substance of the Law of Partnership elaborately treated in the well-known treatise on the subject by the present Master of the Rolls. Dr. Underhill has the reputation of being a good analytical lawyer, and his statement of the law in the shape of propositions accompanied by illustrations in the department of Torts and Trusts is highly prized in India. We welcome his lectures on the subject of Partnership—a department of law which is becoming every day of increasing importance in consequence of the great development of partnerships. We commend the book to all students of law and to all others who aspire to a sound knowledge of the principles of the subject.

The Yearly Abridgment of Reports, by Murray, published by *Messrs. Butterworth & Co., 7 Fleet Street, E. C., London*:—Price S. 12/6.

The yearly abridgment of reports, published by Messrs. Butterworth & Co., is a very useful publication. It must not be confounded with the annual index of the Law Reports, for it contains a full analysis of the cases alphabetically arranged together with an index of the subject-matter. There is also an alphabetical list of defendants which must be a valuable aid to the hunting-up of references.

Quarterly Advance Sheets of the General Digest, American and English, published by the *Lawyers' Co-operative Publishing Company, Rochester, New York*:—Price $1.

We have received the Quarterly Advance Sheets of the General Digest, American and English, No. 10. We have referred to a previous number and expressed our high admiration of the manner in which the work is done. We await the arrival of the permanent volumes with interest, and we venture to express the hope that they would prove a valuable addition to every legal library.

The Indian Stamp Laws, by Mr. Desai Narotam, published by *The Tatva Vivechaka Press, Bombay* :—Price Rs. 5-8.

We have much pleasure in introducing to the public this book entitled "The Indian Stamp Laws," by Mr. Desai Narotam. We commend the enterprise of the author in issuing this book so soon after the new Stamp Act has become law. Under the Act of 1899 he has pointed out the differences between that Act and Act I of 1879. Notes of cases are appended to the sections of the repealed Act which is printed *in extenso*. We think this arrangement is rather inconvenient. We suppose the author's excuse is that the notes had been printed before the passing of the new Act. The book cannot fail to be useful to the profession and to the public generally.