A HANDBOOK

OF

INDIAN LAW

BY

A BARRISTER-AT-LAW AND ADVOCATE OF THE HIGH COURT AT CALCUTTA.

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PREFACE.

THIS handbook is intended primarily for the use of the non-legal public and for students. The object of its author has been to present, in as concise and popular form as the nature of the subject admits, an abridgment of the law, criminal and civil (excluding the personal law of Hindus and Mahommedans) generally in force throughout British India. The Acts of the Provincial Governments are not dealt with. The reader is on this point referred to the Introduction in which is given a short historical account of Legislation and Courts of Law in British India from the time of the East India Company until the present day.

Every endeavour has been made to give an intelligible as well as an accurate presentment of the subject. All amendments of the law made up to date have been duly noted. The authorities for every statement have been given, the cases being cited in the usual manner.

Use has been made, in dealing with the Law of Torts (Civil Wrongs), of the Draft Indian Civil Wrongs Bill prepared by Sir Frederick Pollock under the instructions of the Government of India, and provisionally completed in 1886.* This Bill has not yet become law, the Government of India not having yet finally decided whether it is desirable to codify the law on the subject at present. For general and practical purposes, however, the provisions of this Bill, as given in this handbook, may be taken to contain a condensed and readily intelligible statement of the Law of Torts

* See Pollock on Torts, 2nd Ed., 1890, p. 517.

as at present administered by the Courts in British India. References have been given to the cases (English and Indian) which are the authorities for the statement of the law contained in the Bill.

In order to facilitate a more ready comprehension of the text, in particular that of the Title "*Action and Actionable Claim*," the author has added in the Appendix forms, amongst others, of plaint, concise statement, written statement and memorandum of appeal.

During the progress of this book through the press, the new Land Acquisition Act (I of 1894) was published. The main feature of the new Act is the procedure substituted for that which obtained under Act X of 1870 in the decision of objections to the Collector's award. Under the last mentioned Act the Collector was, in certain events, bound to refer the matter to Court, which then proceeded to determine it with the aid of Assessors. Under the new Act the Collector is bound to make a reference only on being required to do so by a person interested who has not accepted his award. The Civil Court will then determine the questions raised by the reference without the aid of Assessors.

An abridgment of this Act, which came into force on the 1st of March last, is given in the Appendix, to which reference should be made when reading the Title "*Land*" at page 363 of this handbook.

April 1894.

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ADDENDA.

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4 line 15: *add* Act VII of 1892 empowers the Local Government to establish at Madras a "City Civil Court" with jurisdiction to try civil suits (with certain exceptions) not exceeding 2,500 rupees in value.

5 ,, 19: *add* See Act VIII of 1887 (abolishing Military Courts of Requests) repealed by Act XII of 1891

89 ,, 8 from bottom: *add* Act I of 1893 extends the provisions of Act XVIII of 1891 to the Books of Post Office Savings Banks and Money Order Offices.

119 ,, 3: *after* inland navigation, *add* See Acts VI of 1884 and XIII of 1895 (Inland Steam Vessels).

123 ,, 10: *add* "*Semble*—A bill of lading which does not contain some such words as 'to order' or 'to order or assigns,' or which is indorsed in full but without such words, is not a negotiable instrument" (L. R., 5 P. C., 260: Scrutton's Charter Parties and Bills of Lading, p. 115).

128 last line but one: *add* See Act XII of 1885 (Sea Passengers).

130 "*Charities*," *add* "See Act VI of 1890 (Charitable Endowments). This Act provides for the vesting and administration of property held in trust for charitable purposes: it extends to the whole of British India inclusive of Upper Burma and British Baluchistan. 'Charitable purpose' does not include a purpose which relates exclusively to religious teaching or worship (ib., ss. 1, 2).

257 line 7: *add* The Act however allows examination and repair of machinery on Sundays.

259 "*Ferry*," *add* See also following Acts II of 1873, XVI of 1874 (Burma Ferries), and Acts XVII of 1878, III of 1886, and XII of 1891 (Northern India Ferries: Punjab, N.-W. P., Oudh, Central Provinces, Assam, Ajmer, Merwara).

259 references 1) and 2): *add* L. R. XIX Ind. App. 48; (rights of co-owners *v.* p. 57, ib. *et seq.*)

267 line 17: *add* Act II of 1867 (B.C.) has been repealed so far as it applies to K, Assam by Act XII of 1891.

290 reference 1): *add* Act XXIV of 1886 extending the Act to Bombay has S been repealed by Act XII of 1891.

326 "*Insurance*," *add* See cl. 7, Act XII of 1885 (Sea Passengers).

301 reference 3): *add* See also s. 5A (added by Act VI of 1892).

19 12 lines from bottom: *add* Section 10, Act XV of 1872, which prescribes the time for solemnizing marriage does not apply to "a clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies and customs of the Church of Scotland" (s. 2, Act II of 1891).

439 reference 4) *add* See amending Act 44 and 45 Vic., cap. 57, s. 51.

573 "*Small Cause Courts*," *add* See Act VII of 1892 (empowering the Local Government to establish at Madras a "City Civil Court").

CORRIGENDA.

Page

22 reference : *for* 9) ib. 1) s. 202, ib. *read* 9) s. 202, ib. 1) s. 201, ib.
29 reference 8) : *for* Act XII of 1889 *read* Act VII of 1889.
36 line 8 : *for* so far as regards payment *read* to pay.
47 authorities : *for* Act XX of 1847 *read* Act XX of 1887.
61 line 4 : *for* specially *read* specifically.
62 ,, 29 : *for* security *read* surety.
90 ,, 18 : *for* Act XVII of 1860 *read* Act VII of 1889.
98 ,, 26 : *for* drawer *read* drawee.
107 last line but one : *for* drawer *read* drawee.
121 line 2 : *for* Act XXII of 1863 *read* Act I of 1894.
133 9 lines from bottom : *for* presenting *read* prescribing.
153 5 ,, ,, : *for* (v. *ante*, "Fraud") *read* (v. *post*, "Fraud").
156 line 14 : *for* (*vide* illust. *d*) *read* (*vide* illust. 4).
,, 20 : *for* (illust. *d*) *read* (*vide* illust. 2).
158 ,, reference 5) : *for* s. 23, ib. *read* s. 24, ib.
162 ,, 2 : *for* any one *read* any one or more.
189 ,, 3 : considered as offences *to be placed within brackets*, thus ( ).
202 ,, 22 : *after* behalf *insert* and either of the respondents.
242 ,, 6 from bottom : *after* setting aside *insert* sale.
243 last line : *for* registering *read* resisting.
256 line 18 : *for* and 8 *read* or after 8.
263 ,, 5 from bottom : *for* the Act does prevent *read* the Act does not prevent.
278 ,, 9 from bottom : *for* In addition, etc., *up to* may *read* In addition thereto to the special powers of appointing guardians to infants given by this Act, the High Courts may.
279 line 7 from bottom : *for* complaint *read* confinement.
289 ,, 23 : *for* patent *read* latent.
290 ,, 9 : *after* Madras *insert* Bombay.
294 last line : *for* provisions *read* provisos.
300 line 27 : *for* ten *read* twelve.
302 line 1 : *after* is *insert* on or.
,, 8 from bottom : *for* preceding *read* following.
304 Remark column : line 3 from bottom : *for* their *read* that.
305 references : *read* as follows :—7) ss. 29, 15, ib. 8) s. 15, ib. 9) ss. 21, 24, ib. *place* 9) after "tenant" the last word in the last line.
347 schedule (4) : *for* children of (3) *read* children of the paternal grandfather.
348 line 24 : *for* or having *read* or after having.
414 *transfer* reference 4) to p. 415.
439 *delete* first two "es.
583 line 11 : *for* lessor *read* lessee.

A HAND BOOK OF INDIAN LAW.

AUTHORITIES—21 and 22 Vic., cap. 106 : H. Cowell, Tagore Law Lectures, 1872 ; Morley's Digest . 13 Geo. I : Clarke's Rules and Orders : 13 Geo. III, cap. 63 : 21 Geo. III, cap. 70 : 39 and 40 Geo. III, cap. 79 ; Harrington's Analysis : Meadows Taylor's History of India ; 24 and 25 Vic., cap. 104 : Letters Patent, Bengal, 1865 : Act IV of 1866 : 3 and 4 Will. IV, cap. 85 : 24 and 25 Vic., cap. 67 : 21 and 22 Vic., cap. 106 : 55 and 56 Vic., cap. 14 : Pollock on Torts, 2nd Ed., 1890 ; R. D. Alexander's Indian Case-Law on Torts, 3rd Ed., 1891 : and cases cited.

"British India."—The words "British India" denote the territories which are or may become vested in Her Majesty by the statute[1] entitled "An Act for the better government of India," except the settlement of Prince of Wales' Island, Penang, Singapore and Malacca.[2]

The East India Company, from and out of which the Indian Empire has arisen, was in its origin an association of private merchants styled "The Governor and Company of Merchants of London, trading in the East Indies," incorporated by Charter of Queen Elizabeth in the year **1600.** This association was given the monopoly of trade with all parts of Asia, Africa, and America beyond the Cape of Good Hope eastward to the Straits of Magellan. Its agents established in India fortified and garrisoned factories. A new charter was granted in **1610** by James I which confirmed all the privileges given under the former. Surat was established in **1612.** In **1634** a charter was granted to a new company which entered into rivalry with the old. **Madras** (Fort St. George) was established in **1640,** and in **1645** various settlements, of which Hooghly was the chief, were commenced in Bengal. The two rival companies were united, and a charter issued to them by Cromwell in **1657,** which was renewed and confirmed by a charter granted by Charles II in **1661** which, in addition to trading privileges, conferred upon the united company important political and judicial authority, and other rights of a sovereign power in the Company's possessions (v. *post*). **Bombay** was ceded to the English crown in **1661,** and was taken possession of in **1664.** The English at this period were not the only traders from Europe. In addition to the Portuguese, the French had established a company in **1664,** and a settlement at Chandernagore in **1676.** They were followed by the Dutch and the Danes. In **1688**

1) *21 & 22 Vic., cap. 106.*
2) *v.* Penal, Criminal, and Civil Procedure Codes.

Bombay was transferred to the Company with all powers of Local Government. **Calcutta** was established in **1690** by Mr. Job Charnock. The Company had, in addition to the foreigners, British competitors in the shape of "interloping" traders. These latter applied for and obtained in **1698** a charter. In **1702** all traders to India were amalgamated under the name of the "United East India Company." In **1708** a final adjustment of the affairs of the companies was made under an award by Lord Godolphin in the sixth year of Queen Anne, the charter granted by William III in 1698 remaining as the foundation of the privileges of the united company, under which the Court of Directors was constituted, and the General Court of Proprietors were vested with the chief authority and control over the affairs of the Company. This constitution remained unchanged until the regulating Act of **1773** (v. *post*); under the provisions of which statute **a Governor-General and Council were first nominated**, with power over the whole of the Company's possessions in India, a Board of Control being shortly afterwards formed at home. During the 65 years between 1708 and 1773 great acquisitions of territory were made, and the position of the Company changed from tenants of factories owing obedience to the Mogul Emperor to one of practical and independent sovereignty (v. *post*).[3] Treaties with the Mogul Court and the Nawab of the Carnatic, victory over the French and the battle of Plassey (1757) had secured to the Company a large part of the Madras Presidency and the provinces of Bengal, Behar and Orissa. The enlarged dominions and conquests of the East India Company attracted the attention of the Houses of Parliament, which in **1783** rejected Mr. Fox's bill for the transfer of the Government of India from the Company to the Crown, but which in **1784** accepted the bill of Mr. Pitt which curtailed the privileges of the Company, established a supervising Board of Control in England, and fixed the constitution of the Company until its abolition in 1858. The conduct of commercial affairs and matters of minor importance remained with the Directors. In **1813** the monopoly of the Company was abolished, and free trade permitted with India. The Charter of the Company, extended in 1813, for 20 years, expired in **1833**, and with it their monopoly with China. The new charter was limited to the administration of India for a period of 20 years; and henceforward the Court of Directors became an administrative body only, subject to the Board of Control, in many respects with greater stringency than before.[4] The

3) H. Cowell, Tagore Law Lectures, 1872, pp. 8, 9.
4) Meadows Taylor's "History of India," p. 628.

Company finding itself unable to compete in commerce with private traders, the stockholders resolved in **1834** to close its commercial business: from this date until 1858 when it was brought to an end, the Company confined itself to the administration of its territories, which had been greatly increased during the administrations of Lord Cornwallis (1786—1797) and Lord Wellesley (1800—1803), and which were afterwards further enlarged by the conquest of Scinde in **1845**, of the Punjab in **1849**, and of Pegu and Martaban in Burmah in **1852**. In **1857** occurred the Sepoy Mutiny, "which aroused the people of England to an interest in Indian affairs which had never before existed." It was then determined that the administration of these large dominions should no longer be left to individuals, but should be undertaken by the British nation itself. Accordingly **in 1858 an Act was passed transferring the Government of India from the Company to the Crown**, and bringing to an end the East India Company, which at the date of the Act had been in existence for a period of more than two-and-a-half centuries.

Law and Courts of Law in India until the establishment of the Supreme Courts.—In the year **1622** James I by charter authorized the Company to chastise and correct all English persons residing in the East Indies and committing any misdemeanour, either with martial law or otherwise. The first authority, however, for the introduction of British law into India was granted by Royal Charter of Charles II in **1661**. An amended charter was granted in **1683** empowering the Governor and Council to establish Courts of Judicature: the Judges were enjoined to decide according to equity and good conscience and according to the law and customs of merchants. These provisions were continued in the charter granted by James II in **1686**: and a similar power was given to the New East India Company by the Charter of the 10th Will. III (v. *ante*) granted in September **1698**[5]. In the year **1726** the Company established "**Mayors' Courts**" consisting of a Mayor and nine Aldermen, who adjudicated upon disputes, and from whose decision an appeal lay to the Governor and Council of the factory. The same charter which established the Mayors' Courts established Criminal Courts for the trial of offences, except high treason.[6] **On the establishment of these Courts in Calcutta, Madras, and Bombay, the Common and Statute Law in force in England in the year 1726 was deemed to be introduced into and in force in these towns so far**

5) Morley's Digest, Vol. 1, pp. 9, 10.
6) 13 Geo. I.

as it was applicable to local circumstances.[7] The working of the Mayors' Courts not being found to be satisfactory a statute was passed,[8] in accordance with which a **Supreme Court** was established at Fort William in Bengal in the year **1774.**[9] This Act is known as "The Regulating Act." The powers given by this Act to the Supreme Court were found to be too great and to cause a conflict between the Company's Government and the King's Court. By a subsequent statute,[1] therefore, passed in **1781** the powers of the Supreme Court were curtailed and more accurately defined, and **provision was made for the first time for the reservation to Hindus and Mahommedans of their own peculiar laws in matters relating to succession and inheritance to lands, rents, and goods, and all matters of contract and dealing between party and party.**[2] "Perhaps, the most important part of the Act, and the one which most completely reversed the policy and intention of the Act of 1773[3] was the recognition by Parliament of the Civil and Criminal Provincial Courts (*v. post*), existing independently of the Supreme Court; and of the Governor-General in Council, or some Committee thereof, as the Chief Appellate Court of the country, and the vesting of the Council with power to frame regulations for those Provincial Courts, *independently of the Supreme Court.*[4]" The Mayors' Courts at Madras and Bombay existed until **1797** when they were abolished and superseded by **Recorders' Courts**. The Recorder's Court was abolished at Madras in **1801**, and a Supreme Court was established in its place, which was directed to have the like jurisdiction and to be invested with the same powers, and subject to the same restrictions, as the Supreme Court in Bengal.[5] The Recorder's Court at Bombay was not abolished until **1823** when a Supreme Court was established, invested with the same powers and subject to the same restrictions as the Supreme Court in Bengal.[6] In addition to the Supreme Courts there existed **Courts of Requests** established by Charter in 1753 for the trial of civil suits where the subject matter of the suit did not exceed a certain sum,

7) Morton, 72 ; Boulu. Rep., 240 : 3 B. L. R., O. C. J., 59 : ib., 98, 99 ; 1 Bom., App. 1 : 1 Hyde, 70 : 1 Moo. I, A., 342 : Clarke's Rules and Orders.
8) 13 Geo. III, cap, 63.
9) Charter, 26th March 1774.
1) 21 Geo. III, cap. 70.
2) s. 17, ib.
3) 13 Geo. III, cap. 63, v. *ante*,
4) *ss.* 21, 22, 23, *ib.* : Cowell's Tagore Law Lectures, 1872, p. 75.
5 39 & 40, Geo. III, cap. 79 : Letters Patent, 26th December 1801.
6) 4 Geo. IV, cap. 71 : Letters Patent, 8th December 1823.

These Courts were in **1850** superseded by the establishment of **Small Cause Courts** in the Presidency towns. Subsequently similar tribunals were established in the mofussil.

Jurisdiction of the Supreme Courts.—The Supreme Courts were by their charters vested with five distinct jurisdictions:—Civil, Criminal, Equity, Ecclesiastical, and Admiralty: and were enjoined to accommodate their process, rules, and orders, to the religion and manners of the Natives, so far as the same might be done without interfering with the due execution of the laws and the attainment of justice. This jurisdiction extended over (1) British subjects throughout India, in all matters civil and criminal; (2) the inhabitants of Calcutta, Madras and Bombay, within fixed limits, whether Natives or others, in all matters civil and criminal: but Natives in some civil matters had justice administered to them according to the Hindu or Mahommedan Law (v. *ante*); (3) Native subjects, servants of the East India Company, or of any British subject, for acts committed as such, with limitations in certain civil matters; (4) Native subjects in civil matters, for transactions in which they bound themselves by bond to be amenable to the Supreme Courts; (5) all persons whatsoever for crimes maritime.[7]

The Law which was administered in the Supreme Courts may be classed under four heads:—(1) The Common and Statute Law, as it prevailed in England in the year 1726 (v. *ante*), and which was not subsequently altered by statutes extending to India, or by Acts of the Legislative Council of India; (2) the unrepealed Statute Law expressly extending to India, enacted since 1726, and the statutes extended to India by the Acts of the Legislative Council of India; (3) the Civil Law as it obtained in the Ecclesiastical and Admiralty Courts in England; (4) Regulations made by the Governors-General in Council and the Governors in Council previously to the 3rd and 4th Will. IV, c. 85, and registered in the Supreme Courts, and the Acts of the Legislative Council of India made under the same Act; (4) the Hindu and Mahommedan Law in actions regarding inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Hindu or Mahommedan was a defendant.[8]

The Sudder and Moffussil Courts existed contemporaneously with, and independent of, the Supreme Courts. The "grant to the Company in **1765** of the Dewanny over the provinces of Bengal, Behar, and Orissa, assured to it the virtual

7) Morley's Digest, p. 21.

8) ib., pp. 22, 23.

sovereignty over these provinces, the office of Dewan implying not merely the collection of the revenue, but the administration of civil justice. The Nizamut or administration of criminal justice was at the same time conferred upon the Nawab Nazim. From this period the Nizamut as well as the Dewanny were exercised by the British Government in India through the influence possessed by the English over the Nawab Nazim. For some time subsequent to this assumption of power the administration of justice and the collection of the revenue were left in the hands of Native officers. Owing to the great abuses which prevailed, the Court of Directors in **1772** announced to the Government of Bengal their intention "to stand forth as Dewan and, by the agency of the Company's servants, to take upon themselves the entire care and management of the revenues." In order to carry into effect this determination a committee was appointed consisting of the Governor (Warren Hastings) and four coadjutors, who drew up a report, comprising plans for the more effective collection of the revenue and the administration of justice. The report gave a detailed account of the Mahommedan Law Courts, and, after animadverting on their inefficiency, proceeded to set forth a plan for the more regular administration of civil and criminal justice adapted "to the manners and understandings of the people, and exigencies of the country, adhering as closely as possible to their ancient usages and institutions.[9]" The following Courts were established:—Moffussil Dewanny Adawluts or Provincial Civil Courts; Criminal Courts styled Foujdary Adawluts, and two Superior and Appellate Courts at the seat of Government, called the Dewanny Sudder Adawlut (Civil) and the Nizamut Sudder Adawlut (Criminal). The plan proposed was adopted by Government on the 21st August **1772.**[1] In **1773** a statute was passed, providing for the administration of the Government of India by the appointment of a **Governor-General and Council** who were empowered to make rules and regulations for the good government of Bengal, and were thus **invested for the first time by Parliament with a delegated power of legislation.**[2] The Provincial Courts received the full recognition of Parliament by the Act of 1781 (v. *ante*). The system of administration of justice in Bengal was the foundation of the systems in Madras and Bombay.[3]

Though the constitution of these Courts was afterwards altered, they continued to exist together with, and independently of,

9) Harrington's Analysis, p. : Morley, pp. 31—34.
1) Morley's Digest, p. 34.
2) Morley's Digest, p. 37: 13 Geo. III, cap. 63, ss. 36, 37.
3) Morley, p. 30.

the Supreme Courts, until the abolition of the latter in 1861. They were as dissimilar in the law they administered as in their origin. In the Supreme Courts the civil and criminal law administered was (with the exceptions made in favour of Hindus and Mahommedans: v. *ante*) English: so also was the procedure. The Mofussil Courts, on the other hand, had nothing to do with English Law, and were amenable in all respects to the regulations of Government, and when Hindu or Mahommedan Law did not apply, or when no Regulations were applicable, were directed to proceed according to justice, equity, and good conscience. That is to say, in cases for which no law was provided, the Judges were authorized to use the best discretion they possessed. The procedure was such as was prescribed by the Regulations.[4]

Abolition of the Supreme Courts.—The inconveniences of this double system were numerous. The assumption of the Government of India by the Crown in 1858, and the publication in the following years of the Codes of Civil and Criminal Procedure, and afterwards the Penal Code, which Codes applied throughout the whole Empire, tended in the direction of one uniform system for the administration of justice in India. This uniformity was further secured by the abolition in **1861** of the Supreme Courts in the three Presidencies, and the constitution in each Presidency town of a High Court of Judicature, supreme over all the Courts both in the Presidency town and in the Mofussil.[5]

The High Courts.—In 1861, an Act was passed[6] empowering the Crown to establish High Courts. Charters were hereupon issued in **1862**, and new Charters in **1865**, constituting the High Courts at **Calcutta, Madras, and Bombay.** In March **1866** Letters Patent were issued establishing a High Court at **Allahabad** in the North-West Provinces. The result of the establishment of the High Courts was to combine the Judges of the Supreme and Sudder Courts, and thereby to constitute a single tribunal. The Supreme Courts, however, in a sense survived as a distinct branch of the High Courts, *viz.*, their Original Side. The local limits of the jurisdiction of the High Courts on their Original Side were, however, confined within the limits of the towns of Calcutta, Madras, and Bombay. It was directed by the Charters that the law and equity, to be applied in each case by the High Courts, in their Original Jurisdiction, shall,

4) Tagore Law Lectures, 1872, pp. 224—226. The law now regulating the Provincial Civil Courts is consolidated in the various Civil Courts Acts; see "*Action and Actionable Claim*" and "*Appeal, Revision, Review, and Reference.*"

5) ib.

6) 24 and 25 Vic., c. 104.

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until otherwise provided, be the law and equity which would have been applied by the Supreme Court. "Until otherwise provided" shows that there was an intention to give to the Government here, in its legislative capacity, a power to make alterations which would affect this provision. In the exercise of this power it has made Hindus and Mahommedans as well as all other persons in India subject in matters of contract[7] to the provisions of Act IX of 1872.[8] The law to be administered by the High Court in the exercise of its Appellate Jurisdiction is to be the law, equity, or rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case;[9] that is, in the case of appeals from the mofussil, the law and equity, which ought to have been applied by the Mofussil Court to the case: (as to the jurisdiction of the High Courts, see "*Action and Actionable Claim*," "*Appeal, Revision, Review, and Reference*," and "*Prosecution*"). In the **Punjab** a Chief Court was established in 1866[1] which is framed very much on the model of the High Courts. It derives its existence from an Act of the Imperial Legislative Council, instead of a Royal Charter, and the Judges who compose it are appointed by the Governor-General in Council and not by Her Majesty.[2]

Legislation in India.—In **1773** a statute was passed empowering the Governor-General in Council to make rules and regulations for the good government of Bengal. **The Governor-General and Council were thus invested for the first time by Parliament with a delegated power of legislation.**[3] This power, however, was subject to the veto of the Supreme Court. In **1781** (v. *ante*) the Governor-General and Council were empowered to frame Regulations for the Provincial Courts without reference to the Supreme Court; these Regulations, however, did not bind the latter Court unless they were duly registered. In **1797** the Company collected the Regulations in the shape of a revised code. In the year **1800** the Governor and Council of **Madras** were invested with the same legislative power as had previously by the Act of 1781 (v. *ante*) been given to the Governor-General and Council. In **1807** provisions were made for legislation in **Bombay**. In **1813** the legislative power so conferred on all three Councils was extended

7) Excepted by the statute 21, Geo. III, c. 70, v. *ante*.

8) *v.* judgment of Couch, C.J., in 14 B. L. R., p. 81.

9) s. 21, Letters Patent, Bengal, 1865. The terms of the Letters Patent of the High Courts at Madras and Bombay are similar to those of the Letters Patent of the Calcutta High Court.

1) Act IV of 1866.

2) Tagore Law Lectures, 1872, Lecture X, *passim*.

3) 13 Geo. III, c. 63, ss. 36, 37; Morley's Digest, p. 37.

and at the same time placed under still greater control. Thus from time to time the legislative powers of the Councils were developed; and in pursuance of those powers they enacted laws and regulations till 1834. Down to that date, "which is the most important epoch in the history of Indian legislation," there were five different bodies of Statute Law in force in the Empire: (1) the whole of the English Statute Law existing in 1726, so far as it was applicable, which was introduced by the Charter of George I, and which applied, at least, in the Presidency towns; (2) all English Acts subsequent to that date which were expressly extended to any part of India; (3) the Regulations of the Governor-General's Council, which commenced with the revised code of 1793, and continued down to 1834, and which had force only in the Presidency of Bengal; (4) Regulations of the Madras Council from 1802 to 1834 in force in the Presidency of Fort St. George; (5) the Regulations of the Bombay Code, which begins with the revised Code of Mr. Mountstuart Elphinstone in 1827, and continued until 1834, having force in the Presidency of Fort St. David.

By an Act[4] passed **in the year 1834 one central Legislative authority** (the Governor-General in Council) **was established** in place of the three Councils which had before existed. The new Council was authorised to pass laws and regulations for the *whole* of the British territories in India. The Act provided for a special "legal" member of council, not a member of the Company's service, or one of the Executive Council (v. *post*) to sit and vote at all meetings for making laws and legislation. "This, in fact, provided for the first time for a distinct Legislative Council." It continued to exist with some changes and modifications till **1861**, when the work of legislation being found to be too heavy for the single Council sitting in Calcutta, a new system was introduced by which **the local legislatures were re-established** not to supersede, but to work in harmony with, and to a certain extent in subordination to, the Legislative Council of the Viceroy.[5] The Provincial Councils (such as the Council of the Lieutenant-Governor of Bengal) legislate in minor matters affecting the local area subject to their administration. The Supreme Legislative Council deals with matters of imperial importance affecting the whole of British India. It is with the acts of the Supreme Legislative Council only that this hand-book deals.

The Indian constitution.—The Sovereign of India is the

(4) 3 and 4 Will. IV, cap. 85.
(5) 24 and 25 Vic., cap. 67: Tagore Law Lectures 1872, Lecture iv, *passim*. See ss. 5 & 6 of the Amending Act 1892 (55 & 56 Vic., cap. 14.)

Queen-Empress, who acts through the Secretary of State for India—a minister, who is responsible to, and holds his office at the pleasure of, the Houses of Parliament. The Secretary of State in Council is the chief administrative power, after which and next in degree comes the Viceroy and his Council, then the Governors of Madras and Bombay with their Councils, and the Lieutenant-Governors of Bengal, North-West Provinces and the Punjab with their respective Councils. These five principal Provincial Governments, together with the numerous "Local Administrations," governed by Chief Commissioners, or Agents to the Governor-General, are subordinate to the Supreme Government, but are subject to little or no interference beyond general supervision. Certain matters, however, affecting the whole of India such as finance, military defence, arrangements with Foreign and Native States, Post Office, and Telegraphs are directly controlled by the Supreme Government. The **Council of India**, or the Council of the Secretary of State, consists of 15 members. The majority of the Council must be composed of persons who have served or resided in India for at least 10 years, and who have not left India more than 10 years before their appointment.[6] As a rule, the Secretary of State follows the opinion of the majority of his Council, but he is not obliged to do so. The Secretary of State has the power of vetoing any legislative enactment, or administrative arrangement of the Viceroy and his Council. The Viceroy is the head of the Government of India and is appointed by the Sovereign: he holds his appointment for the term of five years; he is assisted by his Council, called the **Supreme Council of India**, the members of which are the heads of the principal departments of Government such as war, finance, and the like, and by another Council for making laws only, called the **Supreme Legislative Council.**[7] The Supreme Council has control over the Provincial Governments, and the power of amending or cancelling any orders or proceedings of such Subordinate Governments. The Supreme Legislative Council undertakes the provision of laws applicable to the Indian Empire generally. Acts dealing with local areas are left to, and dealt with by, the provincial legislative bodies, such as the Legislative Council of the Lieutenant-Governor of Bengal.[8] Each province is for administrative purposes divided into districts, which are again divided into divisions, sub-districts, or sub-divisions, tahsils, pergunnahs, and police

6) 21 and 22 Vic., cap. 106.
7) 24 and 25 Vic., cap. 67. See the Amending Act 1892 (55 and 56 Vic., cap, 14).
8) ib.

charges called thannahs. The chief burden of the executive work of the Indian Empire falls upon the Indian Civil Service. This work is divided into the two main heads of Revenue (collection of land rent, taxes, &c.,) and Judicial administration. Each district is in charge of the Collector or Commissioner, who is the chief Government authority in the district, and who takes official precedence of the Judge, and under whom are the Sub-Collector and Assistant Collectors. The Chief Court of each district is presided over by the "Civil and Sessions Judge." See "*Action and Actionable claim*," "*Appeal, Revision, Review, and Reference*," and "*Prosecution*." In addition to the revenue and judicial departments, there exist special departments dealing with Education, Public Works, Railways and the like.[9]

Civil law in British India.—The law of Civil Procedure,[1] dealing with the mode of trying and enforcing civil rights, is in force, and has (with the exception of certain of the scheduled districts; see *Appendix*) general application to all persons throughout British India. The substantive Civil Law,[2] however, dealing with civil rights and duties is divisible into two portions:—(1) a general law which, whether extending throughout the whole of British India, as in the case of the Contract Act, or to Local Governments or areas only (*e.g.*, the law of Easements as contained in the Easement Act), is yet within British India, or within those local areas or Governments, applicable to all persons whatsoever without distinction of race or creed; (2) a personal law, statutory and customary, which governs persons of certain races and creeds only: *e.g.*, the Parsi Succession Act and the Hindu and Mahommedan customary law relating to inheritance and succession. It is with the first of these portions (as embodied in the Acts of the Supreme Legislative Council) and with Statutory Personal Law only that this hand-book deals.

9) See Horace Bell's "Government of India," to which the author is indebted for the form and some of the matter in this paragraph.

1) See "*Action and Actionable Claim*," "*Appeal, Revision, Review, and Reference*," "*Arbitration*," "*Arrest*," "*Attachment*," "*Execution*," "*Interpleader*," "*Injunctions*," "*Judgments and Decrees*," "*Limitation*," "*Oaths, Evidence, and Witnesses*," "*Receivers*," "*Registration*," "*Small Cause Courts*," and *passim*.

2) The titles are numerous; amongst the more important, see "*Administration*," "*Agency*," "*Bailment*," "*Bankers, Banking, and Cheques*," "*Bills of Exchange and Promissory Notes*," "*Bond*," "*Carriers*," "*Companies*," "*Contract*," "*Copyright*," "*Defamation*," "*Divorce and Matrimonial Law*," "*Executor*," "*Guardian and Ward*," "*Husband and Wife*," "*Indemnity and Guarantee*," "*Insolvency*," "*Insurance*," "*Inventions and Patents*," "*Land*," "*Lease*," "*Legacy and Bequest*," "*Marriage*," "*Masters, Servants, and Apprentices*," "*Mortgage*," "*Minority and Minors*," "*Negligence*," "*Nuisance*," "*Partnership*," "*Possession*," "*Sale*," "*Transfer of Property*," "*Trusts and Trustees*," and "*Wills*."

Law of torts.—Civil wrongs may either arise out of contract, as in the case of a breach of a duty undertaken by contract,[3] or may be independent of contract. Wrongs which do not result from contract between the parties, and which are actionable, *i.e.*, which entitle the persons injured to obtain relief against the wrong doer in a Civil Court, are technically called *torts*, which term is the French equivalent for the English word wrong. An act may be both a tort and a criminal offence: *e.g.*, assault and defamation. The person injured may proceed either in the Civil Court for damages, or in the Criminal Court for the punishment of the wrong-doer. He may also do both. Again, certain acts are torts, although the same facts may constitute a breach of contract, and may, at the option of the aggrieved party, be treated as such. The sphere of torts, therefore, which stands midway between that of offences and that of wrongs arising out of breach of contract, to a certain extent overlaps both. Where there is a legally wrongful act, that is, an act prejudically affecting the person complaining in some legal right, if any damage in legal contemplation is the consequence, an action will lie.[4] The damage suffered must not be too "remote"; it must be such as naturally and ordinarily results from the act. It is no defence to say, "I did not intend to do damage," because every person is presumed to intend the probable consequences of his voluntary acts and omissions. The damage need not be what is commonly called damage, that is actual damage. A person is damaged by the simple invasion of his undoubted rights.[5] It does not follow that because a person has suffered damage he has a remedy by action. He must have suffered an "injury," *i.e.*, an act prejudicially affecting some *legal* right resulting in damage. Generally speaking, there must, in order to enable a person to obtain relief, have been a wrongful invasion of legal right (tort) of one or more of the following kinds:—[A] (1) a wrong affecting the safety and freedom of the person; *e.g.*, assault, criminal force, wrongful confinement, wrongful restraint;[6] (2) a wrong affecting personal relations in the family: *e.g.*, seduction, enticing away of servants;[7] (3) a wrong affecting reputation: *e.g.*, slander and libel;[8] (4) a wrong affecting estate generally: *e.g.*, fraud, slander of title,

3) *See "Contract."*
4) 8 Moo, I. A., 103,
5) 23 W. R., 230; 24 W. R., 97.
6) See *"Assault," "Habeas Corpus," "Malicious Prosecution, and Abuse of Process," "Wrongful Confinement and Restraint."*
7) See *"Masters, Servants, and Apprentices."* Compare in same title, right not to have fulfilment of contracts interfered with: 6 Q. B. D., 333.
8) See *"Defamation."*

malicious prosecution;[9] the above-mentioned torts are *personal* wrongs; [B] (5) a wrong *to property: e.g.*, trespass to land or goods, disturbance of easements, &c.[1]; or an interference with rights analogous to property such as patents, registered inventions, copyright;[2] [C] (6) a wrong affecting person and property generally: *e.g.*, nuisance, negligence.[3] There are several **exceptions** to the general rule that any act or omission which prejudicially affects the legal rights of a person in his person or property is actionable. They are these: (1) no action may be brought in respect of an act of State;[4] (2) nor against a Judge, Magistrate, Justice of the Peace, or other person acting judicially except in certain cases; nor against a person acting judicially for words spoken in office;[5] (3) nor in respect of executive acts rightly, regularly, reasonably, and necessarily done,[6] or of acts of naval and military officers in the execution of their duty and for the enforcement of the rules of the service and preservation of discipline;[7] (4) nor in respect of *quasi*-judicial acts when properly done,[8] or acts within the scope of parental and *quasi*-parental authority: *e.g.*, the moderate correction of a child;[9] (5) nor in respect of acts done of necessity: *e.g.*, forcible acts of the master of a merchant ship done to preserve order, discipline, and safety of the vessel and persons and property on board;[1] (6) nor in respect of damage arising out of acts authorized by statute, if (generally speaking) those acts be done with judgment and caution;[2] (7) nor in respect of acts done in the exercise of common rights: *e.g.*, the injury that may result to another from competition in business;[3] (8) nor (with certain limitations) in respect of acts done by leave and license, or under conditions manifesting acceptance;[4] (9) nor in respect of acts done in private defence;[5]

9) See "*Fraud*" and "*Malicious Prosecution and Abuse of Process.*" "Slander of title," means a statement of something tending to cut down the extent of a man's title, which is injurious only if it is false, and made with intent to injure the plaintiff. See 8 C.B., 868: I. L. R., 1 Mad., 65; Alexander, pp. 267, 268.
1) See "*Trespass*" and "*Easements and Licenses.*"
2) See "*Inventions and Patents*" and "*Copyright.*"
3) Pollock on Torts, p. 7. See "*Nuisance*" and "*Negligence.*"
4) See "*Public Servants and Public Duties.*"
5) *v.* ib., and "*Defamation:*" 37 L. J., Ex. 155.
6) See "*Arrest,*" "*Wrongful Confinement and Restraint,*" "*Public Servants and Public Duties.*"
7) Pollock, p. 107.
8) See "*By-laws,*" § "Clubs."
9) See "*Assault.*"
1) Pollock, pp. 112, 113.
2) 8 Bom., H. C. Rep., 85: I. L. R., 9 Cal., 341: 19 W. R., 309: I. L. R., 12 Bom., 490: 14 B. L. R., 1: 10 B. L. R., O. C., 241. See "*Nuisance.*"
3) Pollock, p. 133.
4) Pollock, p. 143.
5) See "*Offences.*"

(10) nor in respect of acts done involuntarily.[6] "The liability of wrong-doers may either arise directly, as when the wrong-doer himself inflicts the wrong: or owing to abetment, as when the wrong-doer procures or abets the wrong-doing,[7] or owing to ratification, as when the principal ratifies the wrong done by his agent,[8] or owing to relation, as when a master is held liable for the wrong done by his servant."[9]

The liability of joint wrong-doers is both joint and several. A plaintiff may in action on tort sue all or any of them: but judgment recovered against one bars a suit against the rest. Where wrong-doers are jointly concerned in committing an act they know to be illegal, the rule is that there is no contribution between them: therefore if one pays the damages awarded against himself and the others, he cannot compel the others to pay to him their proportionate share. As to survival of right of action, see "*Executor.*"

Criminal Law in British India.—The main portion of the substantive Criminal Law,[1] or the law defining the nature of offences and their punishments, is contained in the Indian Penal Code; the law of Criminal Procedure[2] dealing with the constitution of the Criminal Courts, the jurisdiction of their Judges, and the mode of bringing to trial and trying offenders, is contained in the Code of Criminal Procedure. The Criminal Law as contained in these two Codes is in force throughout British India and applies (with certain reservations in matters of procedure in favour of European British subjects)[3] to all persons in British India, whatever be their nationality, race, or creed.

6) I. L. R., 3 Cal., 776.
7) 16 W. R., 240.
8) 11 W. R., 101. See 2 B. L. R., 140 O. C.
9) Alexander, p. 47. See "*Masters, Servants and Apprentices.*"
1) See "*Animals,*" "*Arrest,*" "*Assault,*" "*Defamation,*" "*Dogs and Ferocious Animals,*" "*Hurt,*" "*Intimidation,*" "*Malicious Prosecution and Abuse of Process,*" "*Nuisance,*" "*Offences,*" "*Oaths, Evidence, and Witnesses,*" "*Unlawful Assembly, Rioting, and Affray,*" "*Wrongful Confinement and Restraint,*" and *passim.*
2) See "*Europeans and European British Subjects,*" "*Habeas Corpus,*" "*Jury and Jurors,*" "*Justices of the Peace,*" "*Oaths, Evidence, and Witnesses,*" "*Prosecution,*" and *passim.*
3) See "*Europeans and European British Subjects.*"

AN ABRIDGMENT

OF

THE LAW IN FORCE IN BRITISH INDIA.

ACTION AND ACTIONABLE CLAIM.

AUTHORITIES—The Civil Procedure Code, Act XIV of 1882, as amended by Acts VI, VII and X of 1888. Act VIII of 1890 and Act VI of 1892. The same edited by J. O'Kinealy. 4th Ed., 1893. Letters Patent (Bengal, Madras, Bombay) 1865: Act XII of 1887 (Bengal, N.-W. P. and Assam Civil Courts): Act III of 1873 (Civil Courts, Madras). Act XIV of 1869 (Civil Courts, Bombay); Act IV of 1882* (Transfer of Property): Cases cited.

A cause of action means the whole of the circumstances which a plaintiff must allege in order to show a right to sue.

An action must be brought in the Court of the lowest grade competent to try it.[1]

Courts of Civil Judicature in India: High Courts.—The High Courts of Bengal, Madras, Bombay, and Allahabad are established by charter; the Civil Courts throughout the country are established by Regulations or Acts of the local legislatures, not by any charter of the Crown.

The jurisdiction of Chartered High Courts is determined by the Letters Patent establishing them. The High Court at Calcutta has ordinary original civil jurisdiction within the limits of the Town of Calcutta, and on the exercise thereof, is empowered to try actions of *every* description, if (1) in the case of suits for land or other immoveable property, such land or property is situated, or (2) in all other cases, if (*a*) the cause of action shall have arisen either wholly, or (*b*) in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary jurisdiction of the High Court, or (*c*) if the defendant at the time of the commencement of the suit dwells or carries on business, or personally works for gain within such limits, except that the High Court has no ordinary original civil jurisdiction in cases falling within the jurisdiction of the Small Cause Court in which the debt or damage or value of the property

*Note.—As to the extent of this Act, see "*Transfer of Property*" p. 600, *infra*.

1) Civ. Pr. Code, s. 15.

sued for, does not exceed 100 rupees. The High Court has also extraordinary original civil jurisdiction in the removal to, or trial by itself of, any suits within the jurisdiction of any Court subject to its superintendence [*Letters Patent, Bengal*, 1865, *cl.* 11, 12, 13.] The Letters Patent giving jurisdiction to the High Court at Madras are similar in all respects, *mutatis mutandis*, to those for the High Court at Calcutta. The Letters Patent for the High Court at Bombay are in nearly every respect the same as those for the Presidencies of Bengal and Madras. The High Court at Allahabad has *extraordinary* original civil jurisdiction only.*

Jurisdiction of other Civil Courts.—The jurisdiction of Civil Courts of Judicature other than Chartered High Courts is determined by the Acts or Regulations constituting them, the Code of Civil Procedure, and the law in force for the time being in respect of the valuation of suits for the purpose of giving jurisdiction. Subject to the pecuniary or other limitations prescribed by any law, suits (*a*) for the recovery of partition, or foreclosure or redemption of a mortgage of, or for the determination of, any other right to, or interest in, or for compensation for wrong to *immoveable* property, or (*b*) for the recovery of moveable property actually under restraint or attachment, *must be instituted in the Court within the local limits of whose jurisdiction the property is situate*, provided that suits to obtain relief respecting, or compensation for, wrong to immoveable property, held by or on behalf of the defendant, may, when the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business, or personally works for gain.[2] "Property" in this section means "property situate in British India.[3]" Subject to the limitations aforementioned, *all other suits must be instituted in a Court within the local limits of whose jurisdiction* (*a*) the cause of action arises; or (*b*) all the defendants at the time of the commencement of the suit actually and voluntarily reside, or carry on business, or personally work for gain; or (*c*) any of the defendants at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; provided that either the leave of the Court is given, or the

*Note.—As to the Appellate and Criminal Jurisdiction of High Courts and Mofussil Courts v. "*Appeal, Revision, Review, and Reference*," p. 50, and "*Prosecution*," p. 525. As to the jurisdiction of Small Cause Courts v. "*Small Cause Courts*," p. 573.

2) Civ. Pr. Code, s. 16: when the local limits of jurisdiction are uncertain, see s. 16A, ib. (added by Act VII of 1888).

3) ib.

defendants, who do not reside, or carry on business, or personally work for gain as aforesaid, acquiesce in such institution;[4] where a person has a permanent dwelling at one place and also a lodging at another place for a temporary purpose only, he is deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging. A corporation or company is deemed to carry on business at its sole or principal office in British India, or in respect of any cause of action arising at any place where it has also a subordinate office, at such place. In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, *viz.*:—(1) The place where the contract was made; (2) the place where the contract was to be performed or performance thereof completed; (3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.[5] As to suits for compensation for wrongs to person or moveables;[6] or suits for immoveable property situate in a single district, but within the jurisdiction of different Courts; or suits for immoveable property situate in different districts;[7] or the power of Courts to stay proceedings where all defendants do not reside within jurisdiction;[8] or as to the transfer of suits by a High Court or District Court to itself or any other Subordinate Court,[9] see the sections of the Code given below.

Civil Courts in Bengal Presidency.—In the Province of Bengal, in addition to the High Courts and Small Cause Courts, there are four classes of Courts, the local limits of whose jurisdiction are fixed by the Local Government, *viz.*, those of the District Judge, Additional Judge, Subordinate Judge, and Munsif.[1]

Subject to the superintendence of the High Court, the **District Judge** has administrative control over all the Civil Courts within the local limits of his jurisdiction.[2] Save as otherwise provided by any enactment for the time being in force, the jurisdiction of a **District** or **Subordinate Judge**, subject to the provisions of section 15, Code of Civil Procedure,[3] extends to all original suits for the time being cognizable by Civil Courts.[4]

Additional Judges are appointed to aid the District Judge in the speedy disposal of business. In the discharge of functions assigned to them by the District Judge, they have the same powers as the District Judge.[5]

The jurisdiction of a **Munsif** extends to all suits the value

4) Civ. Pr. Code, s. 17.
5) ib.
6) s. 18, ib.
7) s. 19, ib.
8) s. 20, ib.
9) s. 25, ib.
1) Act XII, 1887, ss. 3, 13.
2) s. 9, ib.
3) v. *ante*, p. x.
4) s. 18, ib.
5) s. 8, ib.

of which does not exceed 1,000 rupees, unless the jurisdiction has been specially extended to 2,000 rupees.[6]

Civil Courts in Madras Presidency.—In the Province of Madras, in addition to the High Court and Small Cause Courts, there are three classes of Courts, the local limits of whose jurisdiction is fixed by the Local Government, *viz.*, the Court of the District Judge, of the Subordinate Judge, and of the District Munsif.[7]

The **District Judge** has general control over all Civil Courts, subject to the rules prescribed by the High Court. The **District and Subordinate Judges** have a jurisdiction the same as that possessed by the same Judges in Bengal.[8] The jurisdiction of a **Munsif** extends to all suits not exempted from his cognizance, of which the amount or value of the subject-matter does not exceed 2,500 rupees.[9]

Civil Courts in Bombay Presidency.—In the Presidency of Bombay, besides the High Court and Small Cause Courts, there are four classes of Courts, *viz.*, the Courts of the District, Joint, Assistant, and Subordinate Judges respectively.[1]

The Court of the **District Judge** is the principal Court of original civil jurisdiction in the district, and has control over all Civil Courts within its district.[2] **Joint Judges** have co-extensive powers and a concurrent jurisdiction with the District Judge in civil matters referred to them.[3] The District Judge may refer to any Assistant Judge subordinate to him, original suits of which the subject-matter does not amount to 10,000 rupees in amount or value, and miscellaneous applications, not being of the nature of appeals.[4] **Assistant Judges** have jurisdiction to try such suits and to dispose of such applications.[5] An Assistant Judge may be invested with all or any of the powers of a District Judge.[6] The Court of the **Subordinate Judge** is subordinate to the District Court.[7] Subordinate Judges are of two classes: the jurisdiction of a Judge of the first class extends to all original suits and proceedings of a civil nature: the jurisdiction of a Judge of the second class extends to all original suits and proceedings of a civil nature wherein the subject-matter does not exceed in amount or value 5,000 rupees.[8] A Subordinate Judge of the first class has, in addition to his ordinary jurisdiction, a special jurisdiction in respect of such suits and proceedings exceeding 5,000 rupees in amount or value, as may arise within the local jurisdictions of the Courts in the

6) Act XII of 1887, s. 19.
7) Act III of 1873, ss. 8, 10.
8) s. 12, ib.
9) ib.

1) Act XIV of 1869, s. 7.
2) s. 9, ib.
3) s. 12, ib.
4) s. 16, ib.
5) ib.
6) s. 19, ib.
7) ss. 21, 22, ib.
8) s. 24, ib.

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district presided over by Subordinate Judges of the second class.[9] The Subordinate Judge has no jurisdiction in suits in which the Government is a party.[1]*

Procedure in all civil suits is regulated by Act XIV of 1882 (Civil Procedure Code) as amended by subsequent Acts: this Act, with certain restrictions noted below, governs *the whole of British India*[2] except the scheduled districts as defined by Act XIV of 1874.[3]

Nothing in the Civil Procedure Code affects the Courts Acts of the Central Provinces (1865), Burma (1875), Punjab (1877), Oudh (1879) or any law passed or which may be passed by a Governor or Lieutenant-Governor prescribing a special procedure for suits between landowners and their tenants or agents, or providing for the partition of immoveable property. The meaning of this provision is that if there is anything in those Acts inconsistent with the Code, the former and not the latter prevails.[4]

Nothing in the Code affects the jurisdiction or procedure of (1) Military Courts of Request; or (2) of village Munsifs or village Panchayats, under the provisions of the Madras Code; or (3) of the Recorder of Rangoon sitting as an Insolvent Court in Rangoon or Moulmein: or operates to give any Court jurisdiction over suits of which the amount or value of the subject matter exceeds the pecuniary limits (if any) of its ordinary jurisdiction.[5]

Procedure in High Courts.—Certain sections (about 32 in number) of the Civil Procedure Code do not apply or only partially apply to High Courts which are or may hereafter be established under 24 and 25 Vic., cap. 104. Certain sections apply only to High Courts.

In Mofussil Small Cause Courts.—The greater portion of the provisions of the Code extend (so far as they are applicable) to Provincial or Mofussil Small Cause Courts, and to all other Courts (other than the Courts of Small Causes in Calcutta, Madras and Bombay) exercising the jurisdiction of a Court of Small Causes.

In Presidency Small Cause Courts.—Portions only of the Civil Procedure Code (some with modifications) apply to the Small Cause Courts in Calcutta, Madras and Bombay.†

* *Note.*—As to the nature and jurisdiction of the Civil Courts in the Central Provinces, Burmah, Punjab, and Oudh, see their respective Courts Acts 1865, *1875, 1877, 1879* and *amendments.*

† *Note.*—The words and letters "*not H. C.*," or "*not M. S. C. C.*," placed in brackets, denote that the provisions of the law contained in the sentence

9) Act XIV of 1869, s. 25. 3) see *Appendix*, (1.) 5) s. 6, ib. and see s. 7, ib.,

Pending suits.—Except where a suit has been stayed by reason of its having been instituted in a Court, within the limits of whose jurisdiction the defendant or all the defendants does not or do not reside, or carry on business, or personally work for gain, a Court cannot try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under whom they or any of them claim, *pending* in the same or any other Court in British India having jurisdiction to grant such relief, or in any Court beyond the limits of British India established by the Governor-General in Council and having like jurisdiction, or before Her Majesty in Council. The pendency, however, of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded upon the same cause of action.[6]

Res-judicata.—No Court can try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the *same* parties or between parties under whom they or any of them claim, litigating under the *same* title, in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, *and has been heard and finally decided by such Court.*[7]

A foreign judgment, *i.e.*, the judgment of a foreign Court (or a Court situate beyond the limits of British India and not having authority in British India, nor established by the Governor-General in Council) is no bar to a suit in British India if (1) it has not been given on the merits of the case; (2) it appears to be founded on an incorrect view of international law or of any law in force in British India; (3) it is in the opinion of the Court before which it is produced contrary to natural justice; (4) it has been obtained by fraud, or (5) it sustains a claim founded on a breach of any law in force in British India.[8]

Every action must be commenced by presenting a plaint to the Court of the lowest grade competent to try it.[9] **A plaint** is a statement in writing of the circumstances constituting the plaintiff's cause of action, the time when, and the place where, it arose, and a demand of the relief which the plaintiff claims. On the presentation of a plaint to the Court it is either admitted, or rejected, or returned for amendment, or (*not H. C.*) for presenta-

immediately connected with or above them are not applicable to the High Court or Mofussil Small Cause Court, as the case may be. For the procedure in Presidency Small Cause Courts, see "*Small Cause Courts*," p. 573.

tion to the proper Court.[1] The rejection of a plaint does not of its own force preclude the presentation of a fresh plaint.[2] If the plaint is admitted, the plaintiff must present copies of it, or (if permitted by the Court) concise statements of the claim to the defendant.[3]

Documents relied on.—The plaintiff must endorse on, or annex to, the plaint a memorandum of the documents (if any) which he has produced along with it.[4] If a plaintiff sues *upon* a document (*e.g.*, on a promissory note) in his possession or power, he must produce it in Court when the plaint is presented and delivered, or a copy of it, to be filed with the plaint. If he relies on any other document (whether in his possession or power or not) as *evidence* in support of his claim, he must enter them in a list to be added, or annexed to the plaint.[5] This rule does not apply to documents produced for the cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant, or handed to a witness merely to refresh his memory.[6] If any such document is not in his possession or power, he must, if possible, state in whose possession or power it is.[7] Documents which are required to be produced at the presentation of the plaint, or to be entered in a list annexed to it, but which are not so produced, or entered, are not, without the leave of the Court, admissible in evidence on behalf of the plaintiff at the hearing of the case.[8]

Shop and other books.—If the document on which the plaintiff sues is an entry in a shop book, or other book in his possession or power, the plaintiff must produce it and a copy of the entry at the time of filing the plaint. The Court officer will then mark the document for the purpose of identification, and will, after examining and comparing the copy with the original and attesting the copy if found correct, return the book to the plaintiff and file the copy in Court.[9] If a document admitted in evidence during the hearing of a suit is an entry in a shop book or other account in current use, the party on whose behalf the account is produced may furnish a copy of the entry. When the copy has been compared and examined the book will be returned. If the entry is in a book or account belonging to a person other than the party on whose behalf the book or account is produced, similar provisions apply.[1]

A suit must be framed as far as practicable so as to afford ground for a final decision. It must, therefore, include the *whole* of the claim the plaintiff is entitled to make, in respect of the

1) Civ. Pr. Code, ss. 53, 54, 57.
2) ib., s. 56.
3) ib., s. 58; [for a form of plaint, and
4) ib.
5) ib., s. 59.
6) ib., s. 63.
8) ib., s. 63.
9) ib., s. 62.
1) ib., s. 141A.

cause of action. A plaintiff may, however, relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court; but if he does so, or otherwise intentionally relinquishes, or omits to sue in respect of any portion of his claim, he cannot afterwards sue for the amount relinquished or omitted. A plaintiff entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies he cannot afterwards sue for the remedy omitted. An obligation and a collateral security for its performance are deemed to constitute but one cause of action.[2]

Summons.—When the plaint has been registered, and the copies or concise statements have been filed, a summons is issued through the Court to each defendant to appear and answer the claim on a day fixed, either in person or by counsel or pleader, unless the defendant has appeared at the presentation of the plaint and admitted the claim. The Court may order the plaintiff or defendant to appear in person.[3] No party, however, can be so ordered to appear in person unless he resides (*a*) within the local limits of the Court's ordinary original jurisdiction, or (*b*) without such limits and at a place less than fifty, or (where there is railway communication for five-sixths of the distance between the place where he resides and the place where the Court is situate) two hundred miles from the Court-house.[4] The summons will order the defendant to produce all documents required by the plaintiff, or relied on by the defendant, and will state whether, on the day fixed for hearing, the suit will be finally disposed of or set down for settlement of issues.[5] Unless otherwise directed the summons is served at the expense of the party on whose behalf it is issued.[6] If a summons is not served in consequence of the plaintiff's failure to pay the fee for issuing, the suit may be dismissed, unless the defendant appears in person, or by agent, on the day fixed for hearing.[7] If the suit is so dismissed, the plaintiff may, subject to the law of limitation, bring a fresh suit, and the Court may, upon sufficient cause being shown for non-payment of the fee for issue of summons, restore it to the file, if application is made within thirty days of the dismissal of the suit.[8]

Conduct of suit where several plaintiffs or defendants.—Where there are numerous parties having the same interest in one suit, one or more of such parties may (with the Court's permission) sue or be sued, or may defend; in such suit,

2) Civ. Pr. Code, ss. 42, 43. 4) ib., s. 67. 6) ib., s. 93. 8) ib., s. 99.
ib., ss. 61, 66. 5) ib., ss. 68, 70. 7) ib., s. 97.

on behalf of all parties interested. Notice of institution of suit is then given at the plaintiff's expense to all such parties, any of whom may apply to the Court to be made a party to such suit.[9] The Court may give the conduct of the suit to such plaintiff as it deems proper. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead, or act for such other in any proceeding under the Civil Procedure Code.[0] The same rule applies in the case of defendants. The authority must be in writing, signed by the party giving it and filed in Court.[1]

Written statement.—Parties may at any time *before* or at the first hearing of the suit tender written statements of their respective cases. The statements which are required to be as brief as possible and not argumentative, are simple narratives of fact, which the party making the statement believes to be material to the case, and which he either admits or believes he will be able to prove.[2] It is, when made by a defendant, his answer in writing to the plaint of the plaintiff. The Court may at any time require a written statement or additional written statement from any of the parties.[3] For the purpose of answering a statement so required, a written statement or additional written statement may, with the permission of the Court, be received at any time.[4] With this exception and the one mentioned in the next paragraph, no written statement will be received *after* the first hearing of the suit.[5]

Set-off.—If in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any *ascertained* sum of money legally recoverable by him from the plaintiff, and if in such claim of the defendant against the plaintiff both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards (unless permitted by the Court), tender a written statement containing the particulars of the debt sought to be set-off. The Court will, if it allows the set-off and the latter does not in amount exceed its pecuniary jurisdiction, set-off one debt against the other. The effect of a written statement of set-off is that of a plaint in a cross-suit: *e.g.*, B owes A on a bill of exchange Rs. 500. A owes B Rs. 1,000 under a decree. If A brings a suit for Rs. 500 against B, the latter may set-off Rs. 1,000. The effect of his doing so is the same as if he had brought a separate suit for Rs. 1,000. To avoid "circuity of action" B is allowed to plead set-off, and the Court will pronounce a final

(9) Civ. Pr. Code, ss. 30, 32.
(1) ib., s. 35.
(2) ib., ss. 110, 114.
(3) ib., s. 112.
(4) ib.
(5) ib. [for a form of written Statement v. *Appendix* (3).

ident in the same suit, both in the original and the cross-claim. The decree will set out the amount due from each party to the other and will be for the recovery of any sum which appears to be due to either party (in the example given, of Rs. 500 payable by A to B). Both parties must fill the same character in the claim as in the set-off: *e.g.*, A sues B as executor of C: B cannot set-off a debt due to him by A personally. Lastly, the sum must be an "ascertained" sum: *i.e.*, a definite sum, or one which can be made definite on reasonable enquiry, such as a sum due on a mutual account, the balance of which has not been struck. The following is an example of an unascertained sum. A sues B on a bill of exchange: B alleges that A has wrongfully neglected to insure B's goods, and is liable to him in compensation which he claims to set-off; the amount not being ascertained cannot be set-off.[6]

Appearance of the parties.—On the day fixed in the summons the parties must appear in Court in person, or by their counsel, or pleader. If neither party appears the suit will be dismissed unless the Judge otherwise directs.[7] If the suit is dismissed the plaintiff may, subject to the law of limitation (see "*Limitation*," p. 401), bring a fresh suit. The Court may further restore the suit to the file if, within thirty days from the order of dismissal, sufficient cause is shown for non-appearance.[8] A suit will also be dismissed where the plaintiff, after the summons has been returned unserved, fails for a year to apply for a fresh summons.[9]

If the plaintiff appears and the defendant does not appear the Court may proceed to try the suit in the absence of the latter, on proof that the summons was duly served: if it was not, it will order a second summons to be issued. If the suit is adjourned for hearing and the defendant appear at or before the hearing, and assigns good cause for previous non-appearance, he may be heard in answer to the suit.[1] A suit or application heard in the presence of one party only is said to be heard *ex-parte*. An *ex-parte* decree against a defendant may be set aside by the defendant, on proof, that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on.[2]

If the defendant appears and the plaintiff does not appear the Court will dismiss the suit unless the defendant admits the plaintiff's claim or a part of it, in which case the claim, or the part admitted, will be decreed, and the suit as to the remainder dismissed. If a suit is wholly or partially dismissed

6) Civ. Pr. Code, s. 111, ill. (*d*), (*e*): s. 216, ib: 1 Q.B.D. 469: 2 Mad. 296.
7) ib., ss. 96, 98.
8) ib., s. 99.
9) ib. s. 99A.
1) ib., ss. 100, 101.
2) ib., s. 108.

for non-appearance of the plaintiff, the latter is precluded from bringing a fresh suit in respect of the same cause of action. He may, however, apply to set the dismissal aside. The Court will do so on notice to the defendant and on proof that he was prevented by any sufficient cause from appearing when the suit was called on.[3]

Settlement of issues.—The first stage in the hearing of a suit is the "settlement of issues." An issue exists "when a material proposition of fact or law is affirmed by the one party and denied by the other." Material propositions are those propositions of law or fact, which a plaintiff must allege in order to show a right to sue.[4] At the first hearing the Court ascertains upon what material propositions the parties are at variance, and then proceeds to frame and record the issues on which the right decision of the case depends. If, when issues have been framed, the Court is satisfied that no further argument or evidence than the parties can at once supply, is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court will proceed to determine such issues; and if the finding thereon is sufficient for decision, may pronounce judgment accordingly, or if not sufficient, adjourn the further hearing of the suit.[5] The Court may also in any case, after the framing of the issues, adjourn the suit for further hearing to another day. (*The provisions in this paragraph do not apply to M.S.C.C.*)

Hearing of the suit.—After the settlement of issues (if any) and either on the same day, or on the day to which the hearing of the suit is adjourned, the Court will hear the suit. The party who has the right to begin (generally the plaintiff) states his case and produces his evidence in support of the issues which he is bound to prove. The other party then states his case and produces his evidence (if any). The party beginning is then entitled to reply.[6]

Judgment and decree.—Judgment, which means the statement given by the Judge of the grounds of a decree or order, is then, or on some future day, given by the Court. The decree is then drawn up and signed by the Judge. A "decree" means the formal expression of, and adjudication upon, any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court, decides the suit or appeal.[7] In a decree for payment of money the Court may order interest to be paid on the principal sum adjudged, from the date of the suit to the date of decree, in addition to any interest adjudged on such principal

3) Civ. Pr. Code, ss. 102, 103.
4) ib., s. 146.
5) ib., s. 154.
6) ib., ss. 179, 180.
7) ib., s. 2.

sum for any period prior to the institution of the suit, with further interest on the aggregate sum so adjudged from the date of decree to the date of payment.[8] Parties to a suit are entitled at their own expense to certified copies of the judgment and decree.[9] See "*Judgments and Decrees*," p. 356.

Payment by instalments.—In all decrees for payment of money, the Court may for any sufficient reason order that the amount shall be paid by instalments, with or without interest. The Court may also do so *after* decree, on the application of the judgment-debtor and with the consent of the decree-holder.[1]

A judgment-debtor means any person against whom a decree or order has been made.[2]

A decree-holder means any person in whose favour a decree or order capable of execution has been made, and includes any person to whom such decree or order is transferred.[3]

Mesne profits.—In suits for land the Court may decree payment of mesne profits with interest in respect of the property from the institution of the suit until delivery of possession or until the expiration of three years from the date of decree. "*Mesne profits*" of property mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received therefrom, together with interest on such profits.[4]

Withdrawal of suit.—If at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff (*a*) that the suit must fail by reason of some formal defect, or (*b*) that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit. A plaintiff who withdraws from a suit or abandons part of his claim without permission is liable to costs, and is precluded from bringing a fresh suit for the same matter or in respect of the same part. The law of limitation is not affected by the bringing of the first suit. One of several plaintiffs cannot withdraw without the consent of the others.[5]

Compromise of suit.—If a suit is adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise, or satisfaction is recorded, and a decree passed in accordance therewith so far as it relates to the suit. This decree is final, so far as it relates

8) Civ. Pr. Code, s. 209.
9) ib., s. 217.
1) ib., s. 210: 14 W. R., 324 (interest on instalments).
2) ib., s. 2.
3) ib.
4) ib., s. 211.
5) ib., ss. 373, 374.

to so much of the subject-matter of the suit as is dealt with by the agreement, compromise, or satisfaction.[6]

Deposit by defendant in satisfaction of claim.—The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim. Notice in writing of the deposit must be given through the Court by the defendant to the plaintiff, and the amount of the deposit will (unless the Court otherwise directs) be paid to the plaintiff on his application. No interest is allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited be in full of the claim or fall short of it.[7]

If the plaintiff accept such amount only in part satisfaction of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff must pay the costs of the suit incurred after the deposit, and previous thereto, so far as they were caused by excess in the plaintiff's claim.[8]

If the plaintiff accept such amount as satisfaction in full of his claim, he must present to the Court a statement to that effect, which will be filed. The Court will then pass judgment accordingly, and, in directing by whom the costs of each party are to be paid, will consider which of the parties is most to blame for the litigation.[9]

Abatement of action.—When, owing to the death, marriage, or insolvency of one of the parties to a suit, a suit becomes defective, it is said technically to "abate." The effect of abatement is that the suit comes to an end, and no fresh suit can be brought on the same cause of action.[1]

By death.—The death of a plaintiff or defendant does not cause a suit to abate, if the right to sue survives: *e.g.*—(1) A covenants with B and C to pay an annuity to B during C's life; B and C sue A to compel payment; B dies before the decree. The right to sue survives to C, and the suit does not abate. (2) A sues B for libel. A dies. The right to sue does not survive, and the suit abates.[2]

The marriage of a female plaintiff or defendant does not abate a suit which may, notwithstanding, be proceeded with to judgment, and, where the decree is against a female defendant, be executed against her alone.[3]

By insolvency of plaintiff.—The bankruptcy or insolvency of a plaintiff in any suit which his assignee or the receiver appointed in insolvency proceedings under the Code might maintain

6) Civ. Pr. Code, s. 375. 8) ib., s. 379. 1) ib., s. 371 3) ib., s. 369.
7) ib., ss. 376, 377, 378. 9) ib. 2) ib., s. 361

for the benefit of his creditors does not bar the suit, unless the assignee or receiver declines to continue the suit and to give security for costs. If the assignee or receiver so neglects or refuses, the defendant may apply for the dismissal of the suit, on the ground of the plaintiff's bankruptcy or insolvency. The Court may award to the defendant the costs which he has incurred in defending the suit to be proved as a debt against the plaintiff's estate.[4]

Application to set aside order of abatement or dismissal.—The person claiming to be the legal representative of the deceased or bankrupt or insolvent plaintiff may apply for an order to set aside an order for abatement or dismissal; and if it be proved that he was prevented by any sufficient cause from continuing the suit, the Court will set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.[5]

In other cases of assignment, creation or devolution of interest pending a suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections (if any) be continued by or against the person to whom such interest has come either in addition to, or in substitution for, the person from whom it has passed, as the case may require.[6]

Receivers in suits—See "*Receivers*," p. 549.

Paupers.—For the purpose of instituting a pauper's suit (called a suit *in formâ pauperis*) a person is deemed a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.[7]

Subject to the following rules any pauper may bring a suit.—(1) No suit can be brought by a pauper to recover compensation for loss of caste, libel, slander, abusive language, or assault.

(2) Unless the applicant be a woman, who, according to the customs of the country, ought not to be compelled to appear in public, or a person exempted by the Local Government, an application for permission to sue *in formâ pauperis* must be made in person, and in writing signed and verified, and must contain the particulars required to be stated in all plaints; a schedule of any moveable or immoveable property belonging to the petitioner, with its estimated value, must be annexed.

(3) If the applicant be exempted from appearance, the application may be presented by a duly authorized agent who can answer

4) Civ. Pr. Code, s. 370. 5) ib., s. 371. 6) ib., s. 372. 7) ib., s. 401.

all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.[8]

Application to sue will be rejected if not framed or presented in the manner prescribed,[9] or if it appear to the Court—(*a*) that the applicant is not a pauper, or (*b*) that he has, within the two months next before the presentation of the application, disposed of any property fraudulently or with a view to obtain the benefit of suing *in formâ pauperis*, or (*c*) that his allegations do not show a right to sue in such Court, or (*d*) that he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter. If the Court sees no reason to refuse the application, it will fix a day (of which at least ten days' previous notice will be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof of it.[1]

Procedure at hearing of suits by paupers.—On the day so fixed, the Court will examine the witnesses, and may cross-examine the applicant or his agent, and will also hear any argument on the question whether, on the face of the application and on the evidence (if any) taken by the Court, the applicant is or is not entitled to sue. The Court will then either allow or refuse to allow the applicant to sue as a pauper. If the application be granted, it will be numbered and registered, and deemed the plaint in the suit, *which will then proceed in the ordinary manner*, except that the plaintiff will not be liable to any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader, or other proceeding connected with the suit. An order made at the hearing, refusing to allow the applicant to sue as a pauper, is a bar to any subsequent application of the like nature by him in respect of the same right to sue. The applicant is, however, at liberty to institute a suit in the *ordinary* manner in respect of such right, provided that he first pays the costs (if any) incurred by Government in opposing his application for leave to sue as a pauper.[2]

Costs in suit by paupers.—If the plaintiff succeed in the suit, the Court will calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; and such amount will be a first charge on the subject-matter of the suit, recoverable by the Government from any party ordered by the decree to pay it.[3] If the plaintiff

8) Civ. Pr. Code, ss. 402, 404. 1) ib., ss, 405, 407, 408. 3) ib., s, 411.
9) for form see *Appendix* (4). 2) ib., ss, 409, 410, 413.

fails in the suit, or if he is dispaupered, or if the suit is dismissed in consequence of the plaintiff's failure to pay the fee for issue of summons, or because neither party to the suit appears, the Court will order the plaintiff, or any other person made co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; and, if it find that the suit was frivolous or vexatious, it may also punish the plaintiff with fine not exceeding 100 rupees or with imprisonment for a term which may extend to a month, or with both.[4] The costs of an application for permission to sue as a pauper and of an inquiry into pauperism are costs in the suit.[5]

Dispaupering.—The Court may, on motion by the defendant, or by the Government pleader, of which one week's notice in writing has been given to the plaintiff, order the plaintiff to be *dispaupered* (*i.e.*, deprived of the capacity of suing *in formâ pauperis*)—(*a*) if he is guilty of vexatious or improper conduct in the course of the suit; (*b*) if it appears that his means are such that he ought not to continue to sue as a pauper, or (*c*) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter.[6]

Costs generally.—The Court has full power to give and apportion costs of every application and suit in any manner it thinks fit; the fact that the Court has no jurisdiction to try the case, is no bar to the exercise of this power. Every order relating to costs made under the Civil Procedure Code, and not forming part of a decree, may be executed as if it were a decree for money.[7] The Court may give interest on costs at any rate not exceeding six per cent. per annum, and may direct that costs, with or without interest, be paid out of, or charged upon, the subject-matter of the suit.[8]

Security for costs when required.—(1) If, at the institution or at any subsequent stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are **residing out of British India,** and that neither he nor they possess any sufficient immoveable property within British India, independent of the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a fixed time, to give security for the payment of all costs incurred and likely to be incurred by any defendant. Any person who leaves British India under such circumstances as to afford

4) Civ. Pr. Code, s. 412.
5) ib., s. 415.
6) ib., s. 414.
7) ib., s. 220: general rule as to costs: see O'Kinealy, p. 225: 10 Moore, 563: Marsh. 79: 9 W. R. 61, 193.
8) Civ. Pr. Code, s. 222.

reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs is, for the purpose of this provision, deemed to be residing out of British India.

(2) On the application of any defendant in a suit for money **when the plaintiff is a woman**, the Court may at any stage of the suit, make a like order if it is satisfied that the plaintiff does not possess any sufficient immoveable property within British India independent of the property in suit.[9]

In the event of security not being furnished within the time so fixed, the Court will dismiss the suit unless the plaintiff or plaintiffs be permitted to withdraw or show good cause why such time should be extended, in which case the Court may extend it. When a suit is dismissed, the plaintiff may apply on notice in writing to the defendant for an order to set the dismissal aside, and, if it is proved that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court will set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and will appoint a day for proceeding with the suit.[1]

Proceedings by agreement of parties.—Parties interested in the decision of any question of fact or law may enter into an agreement in writing, stating such question in the form of a case for the opinion of a Court, (which would have had jurisdiction to entertain a suit of the like value,) and providing that upon the finding of the Court;—(*a*) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or (*b*) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them; or (*c*) one or more of the parties shall do, or refrain from doing, some other particular acts specified in the agreement.[2] The agreement must be divided into paragraphs and state all facts and documents necessary to enable the Court to decide the question, and must also, if it is one for the delivery of any property, or for the doing, or the refraining from doing, any particular act, state the estimated value of the property to be delivered, or to which the act specified has reference.[3]

The agreement, if correctly framed, may be filed in a Court of competent jurisdiction, and when so filed, will be numbered and registered as a suit between one or more of the parties, as plaintiff or plaintiffs, and the other or others of them as defendant or defendants; notice will then be given to all the parties to the agreement, other than the party or parties by

9) ib., s. 380. 1) ib., s. 381. 2) ib., s. 527. 3) ib., s. 528.

whom it was presented; after the agreement is filed, the parties to it are subject to the jurisdiction of the Court and bound by the statements contained in it;[4] after notice the case will be set down for hearing and will be heard as a suit instituted in the ordinary manner if the Court is satisfied,—(*a*) that the agreement was duly executed by the parties to it, and (*b*) that they have a *bonâ fide* interest in the question stated in it, and (*c*) that the same is fit to be decided. It will then proceed to pronounce judgment thereon, in the same way as in an ordinary suit; upon judgment a decree will follow enforceable in the ordinary manner.[5]

An actionable claim is what is known in English Law as a *Chose in Action*. A *chose* or thing may either be *in action* or *in possession*. A *chose in possession* exists where a person has not only the right to enjoy, but also the actual enjoyment of the thing. A *chose in action* is a thing of which a man has not the possession or actual enjoyment, but has a right to demand by action or other proceeding, *e.g.*, a debt or bond. An actionable claim is transferable. A claim which the Civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary.[6] None of the following provisions relating to actionable claims apply to negotiable instruments.[7]

Assignment of claim.—No transfer of any debt or any beneficial interest in moveable property has any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to, or otherwise aware of, and not having received express notice of, a transfer, with the debt or property is valid as against such transfer: *e.g.*:—A owes money to B, who tranfers the debt to C. B then demands the debt from A, who, having no notice of the transfer, pays B. The payment is valid, and C cannot sue A for the debt.

Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.[8] On receiving such notice, the debtor or person in whom the property is vested must give effect to the transfer unless where the debtor resides, or the property is situate, in a foreign country, and the title of the person in whose favour the transfer is made is not complete according to the law of such country.[9]

Mortgaged Debt.—See "*Mortgage.*"

4) ib., ss. 529, 530.
5) ib., s, 531.
6) Wharton's Law Lexicon, 5th ed., p. 181. s. 130, Act IV of 1882.
7) s. 139, ib.
8) s. 132, ib.
9) s. 133, ib.

Discharge of person against whom claim is sold.—Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it. In other words the purchaser of a debt who pays a less sum for it than the amount due is not entitled to the full benefit of the debt, but only to the sum which he paid for it, together with his expenses and interest. Nothing in the former part of this section applies—(*a*) Where the sale is made to the co-heir to, or co-proprietor of, the claim sold; (*b*) where it is made to a creditor in payment of what is due to him; (*c*) where it is made to the possessor of a property subject to the actionable claim; (*d*) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.

Liability of Transferee.—The person to whom a debt or charge is transferred takes it subject to all the liabilities to which the transferror was subject in respect thereof at the date of the transfer: *e.g.*:—A debenture is issued in fraud of a public company to A. A sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.[1]

See "*Warranty*," "*Legal Practitioners*," and "*Mortgage*."

1) ss. 135, 137 ib.

ADMINISTRATION.

AUTHORITIES—Acts X of 1865 : XXI of 1870 : II of 1874 : V of 1881 : VII of 1889.

Administration means the adjustment and protection of the rights of one or more persons in relation to an estate or property or collection of assets (*i.e.*, property available for the payment of debts). The term is applied to the duties of executors, administrators, trustees, liquidators, etc., in managing the property committed to their charge, paying debts, dividing the surplus, assets, etc. See "*Executor.*"

The Law of Administration of estates of deceased persons is contained in the Indian Succession Act (X of 1865) which constitutes the Law of British India applicable in the case of *all* persons except Hindus, Mahommedans and Buddhists. The latter are governed by the Probate and Administration Act (V of 1881), Succession Certificate Act (VII of 1889), and in the case of Wills by Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal, and in the Towns of Madras and Bombay by the Hindu Wills Act (XXI of 1870). The provisions of Act V of 1881 are nearly the same as those of Act X of 1865 on the subject of Administration. The points in which they differ have been noted below.

Letters of Administration mean an authority under the seal of a Court by which the person to whom it is granted becomes clothed with powers and duties similar to those of an executor. See "*Executor.*"

Order of Administration—See "*Executor.*"

Letters of Administration are granted—(I) In the case of an intestacy; (II) where the deceased person has made a will but has *not* appointed an executor; (III) where the deceased person has made a will and *has* appointed an executor, but the latter (*a*) is legally incapable, or (*b*) refuses to act or fails to accept the executorship within the time limited for acceptance, or (*c*) has died before the testator, or (*d*) before he has proved the will, or (*e*) after he has proved the will but before he has administered all the estate of the deceased. In the case of (I) simple letters of administration are granted; in the case of (II) and (III) letters of administration "with the will annexed."[1] Administration is also granted for defined periods and special purposes. Such grants are called "Limited grants of Administration."

1) ss. 193, 195, 196, 198 (Succession Act); ss. 16, 18, 19, 21 (Act V of 1881).

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To whom granted.—In all these cases the person to whom the grant is made is called the administrator. His position is analogous to that of an executor. An administrator is defined as a "person appointed by the *Court*" (an executor is appointed by the *testator*) "to administer the estate of a deceased person when there is no executor." He is the legal representative of the deceased person for all purposes, and all the property of the deceased person vests in him as such.[2] Letters of administration cannot be granted to any person who is a minor or who is of unsound mind, nor (in any case governed by Act X of 1865) to a married woman without the *previous* consent of her husband ;[3] when, however, letters of administration have been granted to a married woman, she has all the powers of an ordinary administrator.[4] The tables on the next and succeeding pages show the classes of persons entitled to letters of administration. The tables must be read in conjunction with the **Administrator-General's Act** (II of 1874). . By the latter[5] any letters of administration including letters "General," or "Limited," or "with the will annexed," granted by a *High Court* at Calcutta, Madras and Bombay must be granted to the Administrator-General, unless they are granted to the next of kin of the deceased (including thereby a widow or widower or any other person entitled to letters of administration) in preference to a creditor or legatee of the deceased. If administration is applied for to *any other Court* in the three presidencies, the Administrator-General is deemed entitled to administration in preference to any other person merely on the ground of his being a creditor, a non-universal legatee, or a friend of the deceased.

Liability for devastation.—See "*Executor.*"

Powers and duties of administrators after their appointment to their office are for the most part the same as those of executors.—See "*Executor.*"

Effect of letters of administration.—No right to any part of the property of a person who has died intestate can be established in any Court by any person governed by the Indian Succession Act, unless letters of administration have first been granted.[6] In the case of persons *not* so governed (Hindus, Mahommedans, and Buddhists) either letters of administration or a succession certificate under Act VII of 1889 is necessary before any recovery can be had through the Courts of debts

(*continued on page 26*)

2) s. 179. Succession Act, s. 4. Act V. of 1881.
3) s. 189, ib. s. 13, ib.
4) s. 275, ib. s. 96, ib.
5) s. 15.
6) s. 190.

TABLE A.

Of persons entitled to administration of the estate of an INTESTATE applicable in the case of all persons (not being Hindus, Mahommedans, or Buddhists) who have died leaving property in British India, whether domiciled in British India or not.—(See "*Domicile.*")

When intestate dies leaving	Administration will be granted to	REMARKS.
(1) Widow or husband.[7]	*I. The widow or husband* Unless the Court shall see cause to exclude the former either on the ground of some personal disqualification (*e.g.*, if she is a lunatic or has committed adultery) or because she has no interest in her husband's estate (*e.g.*, if she has been barred by her marriage settlement of all interest in her husband's estates)[8]	(*a*) If the Judge think proper he may associate any person or persons with the widow in the administration, who whould be entitled solely to the administration if there was no widow.[9] (*b*) If the widow has married again since the death of her husband, such marriage is not a good cause for her exclusion [1]
(2) No widow or husband, or a widow, whom the Court excludes.[2] (see above).	*II. The person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate.*[3]—(See "*Intestacy.*")	(*a*) Provided that when the mother of the deceased is one of the class of persons so entitled, she is solely entitled to administration.[4] (*b*) Those who stand in equal degree of kindred to the deceased are equally entitled to administration.[5]
(3) No person connected by marriage or consanguinity who is entitled to letters of administration and willing to act.[6]	*III. A creditor of the deceased*, on his application, if the Court think fit.[7]	

7) ss. 201, 205 (Succession Act). 8) ib. 9) ib. 1) s. 202, ib. 2) s. 203, ib. 3) ib. 4) ib. 5) s. 204, ib. 6) s. 206, ib. 7) ib.

TABLE B.

Of persons entitled to administration of the estate of an INTESTATE applicable to Hindus, Mahommedans, and Buddhists.

When	Administration may be granted	REMARKS.
(1) Deceased has died intestate.[8]	*I. To any person, who, according to the rules for the distribution of the estate of an intestate* APPLICABLE IN THE CASE OF SUCH DECEASED, *would be entitled to the whole or any part of such deceased's estate.*	This means that the grant will follow the interest in the estate; thus in case of a Hindu dying leaving no sons, grandsons, or great-grandsons, but a widow, the widow being entitled to his estate will be entitled to administration.—(See "*Intestacy.*")
(2) Deceased has died[9] intestate and several persons entitled to the whole or any part of the deceased's estate apply for administration.	*II. To any one or more of them in the discretion of the Court.*	The Court will prefer a single to a joint administration.
(3) Deceased has died intestate and no person entitled to either the whole or any part of his estate applies for administration.[1]	*III. A creditor of the deceased.*	

8) s. 23. (Probate and Administration Act.) 9) ib. 1) ib.

When a deceased person has left a **Will**, and when owing to the various circumstances mentioned in the first column of the following table, administration of his estate is required, the latter will be granted to the persons in the order and according to the rules stated in the following table :—

TABLE C.

Of persons entitled to administration of the estate of a TESTATOR applicable both in the case of Hindus, Mahommedans, and Buddhists, and of all other persons who have died leaving property in British India, whether domiciled in British India or not.

When	Persons who may be admitted to prove the Will and to whom administration may be granted.	REMARKS.
(1) The will contains the appointment of an executor, and the latter has not renounced the executorship.[2]	*I. The executor only and no other person until notice has issued calling upon the executor to accept or renounce his office.*[3]	(*a*) Except that when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.[4] (*b*) The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made the renunciation precludes him from ever afterwards applying for probate of the will appointing him executor.[5]
(2) Deceased has made a will, but :— (*a*) There is no executor appointed. (*b*) There is an executor appointed, but the latter is legally incapable or refuses to act.[6]	*II. An universal or residuary legatee.*[7]	(*a*) When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been wholly administered, his representative has the same right to administration with the will annexed as such residuary legatee.[8]

2) s. 193. (Succession Act. s. 16. (Probate and Administration Act.)
3) ib.
4) ib.
5) s. 194, ib., s. 17, ib.
6) s. 196, ib., s. 19, ib.
7) s. ib.
8) s. 197, ib., s. 20, ib.

TABLE C.—(*Continued.*)

When	Persons who may be admitted to prove the Will and to whom administration may be granted.	Remarks.
(*c*) The latter has died before the testator or before he has proved the will. (*d*) The latter dies after proving the will, but before he has administered all the estate.[9]	*II. An universal or residuary legatee.*[1]	(*b*) in the case of (*d*) administration is granted of so much of the estate as is still unadministered.[2]
(3) An executor is appointed, but the latter renounces or fails to accept the office within time limited for acceptance or refusal.[3]	*III. The person who would be entitled to administration in case of intestacy.*[4]	For the person entitled: *see* Table A and "*Intestacy*," in the case of persons not Hindus, Mahommedans or Buddhists: and Table B in the case of the latter.
(4) There is no executor and no residuary legatee or representative of a residuary legatee or he declines, or is incapable to act, or cannot be found.[5]	*IV.* (1) *The person or persons who would be entitled to administration in the case of intestacy* or (2) *Any other legatee having a beneficial interest* or (3) *A creditor.*[6]	(*a*) Letters of administration with the will annexed will not be granted to any legatee other than an universal or residuary legatee until notice has been issued and published calling on the next of kin to accept or refuse letters of administration.[7] (*b*) For the persons entitled: see Tables A and B and "*Intestacy*."

9) s. 196. (Succession Act.) s. 19. (Probate and Ad. Act.)
1) ib. 2) ib. 3) s. 195, ib., s. 18, ib. 4) ib. 5) s. 198, ib., s. 21, ib. 6) ib. 7) s. 199, ib., s. 22, ib.

from debtors of deceased persons. When administration is granted, it entitles the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.[8] It does not, however, like probate (see "*Wills*") render valid every intermediate act of the administrator, because the grant does not validate any acts prior to the grant tending to the diminution or damage of the intestate's estate.[9] The grantee of administration has alone power to sue, until the grant has been revoked or recalled.[1] Grant of administration is conclusive as to the representative title of the administrator against debtors of the deceased, and all persons holding property which belonged to him: it affords full indemnity to all debtors paying their debts and all persons delivering up property belonging to the deceased to the person to whom the grant has been made.[2]

Limited grants.—Limited grants are (A) **Grants Limited in Duration** as, (1) Where no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted limited until the will, or an authenticated copy of it be produced. (B) **Grants for the use and benefit of others having right**, as (1) administration with the will annexed granted to the attorney or agent of an absent executor, (where there is no other executor within the province willing to act) for the benefit of his principal limited until he shall obtain probate or letters of administration granted to himself; (2) administration with the will annexed granted to the attorney or agent of an absent person, who, if present, would be entitled to administration limited as before mentioned; (3) administration granted to the attorney or agent of an absent person entitled to administer in case of intestacy, (no person equally entitled being willing to act,) limited as abovementioned; (4) administration granted during minority of sole executor or sole residuary legatee to the legal guardian of the minor or some other person appointed by the Court until the minor shall have completed the age of eighteen years, or (under Act V of 1881) until he shall have attained his majority. (5) Grant of Administration until one of several minor executors or residuary legatees attains majority limited until one of them shall have completed the age of eighteen years, or (under Act V of 1881) shall have attained his majority. An administrator during minority has all the powers of an ordinary administrator. (6) Grant of Administration for use and benefit of lunatic until he shall become of sound mind. (7) Grant of Administration "*pendente*

8) s. 191. (Succession Act.)
s. 14. (Probate Act)
9) s. 192, ib., s. 15, ib.
1) s. 260, ib., s. 82, ib.
2) s. 242, ib., s. 59, ib.

lite," *i.e.*, pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration. (C) **Grants for special purposes.**—(1) Grant of Administration with the will annexed limited to a particular purpose. (2) Grant of Administration limited to property in which a person has a beneficial interest ; *e.g.*, when a sole trustee dies having no interest in the trust property and leaves no representative or person willing to act as such, administration limited to the trust property may be granted to the person beneficially interested. (3) Grant of Administration limited to a suit ; *i.e.*, for the purpose of representing a deceased person in a suit. (4) Grant of Administration limited to the purpose of becoming a party to a suit to be brought against an administrator or executor who has been absent for 12 months from the province in which the probate or administration has been granted. (5) Grant of Administration to any person whom the Court thinks fit. (6) Limited to collection and preservation of deceased's property. Appointment as administrator of a person other than the one who under ordinary circumstances would be entitled to administration ; *e.g.*, where a person has died intestate or leaving a will of which there is no executor willing and competent to act, or where the executor at the time of the death of the deceased person is resident out of the province. (D) **Grants with exception** are made either with will or without whenever the nature of the case requires a grant of this kind. (E) **Grants of the rest.**—(1) Whenever a grant has been made with exception, the person entitled to administration may take out administration to the rest of the deceased's estate. (F) **Grants of effects unadministered.**—(1) If the executor to whom probate has been granted have died leaving part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate. He has the same power as the original executor. (2) Grant of Administration when a limited grant has expired, and there is still some part of the estate unadministered.[3]

Revocation of grants —See "*Probate*"

Practice in granting administration is the same as that in granting probate.—See "*Probate.*"

Application for letters of administration must be made by written petition, stating (1) time and place of deceased's death, (2) the family or other relatives of the deceased, (3) their respective residences, (4) the right on which the petitioner claims (5) that the deceased left some property within the jurisdiction of the District Judge or Delegate to whom the application is made,

3) ss. 200—231 (Succession Act), ss. 24—47 (Probate & Administration Act.)

and (6) the amount of assets which are likely to come into the petitioner's hands: and when the application is to a District Delegate (7) that the deceased at the time of his death resided within the jurisdiction of such Delegate. When the application is to a High Court for letters of administration intended to have effect throughout British India, the petition must further state (8) that to the best of the petitioner's knowledge and belief, no application has been made to any other High Court for letters of administration of the same estate, intended to have such effect: or when any such application has been made, (9) the High Court to which and the person by whom it was made and the proceedings, if any, had thereon. The petition must be signed and verified in the following form:—"I, A. B., petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief."[4]

Form of grant of letters of administration.—The grant is under the seal of the Court and in the following general form:—

Judge of the District of or Delegate, etc., hereby make known that on the day of letters of administration (with *or* without the will annexed (*as the case may be*) of the property and credits of , late of , deceased were granted to the father (*or as the case may be*) of the deceased, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits, and exhibit the same in this Court within 6 months from the date of this grant, or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may from time to time appoint.[5]

An administration bond must be given to the Judge by the person to whom administration is granted with one or more sureties for the due administration of the estate. If the estate is not duly administered, the Judge may assign the bond to some person who will thereupon be entitled to sue the administrator on it.[6]

Time when administration will be granted.—It will not be granted until after the expiration of 14 clear days from the day of the testator or intestate's death.[7]

Caveat.—See "*Probate.*"

4) ss. 246, 246A (Succession Act.)
ss 64, 65, 66 (Probate Act.)
5) s. 255, ib.
s. 77, ib.
6) s. 256, ib.
s. 78, ib.
7) s. 258 (Succession Act.)
s. 80 (Probate & Administration Act.)

The Succession Certificate Act[8] extends to the whole of British India (inclusive of Upper Burmah except the Shan States). By its provisions no Court will pass a decree against a debtor of a deceased person for payment of his debt (including any debt except rent, revenue, or profits payable in respect of land used for agricultural purposes) to a person claiming to be entitled to the effects of the deceased person, or any part thereof, or execute an order for such payment except on the production of the person so claiming of (1) probate or letters of administration to the estate of the deceased, or (2) of a succession certificate under that Act or the Acts therein mentioned. The Act does *not* apply in the case of persons governed by the Indian Succession Act, nor will a certificate be granted thereunder with respect to any debt or security to which a right can be established by probate of a will to which the Hindu Wills Act applies. The District Court within the jurisdiction of which the deceased ordinarily resided at the time of his death, or if at that time he had no fixed place of residence, then within the jurisdiction of which any part of the property of the deceased may be found, may grant a certificate under this Act.

Administrator-General.[9]—In each of the presidencies of Bengal, Madras, and Bombay there is an Administrator-General. Letters of administration granted by a High Court must be granted to the Administrator-General unless they are granted to the next of kin and in the case of grants by any other Court the Administrator-General is entitled to administration in preference to a creditor, non-universal legatee, or friend of the deceased. In the case of any person not being a Hindu, Mahommedan, Parsi, or Buddhist dying and leaving assets exceeding the value of 1,000 rupees, and of no person applying for administration of his estate or probate of his will within one month after his death, the Administrator-General may apply for letters of administration. Whenever any person, whether a Hindu, Mahommedan, Parsi or Buddhist, or not, dies leaving assets within the jurisdiction of a High Court at a Presidency-town, the Court may, upon the application of any person interested in such assets and their due administration either as creditor, legatee, next of kin or otherwise, or of a friend of any minor so interested, or of the Administrator-General, direct the latter to apply for administration on being satisfied that danger is to be apprehended of the misappropriation, deterioration, or waste of the assets. If in either of the above two cases the executor or person entitled to administration appears during the proceedings, probate or administration will be granted to them, otherwise to the Administrator-

8) Act XII of 1889.

9) Act II of 1874.

General. The Court has also the power in such a case to enjoin the Administrator-General to collect and hold the assets until the right of succession or administration is ascertained.

Transfer by private administrator of estate to Administrator-General.—Any private executor or administrator may (with the previous consent of the Administrator-General) by an instrument in writing under his hand, notified in the local Gazette, transfer all estates, effects and interests vested in him by virtue of such probate or letters to the Administrator-General by his name of office. Thereupon the transferror is exempt from all liability as such executor or administrator for any act or omission in respect of the said property *after* the date of the transfer.[1]

Commission.—The Administrator-General of Bengal is entitled to a commission of 3 cent. (which may be raised and again reduced by Government) and the Administrator-Generals of Madras and Bombay to a commission of 5 per cent. (which may be reduced and again raised by Government) respectively upon the amount or value of the assets which they respectively collect and distribute in due course of administration.[2]

Action by administrator for compensation to the family of a person for loss occasioned to it by his death by actionable wrong.—See "*Executor*."

Actions by and against administrator for wrongs committed in the lifetime of a deceased person.—See "*Executor*."

Purchases by administrator of property of deceased.—See "*Executor*."

Powers of several administrators.—See "*Executor*."

Suits by and against administrators trustees or executors.—In all suits concerning property vested in an administrator, trustee or executor when the contention is between the persons beneficially interested in such property and a third person, the administrator, trustee, or executor represents the person interested; it is not ordinarily necessary to make them parties to the suit: though the Court may, if it thinks fit, order them or any of them to be made parties.[3]

When there are several administrators or executors they must all be made parties to a suit against one or more of them: except executors and administrators beyond the local limits of the jurisdiction of the Court, and executors who have not proved their testator's will.[4]

No claim by or against an executor or administrator, or heir as such, can be joined with claims by or against him personally,

1) Act II of 1874, s. 31.
2) ss. 52, 55, ib.
3) Civil Pr. Code, s. 437.
4) s. 438, ib.

unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for jointly with the deceased person whom he represents.[6]

Suits by and against married administratrix.—Unless the Court otherwise directs, the husband of a married administratrix or executrix is not a necessary party to a suit by or against her.[5]

Distribution of assets.—See "*Executor*."

See "*Executor*," "*Probate*," and "*Wills*."

5) s. 439, ib.

6) s. 44, ib., rule B.

AGENCY.

AUTHORITIES—Contract Act. Chapter X: Civil Procedure Code: Cases and Sections cited.

APPOINTMENT AND AUTHORITY OF AGENTS.

An agent is a person employed to do any act for another (called the "principal") or to represent that other in dealings with third persons. Therefore contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.[7]

Any person may employ an agent who is of the age of majority according to the law to which he is subject, and who is of sound mind.

Any person may be an agent as between the principal and third persons: but no person who is not of the age of majority and of sound mind can become an agent so as to be responsible to his principal. In other words, such an agent may bring about a valid contract between his principal and a third party, but will not himself be liable to his principal.[8]

Agency may be constituted expressly, as by words spoken or written, or impliedly, as when it may be inferred from the circumstances of the case. See "*Custom and usage*," and "*Husband and wife.*" These circumstances may include things spoken or written or the ordinary course of dealing. No consideration is necessary to constitute an agency: it may be quite gratuitous: A gratuitous agent is not bound to undertake the agency, but if he does so he is liable for any loss sustained by his principal through his gross negligence.[9]

Agent's authority.—Agents are of two kinds: either *general*, *i.e.*, brokers, factors, auctioneers and other persons employed in recognised businesses: or *particular*, *i.e.*, appointed for some particular case and purpose only. The authority of the first is regulated by the usages and customs of their respective businesses; the authority of the second by the terms of their appointment. The Courts in India have recourse to the general mercantile law of England in order to determine the extent of an agent's authority. An agent having authority to do an act, has authority to do every lawful thing, which is necessary

7) *Contract Act*, ss. 182, 226.
8) ss. 183, 184 ib.
9) ss. 185, 187, ib., 2 M. H. C. 449, I. L. R., 3 Cal., 304.

in order to do such act. So also an agent having authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business: *e.g.* (i) A is employed by B residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same. (ii) A constitutes B, his agent, to carry on the business of a shipbuilder. B may purchase timber and other materials and hire workmen for the purpose of carrying on the business.[1] In an emergency an agent has authority to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances: *e.g.* (i) An agent for sale may have goods repaired if it be necessary. (ii) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. B may sell the provisions at Calcutta if they will not bear the journey to Cuttack without spoiling.[2] It is, however, the agent's duty in cases of difficulty to use all reasonable diligence in communicating with his principal and in seeking to obtain his instructions.[3]

Sub-Agents.

A sub-agent is a person employed by, and acting under the control of, the original agent in the business of the agency.

An agent cannot employ a sub-agent to perform acts which he has expressly or impliedly undertaken to perform personally, unless (1) by the ordinary custom of trade a sub-agent may, or, (2) from the nature of the agency, a sub-agent must be employed.[4]

Representation of principal.—When a sub-agent is properly appointed, the principal is so far as regards third persons represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal. The agent is responsible to the principal for the acts of the sub-agent. The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud or wilful wrong.[5]

Agent's responsibility for sub-agent appointed without authority.—When an agent, without having authority to do so, has appointed a person to act as sub-agent, the agent stands towards such person in the relation of a principal to agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the

1) s. 188, ib., 10 M. I. A., p. 229.
2) s. 189, ib.
3) s. 214, ib.
4) ss. 190, 191, ib.
5) s. 192, ib.

acts of the person so employed, nor is that person responsible to the principal.[6]

Agent appointed by agent under express authority.—When an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is *not* sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him : *e.g.* (i) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale. (ii) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C and Co. B instructs D, a solicitor, to take legal proceedings against C and Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would in his own case ; if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected : *e.g.* (i) A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently, and the ship turns out to be unseaworthy, and is lost. B is not, but the surveyor is, responsible to A. (ii) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.[7]

Ratification.

Effect of.—When acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority. The ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done : *e.g.* (i) A without authority buys goods for B. Afterwards B sells them to C on his own account ; B's conduct implies a ratification of the purchase made for him by A. (ii) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

A person who ratifies any unauthorized act done on his behalf, ratifies the whole of the transaction of which such act

6) s. 193, ib. 7) s. 195, ib.

formed part. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.[8]

Ratification cannot injure third persons.—An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such an effect: *e.g.* (i) A not being authorized thereto by B, demands on behalf of B the delivery of a thing the property of B from C who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver. (ii) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B so as to be binding on A.[9]

Revocation of Authority.

An agency is terminated (1) by the principal revoking his authority; or (2) by the agent renouncing the business of the agency; or (3) by the business of the agency being completed; or (4) by either the prinicipal or agent dying or becoming of unsound mind; or (5) by the principal being adjudicated an insolvent. The termination of the authority of an agent causes the termination (subject to the rules regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.[1]

Limitation on power of revocation.—The principal cannot where the agent has himself an interest in the property which forms the subject-matter of the agency (in the absence of an express contract) terminate the agency to the prejudice of such interest: *e.g.* (i) A gives authorityto B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor is it terminated by his insanity or death. (ii) A consigns a 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death. The principal may, save as is above provided, revoke the authority given to his agent at any time before the authority has been exercised, so as to bind the principal.[2] Nor again can the principal revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations, as arise from acts already done in the agency: *e.g.* (i) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of

8) ss. 196—199, ib. 9) s. 200, ib. 1) ss. 201, 210, ib. 2) ss. 202, 203, ib.

A's moneys remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton. (ii) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name so as not to render himself personally liable. A may revoke B's authority so far as regards payment for the cotton.[3] See "*Gaming and Wagering.*"

Compensation for revocation or renunciation.—Revocation and renunciation may be made either expressly or be implied in the conduct of the principal or agent respectively. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause. Reasonable notice must be given of such revocation or renunciation, otherwise the damage thereby resulting to the principal or agent, as the case may be, must be made good to the one by the other.[4]

The termination of the authority of an agent does not take effect, as far as regards him, before it becomes known to him, or so far as regards third persons before it becomes known to them: *e.g.* (i) A directs B to sell goods for him and agrees to give him 5 per cent. commission. A afterwards by letter revokes B's authority. B after the letter is sent, but before he has received it, sells the goods. He is entitled to his commission. (ii) A at Madras by letter directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell. B after receiving the second letter enters into a contract with C, who knows of the first letter but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.[5]

Agent's duty on death or insanity of principal.—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.[6]

AGENT'S DUTY TO PRINCIPAL.

Conduct of business.—An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to

3) s. 204, ib. 4) ss. 207, 205, 206, ib. 5) s. 208, ib. 6) s. 209, ib.

the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal; and if any profit accrues, he must account for it. If he deviates from his instructions, he will be regarded as a wrong-doer, and it will be no answer for him to say that the loss or damage would have occurred with equal probability if his wrongful act had not been done: *e.g.* (i) A, an agent, engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments. (ii) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C before payment becomes insolvent. B must make good the loss to A.[7]

Skill and diligence required.—An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct; but not in respect of loss or damage which are indirectly, or remotely caused by such neglect, want of skill, or misconduct; *e.g.* (i) A, a merchant, in Calcutta, has an agent, B, in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid according to the usual rate, and for any other direct loss as, *e.g.*, by variation of rate of exchange, but no further. (ii) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby incurred. (iii) A, an insurance broker, employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses, nothing can be recovered from the underwriters. A is bound to make good the loss to B.[8]

Agent's accounts.—An agent is bound to render proper accounts to his principal on demand. Should he fail to do so, he

7) s. 211, ib. Story on Agency, § 119. 8) s. 212, ib.

may be liable to pay interest on any money belonging to his principal in his hands. Not only must proper accounts be rendered, but the agent must be ready to explain them and produce vouchers.[9]

If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shew either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him: *e.g.* (i) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can shew that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him. (ii) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine. A on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.[1] If an agent, without the knowledge if his principal, deals in the business of the agency on his own account, instead of on account of his principal, the latter is entitled to claim from the agent any benefit that may have resulted to him from the transaction, *e.g.*—A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.[2]

Agent's right of retainer.—An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent. Subject to such deduction the agent is bound to pay to his principal all sums received on his account.[3]

Remuneration of agent.—In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale,

9) *s.* 213, ib., I. L. R. 6 Cal. 754: I. L. R. 7 Cal. 627.
1) *s.* 215, ib.
2) *s.* 216, ib.
3) ss. 217, 218, ib.

may not have been sold, or although the sale may not be actually complete.[4]

Misconduct.—An agent, however, who is guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of that part of the business which he has misconducted: *e.g.* (i) A employs B to recover 1,00,000 rupees from C and to lay it out on good security. B recovers the 1,00,000 rupees and lays out 90,000 of it on good security, but lays out the remaining 10,000 on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees, and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to A. (ii) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.[5]

Agent's lien on goods and papers.—In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property whether moveable or immoveable of the principal received by him, until the amount due to himself for commission, disbursements, and services in respect of the same has been paid or accounted for to him.[6]

Principal's Duty to Agent.

The employer is bound to indemnify his agent against the consequences of all lawful acts done by him in exercise of the authority conferred upon him: *e.g.* (i) B, at Singapore, under instructions from A, of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend it. B defends the suit and is compelled to pay damages and costs and incurs expenses. A is liable to B for such damages, costs, and expenses. (ii) B, a broker, at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs, and expenses.[7] So also where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons: *e.g.* (i) A, a decree-holder, and entitled to execution of B's goods, requires the officer

4) Contract Act, s. 219. 5) s. 220, ib. 6) s. 221, ib. 7) s. 222, ib.

of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to recoup the officer for the sum which he is compelled to pay to C in consequence of obeying A's directions. (ii) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C, and for B's own expenses.[8]

Non-liability of employer for criminal act.—Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of his act: *e.g.* (i) A employs B to beat C and agrees to indemnify him against all consequences of the act. B thereupon beats C and has to pay damages for so doing. A is not liable to indemnify B for those damages. (ii) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B on the indemnity.[9]

Injury to agent by principal's negligence.—The principal must make compensation to his agent in respect of injury caused to him by the principal's neglect or want of skill: *e.g.*, A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must make compensation to B.

Effect of Agency on Contracts with Third Persons.

Principal how far bound when agent exceeds authority.—When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal; but if what is authorized is not separable from what is unauthorized, the principal is not bound to recognize the transaction[1]: *e.g.* (i) A, being the owner of a ship and cargo, authorizes his agent B to insure the ship for Rs. 4,000. B procures a policy of Rs.4,000 on the ship,and another for the like sum on the cargo. A is bound to pay the premium on the policy on the ship, but not on that on the cargo. (ii) A

8) Contract Act, s. 223. 9 s. 224, ib. 1) ss. 225, 227, 228, ib.

authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

Notice to Agent.—Any notice given to, or information obtained by, the agent, provided it be given or obtained in the course of the business transacted by him for the principal will, as between the principal and third parties, have the same legal consequences as if it had been given to, or obtained by, the principal. The agent and principal are considered as one person, and therefore it is taken for granted that the principal knows whatever the agent knows: *e.g.* (i) A is employed by B to buy from C certain goods of which C is the apparent owner, and buys them accordingly. In the course of the treaty for sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set-off a debt owing to him from C against the price of the goods. (ii) A is employed by B to buy from C certain goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of the fact. In spite of the knowledge of his agent, B may set-off against the price of the goods, a debt owing to him from C.[2]

Agent cannot personally enforce and is not liable on contracts of Principal.—In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them: but such a contract will be presumed to exist in the following cases:—(1) When the contract is made by an agent for the sale or purchase of goods for a merchant residing abroad: (2) When the agent does not disclose the name of his principal: (3) When the principal, though disclosed, cannot be sued.[3] An agent is responsible though known by the other party to be an agent, if by the terms of the contract he makes himself the contracting party.[4]

Undisclosed Agent.—If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract: but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal. If the principal discloses himself before the contract is completed, the other party may refuse to fulfil the contract, if he can shew that, if he had known who was the principal, or if he had known that the agent was not a principal, he would not have entered into the contract.[5]

2) Contract Act, s, 229.
3) S. 230, ib.
4) 31 L.J, Ex., pp. 174, 175.
5) Contract Act, s, 231,

Agent supposed to be Principal.—When one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain performance subject to the rights and obligations subsisting between the agent and the other party to the contract: *e.g.* A, who owes B Rs. 500, sells him 1,000 rupees worth of rice. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.[6]

Right of person dealing with Agent personally liable.—In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable: *e.g.* A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue B, or C, or both, for the price of the cotton.[7]

But if a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.[8]

Person falsely contracting as Agent.—A person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his own account.[9]

Pretended Agent.—A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.[1]

Effect on agreement of misrepresentation or fraud of Agent.—Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made, or committed by the principals; but misrepresentations made or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals: *e.g.* (i) A being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The

6) Contract Act, s. 232.
7) s. 233, ib.
8) s. 234, ib.
9) s. 236, ib.
1) s. 235, ib.

contract is voidable as between B and C at the option of C. (ii) A, the captain of B's ship, signs bills of lading without having received the goods on board. The bills of lading are void as between B and the pretended consignor.[2]

Liability of principal inducing belief that Agent's unauthorized acts were authorized. — When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the latter is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority: *e.g.* (i) A consigns goods for sale to B, and gives him instructions not to sell under a fixed price. C being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract. (ii) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A: The sale is good.[3]

Representation in Court by Agent. — Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party to a suit or appeal in such Court, may, except when otherwise expressly provided, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf: a party must however appear in person, if the Court so direct. Processes served on the recognized agent of a party to a suit or appeal are as effectual as if they had been served on the party in person unless the Court otherwise directs.[4]

Recognized Agents in Legal Proceedings.—The recognized agents of parties by whom such appearances, applications and acts may be made or done are (1) *persons holding general powers-of-attorney* from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorizing them to make and do such appearances, applications and acts on behalf of such parties; (2) *duly certificated mukhtars*, holding special powers-of-attorney authorizing them to do, on behalf of their principals, such acts as may legally be done by mukhtars; (3) *persons carrying on trade or business* for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

2) s. 238. 3) s. 237. 4) Civ. Pr. Code, ss. 36, 38.

These provisions do not apply in the Punjab, Oudh or Central Provinces; but in those territories the recognized agents are such persons as the Local Government may, from time to time, by notification in the official Gazette, declare to be so.[5]

Agent to receive process.—Besides the recognized agents above-mentioned, any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.[6] The appointment may be special or general and must be made by an instrument in writing signed by the principal, and such instrument, or, if the appointment be general, a duly attested copy must be filed in Court.

Pleaders.—The appointment of a pleader must be in writing; the appointment must be filed in Court. When so filed, it is in force until revoked with the leave of the Court, by a writing signed by the client and filed in Court, or until the client or the pleader dies, or all proceedings in the suit are ended so far as regards the client.

Process served on Pleader. — Processes served on the pleader of any party or left at the office or ordinary residence of such pleader, relative to a suit or appeal, and whether the same be for the personal appearance of the party or not, are presumed to be duly communicated and made known to the party whom the pleader represents; and, unless the Court otherwise directs, are as effectual for all purposes in relation to the suit or appeal as if the same had been given to or served on the party in person.[7]

Agent for Government. — The Government pleader in any Court or such other person as the Local Government may for any Court appoint in this behalf, is the Agent of the Government for the purpose of receiving processes against the Secretary of State in Council issuing out of such Court.[8]

Admissions by Agents.—Statements made by the agent of any party in a suit, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by the party to make them, are admissions.[9]

5) s. 37, ib.
6) s. 41, ib.
7) ss. 39, 40, ib.
8) s. 419, ib.
9) Evidence Act, s. 18.

ALIENS.

AUTHORITIES—Act XXX of 1852, Act III of 1864; Civil Procedure Code: cases cited.

Naturalization.—Any person whilst actually residing in British India may present a memorial to Government, praying that the privileges of naturalization may be conferred upon him. The memorialist must state his age, place of birth, place of residence, profession, trade or occupation, the length of time he has resided in India, and that he is settled in India or is residing in India with intent to settle. The memorial must be in writing or signed, and accompanied by an affidavit verifying the truth of the statements contained therein. The Government after enquiry may if it think fit issue a certificate in writing granting to the memorialist all the rights, privileges and capacities of naturalization under this Act except such rights, privileges or capacities if any, as may be specially excepted in such certificate: the certificate will be delivered to the memorialist and a copy kept. If any material statement in the memorial be false, the Government may declare the certificate issued upon such memorial void. Upon obtaining the certificate and taking the oath of allegiance the memorialist is deemed a natural born subject of Her Majesty, as if he had been born in India and entitled to all the rights, privileges and capacities of a subject of Her Majesty born in India, except such rights, privileges and capacities, if any, which may be specially excepted in the certificate. The oath of allegiance must be taken within 60 days from the date of the certificate. On the taking of the oath a certificate of his having done so is given to the memorialist.[1]

Alien friends may sue in the Courts of British India as if they were subjects of Her Majesty.[2]

Alien enemies residing in British India may sue in the Courts of British India with the permission of the Governor-General in Council, but not without such permission whether the alien be residing in British India or in a foreign country. Every person residing in a foreign country whose government is at war with Great Britain, and carrying on business there without a license from a Secretary of State or Secretary to the Government of India is deemed for the purpose of this rule, an alien enemy residing in a foreign country.[3]

1) Act XXX of 1852. 2) C. Pr. C., s. 430. 3) ib.

Suits against Sovereign Princes, Ruling Chiefs, Ambassadors and Envoys may, with one exception, be brought only with the consent of the Governor-General or Local Government authorized in that behalf certified by the signature of one of the Secretaries to the Government of India or Local Government, but not without such consent, which will be given only where (1) The Prince, &c., has instituted a suit in the Court against the person desiring to sue him; or (2) by himself or another trades within the local limits of the jurisdiction of the Court; or (3) is in possession of immoveable property situate within those limits, and is to be sued with reference to such possession or for money charged on that property. The exception referred to above exists in the case of a tenant of immoveable property, who may as such sue a Prince &c., from whom he holds or claims to hold the property without the consent mentioned. A Sovereign Prince or Ruling Chief must be sued in the name of his state unless when consent is given to sue, it is directed that the Prince or Chief must be sued in the name of an agent or in any other name.[4]

Arrest and execution.—No such Prince, Chief, Ambassador or Envoy can be arrested under the Civil Procedure Code, and except with the consent of the Governor-General in Council no decree can be executed against their property.[5]

Immoveable property.—Aliens in the East Indies may hold real property and transmit it by descent or devise.[6]

The Foreigners Act enables the Government to prevent the subjects of Foreign States from residing or sojourning in British India, or from passing through or travelling therein, without the consent of the Government. "Foreigner" denotes a person not being either a natural born subject of Her Majesty or a native of British India.[7]

4) ib., ss. 433, 434.
5) s. 433 (3), ib.
6) 1 M. I. A., p. 286.
7) Act III of 1864.

ANIMALS.

AUTHORITIES—Act XI of 1890, Act XX of 1847, Act VI of 1879, Act II of 1883; Indian Penal Code.

Prevention of cruelty.—Any person who, in any area to which the Local Government have extended Act XI of 1890*, in any street or in any other place whether open or closed, to which the public have access, or within sight of any person in any street or in any such place (*a*) cruelly and unnecessarily beats, overdrives, overloads, or otherwise ill-treats any animal; or (*b*) binds or carries any animal in such a manner or position as to subject the animal to unnecessary pain or suffering; or (*c*) offers, exposes or has in his possession for sale any live animal which is suffering pain by reason of mutilation, starvation or other ill-treatment, or any dead animal which he has reason to believe to have been killed in an unnecessarily cruel manner, is liable to a fine which may extend to 100 rupees, or with imprisonment for a term which may extend to three months or to both. A person who performs the operation of "Phúká" on a cow is liable to the same penalty. If a person in any place kills an animal with unnecessary cruelty, he is liable to a fine which may extend to 200 rupees or to imprisonment for a term which may extend to 6 months or to both. Where there is reason to believe that the two last offences have been or are about to be committed in any place, a 1st class Magistrate, Sub-divisional Magistrate, or Commissioner of Police or District Superintendent of Police may enter and search or warrant a constable in entering or searching the place. No prosecution for an offence under this Act can be instituted after 3 months from date of the offence. "Animal" in this Act means any domestic or captured animal. The destruction of suffering animals may be ordered by any Magistrate, Commissioner of Police, or District Superintendent of Police.

Employing animals unfit for labour.—By the same Act any person who employs in any work or labour any animal which by reason of any disease, infirmity, wound or sore or other cause is unfit to be so employed, or permits any such unfit animal in his possession, or under his control, to be so employed, is liable to a fine which may extend to 100 rupees. The Magistrate may direct the animal to be taken to the infirmary and charge the owner of the animal the cost of treatment, feeding

* *Note.*—The provisions of the Act have been extended to all municipal areas in Bengal. Notification, 1st May 1891, *Calcutta Gazette*, 5th May.

and watering. If the owner refuses or neglects to pay, the animal may by sold, and the proceeds applied to payment of these charges, and the balance, if any, given to the owner on application by him within two months of the sale. The owner is not liable to make any payment in excess of the proceeds of the sale.

Diseased and dying animals in public places.—By the same Act a person who wilfully permits any animal of which he is the owner to go at large in any street while the animal is affected with contagious or infectious disease, or without reasonable excuse permits any diseased or disabled animal of which he is the owner to die in any street, is liable to a fine which may extend to 100 rupees.[8]

Ferocious animals.—See "*Dogs and Ferocious Animals.*"

Mischief to animals.—Whoever commits mischief by killing, poisoning, maiming or rendering useless, any animal or animals, of the value of Rs. 10 or upwards, is punishable with imprisonment (rigorous or simple) for a term which may extend to two years, or with fine or with both. Whoever commits similar mischief to any elephant, camel, horse, mule, buffalo, bull, cow or ox (whatever may be its value) or to any other animal of the value of Rs. 50 or upwards, is punishable with imprisonment (rigorous or simple) for a term which may extend to 5 years, or with fine, or with both.[9]

Theft of animals.—Wild birds or animals are not objects of theft unless where they are domesticated or confined.[1]

Criminal negligence in respect of any animal—See "*Dogs and Ferocious Animals.*"

Wild elephants.—No person may kill, injure or capture, or attempt to kill, injure or capture any wild elephant unless (*a*) in defence of himself or some other person; (*b*) when such elephant is found injuring houses or cultivation, or upon, or in the immediate vicinity of, any main public road, or any railway or canal; or (*c*) he is permitted by a license so to do. The penalty for infringing this rule is a maximum fine of Rs. 500 for each elephant concerned. Every wild elephant captured and the tusks of every wild elephant killed by any unlicensed person, are the property of Government. The Collector or Deputy Commissioner of any district may, subject to any special rules in force grant licenses to kill or capture wild elephants. Any person breaking the conditions under which a license is granted, forfeits the license and becomes liable to a maximum fine of

8) Act XI of 1890 *passim*.
9) Indian Penal Code, ss. 428, 429.
1) Mayne's Penal Code, p. 340.

500 rupees. The license must be shown on the requisition of an officer of Revenue or Police.[2]

Ferocious animals—See "*Dogs and Ferocious Animals.*"

Protection of wild birds and game.—Local Governments and cantonments and municipal authorities are empowered to make rules for the protection of birds and other game and (*a*) to define the expression 'Wild Bird' or game for the purposes of the Act in its application to a municipality or cantonment; and (*b*) to define for the purposes of the Act the breeding season of any wild bird or game; and (*c*) to make rules for prohibiting the possession or sale during its breeding season of any kind of wild bird or game recently killed or taken, or the importation into the cantonment or municipality of the plumage of any kind of wild bird or skin of any animal during such season. The rules made must be published, and in the case of rules made by a municipal or cantonment authority, be confirmed by the Local Government before publication in the official Gazette.[3]

Dogs and horses—See "*Dogs and Ferocious Animals*" and "*Horses.*"

2) Act VI of 1879, amended by Act II of 1883: extends to N.-W. P., Oudh, Central Provinces, British Burmah, Coorg and to any other area to which the Act is by notification extended by a Local Government.

3) Act XX of 1887 for rules v. *Calcutta Gazette*, 31st July 1889: 6th March 1889.

APPEAL, REVISION, REVIEW AND REFERENCE.

AUTHORITIES—Civil Procedure Code, Parts VI, VII and VIII, sections cited. Letters Patent, Bengal, Madras, Bombay, 1865, N.-W. P., 1866. Act XII of 1887; Act III of 1873; Act XIV of 1869.

Appeals are of three kinds.—(1) Appeals from original decrees, or first, or "regular" appeals; (2) appeals from appellate decrees, or second, or "special" appeals; (3) appeals to the Privy Council. *In addition to the power of appeal conferred on* suitors, the Courts themselves are possessed of certain discretionary powers called powers of "Revision" or "Review" exerciseable at their own instance or at that of suitors. Appeals are permitted also from certain classes of orders.

Appellate Courts: High Courts.—An appeal lies to the High Court at Calcutta* in its appellate jurisdiction from decrees passed in its original jurisdiction. The High Court is also a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence.[1] The Allahabad High Court is a Court of Appeal from the Civil Courts of the North-West Provinces and from all other Courts to which there was at the time of the granting of the Letters Patent an appeal to the Sadr Dewani Adalut.[2] See "*Action.*"

Other Civil Appellate Courts in Bengal.—Save as otherwise provided by any enactment for the time being in force, an appeal from a decree or order of a **District Judge** or Additional Judge lies to the High Court.[3] Save as aforesaid, an appeal from a decree or order of a **Subordinate Judge** lies (*a*) to the District Judge where the value of the original suit in which, or in any proceeding arising out of which, the decree or order was made did not exceed Rs. 5,000; and (*b*) to the High Court in any other case. Save as aforesaid an appeal from a decree or order of a **Munsif** lies to the District Judge unless by notification the appeal is declared to be to a Subordinate Judge. In any case where an appeal lies to a District Judge, and the function of receiving appeals has been assigned to an Additional Judge, the appeals may be preferred to him.[4] See "*Action.*"

* As to appeals in criminal cases see "*Prosecution.*" The provisions of the Letters Patent 1865 relating to the Madras High Court are, *mutatis mutandis*, similar in all respects to those of the Letters Patent for the Calcutta High Court. The Letters Patent for the High Court at Bombay are in nearly every respect the same as those for the other presidencies.

1) Letters Patent 1865 clauses 15 and 16. 2) Letters Patent, N.-W. P., 1866, clause 11. 3) s. 20, Act XII of 1887. 4) Ib., s. 21.

In Madras Presidency.—Regular or special appeals (when allowed by law) lie from the decrees or orders of a **District Court** to the High Court: appeals (when allowed by law) from the decrees and orders of **Subordinate Judges** and **District Munsifs**, lie to the District Court, except when the amount or value of the subject-matter of the suit exceeds Rs. 5,000, in which case the appeal lies to the High Court. When, however, a Subordinate Judge's Court is established in any district at a place remote from the District Court, the High Court may direct that appeals from the District Munsifs within the local limits of the jurisdiction of such Subordinate Judge be preferred in the Court of the latter.[5] See "*Action.*"

In Bombay Presidency.—Except as provided in ss. 16, 17 and 26 (v. *post*,) the **District Court** is the Court of Appeal from all decrees and orders passed by the Subordinate Courts from which an appeal lies under any law for the time being in force.[6] An appeal lies from the **Assistant Judge** to the District Judge or the High Court according as the amount or value of the subject-matter does not exceed or exceeds Rs. 5,000.[7] Assistant Judges may also be empowered to try such appeals from the Subordinate Courts as would lie to the District Judge.[8] In all suits decided by a Subordinate Judge of the first class in his ordinary original jurisdiction of which the amount or value exceeds Rs. 5,000 the appeal lies direct to the High Court.[9] See "*Action.*"

First Appeals.

Appeals from original decrees.—Unless when otherwise expressly provided, an appeal lies from the decrees (including a decree passed *ex-parte*) or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts.[1] One of several plaintiffs or defendants may obtain the reversal of the whole decree if it proceeds on ground common to them all.[2]

Form and Procedure.—An appeal is made in the form of a memorandum in writing presented by the appellant, accompanied by a copy of the decree appealed against and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded. The memorandum must set forth the grounds of objection to the decree appealed against; the appellant will not (unless leave of the Court be given him) be heard in support of any ground of objections not so taken by him.[3] When an

5) Act III of 1873, s. 13.
6) Act XIV of 1869, s. 8.
7) ib., s. 16.
8) ib., s. 17.
9) ib., s. 26.
1) Code of Civil Procedure, s. 540.
2) s. 544, ib.
3) ss. 541, 542, ib.

appeal is admitted it is endorsed with the date of presentation and registered in a book called the "Register of Appeals." When the appeal is registered notice is given by the Appellate Court to the Court against whose decree the appeal is made. The latter then sends up all the papers in the suit. The Court may, after hearing the appellants, dismiss the appeal without sending notice to the lower Court; but if it does not, it will fix a day for the hearing: notice will then be given to the respondent, and notice of the day fixed stuck up in the Appellate Court. If the appellant does not appear on the day fixed, the appeal will be dismissed: if the appellant only appears the appeal will be heard *ex-parte*. A respondent against whom an *ex-parte* decree has been made, may apply that it be re-heard: the Court may re-hear the appeal if it is shown that notice of the appeal was not duly served, or that he was prevented by other sufficient cause from attending when it was called on. Additional evidence is not generally speaking allowed to be given in appeal. Unless the case is "remanded" or referred back to the first Court for the decision of any issue or fact, judgment, decree, and execution, follow in due course. A certified copy of the decree and judgment is sent to the Court whose decree is appealed against, and an entry of the judgment of the Appellate Court is made in the register of the civil suits. Copies of the judgment and decree will be furnished to the parties on their application and at their expense.[4]

Execution of decree during appeal.—Execution of a decree is not stayed by reason only of an appeal having been preferred against the decree. But the Appellate Court may for sufficient cause order the execution to be stayed. If an application be made for stay of execution of an appealable decree before the expiry of the time allowed for appealing, the Court which passed the decree may for sufficient cause order the execution to be stayed: no order staying execution will however be made unless the Court making it is satisfied—(*a*) that substantial loss may result to the party applying for stay of execution unless the order is made; (*b*) that the application has been made without unreasonable delay; and (*c*) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him. If an order is made for the execution of a decree against which an appeal is pending, the Court which passed the decree will, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property and for the due

4) ss. 548—583, ib., for a form of Memorandum of Appeal, see Appendix.

performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security. And when an order has been passed for the sale of immoveable property in execution of a decree for money, and an appeal is pending against such decree, the sale will on the application of the judgment-debtor be stayed until the appeal is disposed of, on such terms as to giving security or otherwise as the Court which passed the decree thinks fit.[5]

Remand.—If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point, and the decree upon such preliminary point is reversed upon appeal, the Appellate Court may "remand" the case together with a copy of the order made in appeal to the first Court, with directions to re-admit the suit and proceed to determine it on the merits.[6]

Reference.—If the first Court has omitted to frame or try any issue, or to determine any question of fact, essential to the right decision of the suit upon the merits, the Appellate Court may frame issues for trial, and refer the same for trial to the first Court; the latter will take the additional evidence required, try the issues, and return to the Appellate Court its finding thereon together with the evidence.[7]

Security for costs.—The Appellate Court may either before the respondent is called upon to appear and answer, or afterwards, on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both; the Court will do so in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British India independent of the property (if any) to which the appeal relates. If security is not furnished within the time ordered, the appeal will be rejected.[8]

Second Appeals.

Appeals from appellate decrees.—Unless when otherwise provided, from all decrees passed in appeal (including appellate decrees *ex-parte*) by any Court subordinate to a High Court, an appeal lies to the High Court on the following grounds only, viz :—(*a*) the decision being contrary to some specified law or usage having the force of law; (*b*) the decision having failed to determine some material issue of law, or usage having the force of law; (*c*) a substantial error or defect in the procedure as prescribed by this code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits.[9]

5) ss. 545-546, ib.
6) s. 562, ib.
7) s. 566, ib.
8) s. 549, ib.
9) s 584, ib.

No second appeal is allowed except on the grounds just mentioned, nor in any suit of the nature cognizable by a Small Cause Court when the amount or value of the subject-matter of the original suit does not exceed Rs. 500.[1] See "*Small Cause Court.*"

The provisions of the law as to second appeals and to the execution of decrees passed in such appeals are, as far as may be, those which apply to first appeals.[2]

Pauper Appeals.

Any person entitled to appeal, who is unable to pay the fee required for the petition of appeal, may, on presenting an application accompanied by memorandum of appeal, be allowed to appeal as a pauper; subject, so far as applicable, to the rules regulating appeals and pauper suits (see "*Action*"). The Court will however reject the application, unless it thinks that the decree appealed against is contrary to law, or to some usage having the force of law, or is otherwise erroneous or unjust.[3]

Appeals to the Privy Council.

Appeals to Privy Council.—Whoever wishes to appeal to the Privy Council must apply to the Court whose decree is complained of by petition stating the grounds of appeal, and praying for a certificate, either that, as regards amount or value and nature, the case fulfils the requirements of the law (see next paragraph) or that it is otherwise a fit one for appeal; upon receipt of the petition, the Court will direct notice to be served on the opposite party to show cause why the said certificate should not be granted.[4]

Value of subject-matter.—An appeal lies to the Privy Council (1) from any final decree passed on appeal by a High Court, or any other Court of final appellate jurisdiction; (2) from any final decree passed by a High Court in the exercise of original civil jurisdiction; and (3) from any decree when the case is certified to be a fit one for appeal to the Privy Council. In each of the cases mentioned in clauses (1) and (2) the amount or value of the subject-matter of the suit in the Court of first instance must be Rs. 10,000 or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum or upwards, or the decree must involve, directly or indirectly, some claim or question to, or respecting, property of like amount or value, and, when the decree appealed from affirms the decision of the Court immediately below the Court

1) ss. 585, 586, ib.
2) s. 587, ib.
3) s. 592, ib.
4) ss. 598, 600, ib.

passing such decree, the appeal must involve some substantial question of law.[5] For the purpose of appeal, the Court of the Recorder of Rangoon is deemed a "High Court."[6]

Security and deposit.—If the certificate is granted the applicant must within six weeks of the date of the decree complained of, or within six weeks of the grant of the certificate, whichever is the latest date (*a*) give security for the costs of the respondent; and (*b*) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to the Privy Council a correct copy of the necessary portions of the record of the suit.[7] When security has been completed and deposit made, the Court may declare the appeal admitted, and give notice thereof to the respondent and transmit a copy of the record of the suit to the Privy Council.[8]

Powers of Court pending appeal.—Notwithstanding the admission of any appeal, the decree appealed against will be unconditionally enforced, unless the Court admitting the appeal otherwise directs. The Court may, if it thinks fit, on any special cause shown by any party interested in the suit, or otherwise appearing to the Court—(*a*) **impound** any moveable property in dispute or any part thereof; or (*b*) allow the decree appealed against to be enforced, taking security from the respondent for the due performance of any order which the Privy Council may make; or (*c*) **stay the execution** of the decree appealed against, taking security from the appellant for the due performance of the decree appealed against, or of any order which the Privy Council may make; or (*d*) place any party seeking the assistance of the Court under such conditions, or give such other direction respecting the subject-matter of the appeal, as it thinks fit.[9]

Revision.

The High Court may call for the record of any case *in which no appeal lies* to the High Court and pass such order as it thinks fit, if the Court by which the case was decided appears (1) to have exercised a jurisdiction not vested in it by law; or (2) to have failed to exercise a jurisdiction so vested; or (3) to have acted in the exercise of its jurisdiction illegally or with material irregularity.[1]

Review.

A review is distinct from an appeal: the former is a reconsideration of the same subject by the same Judge, the latter is a hearing before another tribunal. Any person considering himself aggrieved—(*a*) by a decree or order from which an appeal is

5) ss. 595, 596, ib.
6) s. 634, ib.
7) s. 602, ib.
8) s. 603, ib.
9) s. 608, ib.
1 s. 622, ib.

allowed, but from which no appeal has been preferred; (*b*) by a decree or order from which no appeal is allowed; or (*c*) by a judgment on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order, or to the Court, (if any) to which the business of the former Court has been transferred.[2]

Procedure.—The rules of procedure in regard to appeals apply, *mutatis mutandis*, to applications for review.

Reference to High Court.

If before or on the hearing of a suit or an appeal in which the decree is final, or if in the execution of any such decree, any question of law or usage having the force of law, or the construction of a document, which construction may affect the merits, arises, on which the Court trying the suit or appeal, or executing the decree, entertains *reasonable doubt*, the Court may, either of its own motion, *or* on the application of any of the parties, draw up a statement of the facts of the case and the points on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court.[3] The Court may then either stay the proceedings, or proceed in the case, and may pass a decree contingent upon the opinion of the High Court on the point referred.[4]

No execution can be issued, property sold, or person imprisoned, until the receipt of a copy of the judgment of the High Court.[5] When the copy is transmitted the case is disposed of accordingly.

Powers of High Court.—When a case is referred to the High Court the latter may return the case for amendment, and may alter, cancel, or set aside any decree or order which the Court making the reference has passed in the case out of which the reference arose, and may make such order as it thinks fit.[6]

See "*Limitation.*"

2) s. 623, ib. 3) s. 617, ib. 4) s. 618, ib. 5) ib. 6) s. 621, ib.

ARBITRATION.

AUTHORITIES—Civil Procedure Code (Ch. XXXVII): Contract Act: Act I of 1877 (Specific Relief). Indian Penal Code: Act XV of 1877.

A matter may be referred to arbitration in three ways:—(1) by order of Court *during a suit* on the application of *all* the parties thereto; (2) by order of Court, when *apart from any suit*, parties have agreed in writing to refer a matter to arbitration and *one* or both of the parties has filed the agreement in Court and the Court has made an order of reference thereon; (3) without the intervention of the Court.

BY ORDER OF COURT DURING A PENDING SUIT.

Order of Reference.—If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration, they may, at any time before judgment is pronounced, apply, in person or by their respective pleaders specially authorized in writing in this behalf, to the Court for an order of reference.[1]

The application must be in writing and must state the particular matter sought to be referred to arbitration. The arbitrator is nominated by the parties, or if the parties cannot agree, or if the person whom they nominate refuses to accept the arbitration, and the parties desire that the nomination shall be made by the Court, the Court nominates the arbitrator.[2]

On the appointment of the arbitrator the matter in difference is referred to him by the Court, and a time fixed for the delivery of his award which the Court will extend if necessary.[3] If the reference be to two or more arbitrators, provision is made for difference of opinion amongst them either—(*a*) by the appointment of an umpire; or (*b*) by declaring that the decision shall be with the majority, if the major part of the arbitrators agree; or (*c*) by empowering the arbitrators to appoint an umpire; or (*d*) otherwise, as may be agreed between the parties; or if they cannot agree, as the Court determines.[4]

Umpires.—If an umpire is appointed, the Court will fix a time for the delivery of his award in case he is required to act.[5] If the arbitrators are empowered to appoint an umpire and fail to do so, any of the parties may serve the arbitrators with written notice to appoint; and if within seven days of service of notice, or such further time as the Court may allow, no umpire be appointed,

1) s. 506, Civil Procedure Code.
2) s. 507, ib.
3) ss. 508, 514, ib.
4) s. 509, ib.
5) ib.

the Court may itself appoint an umpire.[6] When an umpire has been appointed, he may enter on the reference in the place of the arbitrators—(*a*) if they have allowed the appointed time to expire without making an award; or (*b*) when they have delivered to the Court or to the umpire a notice in writing, stating that they cannot agree.[7]

Powers of arbitrators and umpires.—The Court will issue the same processes to the parties and witnesses whom the arbitrators or umpire wish to examine, as in suits tried before itself. Persons not attending, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, are subject to the like disadvantages, penalties, and punishments, by order of the Court, on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.[8]

Death, incapacity, etc., of arbitrators or umpire.—If the arbitrator, or, when there are more arbitrators than one, any of the arbitrators, or the umpire, dies, or refuses, or neglects, or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return at an early date, the Court will in its discretion either appoint a new arbitrator or umpire in the place of the person so dying, or refusing, or neglecting, or becoming incapable to act, or leaving British India, or make an order superseding the arbitration; in the event of the latter order it will proceed with the suit.[9]

The award.—When an award in a suit has been made, the persons who made it must sign it and file it in Court, together with any depositions and documents which have been taken and proved before them; notice of the filing must be given to the parties.[1] Upon any reference by an order of the Court, the arbitrators or umpire may, with the consent of the Court, state the award, as to the whole or any part, in the form of a special case for the opinion of the Court; such opinion when given is added to and forms part of the award.[2]

Powers of Court in regard to the award.—The Court may, by order, *modify or correct* an award—(*a*) where it appears that a part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part and does not affect the decision in the matter referred; or (*b*) when the award is imperfect in form, or contains any obvious error, which can be amended without affecting such decision.[3] The

6) s. 511, ib.
7) s. 515, ib.
8) s. 513, ib.
9) s. 510, ib.
1) s. 516, ib.
2) s. 517, ib.
3) s. 518, ib.

Court may *remit* the award or any matter referred to arbitration to the reconsideration of the same arbitrators or umpire—(*a*) when the award has left undetermined any of the matters referred to arbitration, or when it determines any matter not referred to arbitration; (*b*) when the award is so indefinite as to be incapable of execution; (*c*) when an objection to the legality of the award is apparent upon the face of it.[4] An award remitted as above mentioned becomes void on the refusal of the arbitrators or umpire to reconsider it.[5]

Judgment according to award.—If the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration, and if no application has been made to set aside the award, or if the Court has refused such application, the Court will, after the time for making such application has expired, proceed to give judgment according to the award, or, if the award has been submitted to it in the form of a special case, according to its own opinion on such case. Upon the judgment so given a decree follows, enforceable by execution in ordinary course. There is no appeal from such decree except in so far as the decree is in excess of, or not in accordance with, the award.[6]

Grounds for setting aside award.—An award can be set aside on the following grounds only—(*a*) corruption or misconduct of the arbitrator or umpire; (*b*) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire; (*c*) the award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit; further no award is valid unless made within the period allowed by the Court.[7]

By Order of Court on the Filing of an Agreement to Refer.

Application to file.—When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement, or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court.

The application, which must be in writing, will be numbered and registered as a suit, **notice** being given to all the parties to the agreement other than the applicants, requiring them to show cause, why the agreement should not be filed. If no sufficient cause be shown, the Court may file the agreement, and make **an order of reference** nominating the arbitrator, when he is not

4) s. 520, ib. 5) s. 521, ib. 6) s. 522, ib. 7) s. 521, ib.

named in the agreement and the parties cannot agree.[8] The provisions (v. *ante*) with regard to arbitrations *during* suit are, so far as they are consistent with any agreement so filed, applicable to the decree, award and all proceedings under an order of reference made in the abovementioned manner.[9]

No specific performance of agreement to refer.—Save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration will be specifically enforced; but if any person who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract will bar the suit.[1]

Agreements in restraint of legal proceedings.—Every agreement by which one party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enfore his rights, is void to that extent.[2]

Agreement to refer to arbitration is not in restraint of legal proceedings.—A contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration; and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred: or any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen is not void.[3] Section 28 (see preceding paragraph) does not affect any provision of any law in force for the time being as to references to arbitration.[4]

Without the Intervention of the Court.

Filing award.—When any matter has been referred to arbitration without the intervention of a Court, and an award has been made, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court. The application, which must be writing, is numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. Notice is given to the parties to the arbitration, other than the applicant, requiring them to show cause, why the award should not be filed.[5] If no ground for remitting or setting aside the award be shown (v. *ante*) the Court will order it to

8) s. 523, ib.
9) s. 523, ib.
1) s. 21, Act I of 1877, for different rule of English law see Pollock on Contract, 5th Ed., p. 318.
2) Contract Act, s. 28.
3) s. 28, ib.
4) ib.
5) s. 525, Civ. Pr. Code.

be filed; the award will then take effect as an award made under a reference by order of Court.[6]

Specific performance of an award.—An agreement to refer to arbitration cannot[7] be enforced, but an award can be specially enforced.[8] For as by the submission to arbitration the parties have contracted to do what the arbitrator shall direct, when the latter has made his decision, the award is considered in equity as amounting to an agreement by the parties on the terms pointed out by him, and fit to be enforced against a party as a party's own agreement.[9]

Reference to arbitration by Companies.—Under the Indian Companies Act, any company may refer to arbitration any matter whatsover in dispute between itself and any other company or person.[1] In regard to procedure the arbitrators and the umpire may proceed in such manner as they or he think fit, except where and as the companies otherwise agree.[2] An award made in due time binds all parties,[3] and cannot be set aside for any irregularity or informality.[4] On the application of any party interested, the submission to arbitration may be filed in the High Court, and an order of reference may be made thereon, with any directions the Court thinks fit. The provisions of the Civil Procedure Code, so far as the same are applicable, apply to every such order and to all proceedings thereunder.[5] (v. *ante.*)

Provisions of Penal Code relating to arbitration.—Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent authority, is a "public servant" within the meaning of the term as used in the Code.[6] Fabricating false evidence before an arbitrator is an offence under the Code.[7] See "*Public Servants and Public Duties.*"

Limitation.—An application under the Code of Civil Procedure to set aside an award, must be made within ten days from the time when the award is submitted to the Court.[8] An application under the Code (ss. 516 or 525) that an award be filed in Court, must be made within 6 months of the date of the award.[9]

6) s. 526, ib.
7) Act I of 1877, s. 21.
8) ib., s. 30.
9) v. "*Contract.*"
1) Act VI of 1882, s. 96.
2) s. 113, ib.
3) s. 116, ib.
4) s. 118, ib.
5) s. 123, ib.
6) Penal Code, s. 21.
7) ib., s. 192.
8) Act XV of 1877, Sch. II, art., 158.
9) ib., art. 176.

ARREST.

AUTHORITIES—Civil Procedure Code: Criminal Procedure Code.

ARREST UNDER THE CIVIL PROCEDURE CODE.

Arrest before judgment.—If at any stage of any suit, other than a suit for the possession of immoveable property, the plaintiff satisfies the Court by affidavit or otherwise (1) that the defendant, with intent to avoid or delay the plaintiff, or to avoid any process of the Court, or to obstruct or delay the execution of any decree that may be passed against him, has absconded, or left, or is about to abscond, or to leave the jurisdiction of the Court; or (2) has disposed of, or removed from the jurisdiction of the Court his property or any part of it; or (3) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby he obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the plaintiff may apply to the Court that security be taken for the appearance of the defendant to answer any decree that may be passed against him in the suit. If the Court is satisfied that the defendant has done, or is about to do any of the above-mentioned acts, it may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance. If the defendant fail to show cause, the Court will order him either to deposit in Court money or other property sufficient to answer the claim against him, or to give security for his appearance at any time when called upon while the suit is pending, and until execution or satisfaction of any decree that may be passed against him in the suit.[1]

Surety.—If security is taken, the surety must bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.[2] The security may at any time apply to the Court in which he became surety to be discharged from his obligation. On such application being made, the Court will summon the defendant to appear, or if it thinks fit, may issue a warrant for his arrest in the first instance. On the appearance of the defendant the Court will direct the surety to be discharged from his obligation, and will call upon the defendant to find fresh security.[3]

1) Civil Pr. Code, ss. 477, 478, 479. 2) s. 479, ib. 3) s. 480, ib.

Imprisonment on failure to find security.—If the defendant fail to deposit money or give security when ordered to do so, the Court may commit him to jail until the decision of the suit, or, if judgment be given against the defendant, until the execution of the decree. No person can be imprisoned in any case on this account for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed Rs. 50: if a person after being sent to prison complies with the order, he will be released. The provisions given below as to allowances payable for the subsistence of judgment-debtors apply to all defendants arrested under the above-mentioned provisions.[4]

Compensation for improper arrest.—If in any suit in which an arrest has been effected, it appears to the Court that such arrest was applied for on insufficient grounds, or if the suit of the plaintiff fails, and it appears to the Court that there was no probable ground for instituting the suit, the Court may, on the application of the defendant, award against the plaintiff in its decree such amount, not exceeding Rs. 1,000 as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the arrest: an award given as above mentioned will bar any suit for compensation in respect of such arrest.[5]

Arrest after judgment.—When an application for execution of a decree is admitted, the Court orders execution according to the nature of the application.[6] When the application is for the execution of a decree for money by the arrest and imprisonment of a judgment-debtor, who is liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court and show cause why he should not be committed to jail in execution of the decree. If appearance is not made in obedience to the notice the Court will, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.[7] For the procedure when the defendant does so appear, see next paragraph but one.

Arrest and imprisonment.—On the issue of a warrant the judgment-debtor may be arrested in execution of a decree at any hour and on any day; he is entitled to be brought as soon as practicable before the Court: for the purpose of making an arrest no dwelling-house can be entered after sunset or before sunrise, and no outer door of a dwelling-house can be broken open; but, when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may unfasten and

4) ss. 481, 482, ib. 5) s. 491, ib. 6) s. 245, ib. 7) s. 245B, ib.

open the door of any room in which he has reason to believe the judgment-debtor is to be found: if however the room be in the actual occupancy of a woman who is not the judgment-debtor, and who according to the customs of the country does not appear in public, the officer must give notice to her that she is at liberty to withdraw and after allowing a reasonable time for her to withdraw and giving her every reasonable facility for withdrawing, he may enter such room for the purpose of making the arrest. When the decree in execution of which a judgment-debtor is arrested, is a decree for money, and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer must at once release him.[8]

Disallowance of application for arrest.—When a judgment-debtor appears before the Court in obedience to a notice issued upon application for execution (see above) or is brought before the Court after being arrested in execution of a decree for money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree, or, if that amount is payable by instalments, the amount of any instalment, the Court may, upon such terms, if any, as it thinks fit, make an order disallowing the application for his arrest and imprisonment, or directing his release, as the case may be. Before making such an order the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely:—(1) the decree being for a sum for which the judgment-debtor was bound as a trustee or as acting in any other fiduciary capacity to account; (2) the transfer, concealment, or removal, by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was made, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree; (3) any undue or unreasonable preference given by the judgment-debtor to any of his other creditors; (4) his refusal or neglect to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it; (5) the likelihood of his absconding or leaving the jurisdiction of the Court with the object or effect abovementioned. During the consideration of these matters, the Court may in its discretion order the judgment-debtor to be imprisoned, or leave him in the custody of an officer of the Court, or release him on his furnishing sufficient security for his appearance on the requisition of the Court. A judgment-debtor so released may be re-arrested.

8) s. 336, ib.

If the Court does not disallow the arrest or direct release, it will order the judgment-debtor to be arrested, if he has not already been arrested, and commit him to jail.[9]

Subsistence money.—No judgment-debtor can be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as, having regard to the scales prescribed by the Local Government, the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court. When a judgment-debtor is committed to jail in execution of a decree, the Court will fix for his subsistence such monthly allowance as he may be entitled to according to the scales, or, where no scales have been fixed, as it considers sufficient with reference to the class to which he belongs. The monthly allowance fixed by the Court must be supplied by the party on whose application the decree has been executed, by monthly payments in advance before the first day of each month. The first payment must be made to the proper officer of the Court for such portion of the current month as remains unexpired, before the judgment-debtor is committed to jail, and the subsequent payments (if any) to the officer in charge of the jail. Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in jail are costs in the suit; but a judgment-debtor cannot be detained in jail or arrested on account of any sum so disbursed.[1]

Discharge from jail.—The judgment-debtor must be discharged from jail—(1) on the amount mentioned in the warrant of committal being paid to the officer in charge of the jail; or (2) with the order of the Court, on the decree being otherwise fully satisfied; or (3) with the order of the Court, at the request of the person on whose application he has been imprisoned; or (4) on such person omitting to pay the subsistence allowance; or (5) with the order of the Court, if the judgment-debtor be declared an insolvent (see "*Insolvency*"); or (6) when the term of his imprisonment, as limited by law is fulfilled: (see next paragraph). A judgment-debtor so discharged is not thereby discharged from his debt; he cannot however be re-arrested under the decree in execution of which he was imprisoned.[2]

Length of imprisonment.—No person can be imprisoned in execution of a decree for more than six months, or (if the decree be for the payment of a sum not exceeding Rs. 50) six weeks.[3]

In suit against public officer.—No warrant of arrest can be issued against a public officer in a suit, in respect of an act purporting to be done by him in his official capacity, without the

9) s. 337A, ib. 1) ss, 339, 340, ib. 2) s. 341, ib. 3 s. 342, ib.

consent in writing of the District Judge: nor is his property liable to attachment otherwise than in execution of a decree.[4]

Sovereign princes, ruling chiefs, ambassadors and envoys cannot be arrested under the Civil Procedure Code.[5]

Women.—No woman can be arrested or imprisoned in execution of a decree for money.[6]

Failure to give evidence or to produce a document.—If any person on whom a summons to give evidence, or produce a document, has been served fails to comply with the summons, or if any person so summoned and attending leaves the Court (1) before he has been examined, or has produced the document and the Court has risen; or (2) before he has obtained the Court's leave to depart, he may, in the absence of lawful excuse for such failure, be arrested and brought before the Court: he may then be fined any amount up to Rs. 500: non-payment or non-tender of a sufficient sum to defray the witnesses' expenses is a lawful excuse.[7]

Wrongful arrest—v. "*Wrongful Confinement.*"

Persons exempt from arrest under civil process.—No Judge, Magistrate or other judicial officer is liable to arrest under civil process while going to, presiding in, or returning from, his Court: and (except in the case noted at p. 65, s. 337A, and s. 256, see "*Execution*") and in the case of certain offences against the Penal Code committed during the course of a suit, or with regard to any document offered in evidence) when any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtears, revenue agents and recognized agents, and their witnesses acting in obedience to a summons, are exempt from arrest under civil process while going to, or attending, or returning from, such tribunal for the purpose of such matter.[8]

Release from arrest on ground of illness.—At any time after a warrant of arrest has been issued under the Civil Procedure Code, the Court may cancel it on the ground of the serious illness of the person against whom the warrant was issued, and when a judgment-debtor has been arrested under the Code, the Court may release him if in its opinion he is not in a fit state of health to undergo imprisonment. When a judgment-debtor has been committed to jail, he may be released (*a*) by the Local Government on the ground of his suffering from any infectious or contagious disease; or (*b*) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness. A judgment-debtor released

4) ss. 425, 427, ib.
5) s. 433 (3), ib.
6) s. 245A, ib.
7) ss. 173, 174, ib.
8) s. 642, ib.

in the above manner and for the above causes may be re-arrested, but the period of his imprisonment cannot in the aggregate exceed that mentioned at p. 65, s. 342, or p. 63, s. 481, as the case may be.[9]

Under the Criminal Procedure Code.

Cognizable offence means an offence for, and "cognizable case" means a case in which, a Police-officer, within or without the Presidency towns, may arrest *without* a warrant.[1]

Any private person may arrest any person who in his view commits an offence which is non-bailable and cognizable. Such offences are (generally speaking) offences relating to coin and Government stamps, offences of murder, culpable homicide, kidnapping, abduction, grievous hurt, assault or criminal force in order to commit theft of property worn or carried by a person, rape, unnatural offence, theft, robbery, dacoity, criminal breach of trust (except by public servant or by a banker, merchant, or agent), receiving stolen property, house-trespass with intent to commit theft, or after making preparations to cause hurt or assault, lurking house-trespass or house-breaking, and some others. A private person may also arrest any person who has been proclaimed an offender. A person so arrested must be made over without unnecessary delay to a Police-officer, or in the absence of a Police-officer, must be taken to the nearest Police-station.[2]

Private persons are bound to render assistance to a Magistrate or Police-officer reasonably demanding aid (*a*) in the taking of any other person whom such Magistrate or Police-officer is authorized to arrest; (*b*) in the prevention of a breach of the peace, or of any injury attempted to be committed to any railway, canal, telegraph or public property; or (*c*) in the suppression of a riot or affray.[3] The duty thus cast on private persons is an obligatory one. It is however optional with them when a warrant is directed to a person other than a Police-officer, to aid in the execution of such warrant, if the person to whom the warrant be directed be near at hand and acting in the execution of the warrant.[4]

In making an arrest a Police-officer or other person must actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.[5] A Police-officer executing a warrant of arrest must notify the substance of the warrant to the person to be arrested, and if so required, must show the warrant.[6] The person residing in, or in charge of any place into which any person acting under a warrant

9) s. 653, ib.
1) Criminal Pr. Code, s. 4.
2) s. 59, ib.
3) s. 42, ib.
4) s. 43, ib.
5) s. 46, ib.
6) s. 80, ib.

of arrest, or any Police-officer having authority to arrest, has reason to believe that the person to be arrested has entered, must, on demand, allow such person or officer free ingress into such place and afford all reasonable facilities for a search therein.[7] The person arrested must not be subjected to more restraint than is necessary to prevent his escape.[8] A person arrested by a Police-officer without a warrant cannot without the special order of a Magistrate be detained for more than 24 hours, exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.[9] If a person in lawful custody escapes, or is rescued, the person from whose custody he escaped or was rescued, may immediately pursue or arrest him in any place in British India.[1] See "*Wrongful Confinement and Restraint.*"

If a person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, all means may be used necessary to effect the arrest. This provision however gives no right to cause the death of a person who is not accused of an offence punishable with death or transportation for life.[2]

Refusal to give name and address.—When any person in the presence of a Police-officer commits, or is accused of committing, a non-cognizable offence, and refuses on demand of a Police-officer to give his name and residence, or gives a name or residence which such officer has reason to believe is false, he may be arrested in order that his name or residence may be ascertained.[3]

7) Cr. Pr. Code, s. 47.
8) s. 50, ib.
9) s. 61, ib.
1) s 66, ib
2) s. 46, ib.
3) s. 57, ib.

ASSAULT.

AUTHORITIES—Indian Penal Code (Act XLV of 1860: as amended): Criminal Procedure Code (Act X of 1882: as amended): Act XV of 1877 (Limitation): Mayne's Commentaries on the Indian Penal Code, 14th Ed., 1890: Pollock on Torts, 2nd Ed., 1890: Draft Indian Civil Wrongs Bill: Cases cited.

Definition.—A person commits an assault if he make any gesture or any preparation intending, or knowing it to be likely, that such gesture or preparation, will cause any person present to apprehend, that he is about to use criminal force (*v. post*) to that person. Thus if A shakes his fist at Z, or begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause Z to believe that he is about to strike him, or that he is about to cause the dog to attack him, A commits an assault. Mere words do not amount to an assault. But the words which a person uses may give to his gestures, or preparation, such a meaning as may make those gestures or preparations amount to an assault. For instance A takes up a stick saying to Z, "I will give you a beating." Here though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.[1]

Criminal force.—An assault fully completed constitutes criminal force. Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause or knowing it to be likely that by the use of such force he will cause injury, fear, or annoyance, to the person to whom the force is used, is said to "use criminal force" to that other.[2] It is not necessary that the person exercising force against another does so directly by his own bodily power; *e.g.*, if A incites a dog to spring on Z without Z's consent, intending to cause injury, fear or annoyance to Z, he uses criminal force towards Z. So also if Z is driving in a carriage, and A lashes his horses (with the above intent and without Z's consent) so as to cause them to quicken their pace, he uses criminal force towards Z, because he has caused change of motion to Z by inducing the animals to change their motion. No act permitted by law can amount to criminal force: such as the moderate punishment of a child by its parent, or a pupil by its teacher. A master may not beat his servant. A master may however moderately chastise his apprentice to whom he stands *in loco parentis*.[3] A person who duly exercises the right of private defence, neither commits any offence, nor does any wrong to the person against whom he exercises it. See "*Offences*," pp. 485-489.

1) Penal Code, s. 351.
2) s. 350, ib: as to compounding of Assault or use of Criminal force, see *Appendix*.
3) s. 350, ib., v. Mayne, pp. 318, 319.

The punishment for assault or criminal force otherwise than on grave and sudden provocation, is imprisonment simple or rigorous for a term which may extend to three months, or fine which may extend to Rs. 500, or both. Certain special forms of assault are punished more severely.[4]

Grave and sudden provocation will not mitigate the punishment (1) if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or if the provocation is given; (2) by anything done in obedience to the law; or (3) by a public servant in the lawful exercise of his powers; or (4) by anything done in the lawful exercise of the right of private defence.[5]

Assault and criminal force on grave and sudden provocation is punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to Rs. 200, or with both.[6]

Assault or criminal force with intent to dishonour, otherwise than on grave and sudden provocation, is punishable with simple or rigorous imprisonment for a term which may extend to two years, or with fine, or with both.[7]

Bond to keep the peace.—A person accused of assault, or other breach of the peace, or of abetting the same, may on conviction be ordered by the Court to execute a bond for a sum proportionate to his means with or without sureties for keeping the peace for a period not exceeding three years. Persons may also be required to show cause why they should not be bound over to keep the peace, upon credible information being given to a Magistrate that they are likely to commit a breach of the peace.[8]

A civil action for damages may be maintained for an assault. Special damage need not be proved. Damages commensurate to the injury and annoyance will be awarded, even though there be no serious personal injury.[9] In assessing damages for an assault, the Court will have regard to the probable effect of the assault on the plaintiff's feelings, standing, or reputation, by reason of the insulting character, publicity, or other circumstances of the act.[1] A suit for compensation for an injury to the person must be brought within a year of the time when the injury is committed.[2]

Battery as distinguished from assault consists in actually striking or touching in a violent, angry, rude, or insolent manner, the person of another.

See "*Offences*" and "*Prosecution.*"

4) Penal Code, s. 352.
5) ib.
6) s. 358, ib.
7) s. 355, ib.
8) Cr. Pr. C., ss. 106, 107.
9) W. R., 1864, 302, ib., 370.
1) v. Pollock on Torts, 2nd Ed., p. 542; Draft Indian Civil Wrongs Bill, s. 30 : 3 H. C. N. W. P. 313.
2) Act XV of 1877, Sch. II, Art. 22.

ATTACHMENT.

AUTHORITY—Civil Procedure Code, Chapters XXXIV and XIX.

Before judgment.—If at any stage of any suit the plaintiff satisfies the Court that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—(*a*) is about to dispose of the whole or any part of his property, or to remove the same from the jurisdiction of the Court in which the suit is pending; or (*b*) has quitted the jurisdiction of the Court, leaving therein property belonging to him, the plaintiff may apply to the Court (specifying the property required to be attached or its value) to call upon the defendant to furnish security to satisfy any decree that may be passed against him, and on his failing to do so, to direct that any portion of his property within the jurisdiction of the Court shall be attached until further order.[1] If the Court is satisfied as to the truth of the plaintiff's allegations, it may require the defendant either to furnish security to produce and place at the disposal of the Court, when required, the property or its value, or such portion as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security: and may also direct the conditional attachment of the whole or any portion of the property specified in the application.[2] If the defendant fails to show cause or to furnish the security required, the Court may order attachment of his property, or a portion thereof, sufficient to satisfy any decree that may be passed against him.[3] If the property is attached and a decree is given in favour of the plaintiff it is not necessary to re-attach the property.[4]

Removal of attachment.—When an order of attachment before judgment is passed, the Court which passed the order will remove the attachment whenever the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.[5]

Does not affect certain rights.—Attachment before judgment does not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.[6]

Compensation for improper attachment.—Same rules apply as for compensation for improper arrest. See "*Arrest.*"

1) s. 483, Civ. Pr. Code.
2) s. 484, ib.
3) s. 485, ib.
4) s. 490, ib.
5) s. 488, ib.
6) s. 489, ib.

Application for attachment in execution of decree.—See "*Execution.*"

Property liable to attachment and sale.—The following property is liable to attachment and sale in execution of a decree, *viz.*, lands, houses or other buildings, goods, money, banknotes, cheques, bills-of-exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in the capital or joint stock of any railway, banking, or other public Company or Corporation, and (except as hereinafter mentioned), all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or over the profits of which, he has a disposing power which he may exercise for his own benefit, and whether the same be held in the name of the judgment-debtor, or by another person in trust for him or on his behalf.[7]

Particulars not so liable.—The following are not so liable—(1) the necessary **wearing apparel and bedding** of the judgment-debtor, his wife and children; (2) tools of **artizans**, and where the judgment-debtor is an **agriculturist** his implements of husbandry and such cattle and seed-grain as may in the opinion of the Court be necessary to enable him to earn his livelihood as such; (3) the materials of houses and other buildings belonging to and occupied by an agriculturist; (4) books of account; (5) mere rights to sue for damages; (6) any right of personal service; (7) stipends and gratuities allowed to military and civil pensioners of Government and political pensions; (8) the **salary** of a public officer, or of any servant of a Railway Company, or local authority to the extent of (*a*) the whole of the salary where the salary does not exceed Rs. 20 monthly: (*b*) Rs. 20 monthly where the salary exceeds Rs. 20 and does not exceed Rs. 40 monthly; and (*c*) one moiety of the salary in any other case; (9) the pay and allowance of persons to whom the Native Articles of War apply; (10) the wages of **labourers** and **domestic servants**; (11) an expectancy of succession by survivorship, or other merely contingent or possible right or interest; (12) a right to future maintenance; (13) any allowance declared by any law passed under the Indian Councils Act, 1861, by a Governor or Lieutenant-Governor in Council, to be exempt from liability to attachment or sale in execution of a decree; (14) where the judgment-debtor is a person liable for the payment of land revenue, any moveable property which under any law applicable to him is exempt from sale for the recovery of an arrear of such revenue. The particulars mentioned in clauses (7), (8), (9), (10) and (13) are exempt from attachment or sale whether before or

7) s. 266, ib.

after they are actually payable. These provisions do not exempt the materials of houses and other buildings from attachment or sale in execution of decrees for rent, or affect the Army Act, 1881, or any similar law for the time being in force [8]

Attachment of debt, share or other moveable property not in possession of debtor: how made.—In the case of (*a*) a debt not secured by a negotiable instrument; (*b*) a share in the capital of any public Company or Corporation; (*c*) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court, attachment is made by a written order prohibiting—(*a*) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court; (*b*) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon; (*c*) in the case of the other moveable property, except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor. A debtor prohibited under clause (*a*) may pay the amount of his debt into Court; this is an effectual discharge. In the case of the salary of a public officer, or the servant of a Railway Company, attachment is made by a written order requiring the officer whose duty it is to disburse the salary, to withhold every month such portion as the Court may direct, until the further orders of the Court.[9]

Of moveable property in possession of debtor.—If the property be moveable property in the possession of the judgment-debtor other than property not liable to attachment and sale, (v. *ante*) attachment is made by actual seizure by the attaching officer who is responsible for its custody: when the property seized is perishable, or when the expense of keeping it in custody will exceed its value, it may be sold at once.[1]

Of negotiable instruments.—If the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, attachment is made by actual seizure, and the instrument is brought into Court and held subject to further orders.[2]

Of property in Court.—If the property is deposited in, or in the custody of, any Court or public officer, attachment is made by a notice to the Court or officer, requesting it or him to hold the property, and any interest or dividend becoming payable on it, subject to the further orders of the Court from which the notice issues.[3]

Of decree for money.—If the property be a decree for money passed by the Court which passed the decree sought to be

8) s. 266, ib. 9) s. 268, ib. 1) s. 269, ib. 2) s. 270, ib. 3) s. 272, ib.

executed, attachment is made by an order of the Court directing the proceeds of the former decree to be applied in satisfaction of the latter decree. If the property be a decree for money passed by any other Court, attachment is made by notice to such Court, given by the Judge of the Court which passed the decree sought to be executed, requesting it to stay the execution of its decree until such notice is cancelled. The Court receiving the notice will stay execution accordingly, unless and until (*a*) the notice is cancelled; or (*b*) the holder of the decree sought to be executed applies to the Court receiving such notice to execute its own decree. In the case of all other decrees, attachment is made by a notice in writing, under the hand of the Judge of the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, when such decree has been passed by any other Court, by also sending to such Court a like notice in writing to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.[4]

Of immoveable property.—If the property be immoveable, attachment is made by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from receiving the same from him by purchase, gift or otherwise. The order is proclaimed at some place on, or adjacent to the property, and a copy of the order is fixed up in a conspicuous part of the property and of the Court-house, and also when the property is land paying revenue to Government, in the office of the Collector of the district in which the land is situate.[5]

Coin, currency-notes.—If the property attached is coin or currency-notes, the Court may, at any time during the continuance of the attachment, direct that the coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled to receive it under the decree.[6]

Rules regulating seizure of property are similar to those regulating arrest. See "*Arrest.*"

Withdrawal of.—If the amount decreed with costs and all charges and expenses resulting from the attachment of any property be paid into Court, or if satisfaction of the decree be otherwise made through the Court, or if the decree is set aside or reversed, an order will be issued, on the application of any person interested in the property, for the withdrawal of the attachment.[7]

Alienation after attachment.—When an attachment has been made by actual seizure, or by written order, any private

4) s. 273, ib. 5) s. 274, ib. 6) s. 277, ib. 7) s. 275, ib.

alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, is void as against all claims enforceable under the attachment.[8]

Investigation of claims to attachment and objections.—If any claim be preferred to, or any objection be made to the attachment of, any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court will proceed to investigate the claim or objection unless it was designedly or unnecessarily delayed. If the property has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.[9] The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.[1] If the Court is satisfied that the property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court will pass an order for releasing the property, wholly or to such extent as it thinks fit from attachment: otherwise it will disallow the claim.[2] The party against whom an order is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of the suit, if any, the order is conclusive.[3]

Attached property subject to mortgage, etc.—The Court may, if it thinks fit, in the case of property subject to a mortgage or lien in favour of some person not in possession, continue the attachment, subject to the mortgage or lien.[4]

Power to order attached property to be sold.—Any Court may order that any property which has been attached, or a portion sufficient to satisfy the decree, be sold, and that the proceeds or a sufficient portion of such sale be paid to the party entitled to receive it under the decree.[5] For rules regulating sales in execution of decrees, see "*Execution.*"

Order as to attachment in decree for payment by instalments.—In all decrees for the payment of money, the Court may for any sufficient reason order that the amount shall be paid by instalments, with or without interest, and after the passing of

8) s. 276, ib.
9) s, 278, ib.
1) s. 279, ib.
2) ss. 280, 281, ib.
3) s. 283, ib.
4) s. 282, ib.
5) s. 284, ib.

any such decree the Court may, on the application of the judgment-debtor, and with the consent of the decree-holder, order that the amount decreed be paid by instalments on such terms as to the payment of interest, the attachment of the property of the defendant, or the taking of security from him, or otherwise, as it thinks fit.[6]

Receiver appointed of attached property—See "*Receivers.*"

6) s. 210, ib.

BAIL.

AUTHORITY—Criminal Procedure Code (Act X of 1882: as amended).

Bail is the security given for the appearance on a day and place certain of a person who has been arrested or imprisoned, but who is set at liberty on the giving of such security. The security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves for his forthcoming, in order that he may be safely protected from prison. Where a person is arrested under a warrant there is usually some reference to the taking of bail. But where the arrest takes place without a warrant the arrested person must be produced before a Magistrate as soon as possible for orders with regard to his custody. Some offences are bailable, and others not. Speaking generally, minor offences are bailable, and grave offences are not. An arrested person may also be set at liberty on his own bond without sureties.

Directions for taking bail on issue of warrant.—Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant, that if such person execute a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed is authorised to take such security and to release such person from custody. The endorsement contains (*a*) the number of sureties; (*b*) the amount in which they, and the person for whose arrest the warrant is issued, are to be respectively bound; and (*c*) the time at which he is to attend before the Court.[1]

Bail in case of bailable offence.—When any person, other than a person accused of a non-bailable offence, is arrested or detained without warrant by an officer in charge of a Police-station, or appears, or is brought before a Court, and is prepared at any time while in the custody of such officer, or at any stage of the proceedings before such Court to give bail, such person must be released on bail: provided that such officer, or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance.[2]

Bail in case of non-bailable offence.—When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a Police-station, or appears or

1) Cr. Pr. Code, s. 76.

2) s. 496, ib.

is brought before a Court, he may be released on bail, but he will not be so released if there appear reasonable grounds for believing that he has been guilty of the offence of which he is accused. But if it appears to such officer or Court, at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed such offence, but that there are sufficient grounds for further inquiry into his guilt, the accused will, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance. Any Court may, however, at any subsequent stage of any proceeding against the accused, cause him, after he has been released as aforesaid, to be arrested, and may commit him to custody.[3]

Amount of bail-bond.—The amount of every bond executed for purposes of bail must be fixed with due regard to the circumstances of the case, and must not be excessive.

Power to direct admission to bail or reduction of bail.—The High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a Police-officer or Magistrate be reduced.[4]

Bonds and bail-bonds.—Before any person is released on bail or released on his own bond, a bond for such sum of money as the Police-officer or Court, as the case may be, thinks sufficient, must be executed by such person, and, when he is released on bail, by one or more sufficient sureties, conditioned that such person will attend at the time and place mentioned in the bond, and will continue so to attend until otherwise directed by the Police-officer or Court, as the case may be.[5]

Discharge from custody.—As soon as the bond has been executed, the person for whose appearance it has been executed must be released; and when he is in jail, the Court admitting him to bail will issue an order of release to the officer in charge of the jail, and such officer on receipt of the order must release him.[6]

Insufficient bail.—If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it, and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.[7]

Discharge of sureties.—All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond either wholly, or so far as relates to the applicants. On such application being made

3) Cr, Pr. Code, s. 497. 4), s. 498, ib. 5) s. 499, ib. 6). s. 500, ib. 7) s. 501 ib.

the Magistrate will issue his warrant of arrest, directing that the person so released be brought before him. On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate will direct the bond to be discharged either wholly, or so far as relates to the applicants, and will call upon such person to find other sufficient sureties, and if he fails to do so, may commit him to custody.[8]

Deposit instead of recognisance or bond.—When any person is required by any Court or officer to execute a bond, with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix, in lieu of executing such bond.[9]

Forfeiture of bond.—Whenever it is proved to the satisfaction of the Court by which a bond has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class, or when the bond is for the appearance before a Court, to the satisfaction of such Court, that such bond has been forfeited, the Court will record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid. If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable property belonging to such person. If such penalty is not paid, and cannot be recovered by such attachment and sale, the person so bound will be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months. But the Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.[1]

Bail pending appeal.—Pending appeal by a convicted person the Appellate Court may order that the execution of the sentence or order appealed against be suspended, and, if he is in confinement, that he be released on bail, or on his own bond.[2]

8) s. 502, ib. 9) s. 513, ib. 1) s. 514, ib. 2) s. 426, ib.

BAILMENT.

AUTHORITY—Contract Act, ch. IX: Act XV of 1877.

A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the '*bailor*.' The person to whom they are delivered is called the '*bailee*.' If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment;[1] as in the case of a vendor who retains possession but expresses his intention to hold for his purchaser, for whom he becomes a bailee. In bailment, the *identical* article delivered is to be returned, or disposed of, according to the bailor's directions. The following are some instances of bailment (1) **deposit**, *i.e.*, the delivery of goods to be kept for the bailor's use; (2) goods delivered to another to be used by him *gratis*; (3) **hire**, *i.e.*, goods delivered to another to be used by him for a consideration; (4) **pawn**, *i.e.*, goods delivered by way of security for money borrowed; (5) goods delivered to be **carried**, or that something may be done to them for reward or *gratis*. (v. "*Carriers.*") Delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee, or of any person authorized to hold them on his behalf.[2]

The bailor is bound to disclose to the bailee faults in the goods bailed of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults. If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed; *e.g.* (*a*) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained; (*b*) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.[3]

1) Contract Act, s. 148. 2) s. 149, ib. 3) s. 150, ib.

Care to be taken by bailee.—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.[4] There is no distinction whatever between the degrees of care required of bailees, except perhaps in the case of common carriers other than railways (v. "*Carriers*"). Whether the bailment is for the benefit of the bailor or bailee, whether it is gratuitous or not, the rule of ordinary prudence is required.

Bailee when not liable for loss.—The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in the preceding paragraph.[5]

Unauthorized use of goods bailed.—A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment. *e.g.*: A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.[6] If the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them. *e.g.*: (*a*) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse; (*b*) A hires a horse in Calcutta from B expressly to march to Benares. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.[7]

Mixture of goods.—If the bailee, *with the consent of the bailor*, mixes the goods of the bailor with his own goods, the bailor and the bailee have an interest, in proportion to their respective shares, in the mixture thus produced. If the bailee, *without the consent of the bailor*, mixes the goods of the bailor, with his own goods, *and the goods can be separated* or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture. *e.g.*: A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark: A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation

4) s. 151, ib. 5) s. 152, ib. 6) s. 153, ib. 7) s. 154, ib.

of the bales, and any other incidental damage. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is *impossible to separate the goods* bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods. *e.g.:* A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. B must compensate A for the loss of his flour.[8]

Repayment by bailor of necessary expenses.—Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor must repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.[9]

Return of goods.—The lender of a thing for use may at any time require its return, if the loan was *gratuitous*, even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, *as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.* If, by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.[1]

A gratuitous bailment is terminated by the death, either of the bailor or bailee.[2]

Bailor entitled to increase or profit from goods bailed.—In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed. *e.g.:* A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.[3]

Bailment by person not entitled.—The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or

8 ss. 155, 156, 157, ib.
9 s. 158, ib.
1) ss. 159, 160, 161 ib.
2) s. 162, ib.
3) s. 163 ib.

to receive back the goods, or to give directions respecting them.[4] If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery,[5] that is to say, the bailee in such a case is protected from suit on the part of the true owner.

If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.[6]

Right of third person claiming goods bailed.—If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.[7] If a third person claims goods from a bailee, the latter may either deliver the goods to him on an indemnity being given, or if an indemnity is refused, institute a suit of interpleader. See "*Interpleader*," p. 336.

Finder of goods.—A person who finds goods belonging to another and takes them into his custody is subject to the same responsibility as a bailee.[8] He is entitled to the goods against every one except the rightful owner. He has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it. When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—(1) when the thing is in danger of perishing or of losing the greater part of its value; or (2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.[9] It is the duty of a finder of property to take steps to discover the rightful owner. For if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it, he is guilty of the offence of criminal misappropriation. See "*Offences*," p. 495.

Bailee's particular lien.—Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving exercise of labour or skill in respect of the goods bailed,

4) s. 164, ib.
5) s. 165, ib.
6) ib.
7) s. 167, ib.
8) s. 71, ib.
9) ss. 168, 169, ib.

he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.[1] Except in the case in the next paragraph mentioned, this right of retainor or lien does not extend to other claims which the bailee may have against the bailor. Thus the borrower of an article cannot keep it by way of security for an antecedent debt.

General lien of bankers, factors, wharfingers, attorneys and policy-brokers.—Bankers, factors, wharfingers, attorneys of a High Court, and policy-brokers, may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.[2] The mere fact that a person fills any of the above-mentioned characters is not sufficient. He must have received the goods and done the act in the particular character to which the general lien attaches. Thus attorneys have a lien only on those papers of their clients which have come into their hands in the course of their professional employment as attorneys. As to the nature of a lien, see "*Sale*," p. 568.

PLEDGE.

Nature of.—The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge.' The bailor is in this case called the '*pawnor*.' The bailee is called the '*pawnee*.'[3]

Rights of pawnee.—The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession, or for the preservation of the goods pledged,[4] and also extraordinary expenses (if any) incurred by him for the preservation of the goods pledged.[5] A pledge does not however give him a general lien, that is to say he cannot, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, will be presumed in regard to subsequent advances made by him.[6]

Default of pawnor.—If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit within three years from the making of the loan or the breach of the promise[7] against the pawnor upon the debt

1) s. 170, ib. 3) s. 172, ib. 5) s. 175, ib. 7) Act XV of 1877, Sch. II,
2) s. 171, ib. 4) s. 173, ib. 6) s. 174, ib. Arts. 57, 115.

or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee must pay over the surplus to the pawnor.[8]

Defaulting pawnor's right to redeem.—If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time *before* the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.[9] If upon a proper tender being made, whether before or after default, the pawnee does not deliver up the goods pledged, the pawnor has an immediate right of action. For "*Limitation*" v. *post*.

Pledge by possessor of goods or of documentary title to goods.—A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods, or documents: Provided (1) that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly: and (2) that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud.[1]

Limitation.—A suit against a depository or pawnee to recover moveable property deposited or pawned must be brought within 30 years of the date of deposit or pawn.[2] Suits for the hire of animals, vehicles, boats or household furniture must be brought within three years of the date when the hire becomes payable.[3] (v. "*Carriers.*")

Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.[4]

Suits by Bailees or Bailors against Wrong-Doers.

If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them

8) s. 176, Contract Act.
9) s. 177, ib.
1) s. 178, ib.
2) Act XV of 1877, Sch. II, Art. 145.
3) Art. 50, ib.
4) s. 179, Contract Act.

any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.[5] Whatever is obtained by way of relief or compensation in any such suit will, as between the bailor and the bailee, be dealt with according to their respective interests.[6]

5) s. 180, ib. 6) s. 181, ib.

BANKERS, BANKING, AND CHEQUES.

AUTHORITIES—*C. M. Collins'* "The History, Law and Practice of Banking," 1881: Act XVIII of 1891 (The Bankers' Books Evidence Act): Act V of 1873 (Government Savings Banks): Act IX of 1872 (Contract Act), Act VI of 1882 (Indian Companies): Act XXVI of 1881 (Negotiable Instruments): the same edited with Notes and Commentary by M. D. Chalmers, 1882: Act XV of 1877.

The relation between a banker and his customer are simply those of debtor and creditor, or borrower and lender. The banker is not a trustee, nor is he bailee or agent for his customer. Money deposited with a banker becomes the money of the banker and ceases to be the money of the person paying it in: it is money lent to the banker, to be repaid when demanded on cheque or draft. A banker can decline to receive lodgments from, or open an account for, any person. But if he does so, he impliedly contracts to transact the customer's banking business and to obey his orders within the scope of a banker's business: and is liable to his customer for any loss suffered by the latter by reason of any disobedience to such orders, or neglect in such business.[1]

Negligent dealing with bill.—When a bill of exchange, accepted payable at a specified bank, has been duly presented there for payment and dishonoured, if the banker so negligently or improperly keeps, deals with, or delivers back such bill as to cause loss to the holder, he must compensate the holder for such loss.[2]

Lodgments are of two descriptions; (1) On "*Deposit Receipt*," when the amount bears interest and is repayable on call, or at a short notice, or is received for a definite period. In the last case the deposit is called "fixed deposit." (2) on "*Current Account*," when the amount does not, unless expressly stipulated, carry interest and is repayable on demand from time to time on written orders from the lodger.[3]

Deposit receipts.—There is no obligation to pay interest in sums deposited unless there is an express stipulation to that effect. The receipt must be produced when payment of either principal or interest is required, and endorsed by the depositor: where it is made out in two or several names the endorsement of each is required. In the case of a deposit receipt being lost the amount is repaid to the depositor upon a satisfactory indemnity.[4]

Current account.—When money is deposited on current account it is repayable on written orders from the customer called

1) Collins, pp. 123, 126.
2) Act XXVI of 1881, s. 77.
3) Collins, p. 125.
4) ib., pp. 127, 129.

cheques. Together with a book of cheques a book called a **pass book** is delivered by bankers to their customers, in which at the head of the first page the bankers are described as the debtors and the customer as the creditor; on the debit side are entered all sums received by the bankers on account of the customer, and on the credit side all sums paid to him or on his account. The customer should return it from time to time to the bankers to be made up; on the entries being made up, it is returned to the customer, who if he sees any error should return the book to be rectified. An entry in a pass book of an amount to the credit of the customer is evidence *primâ facie* of such a lodgment having been made, and will bind the banker unless he can prove it was made in error.[5]

Overdrawn current account.—A customer is as a rule only allowed to overdraw his account upon deposit of security or upon furnishing a guarantee: but if he is permitted to overdraw against deposited securities, the banker cannot dishonour his cheque which does not overdraw beyond the value of the securities deposited (unless by so drawing the customer violates an agreement or understanding) without giving notice to that effect. An agreement by a banker, express or implied, to allow his customer a stated overdraft is binding upon the banker unless there is a failure of the conditions under which the agreement was made, or the aspect of the position and business of the customer has altered.[6] The banker is not entitled to charge his customer interest at any rate per cent. unless the customer has agreed to pay it, or unless such agreement may be inferred from the course of dealing between them.

A letter of credit is an authority from the banker who signs it to the banker or person to whom it is addressed, upon advice to honour the drafts of the person named in it, and who produces the letter, and consequently, he alone is entitled to draw the draft or to receive payment. Each payment is entered on the letter of credit, and the correspondents are thus informed if the credit is exhausted before the expiration of the period named. The letter bears the signature of the party in whose favour it is issued, thus providing the identification requisite.[7]

Circular notes are bills of exchange of a certain amount, accompanied by a letter called a letter of indication, addressed to the foreign correspondent of the issuing banker, and which contains the signature (for identification) of the party for whose favour the notes are issued. The drawees of these notes are the

5) ib., pp. 175, 176. 6) ib., p. 177. 7) ib., p. 239.

correspondents specified in the letter, and the notes are payable without acceptance to the party named in the letter.[8]

Loss of securities.—A banker, as bailee of securities deposited with him by a customer, is not liable for their loss or theft unless he failed to take as much care of them as a man of ordinary prudence would under similar circumstances have done. See "*Bailment.*"

Bankers' lien.—Bankers may, in the absence of a contract to the contrary, retain as a security for a general balance of account any goods bailed to them.[9] A banker has however no general lien upon securities deposited with him to secure a specific sum; nor upon securities deposited with him for a special purpose: such a special purpose being inconsistent with the existence of a general lien.

Bankers' Books Evidence Act.—By and subject to the provisions of this Act, a certified copy of any entry in a banker's book is in all legal proceedings *primâ facie* evidence of the existence of such entry, and admissible as evidence of the matters, transactions, and accounts therein recorded, in every case where, and to the same extent as, the original entry itself is by law admissible. Parties to a legal proceeding may apply to inspect and take copies of any entries in a banker's book for any of the purposes of the proceeding, and for an order on the bank to produce certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding. The terms "bank" and "banker" in the Act mean—(1) any company carrying on the business of bankers; (2) any partnership or individual to whose books the provisions of the Act shall have been extended by the Local Government. "Legal Proceeding" includes an arbitration. No officer of a bank can in any proceeding to which the bank is not a party be compelled to produce any banker's book, the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause.[1]

Companies.—No company can be formed for the purpose of banking consisting of more than ten persons, unless it is registered under the Indian Companies Act, or is formed under some special Act or letters patent.[2]

Non-apparent alterations of negotiable instrument.—Where a note, bill, or cheque, has been materially altered, but does not appear to have been so altered, or where a cheque is presented

8) ib., p. 240.
9) s. 171, Contract Act.
1) Act XVIII of 1891, ss. 2—6.
2) Act VI of 1882, s. 4.

for payment which does not at the time of presentation appear to be crossed, or to have had a crossing which has been obliterated, payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise on due course, discharges such person or banker from all liability thereon: such payment cannot be questioned by reason of the instrument having been altered, or the cheque crossed.[3] This section extends to all alterations the protection given to bankers, in the case of the alteration of the crossing on a cheque, under the English Crossed Cheque Acts, 1876.

Negotiable instruments made by companies.—See "*Companies.*"

SAVINGS BANKS (GOVERNMENT.)

Payment on death of depositor.—If a depositor dies leaving in a Government Savings Bank a sum of money not exceeding Rs. 1,000, and if probate of his will, or letters of administration or a certificate granted under Act XVII of 1860 to collect the debts of the deceased, is not produced to the Secretary of the bank within three months of the death of the depositor, the Secretary of the bank may pay the money to any person appearing to him to be entitled to receive it, or to administer the estate of the deceased.[4]

Saving of right of executor.—Such payment is a full discharge from all further liability in respect of the money so paid, but nothing in the Act precludes any executor, administrator, or other representative of the deceased, from recovering from the person receiving the money the amount remaining in the hands of the latter after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration.[5]

Saving of right of creditor.—Any creditor or claimant against the estate of the deceased may recover his debt out of the money so paid to any person and remaining in his hands unadministered, in the same manner, and to the same extent as if the latter had obtained letters of administration to the estate of the deceased.[6]

Security for administration.—The Secretary of any such bank may take such security as he thinks necessary from any person to whom he so pays over money, and he may assign such security to any person interested in such administration.[7]

Deposit when excluded in computing court-fees.—When the amount of the deposit belonging to the estate of a

3) Act XXVI of 1881, s. 89.
4) Act V of 1873, s. 4.
5) s. 5, ib.
6) ib.
7) s. 6, ib.

deceased depositor does not exceed Rs. 1,000, such amount is excluded in computing the fee chargeable on the probate under the Court-fees Act, 1870, or letters of administration, or certificate (if any) granted in respect of his property. The person claiming probate, &c., should exhibit to the Court a certificate of the amount of the deposit belonging to the estate of the deceased. Such certificate signed by the Secretary of the bank is evidence of the amount of the deposit in the bank belonging to the estate of deceased.[8]

European soldiers.—The above provisions do not apply to money belonging to the estate of any European officer, non-commissioned officer, or soldier dying in Her Majesty's service in India, or of any European who, at the time of his death, was a deserter.[9]

Deposits belonging to minors.—Any deposit made by, or on behalf of, any person under the age of 18 years, may be paid to him personally, if he made the deposit, or to his guardian for his use, if the deposit was made by any person other than the minor, together with the interest, and the receipt of any minor or guardian for money so paid to him is a good discharge.[1]

Deposits belonging to lunatics.—If any depositor becomes insane or incapable of managing his affairs, and if the insanity or incapacity is proved to the Secretary of the bank, the latter may from time to time make payments out of the deposit to any proper person, whose receipt is a sufficient discharge. Where a committee or manager of the depositor's estate has been duly appointed, payments will only be made to it or him.[2]

Married women's deposits.—Any deposit made by, or on behalf of a married woman, or by, or on behalf of a woman who afterwards marries, may be paid to her whether or not the Indian Succession Act, 1865, s. 4 (see "*Husband and Wife*" and "*Marriage*") applies to her marriage: her receipt for the money is a sufficient discharge.[3] See "*Marriage*."

CHEQUES.

A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.[4] A cheque in many respects resembles an ordinary bill of exchange, but is in some entirely different. "It does not require acceptance; in ordinary course it is never accepted; it is not intended for circulation; it is given for immediate payment; it is not entitled to days of grace."[5] The maker of a cheque is called the "drawer," and the person directed to pay,

8) s. 8, ib. 9) s. 9, ib. 1) s. 10, ib. 2) s. 12, ib. 3) s. 13, ib. 4) Act XXVI of 1881, s. 6. 5) Chalmers, p. 13.

that is the banker, is called the "drawee."[6] The majority of provisions in regard to bills of exchange are applicable in the case of cheques; there are in addition certain provisions applicable to cheques only.

Liability of banker.—The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.[7] Heavy damages may be recovered if the drawer's credit has been injured by the banker's failure to honour his customer's cheque when he has sufficient assets in his hands.[8]

Presentment.—A cheque must, in order to charge the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer:[9] as *e.g.*, by the stoppage of payment by the bank. If the bank stops payment, and the payee could with reasonable diligence have presented the cheque before stoppage, the drawer is discharged;[1] for when the holder of a cheque fails to present it for payment within a reasonable time, and the drawer sustains loss or damage from such failure, he is discharged from liability to the holder.[2] In order to charge any person *except* the drawer it is necessary to present a cheque within a reasonable time after delivery by such person.[3] A cheque should be presented or forwarded for presentment on the day after it is received.[4]

Forged indorsement.—Where a cheque payable to order purports to be indorsed by, or on behalf of the payee, the banker is discharged by payment in due course.

Material alteration of cheque and non-apparent crossing v. *ante.*

A crossed cheque is a cheque bearing across its face an addition of the words "and company" (or any abbreviation of these words) between two parallel transverse lines, or of two parallel tranverse lines simply, either with or without the words "not negotiable:" the addition is called a "crossing," and if a cheque bears an addition of the abovementioned kind it is said to be **crossed generally.**[5] Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition is deemed a crossing, and the cheque deemed to be **crossed specially**, and to be crossed to that banker.[6]

6) Act XXVI of 1881, s. 7.
7) s. 31, ib.
8) Chalmers, p. 14.
9) Act XXVI of 1881, s. 72.
1) Chalmers, p. 75.
2) Act XXVI of 1881, s. 84.
3) s. 73, ib.
4) Chalmers, p. 75.
5) Act XXVI of 1881, s. 123.
6) s. 124, ib.

Crossing after issue.—Where a cheque is uncrossed, the holder may cross it generally or specially, and where crossed generally, the holder may cross it specially. Where a cheque is crossed generally or specially, the holder may add the words "not negotiable." Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection.

Payment of crossed cheque.—Where a cheque is crossed generally, the banker on whom it is drawn cannot pay it otherwise than to a banker. Where a cheque is crossed specially the banker cannot pay it otherwise than to the banker to whom it is crossed, or his agent, for collection. Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn must refuse payment.[7]

Payment of crossed cheque out of due course.—A banker who disobeys these rules and pays a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection, is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.[8]

"Not negotiable."—A person taking a cheque crossed generally or specially, bearing in either case the words, "not negotiable," has not, and is not capable of giving, a better title to the cheque than that which the person from whom he took it had.[9] A cheque crossed "not negotiable" is still transferable, but "shorn of the main feature of negotiability, which is that a holder with a defective title can give a good title to a subsequent holder in due course."[1]

Protection of bankers.—Where the banker on whom a crossed cheque is drawn has paid it *in due course*, the banker paying the cheque, and (in case such cheque has come to the hands of the payee) the drawer of the cheque, are respectively entitled to the same rights and placed in the same position in all respects as if the amount of the cheque had been paid to and received by its true owner. A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself, does not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment ;[2] v. also, *ante* "Non-apparent alterations of Negotiable Instrument," p. 89.

See "*Bills of Exchange and Promissory Notes.*"

7) Act XXVI of 1881, ss. 126, 127.
8) s. 129, ib.
9) s. 130, ib.

1) Chalmers, p. 118.
2) Act XXVI of 1881, ss. 128, 131.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

AUTHORITIES—The Negotiable Instruments Act (XXVI of 1881: as amended): the same edited with Notes and Commentary by M. D. Chalmers, 1882: The Civil Procedure Code (XIV of 1882): Act XV of 1877 (Limitation).

A negotiable instrument means a promissory note, bill of exchange, or cheque, expressed to be payable to a specified person or his order, or to the order of a specified person, or to the bearer, or to a specified person or the bearer.[1]

Parties to instruments.—Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery, and negotiation of a note, bill, or cheque. A **minor** may draw, indorse, deliver and negotiate such instruments so as to bind all parties except himself.[2] As to the making of negotiable instruments by Companies, v. "*Companies*," p. 138.

Agency.—Every person capable of binding himself or being bound, may so bind himself or be bound by a duly authorized agent acting in his name. A general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal. An authority to draw bills does not of itself import an authority to indorse.[3] An agent who signs his name to a note, bill, or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.[4]

Inland and foreign instruments.—A note, bill, or cheque drawn or made in British India, and made payable in, or drawn upon any person resident in, British India, is an **inland instrument**: any such instrument not so drawn, made, or made payable is a **foreign instrument**. In the absence of a contract to the contrary, the liability of the maker or drawer of a foreign promissory note, bill, or cheque, is regulated in all essential matters by the law of the place where he made the instrument, and the respective liability of the acceptor and indorser by the law of the place where the instrument is made payable. The law of any foreign country regarding notes, bills, and cheques, is presumed to be the same as that of British India, unless and until the contrary is proved. If a negotiable instrument is made, drawn,

1) Act XXVI of 1881, s. 13.
2) s. 26, ib.
3) s. 27, ib.
4) s. 28, ib.

accepted or indorsed out of British India, but in accordance with the law of British India, the circumstance that any agreement evidenced by such instrument is invalid according to the law of the country wherein it was entered into, does not invalidate any subsequent acceptance or indorsement made thereon in British India. Where a note, bill, or cheque, is made payable in a different place from that in which it is made or indorsed, the law of the place where it is made payable determines what constitutes dishonour, and what notice of dishonour is sufficient.[5]

Ambiguous instruments.—Where an instrument may be consrtued either as a note or bill, the holder may at his election treat it as either.[6]

Difference in words and figures.—If the amount undertaken or ordered to be paid is stated differently in words and in figures, the amount stated in words is the amount considered to be undertaken or ordered to be paid.[7]

Summary suits on negotiable instruments.—In the High Courts and Small Cause Courts of Calcutta, Madras and Bombay and in the Court of the Recorder of Rangoon and of the Judge of Karachi and any other Court having ordinary Original Civil jurisdiction given powers in this behalf by notification of the Local Government, any suit upon a bill of exchange, hundi, or promissory note may, if the plaintiff so desires, be tried under a summary form of procedure. The suit is instituted by presenting a plaint in the ordinary form; but the summons is in a special form calling upon the defendant to obtain *leave* from the Court within the ten days from service to appear and defend the suit. The defendant cannot defend without such leave; and in default of his obtaining such leave, or of appearance and defence in pursuance of such leave, the plaintiff will be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest, at the rate specified (if any) to the date of the decree, and a sum for costs which is fixed by rule of the High Court, unless the plaintiff claims more than such fixed sum, in which case the costs will be ascertained in the ordinary way. The decree may be enforced forthwith. The Court will, upon application by the defendant, give leave to appear and to defend the suit, upon the defendant paying into Court the sum mentioned in the summons, or upon satisfactory affidavits, disclosing a defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application; the defendant will not be required to pay into Court the sum mentioned in the summons, or to give security, unless the Court

5) ss. 11, 12, 134, 137, 136, 135. 6) s. 17, ib. 7) s. 18, ib.

thinks his defence not to be *primâ facie* sustainable, or feels reasonable doubt as to its good faith. The holder of every dishonoured bill of exchange or promissory note has the same remedies for the recovery of the expenses incurred in noting it for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has for the recovery of the amount of the bill or note.[8]

Setting aside of decree.—After decree, the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to appear to the summons and to defend the suit, if it seem reasonable to it to do so, and on such terms as it thinks fit.[9]

Deposit of instrument in Court: security for costs.—In any summary suit the Court may order the bill, hundi, or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.[1]

Attachment of.—See "*Attachment.*"

Sale of in execution.—See "*Execution.*"

Suit on lost negotiable instrument.—In case of any suit founded upon a negotiable instrument, if it be proved that the instrument is lost, and if an indemnity be given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may make such a decree as it would have done, if the plaintiff had produced the instrument in Court at the filing of the plaint.[2]

Joinder of parties.—A plaintiff may at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange hundis and promissory notes.[3]

Instruments in oriental language.—The Act does not affect any local usage relating to any instrument in an oriental language unless such usage is excluded by any words in the body of the instrument, which indicate an intention that the legal relations of the parties thereto should be governed by the Act.[4]

Limitation.—A suit (1) on a bill or note payable at a fixed time after date; (2) on a bill payable at sight, or after sight, but not at a fixed time (3) on a bill accepted payable at a particular place; (4) on a bill or note payable at a fixed time after sight or after demand; (5) on a bill or note payable on demand, and not

8) Chapter XXXIX, Code of Civil Procedure.
9) s. 534, ib.
1) s. 535, ib.
2) s. 61, C. Pr. C.
3) s. 29, C. Pr. C.
4) Act XXVI of 1881, s. 1.

accompanied by any writing restraining or postponing the right to sue; (6) on a note payable by instalments; (7) on a note payable by instalments, which provides that if default be made in payment of one instalment, the whole shall be due; (8) on a note given by the maker to a third person to be delivered to the payee after a certain event should happen; (9) on a dishonoured foreign bill where protest has been made and notice given; (10) by the payee against the drawer of a bill, which has been dishonoured by non-acceptance; (11) by the acceptor of an accommodation bill against the drawer; (12) on any other bill, or note; ——*must be brought within three years of the time* (1) when the bill or note falls due; (2) when the bill is presented; (3) when the bill is presented at that place; (4) when the time fixed expires; (5) the date of the bill or note; (6) the expiration of the first term of payment, as to the part then payable; and for the other parts, the expiration of the respective terms of payment; (7) when the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver; (8) the date of the delivery to the payee; (9) when the notice is given; (10) the date of the refusal to accept; (11) when the acceptor pays the amount of the bill; (12) when the bill or note becomes payable.[5]

Bills of Exchange.

A bill of exchange is an instrument in writing containing an *unconditional order*, signed by the maker (called the Drawer) directing a *certain* person (called the Drawee) to pay a *certain* sum of *money only* to, or to the order of, a *certain* person (called the Payee) or to the bearer of the instrument. Neither in the case of a bill or promissory note is a promise or order to pay "conditional" by reason of the time for payment of the amount, or of any instalment being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is *certain* to happen (*e.g.*, death) although the time of its happening may be uncertain.

The sum payable may be "certain" although it includes future interest, or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that on default of payment of an instalment, the balance unpaid shall become due. Again, the person to whom it is clear that the direction is given, or that payment is to be made, may be a "certain person," although he is misnamed or designated

5) Act XV of 1877, Sch. II Arts. 69—80.

by description only.[6] A drawer may sign by the hand of his agent.[7] When in a bill or endorsement the name of any person is given in addition to the drawee to be resorted to in case of need, such person is called a "**drawee in case of need.**" The making of the bill is completed by delivery. The first time a bill is delivered or negotiated it is said to be "issued."

Liability of drawer.—The drawer by the making and issue of a bill or cheque, binds himself in case of dishonour by the drawee or acceptor, to compensate the holder, provided due notice of dishonour has been given to, or received by him.[8] No drawer of a bill or cheque, or maker of a note, and no acceptor of a bill for honour of drawer is permitted in a suit thereon by a "holder in due course" to deny the validity of the instrument as originally made or drawn.[9] The drawer may, however, in an action against himself allege (1) want of consideration, except against a holder for consideration;[1] or (2) except against a "holder in due course," that the instrument was obtained by unlawful means or for an unlawful consideration;[2] or (3) that his name has been forged; or (4) that he was induced by fraud to sign his name under the belief that he was signing a wholly different document, and that in so signing he acted without negligence; or (5) that he had no capacity to contract; or (6) that he never delivered the instrument *as* a bill of exchange.

Acceptance.—Until acceptance, which is the assent of the drawee to the order of the drawer, the latter is primarily liable. After the drawer has signed his assent upon the bill, or if there are more parts than one, upon one of such parts, and *delivered* the same, or *given notice* of such signing to the holder, or to some person on his behalf, he is called the **acceptor.** When acceptance is refused and the bill is protested for non-acceptance, and any person accepts it *supra protest* for honour of the drawer, or of any one of the indorsers such person is called an **acceptor for honour.**[3] The holder of a bill is entitled to an unqualified or (as it is sometimes called) "general" acceptance, and if he fails to obtain it may either treat the bill as dishonoured[4] or acquiesce in a qualified or limited acceptance. If the holder acquiesces in such an acceptance, or in one which substitutes a different place or time for payment, or which, where the drawees are not partners, is not signed by all the drawees, all previous parties whose consent is not obtained to such acceptance are discharged as against the holder and those claiming under him, unless on notice given by the holder they assent to such acceptance.[5] An accept-

6) s. 5, ib.
7) s. 27, ib.
8) s. 30, ib.
9) s. 120, ib.
1) s. 43, ib.
2) s. 58, ib.
3) s. 7, ib.
4) s. 91, ib.
5) s. 86, ib.

ance may be cancelled until it has been notified to the holder. On such notification it becomes complete and irrevocable.

Liability of acceptor.—Except in the case of a cheque, no drawee of a bill is bound to accept it. No person except the drawee of a bill, or all or some of several drawees, or a person named therein as a drawee in case of need, or an acceptor for honour, can bind himself by acceptance.[6] Until acceptance the drawer is the principal debtor; after acceptance the acceptor is the principal debtor, and the drawer and indorsers his sureties.[7] The acceptor before maturity of a bill is bound to pay the amount thereof at maturity according to the apparent tenor of the acceptance, and the acceptor of a bill at or after maturity is bound to pay the amount thereof to the holder on demand.

In default of payment the acceptor is bound to compensate any party to the bill for any loss or damage sustained by him and caused by such default.[8] Where there are several drawees of a bill of exchange who are not partners, each of them can accept for himself, but none of them can accept it for another without his authority. An acceptor of a bill already endorsed is not relieved from liability by reason that such endorsement is forged, if he knew or had reason to believe the endorsement to be forged when he accepted the bill. An acceptor of a bill drawn in a fictitious name, and payable to the drawer's order, is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an endorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.[9] v. also *ante*, "Liability of Drawer," and *post*, "Negotiation."

Presentment for acceptance.—In the absence of express stipulation presentment of a bill for acceptance, or of a note for payment (v. *post*) is (generally speaking) optional. It is usual and desirable to present the bill in order to obtain the security of the acceptor's name upon the bill, should e haccept, and in default of acceptance to get an immediate right of recourse against the drawer and indorsers. Presentment is necessary in the case of a bill payable after sight: if no time or place is specified in such a bill for presentment, it must be presented to the drawee for acceptance, if he can, after reasonable search, be found, by a person entitled to demand acceptance, within a reasonable time after it is drawn, and in business hours on a business day. If the drawee cannot, after reasonable search, be found, the bill is dishonoured. If the bill is directed to the drawee at a particular place, it must be presented at that place; and if at the due date for presentment he cannot, after reasonable search, be found

6) s. 33, ib. 7) s. 37, i. 8) s. 32, ib. 9) ss. 34, 41, 42, ib.

there, the bill is dishonoured.[1] If the maker, drawee or acceptor of a negotiable instrument has no known place of business, or fixed residence, and no place is specified in the instrument for presentment for acceptance or payment, such presentment may be made to him in person wherever he can be found.[2] Presentment for acceptance, or payment, may be made to the agent of the drawee, maker or acceptor, as the case may be, or where the drawee, maker or acceptor has died, to his legal representative, or where he has been declared an insolvent, to his assignee.[3] The holder must, if so required by the drawee, allow the drawee 24 hours (exclusive of public holidays) to consider whether he will accept it.[4] If the holder allows the drawee more than 24 hours (exclusive of public holidays) all previous parties not consenting to such allowance are thereby discharged from liability to such holder.[5] At the expiration of this time the bill should be demanded back. If the bill is returned generally accepted, the person who presented it must wait until payment is due. If the person presenting it obtains a qualified acceptance he may either treat the bill as dishonoured and give the necessary notices, or assent to the qualified acceptance. If he assents he must give notice to, and obtain the assent of, previous parties to such qualified acceptance (v. *ante*). If lastly the drawee refuses to accept, the person presenting the bill may treat it as dishonoured: he then obtains an immediate right of recourse against the drawer and endorsers, and on notice to them of "dishonour by non-acceptance" an immediate right of action.

Acceptance and payment for honour and reference in case of need.—When a bill of exchange has been noted or protested for non-acceptance or for better security, any person not being a party already liable thereon may, with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto. A person desiring to accept for honour must, by writing on the bill under his hand, declare that he accepts under protest the protested bill for the honour of the drawer or of a particular indorser whom he names, or generally for honour. Where the acceptance does not express for whose honour it is made, it will be deemed to be made for the honour of the drawer. An acceptor for honour binds himself to all parties subsequent to the party for whose honour he accepts to pay the amount of the bill if the drawee do not; and such party and all prior parties are liable in their respective capacities to compensate the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance. But an acceptor for honour is not liable to

1) s. 61, ib. In default of presentment no party to the bill is liable thereon to the person making such default. Where authorized by agreement or usage, presentment (for acceptance or payment) through the post office by means of a registered letter is sufficient (ss. 61, 64 ib.)

2) s. 71, ib. 3) s. 75, ib. 4) s. 63, ib. 5) s. 83, ib.

the holder of the bill unless it is presented, or (in case the address given by such acceptor on the bill is a place other than the place where the bill is made payable) forwarded for presentment, not later than the day next after the day of its maturity. An acceptor for honour cannot be charged unless the bill has at its maturity been presented to the drawee for payment, and has been dishonoured by him, and noted or protested for such dishonour. When a bill of exchange has been noted or protested for non-payment, any person may pay the same for the honour of any party liable to pay the same, provided that the person so paying or his agent in that behalf has previously declared before a notary public the party for whose honour he pays, and that such declaration has been recorded by such notary public. Any person so paying is entitled to all the rights, in respect of the bill, of the holder at the time of such payment, and may recover from the party for whose honour he pays all sums so paid, with interest thereon and with all expenses properly incurred in making such payment. Where a drawee in case of need is named in a bill of exchange, or in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee. A drawee in case of need may accept and pay the bill of exchange without previous protest.[6]

Negotiation.—After a bill, cheque, or note, is drawn, or made, and before the time arrives for payment, it may be transferred to one or more persons. When it is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.[7] The general rule of law is that no person can give a better title to another than he himself possesses; an exception to this rule exists however in the case of negotiable instruments. "These being part of the currency are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is over due, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder." The transfer must be by indorsement if the bill, note, or cheque is in legal effect payable to order, and by delivery of the bill is in legal effect payable to bearer. Every sole maker, drawer, payee, or indorsee, or all of several joint makers, drawers, payees, or indorsees of a negotiable instrument, may, if the negotiability of such instrument has not been restricted or excluded as mentioned in the next paragraph, indorse and negotiate the same. This however does not enable a maker and drawer to indorse or negotiate an instrument, unless he is in lawful possession or is

6) ss. 108—116, ib.

7) s. 14, ib.

holder thereof: or enables a payee or indorsee to indorse or negotiate an instrument unless he is the holder thereof.[8] A negotiable instrument may be negotiated (except by the maker, drawee, or acceptor after maturity) until payment or satisfaction thereof by the maker, drawee, or acceptor at or after maturity, but not after such payment or satisfaction.[9] If a bill which has been negotiated is, at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished.[1]

Indorsement.—When the maker or holder of a negotiable instrument signs the same otherwise than as such maker, for the purpose of negotiation, on the back or face thereof, or on a slip of paper annexed thereto, or so signs for the same purpose, a stamped paper intended to be completed as a negotiable instrument, he is said to endorse the same, and is called the **indorser.**[2] Indorsements are either (1) "in blank" or "general" or (2) "in full" or "special." An indorsement is said to be "in blank" when the indorser signs his name only: if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the indorsement is said to be "in full;" and the person so specified is called the **indorsee**[3] of the instrument. Indorsement is completed by delivery, actual or constructive.[4] A promissory note, bill of exchange or cheque payable to the order of a specified person, or to a specified person or order, is negotiable by the holder, by indorsement and delivery thereof.[5] The indorsement of a negotiable instrument followed by delivery transfers to the indorsee the property therein with the right of further negotiation; but the indorsement may, by express words, restrict or exclude such right, or may merely constitute the indorsee an agent to indorse the instrument, or to receive its contents for the indorser, or for some other person.[6] Subject to the special provisions in regard to crossed cheques (see "*Bankers, Banking and Cheques*") a negotiable instrument endorsed in blank is payable to bearer thereof, even although originally payable to order.[7] If a negotiable instrument after having been indorsed in blank, is indorsed in full, the amount of it cannot be claimed from the indorser in full, except by the person to whom it has been indorsed in full, or by one who derives title through such person.[8] An indorsement is not valid for the purpose of negotiation if it purport to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid, a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.[9] No maker of a note, and no

8) ss. 46—48, 51, ib.
9) s. 60, ib.
1) s. 90, ib.
2) s. 15, ib.
3) s. 16, ib.
4) s. 46, ib.
5) s. 48, ib.
6) s. 50, ib.
7) s. 54, ib.
8) s. 55, ib.
9) s. 56, ib.

acceptor of a bill payable to, or to the order of, a specified person, can, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or bill, to indorse it.[1] No indorser of a negotiable instrument is, in a suit thereon by a subsequent holder, permitted to deny the signature or capacity to contract of any prior party to the instrument. Where the holder of a negotiable instrument, without the consent of the indorser, destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity.[2]

The legal representative of a deceased person cannot negotiate by delivery only, a promissory note, bill of exchange, or cheque payable to order and indorsed by the deceased but not delivered.[3] He must himself re-indorse the bill and deliver it in order to negotiate the bill. If he signs his name to a note, bill, or cheque he is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such.[4]

Liability of indorser.—In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without in such indorsement expressly excluding, or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor, or maker, to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to, or received by, such indorser.[5] Every indorser after dishonour is liable as upon an instrument payable on demand.[6] No indorser of a negotiable instrument is, in a suit thereon by a subsequent holder, permitted to deny the signature or capacity to contract of any prior party to the instrument.[7]

Exclusion of liability.—The indorser may, by express words in the indorsement, exclude his own liability thereon, or make such liability, or the right of the indorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen. Where an indorser so excludes his liability and afterwards becomes the holder of the instrument, all intermediate indorsers are liable to him.[8] The holder of a negotiable instrument indorsed in blank may, without signing his own name, by writing above the indorser's signature a direction to pay to any other person as indorsee, convert the indorsement in blank into an indorsement in full; and the holder does not thereby incur the responsibility of an indorser.[9]

1) s. 121, ib.
2) ss. 122, 40, ib.
3) s. 57, ib.
4) s. 29, ib.
5) s. 35, ib.
6) ib.
7) s. 122, ib.
8) s. 52, ib.
9) s. 49, ib.

The "**holder**" of a promissory note, bill of exchange, or cheque, means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Where the note, bill, or cheque, is lost or destroyed, its holder is the person entitled at the time of such loss or destruction.[1]

"**Holder in due course**" means any person who for *consideration* became the possessor of a promissory note, bill of exchange or cheque, if payable to bearer, or the payee, or indorsee thereof, if payable to, or to the order of, a payee, before the amount mentioned in it became payable, *and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.*[2] "Holder in due course" is the equivalent for "*bonâ-fide* holder for value without notice" of English law. Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied.[3] The position of a holder in due course is a peculiar one, and an exception to the general rule applicable to personal property, that a seller though in possession of the property can give no better title to another than he has himself. In the case of negotiable paper "a thief or any other person having possession of such paper, fair upon its face, can give a *bonâ-fide* purchaser for value a good title to it against all the parties thereto as well as the true owner" In the case of a lost negotiable instrument, or of one obtained from any maker, acceptor, or holder by means of an offence, or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument, is entitled to receive the amount due thereon from such maker, acceptor, or holder, or from any party prior to such holder, unless he, or some person through whom he claims, was a holder thereof in due course.[4] A forged indorsement is regarded as a nullity, and therefore "a person who makes title through a forgery cannot claim the rights of a holder in due course, although he may have taken the bill for value and in perfect good faith."[5] A holder of a negotiable instrument who derives title from a holder in due course has the rights thereon of that holder in due course.[6] The holder of a negotiable instrument who has acquired it *after* dishonour, whether by non-acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transferor, provided that any person who, in good faith and for consideration, becomes the holder after maturity, of an accommo-

1) s. 8, ib.
2) s. 9, ib.
3) s. 36, ib.
4) s. 58, ib., Chalmers, p. 62.
5) Chalmers, p. 63.
6) s. 53, Act XXVI of 1881.

dation note or bill may recover the amount of the note or bill from any prior party.[7] Until otherwise proved, every holder of a negotiable instrument is presumed to be a holder in due course.[8]

Accommodation bills or notes.—If a bill be accepted for the accommodation of the drawer, the latter is the principal debtor and the acceptor the surety: if the acceptor has to pay the bill, the drawer must indemnify him.[9] An "accommodation party" is a person "who has signed a bill as drawer, acceptor or indorser, without receiving any value therefor, but for the purpose of lending his name to some other person."

Payment.—A promissory note, or bill of exchange, in which no time for payment is specified, and a cheque, are payable on demand.[1] In a promissory note or bill of exchange the expressions "at sight" and "on presentment" mean on demand. The expression **after sight** means, in a promissory note, after presentment for sight, and, in a bill of exchange after acceptance, or noting for non-acceptance, or protest for non-acceptance.[2] The **maturity** of a note or bill is the date at which it falls due. Three days of grace are to be added in the case of all notes and bills which in legal effect are not payable on demand.[3] When the day on which a note or bill is at maturity is a public holiday, the instrument is deemed to be due on the next preceding business day. In calculating the date at which a promissory note or bill of exchange, made payable a stated number of months after date or after sight, or after a certain event, is at maturity, the period stated will be held to terminate on the day of the month which corresponds with the day on which the instrument is dated or presented for acceptance or sight, or noted for non-acceptance, or protested for non-acceptance, or the event happens, or where the instrument is a bill of exchange made payable a stated number of months after sight, and has been accepted for honour, with the day on which it was so accepted. If the month in which the period would terminate has no corresponding day, the period will be held to terminate on the last day of such month. In calculating the date at which a promissory note or bill of exchange made payable a certain number of days after date or after sight, or after a certain event, is at maturity, the day of the date, or of presentment for acceptance or sight, or of protest for non-acceptance, or on which the event happens will be excluded.[4] The person making payment is entitled on payment to have the instrument delivered up to him, or if the instrument is lost or cannot be produced, to be indemnified against any further claim.[5] (v. *post.*)

7) s. 59, ib.
8) s. 118 (*g*), ib.
9) Chalmers, p. 46.
1) s. 19, Act XXVI of 1881.
2) s. 21, ib.
3) s. 22, ib., Chalmers, p. 34.
4) ss. 23, 24, 25, Act XXVI of 1881.
5) s. 81, ib.

Presentment for payment.—In the absence of express stipulation, no presentment for payment is necessary in order to charge the *maker* of a note or *acceptor* of a bill, except in the case of a note, bill, or cheque, made, drawn, or accepted, payable at a specified place (*v. post*) which must, in order to charge the maker or drawer, be presented for payment at that place.[6] In order, however, to charge other parties, notes, bills and cheques, must be presented for payment to the maker, acceptor, or drawee respectively by or on behalf of the holder[7] and subject to the following rules: (in default of such presentment, the other parties thereto are not liable thereon to such holder)—(i) Presentment must be made during the usual hours of business, and if at a banker's, within banking hours.[8] (ii) A note or bill made payable at a specified period after date or sight must be presented for payment at maturity.[9] (iii) A note payable by instalments must be presented for payment on the third day after the day fixed for payment of each instalment; non-payment on such presentment has the same effect as non-payment of a note at maturity.[1] (iv) A note, bill, or cheque, payable at a specified place and not elsewhere, must, in order to charge any party thereto, be presented for payment at that place.[2] (v) A note or bill not made "payable at a specified place and not elsewhere" must be presented at the place of business or residence of the maker, drawee, or acceptor, as the case may be; and if there is no known place of business or fixed residence, and no place is specified for presentment for acceptance or payment, presentment may be made to the maker, &c., in person wherever he can be found.[3] (vi) A negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder.[4] (vii) v. *ante* "Presentment for Acceptance." As to presentment of cheques, see "*Bankers, Banking, and Cheques.*"

Payment in due course means payment in accordance with the apparent tenor of the instrument in good faith, and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.[5] Presentment for acceptance or payment may be made to the duly authorized agent of the drawee, maker, or acceptor; or where the drawee, maker, or acceptor has died, to his legal representative, or, where he has been declared an insolvent, to his assignee.[6]

No presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment, in any of the

6) Chalmers, p. 71, s. 69.
7) s. 64, Act XXVI of 1881.
8) s. 65, ib.
9) s. 66, ib.
1) s. 67, ib.
2) s. 68, ib.
3) ss. 70, 71, ib.
4) s. 74, ib.
5) s. 10, ib.
6) s. 75, ib.

following cases :—(*a*) If the maker, drawee or acceptor intentionally prevents the presentment, or if the instrument being payable at his place of business, he closes such place on a business day during the usual business hours, or if the instrument being payable at some other specified place, neither he nor any person authorized to pay it, attends at such place during the usual business hours, or if the instrument not being payable at any specified place, he cannot after due search be found ; (*b*) as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment; (*c*) as against any party, if, after maturity, with knowledge that the instrument has not been presented he makes a part payment on account of the amount due on the instrument, or promises to pay the amount due in whole or in part, or otherwise waives his right to take advantage of any default in presentment for payment; (*d*) as against the drawer if the latter could not suffer damage from want of presentment.[7]

Discharge from liability.—Subject to the next following provisions (clause *c*.), payment of the amount due on a promissory note, bill, or cheque, must, in order to discharge the maker or acceptor, be made to the holder of the instrument. The maker, acceptor, or indorser, respectively, of a negotiable instrument, is discharged from liability thereon—(*a*) to a holder thereof who cancels such acceptor's or indorser's name with intent to discharge him, and to all parties claiming under such holder ;(*b*) to a holder there of who otherwise discharges such maker, acceptor or indorser, and to all parties deriving title under such holder after notice of such discharge ; (*c*) to all parties thereto, if the instrument is payable to bearer, or has been indorsed in blank, and such maker, acceptor, or indorser, makes payment in due course of the amount due thereon. See also *Index sub. voc.* "Discharge from Liability."

Dishonour.—A bill is dishonoured by non-acceptance or non-payment, and a note or cheque by non-payment.[8] Where a drawee in case of need is named in the bill or in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.[9] On dishonour of a note, bill or cheque by non-acceptance or non-payment, the holder or same party who remains liable thereon must give **notice of dishonour** to all other parties whom he seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon. No notice need be given to the maker of the dishonoured note, or the drawer or acceptor of the dishonoured bill or cheque.[1] Notice may be given to the agent of the person to

7) s. 76, ib. 8) ss. 91, 92, ib. 9) s. 115, ib. 1) s. 93, ib.

whom it is required to be given, or where he has died, to his legal representative, or where he has been declared an insolvent, to his assignee.[2] A party receiving notice must, in order to render any prior party liable to himself, transmit notice to such party unless the latter has already received notice.[3] When the instrument is deposited with an agent for presentment, the agent is entitled to the same time to give notice to his principal as if he were the holder giving notice of dishonour, and the principal is entitled to a further like period to give notice of dishonour.[4] When the party to whom notice of dishonour is despatched is dead, but the party despatching the notice is ignorant of his death, the notice is sufficient.[5]

Requisites of notice.—Notice may be oral or written; and may if written, be sent by post; and may be in any form; but it must inform the party to whom it is given, either in express terms, or by reasonable intendment, that the instrument has been dishonoured, and in what way, and that he will be held liable thereon; and it must be given within a reasonable time after dishonour, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended. If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid.[6]

Effect of notice.—When a bill is dishonoured the holder has immediate right of recourse to previous endorsers and to the drawer: the effect of notice or protest duly given or made, is to convert this right of recourse into immediate right of action on the bill.

What is reasonable time.—In determining what is a reasonable time for presentment for acceptance or payment, for giving notice of dishonour and for noting, regard will be had to the nature of the instrument and the usual course of dealing with respect to similar instruments; and, in calculating such time, public holidays will be excluded. If the holder and the party to whom notice of dishonour is given carry on business or live (as the case may be) in different places, such notice is given within a reasonable time if it is despatched by the next post or on the day next after the day of dishonour. If the said parties carry on business or live in the same place, such notice is given within a reasonable time if it is despatched in time to reach its destination on the day next after the day of dishonour. A party receiving notice of dishonour, who seeks to enforce his right against a prior party, transmits the notice within a reasonable

2) s. 94, ib.
3) s. 95, ib.
4) s. 96, ib.
5) s. 97, ib.
6) s. 94, ib.

time if he transmits it within the same time after its receipt as he would have had to give notice if he had been the holder.

No notice of dishonour is necessary—(*a*) when it is dispensed with by the party entitled thereto; (*b*) in order to charge the drawer when he has countermanded payment; (*c*) when the party charged could not suffer damage for want of notice; (*d*) when the party entitled to notice cannot after due search be found: or the party bound to give notice is, for any other reason, unable without any fault of his own to give it; (*e*) to charge the drawers, when the acceptor is also a drawer; (*f*) in the case of a promissory note which is not negotiable; (*g*) when the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument.[7]

Bills in sets.—Bills of exchange may be drawn in parts, each part being numbered and containing a provision that it shall continue payable only so long as the others remain unpaid. All the parts together make a set; but the whole set constitutes only one bill, and is extinguished when one of the parts, if a separate bill, would be extinguished. *Exception.*—When a person accepts or indorses different parts of the bill, in favour of different persons, he and the subsequent indorsers of each part are liable on such part as if it were a separate bill. As between holders in due course of different parts of the same set, he who first acquired title to his part is entitled to the other parts and the money represented by the bill.[8]

Alterations.—Any material alteration of a negotiable instrument renders it void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties: any such alteration if made by an indorsee discharges his indorser from all liability to him in respect of the consideration thereof.[9] These provisions are subject to those relating to inchoate stamped instruments, the conversion of indorsement in blank into indorsement in full, qualified or limited acceptances (v. *ante*) and the crossing of cheques after issue (v. "*Bankers, Banking, and Cheques*"). An acceptor or indorser is bound by his acceptance or indorsement, notwithstanding any *previous* alteration of the instrument.[1] As to non-apparent alterations, v. "*Bankers, Banking, and Cheques.*"

Inchoate instrument.—If one person signs and delivers to another a paper properly stamped, and either wholly blank, or having written thereon an incomplete negotiable instrument, he thereby gives *primâ facie* authority to the holder to make or complete

7) ss. 105, 106, 107, 98, ib. 8) ss. 132, 133, ib. 9) s. 87, ib. 1) s. 88. ib.

upon it a negotiable instrument for any amount specified therein and not exceeding the amount covered by the stamp. The person signing is liable in the capacity he signed it to any holder in due course for such amount, provided that no person other than a holder in due course can recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.[2]

Special rules of evidence.—Until the contrary is proved, the following presumptions will be made:—(*a*) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated, or transferred, was accepted, indorsed, negotiated, or transferred for consideration; (*b*) that every negotiable instrument bearing a date was made or drawn on such date; (*c*) that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity; (*d*) that every transfer of a negotiable instrument was made before its maturity; (*e*) that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon; (*f*) that a lost promissory note, bill of exchange or cheque was duly stamped; (*g*) that the holder of a negotiable instrument is a holder in due course; provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burthen of proving that the holder is a holder in due course lies upon him.[3] See also *Index*.

Consideration.—A negotiable instrument made, drawn, accepted, indorsed, or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto. To this rule there are two exceptions: (1) no party for whose accommodation a negotiable instrument has been made, drawn, accepted, or indorsed, can, if he have paid the amount thereof, recover such amount from any accommodation party; (2) no party to the instrument who has induced any other party to make, draw, accept, indorse, or transfer the same to him for a consideration which he has failed to pay or perform in full can recover thereon an amount exceeding the value of the considera-

2) s. 20, ib. 3) s. 118, ib.

tion (if any) which he has actually paid or performed.[4] When the consideration for which a person signed a note, bill, or cheque, consisted of money, and was originally absent in part, or has subsequently failed in part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced. The drawer of a bill stands in immediate relation with the acceptor, the maker of a note, bill, or cheque with the payee, and the indorser with the indorsee. Other signers may by agreement stand in immediate relation with a holder. Where a part of the consideration for which a person signed a note, bill, or cheque, though not consisting of money, is ascertainable in money without collateral inquiry, and there has been a failure of that part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionately reduced.[5]

Compensation.—The compensation payable in case of the dishonour of a promissory note, bill of exchange or cheque, by any party liable to the holder or any indorsee, will (except in cases provided for by the Code of Civil Procedure, section 532. v. *ante* pp. 95, 96) be determined by the following rules :—(*a*) the holder is entitled to the amount due upon the instrument, together with the expenses properly incurred in presenting, noting and protesting it ; (*b*) when the person charged resides at a place different from that at which the instrument was payable, the holder is entitled to receive such sum at the current rate of exchange between the two places ; (*c*) an indorser who, being liable, has paid the amount due on the same is entitled to the amount so paid with interest at six per centum per annum from the date of payment until tender or realization thereof, together with all expenses caused by the dishonour and payment ; (*d*) when the person charged and such indorser reside at different places, the indorser is entitled to receive such sum at the current rate of exchange between the two places ; (*e*) the party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him, together with all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any). If such bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill.[6]

Suretyship.—See "*Indemnity and Guarantee.*"

Protest.—When a note or bill has been dishonoured by non-acceptance or non-payment, the holder may cause such

4) s. 43, ib. 5) s. 44, 45, ib. 6) s. 117, ib.

dishonour to be noted by a notary public, upon the instrument, or upon a paper attached thereto, or partly upon each. The note must be made a reasonable time after dishonour, and must specify the date of dishonour, the reason (if any) assigned for such dishonour, or, if the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured, and the notary's charges. When a note or bill has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public. Such certificate is called a "protest." In a suit upon an instrument which has been dishonoured, the Court will, on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved. When the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached, before the maturity of the bill, the holder may, within a reasonable time, cause a notary public to demand better security of the acceptor, and on its being refused may, within a reasonable time, cause such facts to be noted and certified as aforesaid. Such certificate is called a protest for better security. A protest must contain—(*a*) either the instrument itself, or a literal transcript of the instrument and of everything written or printed thereupon; (*b*) the name of the person for whom and against whom the instrument has been protested; (*c*) a statement that payment or acceptance, or better security, as the case may be, has been demanded of such person by the notary public; the terms of his answer, if any, or a statement that he gave no answer, or that he could not be found; (*d*) when the note or bill has been dishonoured, the place and time of dishonour, and when better security has been refused, the place and time of refusal; (*e*) the subscription of the notary public making the protest; (*f*) in the event of an acceptance for honour or of a payment for honour, the name of the person by whom, of the person for whom, and the manner in which, such acceptance or payment was offered and effected. A notary public may make the demand mentioned in clause (*c*) either in person or by his clerk or, where authorised by agreement or usage, by registered letter. When a promissory note or bill of exchange is required by law to be protested, notice of such protest must be given instead of notice of dishonour, in the same manner and subject to the same conditions; but the notice may be given by the notary public who makes the protest. All bills of exchange drawn payable at some other place than the place mentioned as the residence of the drawee, and which are dishonoured by non-acceptance, may, without further presentment to the drawee, be protested for non-payment, in the place specified

for payment, unless paid before or at maturity. Foreign bills must be protested for dishonour when such protest is required by the law of the place where they are drawn. Where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.[7]

Lost Bill.—Where a bill has been lost before it is overdue the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so.[8]

Promissory Notes.

A promissory note is an instrument in writing (not being a bank note or currency note) containing an *unconditional* undertaking, signed by the maker, to pay a *certain* sum of money *only* to, or to the order of, a certain person, or to the bearer of the instrument.[9] *A promissory note may be in any form of words, which* fulfil the requirements of this section and from which the intention to make a note appears.[1] The maker may sign by the hand of his agent.[2] Delivery actual or constructive is necessary to complete the instrument.[3] For most purposes the same or similar considerations apply both to bills and notes. The following proceedings relating to bills have no application to notes, *viz.*, presentment for acceptance, acceptance, reference in case of need and acceptance *supra protest*.[4]

An I. O. U. *is not a promissory note*[5] unless (*as it generally does* not) it contains a promise to pay: "it is evidence of an account stated, not necessarily of money lent, and may be used for the purposes for which an account stated can be used," but it is not a negotiable instrument.

Presentment for sight.—A note, payable at a certain period after sight, must be presented to the maker for sight (if he can after reasonable search be found) by a person entitled to demand payment, within a reasonable time after it is made, and in business hours on a business day. In default of such presentment, no party thereto is liable thereon to the person making such default.[6]

See *ante*, "*Bills of Exchange.*"

7) ss. 99—104A, 119, ib.
8) s. 45A, ib.
9) s. 4, ib.
1) Chalmers, p. 8.
2) Act XXVI of 1881, s. 27.
3) 101, 102, 103, 104,
4) Chalmers, pp. 8, 9.
5) Act XXVI of 1881, s. 4.
6) s. 62, ib.

BOND.

AUTHORITIES—Contract Act (IX of 1872): the same edited by Sir H. Cunningham and H. H. Shephard, 1891: Act XV of 1877: and cases cited.

A bond is strictly speaking a written acknowledgement, under seal, of a debt or obligation; the person giving the bond is called the **obligor**, and he to whom it is given is called the **obligee**. A bond is called single when it is without a penalty, and an obligation when (as is usual) it contains a penalty, with a condition for the payment of money, or the performance of some obligation. A 'bond' includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be.[1] In India, contracts under seal having no special privilege attached to them and being treated on the same footing as simple contracts;[2] bonds are rarely under seal. No technical form of words is necessary to constitute a bond. Any words declaring the intention of the parties and denoting the obligation will be sufficient, provided the writing be on stamped paper of proper value and signed and delivered by the party intended to be charged. Practically, bonds as security for the payment of money are being superseded by promissory notes and are mainly used as securities for the performance of some obligation.

Although essentially the same, bonds have different names in accordance with the nature of the transaction in connection with which they are executed—*e.g.*, administration-bonds, security-bonds, customs-bonds, indemnity-bonds, bail-bonds, &c. In most of the vernacular dialects of India a bond is called a '*khat.*'

Penalty and liquidated damages.—Under English law a distinction is drawn between money recoverable by way of penalty, and money recoverable by way of liquidated damages. In the latter case the whole sum is recoverable: in the former the penalty is regarded merely as a security for the damages actually sustained. But in Indian Courts the distinction is ignored. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract *reasonable compensation not exceeding the amount so named*, *e.g.*—A contracts with B that if A practises as a surgeon within Calcutta, he will

1) Act XV of 1877, s. 3. 2) 12 Moo. I. A., 275.

pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.[3]

Bonds for performance of public duty are exceptions to the above-stated rule. When any person enters into any **bail-bond, recognizance,** or other instrument of the same nature, or under the provisions of any law, or under the orders of the Government of India or of any Local Government, gives any bond for the performance of any public duty or act in which the public are interested, he is liable upon breach of the condition of any such instrument, to pay the *whole* sum mentioned therein. A person however who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.[4]

Bond to secure payments by instalments.—If in a bond, under which the money due is agreed to be paid by fixed instalments, it is stipulated that on default in payment of any one instalment, the whole balance due on the bond be immediately payable, such stipulation is not penal; the effect of it is merely to remit the parties to their original position. Therefore on default of payment of any instalment, the obligee may at once sue the obligor on the bond for the whole amount unpaid. But it would be otherwise if, on the supposed default, a larger sum than that originally due were agreed to be paid, as where in a bond payable in two instalments, it was stipulated that on default in payment of either instalment double the entire amount of the bond should become payable at once.[5]

Bonds given for an unlawful consideration or with an illegal object are void. See "*Contract.*" Thus bonds given in consideration of future cohabitation are void, though bonds founded on past cohabitation are valid, and not liable (unless there are other elements in the case) to be set aside.[6] Bonds in restraint of trade, or marriage, or by way of wager, or without consideration (and not within the excepted cases) are also void. See "*Contract.*"

Stipulations to pay enhanced interest.—A stipulation in a bond that the debtor shall, on default in paying up the principal at a certain time, pay for the future compound interest or interest at a higher rate, is not penal in its character and therefore on default the obligee may sue for and obtain interest at the enhanced rate.[7]

3) Act IX of 1872, s. 74. 4) ib.
5) See Cunningham and Shephard's Contract Act, and cases there cited, p. 223.
6) 3 All., 787 : L. R. 16 Eq., 275, 282 : 33 L. J., Ch. 461 : 6 B and C., 133.
7) Cunningham and Shephard, p. 224.

Bonds made by joint obligors or in favour of joint obligees.—See *"Contract"* (joint promisors).

Discharge of surety.—See *"Indemnity and Guarantee."*

Administration-bond.—In the case of a bond executed by an administrator under S. 256 of the Succession Act, the holder can only recover under it the damage that has resulted to himself or those interested in the bond from the breach complained of.[8]

Bail-bond.—See *"Bail."*

Bonds conditioned for good conduct or faithful service of a person in an office or employment.—In the case of these bonds the liability of the surety is co-extensive with the duration of the office,[9] which may be annual, permanent, or uncertain as the case may be. If the duration of office be uncertain, the liability will be equally so.[1] If there be substantial change in the employment, as that of a clerk being promoted to the office of manager—or in the firm of employers, as that of the retirement of a partner—the surety will be discharged from his obligation, as to transactions subsequent to the change.[2] See *"Indemnity and Guarantee."*

Limitation.—A suit (1) on a single bond where a day is specified for payment; (2) on a single bond where no such day is specified; (3) on a bond subject to a condition: (4) on a bond payable by instalments, which provides that if default be made in payment of one instalment the whole shall be due; (5) on any other bond—*must be brought within three years of*; (1) the day so specified; (2) the date of executing the bond; (3) the time when the condition is broken; (4) the time when the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no waiver; (5) the time when the bond becomes payable. A single, or simple, bond expresses a single obligation without alternative conditions; it may be defined as, a written engagement for the payment of money without a penalty.[3]

8) 10 All., 29.
9) 2 Wms. Saund., 411A., 3 Ex., 380.
1) 26 L. J. Q. B., 90.
2) 3 Q. B. 276: 29 L. J. Q. B., 150, 6 E and B, 911: 10 Ex., 689: s. 133, Contract Act and ss. 129, 130, ib.
3) Act XV of 1877, Sch. II. arts. 66, 67, 68, 75, 80; I. L. R., 4 All., 3,

BY-LAWS.

AUTHORITIES—Lumley (W. G.) On By-laws: Act XV of 1877; cases cited.

Definition.—"A by-law is a rule obligatory on a body of persons or over a particular district, not being at variance with the general laws of the realm, and being reasonable and adapted to the purposes of the Corporation, and any rule or ordinance of a permanent character which a corporation is empowered to make either by the Common or Statute Law. It is a law made with due legal obligation, by some authority less than the sovereign authority, in respect of a matter specially or impliedly referred to that authority, and not provided for by the general law of the land."[1] The authority to make by-laws arises (1) by necessary implication (where no express provisions exist); (2) by charter; (3) by express statute. The mode of making by-laws is generally prescribed by the charter or statute giving authority to make them.

Clubs.—The general body have power to make by-laws or rules for the governance of themselves, and these rules are recognised by Courts of Law. The members are bound by them, and cannot obtain redress against the decision of the general or governing body upon them where they are fairly and *bonâ fide* acted upon.[2] The general rule as to powers of this class (*e.g.*, the powers of a committee of a club) is "that persons exercising them are protected from civil liability, if they observe the rules of natural justice, and also the particular statutory or conventional rules (if any) which may prescribe their course of action. The rules of natural justice appear to mean, for this purpose, that a man is not to be removed from office or membership, or otherwise dealt with to his disadvantage, without having fair and sufficient notice of what is alleged against him, and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions be satisfied, a Court of Justice will not interfere, not even if it thinks that the decision was in fact wrong. If not, the act complained of will be declared void, and the person affected by it maintained in his rights until the matter has been properly and regularly dealt with. These principles apply to the expulsion of

1) Lumley, p. 2.

2) ib. 11: L. R., 5 Eq., 63: 33 L. T., 642. Pollock on Torts (2nd ed.), pp. 109-110, and cases there cited: 2 Mac. and G. 216 (removal of a director of a company) 17 Ch. Div., 615 (expulsion of a member from a club) 40 L. J. Ch., 452 (Minister of Baptist Chapel) 11 Ch. Div., 353: 13 Ch. Div., 346 (club cases).

a partner from a private firm when a power of expulsion is conferred by the partnership contract [3]

Properties of by-laws.—"As a by-law is a law made by an inferior authority, it must not only contain all the properties of a public law, but is subject to certain qualifications arising out of the subordination of the authority that makes it Hence in the *first* place a by-law must (1) be *consistent with*, and not repugnant to, the general law; (2) provide something in *addition* to the *general law*, and therefore must not simply re-enact it; (3) it must not make a provision in respect of a matter already provided for *other than* what the general law has prescribed. In the *second* place a by-law must be (4) *certain* in its enactment, *i.e.*, free from ambiguity, and must afford complete direction to those who are to obey it; (5) *general* in its application; (6) *reasonable;* (7) *positive* in its terms, and directed to prohibit or enjoin an act by the persons upon whom it is to operate; (8) it must contain a proper sanction by prescribing a *definite penalty* for the breach of it;[4] (9) it must not be *ultra vires* (v. *post*). These are the legal aspects of a by-law. The policy or expediency, the usefulness or futility, the applicability, the urgency or necessity for the by-law, are subjects for the consideration of the confirming authority, where there is one, but do not raise questions of law: though they may sometimes assist in the consideration of the question of the reasonableness of the by-law, or its excess of authority."[5]

Nuisances.—Corporations and other bodies have been empowered to make by-laws for the more prompt and convenient suppression of nuisances. "No doubt the general rule of by-laws is that they must be reasonable, and not prejudicial to the king or subject. But when the subject-matter of a law is the prevention of *nuisances* the consideration must be upon the convenience in general, taking in the crown, the party, and the people: and where the general convenience is greater than the inconvenience, the by-law may be proper and reasonable."[6]

Ultra vires.—A by-law is said to be *ultra vires* when it is made in respect of any matter not within the authority of the body enacting it, or so as to operate upon persons not subject to it. Where the power is conferred by charter or statute for a particular purpose, the by-law must not got beyond the scope of the charter or statute. By-laws which are *ultra vires* are invalid.[7]

Limitation.—A suit upon a Statute, Act, Regulation, or By-Law, for a penalty or forfeiture must be brought within one year of the time when the penalty or forfeiture is incurred.[8]

3) ib.; 10 Ha., 493: L. R., 9, Ex. 190. Without an express provision in the articles, a partner cannot be expelled at all: see s. 253, Indian Contract Act.
4) See 8 Mad. H. C., Ap. 3.
5) Lumley, p. 86.
6) C.t. H., 409, Bosworth *v.* Herne.
7) Lumley, p. 149.
8) Act XV of 1877, Sch. II, Art., 6.

CARRIERS.

AUTHORITIES—Act III of 1865 (Carriers): Maude and Pollock's Law of Merchant Shipping, 4th ed.: Carver's Carriage by Sea (1891): Act IX of 1856 (Bills of Lading): Act IX of 1890 (Railways): Goodeve's Railway Passengers (1885): *Indian Penal Code*: Act XV of 1877: Act IX of 1872 (Contract): and cases cited.

COMMON CARRIERS BY LAND OR INLAND NAVIGATION.

AUTHORITIES—Act III of 1865 (Carriers): Act IX of 1872 (Contract): Act XV of 1877: Indian Penal Code: cases cited.

A common carrier is a person, other than the Government, engaged in the business of transporting for hire property from place to place by land or inland navigation, for all persons indiscriminately.[1]

General liability of common carriers.—The rule of common law is that a common carrier is an insurer of goods made over to him for conveyance, and that he is liable for all accidents or loss not caused by the act of God or the Queen's enemies. Explaining the phrase **act of God** it has been said that "a common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him." Whether common carriers in India are governed by this rule of the Common Law is a doubtful point. The question has been decided in the affirmative by the High Court of Bengal, and in the negative by the High Court of Bombay. The latter Court have held that the Common Law rule is no longer in force, being inconsistent with the provisions of the Contract Act,[2] and that therefore the liability of common carriers is that of ordinary bailees and governed by s. 151 of this Act.[3] The High Court of Bengal however have held that the Common Law rule, being a special usage or custom of trade, stands unaffected by the provision of the Contract Act.[4] According to the view of the law taken by the Bombay High Court a common carrier, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the goods delivered over to him for conveyance, if he has taken as much care of the goods delivered to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods delivered.[5]

1) Act III of 1865, s. 2.
2) ss. 151, 152.
3) I. L. R., 3 Bom., 109.
4) I. L. R., 10 Cal., 166.
5) s. 151, Contract Act. See "*Bailment.*"

According to the law as accepted in Bengal a common carrier is (in the absence of a special contract) liable for all accidents or loss not caused by the act of God or the Queen's enemies.

This liability is modified by the Carriers' Act, which was introduced not only to enable common carriers by land or inland navigation to limit their liability for loss of, or damage to, property delivered to them to be carried, but also to declare their liability for loss of, or damage to, such property, occasioned by the negligence or criminal acts of themselves, their servants, or agents.

Liability in case of goods over Rs. 100 in value and of a certain description.—In the case of goods of the following description—gold and silver coin: gold and silver in a manufactured or unmanufactured state: precious stones and pearls: jewellery: time-pieces of any description: trinkets: bills and hundis: currency notes of the Government of India, or notes of any banks, or securities for payment of money, English or foreign: stamps and stamped paper: maps, prints, and works of art: writings: title-deeds: gold or silver plate or plated articles: glass: china: silk in a manufactured or unmanufactured state, and whether wrought up or not with other materials: shawls and lace: cloths and tissues embroidered with the precious metals, or of which such metals form part: articles of ivory, ebony, or sandal wood,—and which exceed Rs. 100 in value,—it is necessary to declare to the carrier or his agent their description and value. Without such a declaration a common carrier is not liable for their loss or for any damage to them.[6] Every carrier may require payment for the risk undertaken in carrying property exceeding Rs. 100 in value and of the abovementioned description, at such rate of charge as he may fix: provided that, to entitle such carrier to payment at a rate higher than his ordinary rate of charge, he shall have caused to be exhibited in the place where he carries on his business as a carrier, notice of the higher rate of charge required, printed or written in English and in the vernacular.[7] In case of the loss of, or damage to, property of the value and description abovementioned, when the value and description has been declared, and payment has been required, the person entitled to recover in respect of such loss or damage is also entitled to recover any money actually paid to such carrier in consideration of the aforementioned risk.[8]

Liability not limited by notice.—The liability of any common carrier for the loss of, or damage to, any property delivered to him to be carried (not being of the description abovementioned) cannot be limited or affected by any public notice;

6) s. 3, and Schedule Act III of 1865. 7) s. 4, ib. 8) s. 5, ib.

but any such carrier, not being the owner of a railroad, or tramroad constructed under the provisions of Act XXII of 1863 may, by **special contract**, signed by the owner of such property so delivered as last aforesaid, limit his liability in respect of the same.[9] The liability of the owner of a tramroad constructed under the above Act cannot be so limited by special contract: he will however only be liable for loss or damage caused by negligence, or a criminal act on his part, or on that of his agents or servants.[1]

Negligence.—Every common carrier is liable to the owner for loss of, or damage to, any property delivered to him to be carried when such loss or damage shall have arisen from the negligence or **criminal act** of the carrier, or of any of his agents or servants.[2] A plaintiff however in a **suit** against a common carrier for loss, damage or non-delivery is not required to prove that the loss, damage, or non-delivery was owing to the negligence, or criminal act of the carrier, his servants, or agents.[3]

Effect of delivery to carrier and stoppage in transitu —*v. post* and "*Contract.*"

Dak carriage.—A person carrying on the ordinary business of a proprietor of dâk carriages is not a "common carrier." Such a person is bound to exercise reasonable and ordinary care in respect to luggage entrusted to him, but is not responsible for any loss which may not arise from the negligence or default of himself or his servants.[4]

Criminal breach of trust by carrier.—Whoever being entrusted with property as a carrier, wharfinger, or warehouse keeper, commits criminal breach of trust in respect of such property, is punishable with imprisonment (simple or rigorous) for a term which may extend to seven years and is also liable to fine.[5] See "*Trusts and Trustees.*"

Limitation.—A suit against a carrier (1) for compensation for losing or injuring goods: (2) for compensation for delay in delivering goods—must be brought within *two* years of the time when (1) the loss or injury occurs: (2) when the goods ought to be delivered.[6]

CARRIERS BY SEA.

AUTHORITIES—Maude and Pollock's Law of Merchant Shipping, 4th ed., Carvers' Carriage by Sea (1891): Act IX of 1856 (Bills of Lading): Contract Act: Indian Penal Code: cases cited.

General liability at Common Law.—By the Common Law the liability of the carrier by sea is that of the common carrier

9) s. 6, ib.
1) s. 7, ib.
2) s. 8, ib.
3) s. 9, ib.
4) 2 N. W., 237.
5) Penal Code, s. 407.
6) Act XV of 1877, Sch. II, Art. 30, 31.

by land (*v. ante.*) Every shipowner who carries goods for hire in his ship undertakes to carry them at his own absolute risk, the act of God (*v. ante*) or of the Queen's enemies alone excepted, unless by agreement, between himself and a particular freighter, on a particular voyage, he limits his liability by further exceptions.[7] The following is a summary of the Common Law rules. Where a shipowner receives goods to be carried for reward, whether in a general ship with goods of other shippers, or in a chartered ship whose services are entirely at the disposal of the one freighter, it is, apart from express contract, implied at Common Law: (1) that he is to carry and deliver the goods in safety, answering for all loss or damage which may happen to them while they are in his hands as carrier; (2) *unless* that has been caused by some act of God, or of the Queen's enemies, or some defect or infirmity of the goods themselves, or their packages, or through a voluntary sacrifice for the general safety (jettison); (3) and that those exceptions are not to excuse him, if he has not been reasonably careful to avoid or guard against the cause of loss or damage; or if the loss or damage has been due to some unfitness of the ship to receive the cargo, or to unseaworthiness which existed when she commenced her voyage.[8] Usually however this liability at Common Law of carriers is lessened, or modified by the charter party or bill of lading.

Chartered and general ships.—Ships employed for the carriage of goods are either general or chartered. A ship is said to be chartered whose services are entirely or in principal part let to one freighter, or when the ship itself is let to the charterer so that he takes over the charge and control of her. In the latter case the shipowner is not, in the former he is a carrier.[9] A ship is a 'general' ship when it is not chartered wholly to one person, but the owners offer her generally to carry the goods of any persons who may choose to employ her, or when, if chartered to one merchant, he offers her to several sub-freighters for the conveyance of their goods.

Exemptions by statute.—The liability of carriers by sea has been modified and restricted by the provisions of various Merchant Shipping Acts enacted for their protection.

A bill of lading is a document acknowledging the shipment of goods. It is generally signed by the master: it is delivered by him to the shippers on the goods being shipped. In practice when goods are shipped an acknowledgment known as the **mate's receipt**, is, in the first instance, given by the mate. This is afterwards exchanged by the captain or the broker of the ship for the bill of lading. Several copies of the bill of lading are

7) L. R. 7, Ex. 267. 8) Carver, pp. 22, 23. 9) ib., p. 7.

generally made out: one or more of these is sent by the shipper of the goods to the person for whom they are intended, one is retained by the shipper himself, and another is kept by the master for his own guidance: a bill of lading specifies the name of the master, the port and destination of the ship, the goods, the consignee, and the rate of freight.[1] The bill of lading contains the contract of affreightment, which is a contract to carry goods by sea for a fixed payment called freight. A bill of lading is a negotiable instrument, and is transferable by endorsement, the property in the goods thereby passing to the endorsee.[2] Every consignee and endorsee to whom the property in the goods passes by consignment, or endorsement, is vested with all rights of suit, and subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.[3] But nothing in the Act contained prejudices or affects any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, by reason, or in consequence of, his being such consignee or endorsee, or of his receipt of the goods, by reason, or in consequence of, such consignment or endorsement.[4]

Bill of lading: conclusive evidence of shipment.—Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive evidence of such shipment, as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading has had actual notice at the time of receiving the same that the goods had not in fact been laden on board, provided that the master or other person so signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.[5] Therefore a bill of lading in the hands of a *bonâ-fide* holder for value cannot be questioned by the master or other person signing it on the ground of the goods not having been laden. If the captain of a ship, signs bills of lading without having received on board the goods mentioned therein, the bills are void as between the owner and the pretended consignor.

Title conveyed by seller of goods in possession of bill of lading.—See "*Title*."

Stoppage in transitu.—The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing

1) Maude and, Pollock, p. 338.
2) Act IX of 1856.
3) s. 1, ib.
4) s. 2, ib.
5) s. 13, ib.

title to goods, assigns it, while the goods are in transit to a second buyer, who is acting in good faith and who gives valuable consideration for them.[6]

Pledge of bill of lading.—See "*Bailment.*"

Charter party is a written agreement by which a shipowner agrees to place an entire ship, or a part of it, at the disposal of a merchant for the conveyance of goods, binding the shipowner to transport them to a particular place for a sum of money which the merchant undertakes to pay as freight for their carriage. The charter party contains the contract of affreightment, and embodies the terms upon which the shipowner lends the use of the ship, and contains stipulations as to the nature of the voyage, the time and mode of employing the vessel, the places of loading and delivery, the mode and time of paying the freight, the number of **laying days** (that is, the time allowed the freighter for loading and unloading) and the rate of **demurrage** (that is the sum which is fixed as a remuneration to the shipowner for the detention of the ship beyond the time allowed.[7])

Limitation—v. *ante.*

Stoppage in transitu where bill of lading is pledged.—Where a bill or lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge, to secure an advance made specifically upon it, in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit, *e.g.*:—(*a*) A sells and consigns goods to B of the value of Rs. 12,000. B assigns the bill of lading for these goods to C, to secure a specific advance of Rs. 5,000 made to him upon the bill of lading by C. B becomes insolvent, being indebted to C to the amount of Rs. 9,000. A is not entitled to stop the goods except on payment or tender to C of Rs. 5,000. (*b*) A sell and consigns goods to B of the value of Rs. 12,000. B assigns the bill of lading for these goods to C, to secure the sum of Rs. 5,000 due from him to C, upon a general balance of account. B comes insolvent. A is entitled to stop the goods in transit without payment or tender to C of the Rs. 5,000.[8]

Effect of delivery to carrier.—A delivery to a wharfinger or carrier of the goods sold, has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him, unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods, *e.g.*:—B, at Agra, orders of A, who lives at Calcutta, three casks of oil to be sent

6) s. 102, Contract Act. 7) Maude and Pollock, pp. 289, 290.
8) Contract Act, s. 103.

to him by railway. A takes three casks of oil directed to B to the railway station, and leaves them there without conforming to the rules which must be complied with in order to render the railway company responsible for their safety. The goods do not reach B. There has not been a sufficient delivery to charge B in a suit for the price.[9]

Criminal breach of trust by carrier—v. *ante*.

RAILWAYS.

AUTHORITIES—Act IX of 1890 (extends to the whole of British India, inclusive of Upper Burma, and, in so far as it has been, or may be extended under the provisions of the Sindh-Peshin Railway Act 1887 of British Baluchistan, and applies also to all subjects of Her Majesty within the dominions of Princes and States in India in alliance with Her Majesty, and to all native subjects of Her Majesty without and beyond British India and those dominions): Goodeve's Railway Passengers (1885.)

Liability of railways as carriers.—The responsibility of a railway company for the loss, destruction, or deterioration of animals, or goods delivered to it to be carried by railway is that of a bailee. Under ss. 151, 152 and 161 of the Indian Contract Act (v. "*Bailment*") a railway administration will therefore not be liable, if it has taken as much care of the goods or animals delivered to it as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods delivered. No agreement limiting that responsibility is valid unless it is in writing and signed by, or on behalf of, the consignor, and is otherwise in the form approved by the Governor-General in Council. Nothing in the Common Law of England or in the Carriers' Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods affects the responsibility (as in this section defined) of a railway administration.[1]

Loss of, or injury to, animals.—In the case of the loss, destruction, or deterioration of animals, the responsibility of the railway company does not exceed, in the case of elephants or horses, Rs. 500 a head; in the case of camels or horned cattle, Rs. 50 a head; or in the case of sheep, goats, dogs or other animals, Rs. 10 a head, unless the respective animals have been at the time of their delivery for carriage declared to be of a higher value.

Where such higher value has been declared, the railway company may charge a higher rate of freight.[2]

Passenger's luggage.—A railway company is not responsible for the loss, destruction, or deterioration of any luggage belonging to, or in charge of, a passenger unless a railway servant has booked it and given a receipt for it.[3]

9) s. 91, ib. 1) Act IX of 1890, s. 72. 2) s. 73, ib. 3) s. 74, ib.

Articles of special value.—When any articles of the nature mentioned in the next paragraph are contained in any parcel, or package delivered to a railway company for carriage by railway, and the value of such articles in the package or parcel exceeds Rs. 100, the railway company is not responsible for the loss, destruction or deterioration of the parcel or package, unless the consignor caused its value and contents to be declared, or declared them at the time of delivery, and if so required by the railway company, paid, or engaged to pay a percentage on the value so declared by way of compensation for increased risk.[4]

Articles of special value (*in alphabetical order*).—Bank notes; bills of exchange; carvings; china (articles of); clocks; cloths and tissue [of which gold or silver forms a part, not being the uniform of an officer, soldier, sailor, police-officer or volunteer, or of any public officer, British or foreign, entitled to wear uniform]; coral; ebony; engravings; essential oils used in the manufacture of *itr* or other perfume; furs; glass (articles of); gold and silver [coined or uncoined, manufactured or unmanufactured]; hundis; ivory; jewellery; lace; lithographs; maps; marble (articles of); musical instruments; musk; opium; paintings; pearls; photographs; plated articles; pottery (art); promissory notes; precious stones; sandalwood; scientific instruments; sculpture; securities (Government); shawls; silks; silver (coined or uncoined, manufactured or unmanufactured); stamps (Government); time-pieces; title-deeds; trinkets; watches; works of art; writings.[5]

Loss of, and damage to, articles of special value.—When any parcel or package of which the value has been declared as abovementioned, has been lost, or destroyed, or has deteriorated, the compensation recoverable will not exceed the value so declared, and the burden of proving the value so declared to have been the true value will, notwithstanding anything in the declaration, lie on the person claiming the compensation.[6]

Examination of articles of special value.—A railway company may make it a condition precedent of carrying a parcel declared to contain any article mentioned in the above list, that a railway servant has been satisfied by examination or otherwise that the parcel actually contains the article declared to be therein.[7]

Proof of loss, etc.—It is not necessary for the plaintiff, in any suit against a railway administration for compensation for loss, destruction, or deterioration of animals or goods delivered to it for carriage, to prove how the loss, destruction or deterioration was caused.[8]

Claim to be made within six months.—A person will not be entitled to a refund of an over-charge in respect of animals

4) s. 75, ib. 5) ib., Sch. II. 6) ib. 7) ib. 8) s. 76, ib.

or goods carried by railway, or to compensation for the loss, destruction, or deterioration of animals or goods delivered to be carried, unless his claim to the refund or compensation has been preferred in writing by him, or on his behalf, to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway.[9]

Suits for compensation for injury to through booked traffic.—Notwithstanding anything in any agreement purporting to limit the liability of a railway administration, with regard to traffic while on the railway of another administration, a suit for compensation for loss of the life of, or personal injury to, a passenger, or for loss, destruction or deterioration of animals or goods where the passenger was, or the animals or goods were booked through over the railways of two or more railway administrations, may be brought either against the railway company from which the passenger obtained his pass or purchased his ticket, or to which the animals or goods were delivered by the consignor, (as the case may be) or against the railway administration on whose railway the loss, injury, destruction or deterioration occurred.[1]

Loss of goods carried partly on inland waters.—When a railway administration under contract to carry animals or goods by any inland water, procures the same to be carried in a vessel not being part of a railway, the responsibility of the railway administration for the loss, destruction, or deterioration of the animals or goods during their carriage in the vessel, is the same as if the vessel were part of such a railway.[2]

Liability of railways in respect of accidents at sea.—When a railway administration contracts to carry passengers, animals, or goods, partly by railway and partly by sea, a condition exempting the railway administration from responsibility for any loss of life, personal injury, or loss of, or damage to, animals or goods which may happen during the carriage by sea from the act of God, the king's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever shall, without being expressed, be deemed to be part of the contract, and subject to that condition, the railway administration shall, irrespective of the nationality or ownership of the ship used for the carriage by sea, be responsible for any loss of life, personal injury, or loss of, or damage to, animals or goods which may happen during the carriage by sea, to the extent to which it would be responsible under the Merchant Shipping Act, 1854, and the Amendment Act, 1862, if they were registered under the former of those Acts, and the

9) s. 77, ib. 1) s. 80, ib. 2) s. 81, ib.

railway administration were owner of the ship and not to any greater extent.[3]

Effect of delivery to carrier and stoppage in transitu —v. *ante* and "*Contract.*"

Cattle trespass on railway.—See "*Trespass.*"

Action for injuries to passengers.—An action by a passenger against a railway company in respect of injuries is founded entirely in negligence. The company do not warrant the safety of the passengers; their undertaking or obligation as to them is that as far as human care (including in that term skill and foresight) can go, they will provide for their safe conveyance. Their duty or contract is, that all persons connected with the carrying and with the means and appliances of the carrying, with the cariages, the road, the signalling, and otherwise, shall use care and diligence, so that no accident shall happen. It is always a question whether the mischief could have been reasonably foreseen. But if when everything has been done that human prudence can suggest for the security of the passengers, an accident happens, the company will not be liable.[4] A plaintiff must not however have so far contributed to the injury by his own neglect, that but for such neglect the injury would not have happened.

Limitation—v. *ante.*

3) s. 82, ib.
4) Goodeve's "Railway Passengers," Ed. 1885, pp. 47, 59.

CHAMPERTY AND MAINTENANCE.

AUTHORITIES—Contract Act (IX of 1872): and cases cited.

Maintenance under English law denotes the offence committed by a person who, having no interest in a suit, maintains or assists either party, with money or otherwise, to prosecute or defend it. It and champerty are in England misdemeanours at Common Law and punishable with fine and imprisonment. It and champerty are also prohibited by several statutes.

Champerty.—Every champerty implies a maintenance, but every maintenance is not champerty. Champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it, if the suit is successful. Under English law a champertous agreement is invalid and cannot be enforced.

Law in India.—In India neither maintenance nor champerty is an offence, nor is a champertous agreement *per se* invalid. The specific English law of maintenance and champerty has not been introduced into India,[1] but champertous agreements are void under s. 23 of the Contract Act if they are opposed to public policy. The Court will consider whether the transaction is merely the acquisition of an interest in the subject-matter of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation, disturbing the peace of families and carried on from a corrupt and improper motive.[2]

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not (in the opinion of the Privy Council) to be regarded as being, *per se*, opposed to public policy. Indeed, cases may easily be supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.[3] But agreements of this kind are carefully watched by the Courts, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, they are to be declared contrary to public policy, and effect is not to be given to them.[4]

1) 4 Ind. App., 45.
2) L. R., 1 Ind. App., p. 241.
3) L. R., 4 Ind. App., p.47.
4) ib.

CHARITIES.

AUTHORITIES—Code of Civil Procedure, ch. 40 : Act X of 1865 : Act IV of 1882.

When suits relating to public charities may be brought.—In case of any alleged breach of any express or constructive trusts created for public, charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trusts, the Advocate-General acting *ex-officio*, or two or more persons having an interest in the trust, and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—(*a*) appointing new trustees under the trust ; (*b*) vesting any property in the trustees under the trust ; (*c*) declaring the proportions in which its objects are entitled ; (*d*) authorizing the whole or any part of its property to be let, sold, mortgaged, or exchanged ; (*e*) settling scheme for its management, or granting such further or other relief as the nature of the case may require. The powers conferred by this section on the Advocate-General may, outside the presidency towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.[1]

Bequest to religious or charitable uses.—No man having a nephew or niece, or any nearer relative (v. "*Intestacy : Table of consanguinity*") has power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons : *e.g.*, A having a nephew makes a bequest by a will not executed or deposited as required—for the relief of poor people ; for the maintenance of sick soldiers ; for the erection or support of a hospital ; for the education and preferment of orphans ; for the support of scholars ; for the erection or support of a school ; for the building and repairs of a bridge ; for the making of roads ; for the erection or support of a church ; for the repairs of a church ; for the benefit of ministers of religion ; for the formation or support of a public garden ;—all these bequests are void.[2]

1) C. Pr. C. s. 539.
2) Act X of 1865, s. 105, (does not apply to Hindus, etc.)

Cy pres doctrine.—Charities are favoured by law and receive a more liberal construction than gifts to individuals. The rule of *cy près* is applied to charitable bequests, where from the objects of the bequest being uncertain, or the persons who are to take non-existent, or the bequest being unable to be carried into exact execution, or for other like causes, a literal execution becomes inexpedient or impracticable. The Court in such cases will carry out the will *as nearly as it can* according to the original purpose or (as the technical expression is) *cy près*.[3] Thus the court may if necessary sanction a different scheme from that proposed by the testator, or if no object exists answering the description, may devote the subject of the bequest to other charities.

Transfer of property in perpetuity for benefit of public.—The rule against "Perpetuity" (see "*Transfer of Property:*" "*Perpetuity*") does not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object object beneficial to mankind.[4]

Charitable and religious societies.—See "*Societies.*"

Any income derived from property solely employed for religious or charitable purposes is exempt from income-tax (v. "*Income-tax.*")

See "*Trusts and Trustees.*"

3) 2 Story's Eq. Jur. 1169.

4) s. 17, Act IV of 1882.

COMPANIES.

AUTHORITIES—Act VI of 1882: Act VI of 1887: the same edited by L. P. Russell (1888): and cases cited.

Mode of forming company.—Any seven or more persons associated for any lawful purpose may, by subscribing their names to a **memorandum of association** and otherwise complying with the requisitions of the Act in respect of registration, form an uncorporated company with or without limited liability.[1] Foreigners are persons within the meaning of this section, although the whole or any part of the business of the proposed company is intended to be transacted out of British India.[2]

A promoter is one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps (a mere projector is not a promoter) to accomplish that purpose.[3] Promoters stand undoubtedly in a fiduciary position to the company.[4] A promoter is accountable to the company for all moneys secretly obtained by him from it just as if the relationship of principal and agent or trustee and *cestui que trust* had really existed between him and the company when the money was so obtained.[5]

Necessity for and effect of registration.—No company, association, or partnership consisting of more than *ten* persons may be formed for the purpose of *banking* unless it is registered as a company under the Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council, or by Royal Charter or Letters Patent; and no company, association, or partnership consisting of more than *twenty* persons may be formed for the purpose of carrying on *any other business that has for its object the acquisition of gain* by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act or of Letters Patent.[6] After registration of the memorandum and articles (if any) of association the Registrar gives a **certificate of incorporation**; thereupon the subscribers to the memorandum of association, together with such other persons as may fromt ime to time become members of the company, become a body corporate by the name contained in the memorandum of assocation, capable of

1) Act VI of 1882, s. 6.
2) ib.
3) 2 C. P. Div., 541.
4) 3 App. Cas., 1230.
5) 33 Ch. Div., 44, v. post, "*Prospectus*."
6) Act VI of 1882, s. 4.

exercising all the functions of an incorporated company and having perpetual succession and a common seal.[7]

The memorandum of association is the charter of a company and defines the limitation of its powers. The company is so to speak identified by its memorandum of association: it must be signed by each subscriber in the presence of, and be attested by, one witness at least. When registered it binds the company and its members to the same extent as if each member had subscribed his name thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors and administrators, a contract to observe all the conditions of such memorandum subject to the provisions of the Act.[8] Every memorandum must contain (1) the name of the company; (2) the address of its registered office; (3) the objects for which the company is established. The memorandum of a company limited by shares or by guarantee must contain further particulars.[9] (v. *post*).

No alteration of the memorandum may be made by any company: this rule is subject to the following **exception.** A company limited by shares may so far modify the conditions contained in its memorandum, if authorized so to do by its regulations as originally framed, or as altered thereafter by special resolution, as to (i) *increase its capital* by the issue of new shares of such amount as it thinks expedient; or (ii) *consolidate and divide its capital* into shares of larger amount than its existing shares; or (iii) *convert* its paid-up shares into stock;[1] or (iv) *reduce its capital*;[2] or (v) *sub-divide its shares*;[3] or (vi) reduce its capital by *cancellation* of unissued shares;[4] or (vii) make the *directors' liability unlimited*.[5]

Articles of association.—The memorandum of association may, in the case of a company limited by shares, and must in the case of a company limited by guarantee, or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and presenting such regulations for the company as the subscribers deem expedient.[6] The articles must be printed and signed by each subscriber in the presence of, and be attested by, one witness at the least;[7] and must together with the memorandum of association be delivered to the Registrar of Joint-stock Companies who will retain and register them.[8] The effect of the articles when registered is to bind the company and its members to the same extent as if each member had subscribed his name thereto, and as

7) s. 41, ib.
8) s. 11., ib.: Russell, p. 11.
9) ss. 8, 9, 10, ib.
1) s. 12, ib.
2) s. 13, ib.
3) s. 24, ib.
4) s. 23. ib.
5) s. 76, ib.
6) s. 37, ib.
7) s. 39, ib.
8) s. 40, ib.

if such articles contained a contract on the part of himself, his heirs, executors and administrators to conform to all the regulations contained in such articles subject to the provisions of the Act.[9] The articles cannot extend the memorandum of association and cannot, except as expressly provided for, (v. *ante*) modify or alter it. If the articles conflict with the memorandum, the former must give way to the latter, for that is the more important document of the two, and cannot be altered except in the particulars specified in the Act.[1] The articles are a contract between all the shareholders to comply with the regulations contained in in them : they are binding until altered[2] in the manner prescribed by the Act ; that is, by a meeting duly called to pass a resolution altering them.[3] The Act obliges a company to furnish to every member at his request, on payment of a sum not exceeding one rupee for each copy, copies of the memorandum and articles of association.[4]

The liability of members of a company formed under the Act may, according to the memorandum of association, be limited either—(i) to the amount, if any, unpaid on the shares respectively held by them ; or (ii) to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.[5] A company in which the liability of the members is limited in the first manner is called a **company limited by shares,** and in the second manner a **company limited by guarantee.** The memorandum of association of a company limited by shares must contain in addition to the particulars already noticed (v. *ante*) (i) the word "limited" after the name of the company ; (ii) a declaration that the liability of members is limited ; (iii) the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount ; no subscriber may take less than one share, and each must write opposite to his name the number of shares he takes.[6] The memorandum of a company limited by guarantee must in addition to the particulars already noticed as common to every memorandum contain a declaration of guarantee and of the amount guaranteed.[7] Where no limit is placed on the liabilty of members the company is called an **unlimited company.** Where a company is formed as a limited company, the liability of the directors or managers of such company, or of the managing directors, may, if so provided by the memorandum of association, be unlimited.[8] For liability of members on winding up v. *post.*

9) s. 39, ib.
1) Russell, pp. 12, 13.
2) s. 76, Act VI of 1882.
3) Russell, p. 32.
4) s. 42, Act VI of 1882.
5) s. 7, ib.
6) s. 8, ib.
7) s. 9, ib.
8) s. 7, ib.

Associations not for profit.—Where any association which might be formed under the Act as a limited company proves to the Local Government that it is formed for the purpose of promoting commerce, art, science, charity, or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association in promoting its objects, and to prohibit the payment of any dividend to its members, the Local Government may direct such association to be registered with limited liability without the addition of the word "limited" to its name; upon registration such an association enjoys all the privileges and is subject (with some few exceptions) to the obligations imposed on limited companies.[9]

Stock and shares.—Stock in a trading company like shares, is a share in the capital stock of the company, differing chiefly from shares in being subdivisible into fractional parts and registered upon a different plan of book-keeping. A share is an indivisible whole, whether subject to calls or paid-up. Stock is share capital fully paid-up and consolidated. The consolidated stock of a company can be bought just in the same way as the stock of the public debt can be bought, split up into as many portions and subdivided into as small fractions as the purchaser may please. Independently of that however, it possesses all the qualities of shares. It is in fact, simply a set of shares put together in a bundle.[1] A stockholder in a trading or public company is in law and common parlance a shareholder.[2] Shares or other interest of any member of a company under the Act are moveable property capable of being transferred in manner provided by the regulations of the company and are not of the nature of real estate. Each share in the case of a company having a capital divided into shares, must be distinguished by its appropriate number.[3]

What is a "member."—The subscribers of the memorandum of association under the Act are deemed to have become members of the company whose memorandum they have subscribed, and upon the registration of the company must be entered as such upon the register of members: and every other person who has *agreed* with a company under the Act to become a member of such a company, and whose name is entered on the register of members, is deemed a member of the company.[4]

How membership is acquired.—A man can only become a member of a company and a contributory by contract,[5] and there is no difference between a contract to take shares and any

9) s. 26, ib.
1) L. R. 7, H. L., 724.
2) 10 Ch. App., 148.
3) s. 44, Act VI of 1882.
4) s. 45, ib.
5) Ch. D., 706.

other contract.[6] To constitute a binding contract to take shares in a company, when such contract is based upon application and allotment, it is necessary that there should be—(i) an application by the intending shareholder; (ii) an allotment by the directors of the company of the shares applied for; and (iii) a communication by the directors to the applicant of the fact of such allotment having been made.[7]

Allotment is generally neither more nor less than the acceptance by the company of the offer of an intending shareholder to take shares: it is an appropriation of a certain number of shares, but not of specific shares.[8] An application for shares must be accepted within a reasonable, time otherwise the applicant is not bound.[9]

A transfer of shares or interest in a company must be registered by the company at the request of the transferor just as if the application had been made by the transferee.[1] This provision is for the protection of the transferor in case the transferee fails to perform his duty. The ordinary contract on the sale of registered shares is only that the seller shall give to the purchaser a valid transfer, and do all that is required to enable the purchaser to be registered as a member in respect of such shares; the purchaser's duty (which is not altered by this section) being to get himself registered as such member.[2] A transfer by the personal representative of a deceased member of a company is, notwithstanding the representative may not himself be a member, of the same validity as if he was a member.[3] No company under the Act has power to buy its own shares.[4] Any company registered under Acts XIX of 1857 or VII of 1860 may cause its shares to be transferred in manner hitherto in use prior to the passing of Act VI of 1882, or in such other manner as the company may direct.[5]

Share-warrants to bearer.—A company limited by shares and authorized so to do may with respect to any share which is fully paid up, or with respect to stock, issue under their common seal a warrant called a "share-warrant" stating that the bearer thereof is entitled to the shares or stock therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on such shares or stock.[6] A share-warrant entitles the bearer to the shares or stock specified in it; such shares or stock may be transferred by the delivery of the share-warrant.[7] The bearer of a share-warrant who surrenders it for

6) 29 Ch. D., 426.
7) Ib.
8) Ib.
9) L. R., 1 Ex, 109.

1) s. 29, Act VI of 1882.
2) Russell, pp. 27, 28.
3) s. 46, Act VI of 1882.
4) s. 249, ib.
5) s. 223, ib.
6) s. 30, ib.
7) s. 31, ib.

cancellation is entitled to have his name entered as a member in the register of members.[8] The bearer of a share-warrant may, *if* the regulations of the company so provide, be deemed to be a member of the company within the meaning of the Act either to the full extent, or for such purposes as may be prescribed by the regulations.[9]

Calls upon shares.—A company if so authorized may—(*a*) make arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid, and in the time of payment of such calls; (*b*) accept from any member of the company who assents thereto the whole, or a part of the amount remaining unpaid on any share or shares held by him, either in discharge of the amount of a call payable in respect of any other share or shares held by him, or without any call having been made; (*c*) pay a dividend in proportion to the amount paid up on each share in cases where a larger amount is paid up in some shares than on others.[1] Every share is deemed to have been issued and to be held subject to the payment of the whole amount thereof in **cash**, unless the same has been otherwise determined by a contract in writing, and filed with the Registrar of Joint-stock Companies at or before the issue of such shares.[2]

Trusts.—No notice of any trust, express, implied, or constructive, will be entered in the register or be receivable by the Registrar in the case of companies under this Act and registered in British India.[3] A person who takes shares in a company as a trustee is personally liable, and must seek his indemnity from the trust estate.[4]

Ultra vires.—The objects for which a company is formed, and which are defined in the memorandum of association, cannot be extended by the articles, and a contract made by the directors of a company upon a matter not included in the memorandum of association is *ultra vires* of the directors and is not binding on the company. Nor can such a contract be rendered binding on the company, though afterwards expressly assented to at a general meeting of shareholders. Being in its inception void, it cannot be ratified even by the assent of the whole body of shareholders.[5] If a company is acting *ultra vires*, a single shareholder may get an injunction to restrain it.[6] See also "*Contract.*"

Contracts by companies.—Contracts on behalf of any company under the Act may be made as follows:—(*a*) any

8) s. 32, ib.
9) s. 33, ib.
1) s. 27, ib.
2) s. 28, ib.
3) s. 53, ib.
4) 4 Macq. H. L., 950.
5) Russell, p. 12.
6) 8 H. L. C., 712.

contract which if made between private persons would be by law required to be in writing, and, if made according to English law, to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may in the same manner be varied or discharged; (*b*) any contract, which if made between private persons would be by law required to be in writing signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may, in the same manner, be varied or discharged; (*c*) any contract, which if made between private persons would by law be valid, although made by parol (word of mouth) only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company; and such contract may, in the same way, be varied or discharged. All contracts duly made are effectual in law, and are binding upon the company and their successors, and all other parties thereto, their heirs and representatives, as the case may be.[7] For specific performance of contracts see "*Contract.*"

A promissory note, bill of exchange or hundi is deemed to have been made, drawn, accepted, or endorsed on behalf of any company under the Act, if made, drawn, accepted, or endorsed in the name of the company by any person acting under its authority, or if made, drawn, accepted, or indorsed by or on behalf or on account of the company by any person acting under its authority.[8] The official liquidator of a company has power with the sanction of the Court, to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company.[9]

A contributory means a person liable to contribute to the assets of a company under the Act, in the event of the same being wound up.[1] If a contributory dies either before or after he has been placed on the list of contributories, his personal representatives, heirs and devisees are liable to contribute in discharge of the liability of such deceased contributory.[2]

Liability of present and past members on winding up.—In the event of a company formed under the Act being wound up, every present and past member of such company is liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company and the costs, charges and expenses of the winding up, and for the

7) s. 67, Act VI of 1882.
8) s. 72, ib.
9) s. 144 (*f*), ib.
1) s. 124, ib.
2) s. 126, ib.

payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves with the following qualifications, *viz.*, (A) **No past member is liable** (*a*) to contribute to the assets of the company if he has ceased to be a member for one year or upwards prior to the commencement of the winding up; (*b*) to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member; (*c*) to contribute to the assets of the company unless the Court is satisfied that the present members are unable to satisfy the contributions required to be made by them.

The liability of past members is a liability to contribute to the general assets of the company, against which assets, creditors (at whatever time their debt may have been contracted) have equal rights. In estimating the debts to which a past member is liable, all dividends paid on those debts under the winding up must be deducted. (B) **In the case of a company limited by shares** no contribution will be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as present or past member. (C) **In the case of a company limited by guarantee** no contribution will be required from any member exceeding the amount on the undertaking entered into on his behalf by the memorandum of association. (D) Nothing in the Act invalidates any provision in a policy of insurance or other contract, whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract. (E) No sum due to a member in his character as member, by way of dividend, profits or otherwise, will be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories amongst themselves.[3]

Directors.—A company as an abstract being, can represent or do nothing. It can only act by its managers. The directors are a body to whom are delegated the duty of managing the general affairs of the company. They are trustees or agents of the company. As regards the shareholders they are trustees of the company's money and property; as regards strangers they are agents in the transactions they enter into on behalf of the company. Their personal liability as agents in suits upon contracts made by them is governed by the ordinary law of principal and agent. Directors are trustees for the shareholders. If they abuse their powers to the damage of the company, for their own benefit,

3) s. 61. ib.

they are liable to make good the breach of trust to their *cestui que trust* like any other trustees. But directors are not trustees for the creditors of the company. Creditors have no greater rights against the directors than against any other member of the company. They have only those statutory rights against the members which are given them in the winding up. The authority of the directors is defined by the articles of association.[4] All acts done by them within the limits of their authority are binding on the company, but not any acts done for objects which the company has no power to entertain.[5] The Court has power to compel delinquent directors, officers and managers to repay any monies misapplied, or retained by them, or for which they have become accountable, or assess damages against them by way of compensation.[6]

Liability of director whose liability is unlimited.—With respect to the contributions required in the event of the winding up of a limited company from any director or manager whose liability is unlimited there exists the following modification of the rules in the last paragraph but one mentioned (*v. ante*)—(*a*) subject to the provisions in the Act contained any such director or manager, whether past or present, will in addition to his liability (if any) to contribute as an ordinary member, be liable to contribute as if he were at the date of the commencement of such winding up, a member of an unlimited company; (*b*) no contribution required from any past director or manager in respect of any debt or liability of the company contracted after the time at which he ceased to hold such office shall exceed the amount (if any) which he is liable to contribute as an ordinary member of the company; (*c*) no contribution required from any past director or manager who has ceased to hold such office for a period of one year or upwards prior to the commencement of the winding up shall exceed the amount (if any) which he is liable to contribute as an ordinary member of the company; (*d*) subject to the provisions contained in the regulations of the company, no contribution required from any director or manager shall exceed the amount (if any) which he is liable to contribute as an ordinary member, unless the Court thinks it necessary to require such contribution in order to satisfy the debts and liabilities of the company, or the costs, charges and expenses of the winding up.[7]

Companies' power to refer to arbitration—*v.* "*Arbitration.*"

4) 6 H. L. C., 419.
5) ss. 55—71, Act VI of 1882 Schedule A: s. 38: Russell, pp. 265—272.
6) s. 214, Act VI of 1882.
7) s. 62, ib.

Articles of association may be altered or supplemented (subject to the provisions of the Act and to the conditions in the memorandum of association) in general meeting by the passing of a special resolution.[8]

A special resolution is a resolution passed by a majority of not less than three-fourths of such members of the company for the time being entitled to vote, as may be present in person or by proxy (where proxies are allowed) at any general meeting, of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote, as may be present in person or by proxy at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than 14 days, nor more than one month, from the date of the meeting at which such resolution was first passed.[9]

A prospectus issued to the public is the basis of the contract to take shares.[1] Its proper office is to invite the public to take shares in the new company. Every prospectus and every notice inviting persons to subscribe for shares in any joint stock company, must specify the dates and names of the parties to any agreement enforceable by law which has been entered into by the company, or the promoters, directors or trustees thereof, before the issue of such prospectus or notice (whether subject to adoption by the directors, or the company, or otherwise), and which might reasonably influence a person in determining whether he would, or would not become a shareholder in the company: and any prospectus or notice not specifying the same, is fraudulent on the part of the promoters, directors and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he has had notice of such contract.[2] As to fraud and misrepresentation v. "*Contract.*"

Winding up of a company may either take place (*a*) compulsorily by the Court; (*b*) voluntarily by the company itself; (*c*) subject to the supervision of the Court.

Winding up by Court may take place (*a*) whenever the company has passed a special resolution requiring the company to be wound up by the Court; (*b*) whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year; (*c*) whenever the members are reduced in number to less than seven; (*d*) whenever the company is unable to pay its debts; (*e*) whenever

8) s. 76, ib.
9) s. 77, ib.

1) 17 Beav., 87.
2) s. 88, Act VI of 1882.

for any other reason of a like nature the Court is of opinion that it is just and equitable that the company should be wound up.[3] The application for winding up must be made by petition presented by the company, or by any one or more creditor or creditors of the company, or contributory or contributories.[4]

Procedure.—The winding up commences with the presentment of the petition.[5] The petition is then either dismissed, or an order made for winding up the company. A copy of the order is forwarded to the Registrar. Such order is deemed to be a notice of discharge to the servants of the company except when the business of the company is continued.[6] The Court has power to stay proceedings.[7] If proceedings are continued, the Court appoints one person or more as official liquidator or liquidators. As soon as may be after the winding up order the Court settles a list of contributories, causes the assets of the company to be collected and applied in discharge of its liabilities existing at the date of the order.[8] The Court may exclude creditors not proving within a certain time to be fixed by it.[9] The Court adjusts the rights of the contributories amongst themselves, and distributes any surplus that may remain among the parties entitled thereto.[1] When the affairs of the company have been completely wound up, the Court makes an order that the company be dissolved from the date of such order, and the company is dissolved accordingly.[2] The order is then reported to the Registrar.[3] All orders made by the Court during the winding up are enforceable in the same manner as decrees in any suit pending in such Court,[4] and re-hearings and **appeals** may be had in the same manner, and subject to the same conditions in and subject to which, appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction, subject to the provision that notice of the appeal or rehearing must be given within three weeks after any order complained of has been made.[5]

Voluntarily winding up of a company under the Act may take place—(*a*) whenever the period (if any) fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs upon the occurrence of which it is provided by the articles that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily; (*b*) whenever the company has passed a special resolution requiring the

3) s. 128, ib.
4) s. 131, ib.
5) s. 133, ib.
6) s. 137, ib.
7) s. 138, ib.
8) s. 147, ib.
9) s. 156, ib.
1) s. 157, ib.
2) s. 159, ib.
3) s. 160, ib.
4) s. 166, ib. v. "*Execution.*"
5) s. 169, ib.

company to be wound up voluntarily ; (*c*) whenever the company has passed an extraordinary resolution to the effect that it has been proved to its satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same.[6] During the winding up the corporate state and powers of the company continues, but all **transfers of shares**, except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company, taking place after the commencement of the winding up **are void.**[7]

The company must appoint liquidators, and upon their appointment all the powers of the directors cease, except in so far as the company in general meeting or the liquidators may sanction the continuance of such powers.[8] The liquidators or contributories may apply to the Court on motion to determine any question arising on the winding up, or to exercise all or any of the powers which the Court might exercise if the company were being wound up by itself.[9] The liquidators on the conclusion of the winding up make up an account and lay it before the company at a general meeting, and make a return of such meeting having been held to the Registrar: on the expiration of three months from the date of the registration of such return the company is deemed to be dissolved.[1] The voluntary winding up of a company is no bar to the right of any creditor to have the same wound up by the Court, if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding up.[2]

Winding up subject to supervision of Court.—When a resolution has been passed by a company to wind up voluntarily, the Court may make an order directing that the voluntary winding up shall continue, but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just.[3] So far as the Court does not interfere, a winding up under supervision remains essentially a voluntary winding up; but the Court has full authority to interfere, and to exercise to any extent the power which it might have exercised if an order had been made for winding up the company by the Court.[4]

Liquidators who may be either official or non-official are persons appointed either by the Court (when they are called "official") or by the company, on a winding up, for the purpose of assisting and conducting the proceedings therein. All the property, effects and actionable claims to which the company is or

6) s. 173, ib. 8) s. 177, ib. 1) ss. 186, 187, ib. 3) s. 191, ib.
7) s. 175 ib. 9) s. 182, ib. 2) s. 189, ib. 4) Russell, p. 185.

appears to be entitled must be taken by an official liquidator into his custody or under his control.[5] An official liquidator has power with the sanction of the Court to bring and defend suits, prosecutions and other legal proceedings on behalf of and in the name of the company : and generally to carry on the business of the company, and to do all such things as may be necessary for winding up the affairs of the company and distributing its assets.[6] The liquidators under a voluntary winding up may *without* the sanction of the Court exercise all the powers given to official liquidators.[7] Where an order is made for a winding up subject to the supervision of the Court the liquidator appointed may, subject to any restrictions imposed by the Court, exercise all his powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily.[8]

Dispositions after commencement of winding up.—Where any company is being wound up either by the Court or under its supervision, all dispositions of the property of the company, and every transfer of shares, or alteration in the status of the members of the company, made between the commencement of the winding up and the order for winding up are, unless the Court otherwise orders, **void**.[9]

Fraudulent preference.—Every conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property, which would if made or done by or against any individual trader, be deemed, in the event of his insolvency, to have been made or done by way of undue or fraudulent preference of the creditors of such trader, is, if made or done by or against any company (in the event of such company being wound up under the Act) invalid.[1] For the purposes of this section an application or resolution for, winding up a company, correspond with an act of insolvency in the case of an individual trader. (see "*Insolvency*.") Any conveyance or assignment made by any company formed under the Act of all its estate and effects to trustees for the benefit of all its creditors, is void.[2]

The documents kepts by the Registrar of Joint-stock Companies may be inspected by any person on payment of the fee (not exceeding one rupee for each inspection).[3]

Companies formed and registered under Act XIX of 1857 and Act VII of 1860.—Subject to some few qualifications and exceptions, Act VI of 1882 applies to companies formed and registered under these Acts : the provisions of the Act

5) s. 143, Act VI of 1882.
6) s. 144, ib.
7) s. 177, (g.), ib.
8) s. 195, ib.
9) s. 197, ib.
1) s. 213, ib.
2) ib.
3) s. 220, (c) ib.

relating to companies registered but not formed under the Act also apply, with a qualification, to companies registered but not formed under these Acts.[4]

Banks of Bengal, Madras and Bombay.—The Indian Companies Act VI of 1882 does not apply to these banks[5] which are governed by Act XI of 1876 as amended by Act V of 1879.

Priority of debts.—In the distribution of the assets of any company being wound up the following debts are to be paid in priority to all others, though ranking equally amongst themselves :—(*a*) all revenue, taxes, cesses and rates ; (*b*) all wages or salary of any **clerk** or **servant** in respect of services rendered to the company within the two months next before the commencement of the winding up, not exceeding Rs. 1,000 for each clerk or servant ; (*c*) all wages of any **labourer** or **workman**, not exceeding 500 rupees for each, whether payable for time or piecework in respect of services rendered to the company within the aforementioned time. Subject to the retention of such sums as may be necessary for the cost of administration, or otherwise, the foregoing debts must be discharged forthwith and paid in full, unless the assets of the company are insufficient to meet them, in which case they will abate in equal proportions among themselves.[6]

4) s. 222, ib. 5) s. 256, ib. 6) Act VI of 1887.

CONTEMPT OF COURT AND CONTEMPT OF AUTHORITY OF PUBLIC SERVANTS.

AUTHORITIES—Folkard's Law of Libel and Slander (4th ed.) : Indian Penal Code : Criminal Procedure Code ; and cases cited.

CONTEMPT OF COURT.

Offence and remedy the same in India as in England—The High Courts in the Presidencies are superior Courts of Record, and the offence of contempt, and the powers of the High Court for punishing it, are the same in India as in England, not by virtue of the Penal Code for British India and the Code of Criminal Procedure (1882), but by virtue of the Common Law of England. By the Common Law every Court of Record is the sole and exclusive judge of what amounts to a contempt of Court.[1] The power of committal of a person for contempt is given to Courts of Justice for the purpose of ensuring the better and more secure administration of justice.[2] The High Courts in addition to these powers (inherent in them as superior Courts of Record) have all the powers given under the Penal and Criminal Procedure Codes (v. *post*).

The remedies for contempt of Court are various, and are either summary—as by the immediate apprehension of the offender, and imposition of a fine, or commitment to prison or both ;—by attachment ; by rule to show cause why an attachment should not issue ; by requiring the offender to find sureties for his good behaviour.[3]

Nature of the offence.—Offences of this nature may consist either (i) in the more gross violation of decency, by making use of contumelious and insolent language in the face of the Court, or otherwise offending against decency or the decorum to be observed in all Courts of Justice ; (ii) in wilfully disregarding an order lawfully made by a competent Court in defiance of its authority ; *e.g.* a witness refusing to answer proper questions, or to produce documents liable to be produced ;[4] (iii) in the publishing of reflections on the purity of the proceedings of a Court of Justice tending to obstruct the course of justice ; (iv) in calumniating the parties concerned in causes before the Court, and attempting to prejudice the minds of the public against suitors and others, before the cause is heard ; (v) in threatening a judicial officer, sending or offering a bribe to a Judge, or

1) I. L. R., 10 Cal., 109.
2) 2 Myl. and Cr., 339.
3) Folk., 641.
4) v. s. 485, Cr. Pr. C.

otherwise endeavouring by private communication to influence by private feelings the conduct of any one invested with the duty of judicially disposing of matters pending in a Court of Justice.[5]

Publications reflecting on and threats against suitors and witnesses, and all attempts to prejudice the mind of the public against persons concerned as parties in causes before the cause is finally heard, are contempts. A threatening letter addressed and sent by the plaintiff to the defendant pending the suit has been held to be a contempt: so also threatening a petitioner in the Divorce Court to publish concerning him a statement of facts unless he withdraws his petition.[6]

CONTEMPTS OF LAWFUL AUTHORITY OF PUBLIC SERVANTS.

These contempts are (1) absconding to avoid service, or summons, or order proceeding from a public servant; (2) preventing service of summons or other proceeding, or preventing publication thereof; (3) non-attendance in obedience to an order from a public servant, *e.g.*, on a summons to appear as a witness; (4) omission to produce a document to a public servant by a person legally bound to produce such document; (5) omission to give notice or information to a public servant by a person legally bound to give notice or information; (6) furnishing false information; (7) refusing oath when duly required to take oath by a public servant; (8) refusing to answer a public servant authorized to question; (9) refusing to sign statement; (10) false statement on oath to public servant or person authorized to administer oath; (11) false information, with intent to cause a public servant to use his lawful power to the injury of another person; (12) resistance to the taking of property by the lawful authority of a public servant; (13) obstructing sale of property offered for sale by authority of a public servant; (14) illegal purchase or bid for property offered for sale by authority of a public servant; (15) obstructing public servant in discharge of his functions; (16) omission to assist public servant when bound by law to give assistance; (17) disobedience to an order duly promulgated by a public servant; (18) threat of injury to a public servant; (19) threat of injury to induce any person to refrain from applying for protection to a public servant.[7]

Prosecution.—A person guilty of the above contempts must (except in the cases mentioned in the next paragraph), be prosecuted in the ordinary manner before a Criminal Court. No Court, however, can take cognizance of offences 1—17 (both inclusive; v. *ante*), except with the previous sanction, or on the complaint, of the public servant concerned, or of some public

5) Folk., pp. 630—641. 6) Folk., ib. 7) ss. 172—190, Indian Penal Code.

servant to whom he is subordinate.[8] When any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any of these offences (1—17) committed before it, or brought under its notice in the course of a judicial proceeding, it may send the case for enquiry or trial to the nearest Magistrate of the first class.[9] A Civil or Revenue Court may also in certain cases commit the offender to the High Court.[1]

Procedure in certain cases of contempt (1) when offences 4, 7, 8, or 9, or the offence of intentionally insulting or interrupting a public servant sitting in any stage of a judicial proceeding[2] is committed in the view or presence of any Civil, Criminal, or Revenue Court, the Court may cause the offender, whether he is an European British subject or not, to be detained in custody; and at any time before the rising of the Court on the same day may, if it thinks fit, take cognisance of the offence and sentence the offender to fine not exceeding Rs. 200, and, in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.[3] If the Court considers that the sentence which it is empowered to pass by this section is not adequate, or is of opinion for any other reason that the case should not be disposed of by it, it may send such case before a Magistrate competent to try it, and may require security for the appearance of the accused person. But if the case is not sent to a Magistrate and the Court offended against itself deals with the offender, there is an appeal from any sentence it may pass against him.[4] When any Court has under s. 480 (v. *ante*) adjudged an offender to punishment for refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption, the Court may discharge the offender on submission or apology.

A Court of Session may charge a person for any offence referred to above (1—17) and committed before it, or brought under its notice in the course of a judicial proceeding, and may commit, or admit to bail, and try, such person upon its own charge.[5]

Witness refusing to answer, etc.—If any witness before a *Criminal* Court refuses to answer such questions as are put to him, or to produce any document in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or, by warrant under the hand of the presiding Magistrate or Judge, commit him to the custody of an officer of the Court, for any term

8) Cr. Pr. C., s. 195.
9) s. 476, ib.
1) s. 478, ib.
2) s. 228, Indian Penal Code.
3) s. 480, Cr. Pr. C.
4) s. 486, ib.
5) s. 477, ib.

not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document. In the event of his persisting in his refusal he may be dealt with as aforesaid, and, in the case of a Court established by Royal Charter (High Court) will be deemed guilty of a contempt.[6]

Restricted powers of certain Judges and Magistrates. —Except as above mentioned no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court, the Recorder of Rangoon and the Presidency Magistrate is competent to try any person for any offence in the nature of a contempt, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.[7]

6) s. 485, ib.

7) s. 487, ib.

CONTRACT.

AUTHORITIES—Act IX of 1872 (Indian Contract Act): The same edited with notes by Sir Henry Cunningham and H. H. Shephard, 6th Ed.: Act I of 1877 (Specific Relief): Cases cited.

Contract law in India.—The Indian Contract Act is not exhaustive of the Law of Contract in India. As to that portion of the Law of Contract which is contained in the Act, the Indian and English Law of the Contract are, in the main, the same. Certain portions of the Law of Contract are not dealt with, *viz.* contracts affecting land (dealt with by the Transfer of Property Act), contracts affecting negotiable instruments (dealt with by Negotiable Instruments Acts) and certain others. Special enactments, not expressly repealed by the Contract Act, dealing with particular contracts such as seamen's contracts under the Merchant Shipping Act, are exempted from the operation of the Contract Act.[1] The Contract Act is applicable in all Courts and to people of all races within the British territories.[2] The High Courts, however, in their Original Jurisdiction still administer their own law to Hindus and Mahomedans in the matter of contracts, in cases other than those directly provided for by this, or any other Act, as in the application in the case of Hindus of the rule of Hindu Law known as *damdupat*, according to which the interest recoverable at one time by a creditor cannot exceed the principal sum. These cases are, however, comparatively few and unimportant.

Foreign contracts.—If the contract was made in British India, it will be expounded according to the law of British India; if abroad, according to the law of the country where it was made, because in the conflict of laws it is generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties adopted or ought to be presumed to have adopted as the footing upon which they dealt, and that such law therefore ought to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that, that the subject-matter is immoveable property situate in another country and so forth; the general rule therefore is that the rights of parties to a contract are to be judged by that law by which they intended or are presumed from circumstances to have intended to have bound themselves.[3]

Usage and custom—See "*Custom and Usage.*"

A contract is an agreement enforceable by law. In its formation there are two stages, (A) a *proposal* by one party called the

1) s. 1. Act IX of 1872. 2) 14 B. L. R., 76. 3) L. R. Q. B., 115.

promisor; (B) an *assent* to the proposal by which the proposal is accepted by the other party (called the *promisee*). An accepted proposal is a *promise*. Every promise, and every set of promises forming the consideration for each other, is an *agreement*; and an agreement enforceable by law, *i.e.*, an agreement which fulfils the conditions of sec. 10 (v. *post*) is a contract. An agreement not enforceable by law is said to be void.[4]

The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

Of an acceptance (as against the proposer) when it is put in the course of transmission to him so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete (as against the person who makes it) when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.[5]

A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.[6]

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.[7]

Contracts by letters or telegrams.—The following examples of the communication and revocation of proposals and acceptances in the case of contracts by letter or telegram illustrate the foregoing rules. (I) A proposes by letter to sell a horse to B at a certain price: the communication of the proposal is complete when B receives the letter. (II) B accepts A's proposals by a letter sent by post; the communication of the acceptance is complete as against A, when the letter is posted; as against B, when the letter is received by A. (III) A revokes his proposal by telegram: the revocation is complete as against A when the telegram is despatched. It is complete as against B, when B receives it. B revokes his acceptance by telegram: B's revocation is complete as against B when the telegram is despatched and as against A when it reaches him. (IV) A proposes by a letter sent by post to sell his horse to B: B accepts the proposal by a letter sent by post. A may revoke his proposal at any time before, or at the moment when, B posts his letter of acceptance, but not afterwards. B may revoke his acceptance at any time

4) s. 2, Act IX of 1872.
5) s. 4, ib.
6) s. 5, ib.
7) ib.

before, or at the moment when, the letter communicating it reaches A, but not afterwards.[8]

A proposal is revoked (1) by the communication of notice of revocation by the proposer to the other party; (2) by the lapse of time prescribed in such proposal for its acceptance, or (if no time is prescribed) by the lapse of a reasonable time, without communication of the acceptance; (3) by the failure of the acceptor to fulfil a condition precedent to acceptance; (4) by the **death** or **insanity** of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.[9]

What is a good acceptance.—A proposal when properly accepted becomes a promise, but in order to convert a proposal into a promise, the acceptance must be (1) absolute and unqualified; (2) expressed in some usual and reasonable manner, unless the proposal prescribes the manner, in which it is to be accepted. If the proposal does so, and the acceptance is not made in such manner, the proposer may within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted, in the prescribed manner and not otherwise. But if he fails to do so he accepts the acceptance.[1] Proposals or acceptances may be made either in words (in which case the promise is said to be express) or otherwise than by words (in which case the promise is said to be implied).[2] Therefore a proposal may be accepted either by words or by act of the accepting party, as by the performance of the conditions of a proposal or by the receipt of consideration [3]

Advertisements.—So in the case of advertisements **offering reward** for the discovery of a crime, or the recovery of a lost article, etc., the person who discovers the crime, or recovers the article, accepts the advertiser's proposal, in doing that which the advertiser requires, and is entitled to, and to sue for, the reward.

All agreements are contracts if they are made (1) by the free consent of parties competent to contract; (2) for a lawful consideration; (3) with a lawful object; and (4) if they are not by the the Act expressly declared to be void.[4] **Writing** is also necessary in the case of certain contracts, *viz.*, sales, leases, negotiable instruments and certain transactions under the Trust Act (s. 5) and the Companies Act (Act VI of 1882, sec. 67). Certain contracts are required further to be registered. See "*Registration.*"

Every person is competent to contract who (1) is of the age of majority, according to the law to which he is subject, see "*Minority*"; (2) is of sound mind, see *post* and "*Lunacy*"

8) ss. 4, 5, ib.
9) s. 6, ib.
1) s. 7, ib.
2) s. 9, ib.
3) s. 8, ib.
4) s. 10, ib.

and (3), who is not disqualified from contracting by any law to which he is subject; see "*Marriage.*"

Contracts of minors.—See "*Minority and Minors.*"

Contracts of lunatics.—See "*Lunacy.*"

Soundness of mind.—A person is said to be of sound mind for the purpose of making a contract, if at the time when he makes it, he is capable of understanding it, and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind may make a contract in a lucid interval. A person who is usually of sound mind, but occasionally of unsound mind, as in the case of a sane man delirious from fever, may not make a contract when he is of unsound mind, *e.g.*, during the delirium.[5]

Drunkenness.—A man who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect upon his interests, cannot contract whilst such drunkenness lasts.[6]

Free consent.—Two or more persons are said to consent when they agree upon the same thing, in the same sense.[7] Consent is said to be *free*, when it is not caused by (1) coercion; (2) undue influence; (3) fraud; (4) misrepresentation; or (5) mistake.[8]

Agreements entered into without free consent are voidable at the option of the party whose consent was caused by (1), (2), (3), or (4). When consent to an agreement is caused by coercion, undue influence, fraud, or misrepresentation, the agreement is a contract **voidable** at the option of the party whose consent was so caused.[9] For his remedies v. *post.* A contract entered into by mistake is **void**; v. *post.* The distinction between a void and voidable agreement is that the former never existed in the eye of the law and cannot be confirmed, whereas the latter exists until the party at whose option it can be set aside, elects to do so. The option to treat a contract as voidable cannot be exercised if it would injure third parties, or unless there can be *restitutio in integrum.*

A fraud or misrepresentation, which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable. If consent was caused by misrepresentation or by fraudulent silence (v. *ante*, "*Fraud*") the contract is nevertheless not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence: *e.g.* (1) A intending to deceive B, falsely represents that 500 maunds of indigo are made annually at A's factory, and thereby induces

5) s. 12, ib.
6) ib.
7) s. 13, ib.
8) s. 14, ib.
9) s. 19, ib.

B to buy the factory. The contract is voidable at the option of B. (2) A by misrepresentation, leads B erroneously to believe that 500 maunds of indigo are made annually at A's factory. B examines the accounts which show that only 400 maunds have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation. (3) A fraudulently informs B that A's estate is free from incumbrance, B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage debt redeemed. (4) B having discovered a vein of ore on the estate of A, adopts means to conceal the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under value. The contract is voidable at the option of A. (5) A is entitled to succeed to an estate at the death of B; B dies; C having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.[1]

Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed. "Coercion" is distinguished from the "duress" of English law to which it for the most part corresponds, in that it may be directed against the *goods* as well as against the *person*, and may be caused by any one to the prejudice of any person whatever, whether a party to the contract or not. The following is an instance of coercion:—A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. A afterwards sues B for breach of contract at Calcutta. A has employed coercion, although his act is not an offence by the law of England, and although sec. 506 of the Indian Penal Code was not in force at the time when, or place where, the act was done.[2]

Undue influence is said to be employed in the following cases:—(1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained; (2) when a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that, to

1) s. 19, ib.

2) s. 15, ib.

which, but for such treatment, he would not have consented, although such treatment may not amount to coercion. Common instances of relations of authority and confidence between parties are those of guardian and ward, doctor and patient, trustee and *cestui que* trust, attorney and client, spiritual advisers and those whom they advise. The following may be taken as illustrations of the section :—(1) A, a young woman, who has resided during her minority in the family of B, her guardian, continues to reside with him after attaining majority, and is induced by means of his influence, to enter into a contract with him, which is disadvantageous to herself. B employs undue influence. (2) A, having advanced money to his son, B, during his minority, upon B's coming of age, obtains by parental influence, a bond from B, for a greater sum than the sum due upon the advance. A employs undue influence. (3) A is induced by B's influence over him as his legal adviser, to convey an estate to B for his benefit. B employs undue influence. (4) A, a man enfeebled by disease or age, is induced by B's influence over him as his medical adviser, to agree to pay B an unreasonable sum for his professional assistance during the rest of A's life. B employs undue influence.

Money-lenders and hard bargains—The Courts will relieve borrowers from unconscionable bargains into which they have been induced to enter by money-lenders taking advantage of their distressed circumstances.[3] The ordinary rule is that "if people with their eyes open, choose wilfully and knowingly to enter into unconscionable bargains the law has no right to protect them."[4] But where the circumstances of the parties contracting, "weakness on the one side, usury on the other, or extortion, or advantage taken of that weakness, raise a presumption of fraud in the sense of an unconscientious use of the power arising out of those circumstances, the transaction cannot stand, unless the party claiming the benefit of it can repel the presumption by evidence, proving it to have been in point of fact, fair, just and reasonable.[5] The relief granted to the borrower consists in remitting the lender to his claim for money actually advanced with ordinary interest thereon. See "*Bonds.*"

Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract. (1) The suggestion as a *fact* (*i.e.*, not as an opinion) of that which is not true, by one who

3) s. 16, Act IX of 1872, L. R. 8 Ch. 484—490.
4) 4 Cal., 135 : 6 Bom., 309 : 10 Mad., 203.
5) L. R. 8 Ch. 484.

does not believe it to be true; (an untrue statement made recklessly is fraudulent). (II) The *active* (*i.e.*, something more than mere *omission* to speak) concealment of a fact by one having knowledge or belief of the fact. Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumtances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech. "In general, the parties to an agreement are supposed to be on an equal footing in understanding and experience, and each is supposed to trust to his own skill and judgment; mere silence, therefore, even on a matter likely to affect the other parties willingness to contract, does not amount to fraud (*vide* illust. *d*.) **Caveat emptor** (let the buyer beware) is the rule applicable to other agreements, as well as those for sale, and if parties do not wish to bargain on those terms, it is always open to them to protect themselves by special stipulations."[6] From this general rule there are two exceptions: the first being in the case where it is the duty of the party keeping silence to speak (illust. *d*.) v. "*Agency*, *Partnership*, *Indemnity*, *Insurance*;" the second, where his silence is equivalent to speech; *e.g.* (1) A sells, by auction to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A. (2) B is A's daughter and has just come of age. Here the relation between the parties would make it A's duty to tell B if the horse is unsound. (3) B says to A: "if you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech. (4) A and B being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B. (III) A promise made without any intention of performing it. [This would not be fraud under English law.] (IV) Any other act fitted to deceive. [This provision includes any form of legal fraud not expressly provided for by the other clauses.] (V) Any such act or omission as the law expressly declares to be fraudulent: *e.g.*, fraudulent transfers under the Insolvent Act and under sec. 55 of the Transfer of Property Act, *vide* "*Transfer of Property*."[7] In every case, the fraud must be by a party and not by a stranger to the contract.

Misrepresentation means and includes: (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any

6) Cunningham and Shephard, p. 72. 7) s. 17, Act IX of 1872.

one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him. [This would appear to refer to cases in which there has been a failure to make some disclosure, or to ascertain and communicate some fact, or comply with some formality, or take some precaution, which was from the nature of the transaction, obligatory on one party to the contract, and the result of such failure has been to give an advantage to him, and to cause disadvantage to the other party by misleading him to his prejudice, although the breach has been committed without any intention to deceive, or to lead him into the contract];[8] (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.[9]

Mistake.—Where *both* the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is *void*. An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not a mistake as to a matter of fact.[1] A contract, however, is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact: *e.g.* (1) A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation, the contract is not voidable. (11) A and B make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France, the contract is voidable.[2] Nor is a contract voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.[3]

Unlawful consideration and object.—The consideration or object of an agreement is lawful unless—(1) it is forbidden by law, such as agreements in restraint of the marriage of any person other than a minor, or agreements by way of wager (*v. post*); or (2) is of such a nature as, if permitted, it would defeat the provision of any law, as in the following case:—A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser and agrees to convey the estate to A, upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law; or (3) is fraudulent, *e.g.*, agreements in fraud of creditors; or (4) it

8 Cunningham and Shephard, p. 75.
3 Bom., 267.
9) s. 18, Act IX of 1872.
1) s. 20, ib.
2) s. 21, ib.
3) s. 22, ib.

involves or implies injury to the person or property of another, *e.g.*, a printer cannot recover the price of printing a libellous work; or (5) the Courts regard it as immoral or opposed to public policy. The following is an instance of an immoral contract:—A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code. The following one is an instance of a contract opposed to public policy:—A promises to obtain for B an employment in the public service, and B promises to pay Rs. 1,000 to A. The agreement is void, as the consideration for it is unlawful. In each of these cases the consideration or object of the agreement is said to be unlawful, and every agreement of which the object or consideration is unlawful is void.[4] Even a *partial* illegality in either consideration or object will invalidate the entire contract.[5] Where, however, there are promises to do things legal, and also other things illegal, the former are a contract, the other a void agreement: where in an alternative promise, one branch is legal and the other illegal, the legal is alone enforceable.[6]

An agreement made without consideration is void; in other words, there must be a *quid pro quo*. Unless the promisor is to get something in return for his promise, the promisee cannot enforce it. There are, however, to this general rule, three **exceptions**:—An agreement without consideration is a contract; (i) if it is expressed in writing and registered under the law for the time being in force for the registration of assurances, and is made on account of natural love and affection between parties standing in a near relation to each other; *e.g.*, A for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it: this is a contract; (ii) it is a promise to compensate, wholly or in part, a person who has voluntarily done something for the promisor, or something which the promisor was legally compellable to do: *e.g.*, A finds B's purse and gives it to him. B promises to give A Rs. 50: or, A supports B's infant son. B promises to pay A's expenses in so doing: both are contracts; (iii) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits; *e.g.*, A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract. In any other case, an agreement without consideration is void. These

4) s. 23, ib. 5) s. 23, ib. 6) ss. 57, 58, ib.

rules do not, however, affect the validity as between donor and donee of a gift actually made; *e.g.*, A promises to give B a Government security: such an agreement being merely what is called "executory" and without consideration, is void. If, however, A were after his promise, actually to endorse and deliver the security to B, the gift would be valid as between A and B even though without consideration, because the agreement being "executed," there is no longer any promise: its place has been taken by an act valid by, and known to law as a gift. An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given; *e.g*, A agrees to sell a horse worth Rs. 1,000 for Rs 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration. On the other hand, A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given: the inadequacy of the consideration is a fact which the Court will take into account in considering whether or not A's consent was freely given.

A deed under seal according to English law dispenses with the necessity of consideration; but this is not the case in India.[7]

Agreement in restraint of marriage—See "*Marriage.*"

Immoral contracts.—A landlord cannot recover the rent of lodgings knowingly let to a prostitute,[8] nor can an action be sustained for the hire of a brougham lent to a woman with the knowledge that it was intended to be used in furtherance of her immoral calling.[9] Agreements for future concubinage are void,[1] but a promise to pay a woman an allowance on account of past cohabitation has been held valid.[2] When the reputed father of illegitimate children promised to pay the mother an annuity if she would maintain and educate the children, it was held that the maintenance of the children was a sufficient consideration to support the promise.[3] No action can be maintained for the price or value of libellous or immoral pictures sold by the plaintiff to the defendant.[4]

Agreements in restraint of trade—See "*Trade and Trade Marks.*"

Contracts involving injury to third parties or made with a view to defraud them are void;[5] so, where a clerk made an

7) 12 Moo. I. A., 275.
8) 9 B. L. R., App., 37.
9) L. R., 1 Ex., 213.
1) s. 23, Act IX of 1872.
2) 3 All., 787. See also "*Bonds.*"
3) L. R., 9 Ex., 307: 9 M. & W. 496: 6 C. B. N. S., 223.
4) 4 Esp., 97.
5) s. 23. Act IX of 1872.

agreement with the brokers of his employers, to receive a percentage of the brokerage earned in transactions carried out for his employers, as a consideration for inducing his master to employ the brokers, the agreement was held to be void.[6]

Agreements in restraint of legal proceedings.—See "*Arbitration.*"

Uncertain agreements.—Agreements, the meaning of which is not certain, or capable of being made certain, are void:[7] *e.g.* (*a*) A agrees to sell to B 'a hundred tons of oil.' There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty. (*b*) A agrees to sell to B a hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void. (*c*) A, who is a dealer in cocoanut oil only, agrees to sell to B 'one hundred tons of oil.' The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of cocoanut oil. (*d*) A agrees to sell to B 'all the grain in my granary at Ramnagar.' There is no uncertainty here to make the agreement void. (*e*) A agrees to sell to B 'one thousand maunds of rice at a price to be fixed by C.' As the price is capable of being made certain, there is no uncertainty here to make the agreement void. (*f*) A agrees to sell to B 'my white horse for Rs. 500 or Rs. 1,000.' There is nothing to show which of the two prices was to be given. The agreement is void.

Wagers.—See "*Gaming and Wagering.*"

Obligation of performance.—The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of the Contract Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract, *e.g.* (*a*) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives. (*b*) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.[8] For some cases in which performance is excused under the provisions of the Act, v. *post.* Instances of other laws dispensing performance are the Insolvency Act and insolvency provisions in the Code of Civil Procedure, and the Limitation Act. The representatives of the promisors are only liable to the extent

6) 7 Bom. O. C., 91. 7) s. 29, Act IX of 1872. 8) s. 37, ib.

of the assets which have come into their hands. Contracts in which the personal skill and qualities of the promisor are necessary to their performance (v. illust. *b*., *ante*) are necessarily discharged by death. For the remedies in case of non-performance v. *post*. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Tender.—Ever such offer must be—(1) unconditional; (2) made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do; (3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. An offer to one of several joint promisees has the same legal consequences as an offer to all of them. The following case is an instance of the third condition of a valid offer to perform: A contracts to deliver to B at his warehouse, on the first March 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in the above-mentioned rule, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.[9]

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract unless he has shown an intention of acquiescing in its continuance.[1] Should the promisee shew such an intention, he remains subject to all his liabilities under the contract, and the promisor may thus, if he so wishes, not only complete the contract, but also take advantage of any subsequent circumstances which would justify him in declining to complete it.[2]

Joint promises.—When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representatives jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly must fulfil the promise.[3] When two or more persons make a joint promise, the promisee may,

9) s. 38, ib.
1) s. 39, ib.
2) Cunningham and Shephard, p. 147.
3) s. 42, Act IX of 1872.

in the absence of express agreement to the contrary, compel any one of such joint promisors to perform the whole of the promise, *e.g.*: A, B and C *jointly promise to pay* D Rs. 3,000. D may compel either A, B, or C to pay him the money. *Each of two or more joint promisors may compel every other* joint promisor to contribute equally with himself to the performance of the promise, unless the contrary is agreed. If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares: *e.g.*, A, B and C jointly promise to pay D Rs. 3,000. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive Rs. 500 from A's estate, and Rs. 1,250 from B.[4] Nothing in this section prevents a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitles the principal to recover anything from the surety on account of payments made by the principal.[5]

Effect of release of one joint promisor.—When two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or promisors.[6]

Devolution of joint rights.—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly. In short, when there are several promisees or creditors, performance must be demanded by them jointly: one cannot sue by himself for his share.[7]

Time and Place for Performance.

Where no time is specified and no application by the promisee is to be made, the engagement must be performed within a reasonable time, and what is 'a reasonable time' must be decided by the circumstances in each particular case.[8] Where a promise is to be performed on a **certain day**, and the promisor has (1) undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which

4) s. 43, ib.
5) ib.
6) s. 44, ib.
7) s. 45, ib.
8) s 46, ib.

the promise ought to be performed; (2) not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for the performance at a proper time and place and within the usual hours of business; (3) when a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.[9]

Performance of reciprocal promises.—Where a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.[1] Where, however, the order in which reciprocal promises are to be performed is expressly fixed by the contract, they must be performed in that order; and where the order is not expressly fixed by the contract, they must be performed in that order which the nature of the transaction requires.[2] Where there are reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.[3]

The effect of failure to perform at a fixed time, in a contract is, that the contract becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. If time was not of the essence of the contract, the contract does not become voidable thereby; but the promisee is entitled to compensation from the promisor for any loss occasioned by such failure.[4]

Effect of acceptance of performance at a time other than that agreed upon.—If, in a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.[5]

Agreement where act is impossible.—An agreement to do an act impossible in itself is void. If, after the contract is made, the act becomes impossible, or, by reason of some event which the promisor could not prevent, it becomes unlawful, the contract becomes void when the act becomes impossible or

9) ss. 47, 48, 49, ib.
1) s. 51, ib.
2) s. 52, ib.
3) s. 53, ib.
4) s. 55, ib.
5) ib.

unlawful.[6] Where one person has promised to do something which he knew, or with reasonable diligence might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.[7]

Appropriation of payments.—The following are the rules for the appropriation of payments made by a debtor to a creditor. (i) Where the debtor makes a payment, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must he applied accordingly.[8] (ii) Where the debtor has not intimated, and there is nothing to show to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt, even if its recovery be barred by limitation.[9] (iii) Where neither party makes any appropriation, the payment goes in discharge of the debts in order of time, even though they be barred by limitation. If the debts are of equal standing, the payment is applied in discharge of each proportionately.[1]

Quasi Contracts.

Claim for necessaries.—If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person:[2] *e.g.*, A supplies B a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

Reimbursement.—A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other[3] *e.g.*, B holds lands in Bengal on a lease granted by A, the zemindar. The revenue payable by A to Government being in arrear, his land is advertised for sale by the Government. Under the revenue law the consequence of such sale will be the annulment of B's lease. B to prevent the sale and consequent annulment pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

Obligation of person enjoying non-gratuitous act.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and

6) s. 56, ib.
7) ib.
8) s. 59, ib.
9) s. 60, ib.
1) s. 61, ib.
2) s. 68, ib.
3) s. 69, ib.

such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered: *e.g.*, A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.[4]

Responsibility of finder of goods—See "*Bailment.*"

Liability of person to whom money is paid or thing delivered under mistake.—A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it: *e.g.*, a railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.[5]

REMEDIES IN RESPECT OF CONTRACTS AND OTHER INSTRUMENTS.

General nature of relief.—The Court may (1) compel a promisor to perform his promise (v. *post*, "Specific Performance"); (2) give compensation and damages; (3) rescind the contract or other instrument (v. *post*, "Rescission"); (4) direct the contract or other instrument to be given up and cancelled (v. *post*, "Cancellation").

In case of coercion, undue influence, fraud, or misrepresentation.—A person whose consent to an agreement has been caused by coercion, undue influence, fraud, or misrepresentation, may avoid the contract or affirm it;[6] (v. *supra*, p. 153). If he avoids it he may sue for damages and to have the contract rescinded (v. *post*). If he confirms it and elects to treat the contract as valid, he may sue for specific performance and may ask for compensation for the breach of the contract either in addition to, or in substitution for, such performance.[7] If a suit is brought against him on the agreement for damages or specific performance he may defend the suit and refuse to carry out the agreement. A party to a contract, whose consent was caused by fraud or misrepresentation may insist that the contract shall be performed and that he shall be put in the position he would have been if the representations made had been true.[8]

In other cases.—Where a contract has been broken the ordinary remedy is a suit for damages for breach of contract: where the contract is of a certain character, and where certain conditions are fulfilled a suit may be brought to specifically enforce the carrying out of the agreement.

Damages.—When a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any

4) s. 70, ib.
5) s. 72, ib.
6) s. 19, Act IX of 1872.
7) s. 19, Act I of 1877.
8) s. 19. Act IX of 1872.

loss or damage which arose *in the usual course of things* from such breach, or which the parties knew, when they made the contract to be *likely* to result from the breach of it: *e.g.*, A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to the contract. B is entitled to recover from A the cost of making the repairs conform to the contract. The compensation is not, however, to be given for any remote or indirect loss or damage: *e.g.*, A contracts with B, to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the specified time, and, in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract (but which had not then been communicated to A) and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation. If at the time of contracting, B had informed A that he had to perform a contract with the third party, then A would have had to repay to B any compensation that B had been obliged to pay the third party for B's breach of that contract. In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account: *e.g.*, B, a servant of A, is wrongfully discharged by A. B is bound, if possible, to obtain fresh employment, and the wages which have been, or might have been gained by such employment are deducted from the sum to which he is entitled by way of damages.[9]

Specific Performance.

Specific performance is a form of relief given in certain cases in suits on contracts. Where damages would be an inadequate compensation for the breach of an agreement, the contractor will be compelled by the Court to perform specifically what he has agreed to do.

Relief discretionary.—It is a matter of discretion with the Court to grant specific relief to a suitor with regard to contract even in cases in which the conditions entitling a person to such relief are satisfied, and it would be lawful to grant it. But the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a Court

9) s. 73, ib.

of Appeal.[1] The following are cases in which in which **the Court may properly not exercise a discretion** to decree specific performance—(I) Where the circumstances under which the contract is made are such as to give the plaintiff an **unfair advantage** over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part. (II) Where the performance of the contract would involve some **hardship** on the defendant which he did not foresee, whereas it non-performance would involve no such hardship on the plaintiff. On the other hand the following is a case in which **the Court may properly exercise a discretion** to decree specific performance:—(III) **Where the plaintiff has done substantial acts or suffered losses** in consequence of a contract capable of specific perf rmance.[2]

Contracts which may be specifically enforced.—(*a*) when the act agreed to be done is in the performance, wholly or partly, of a **trust**; (*b*) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; (*c*) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief (see next §); or (*d*) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.[3]

Contract to transfer immoveable property.—Unless and until the contrary is proved, the Court will presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved.[4]

Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a *small* proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency. But where the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, the party unable to perform the whole of his part of the contract is not entitled to obtain a decree for specific performance, but it is open to the Court, at the suit of the other party, to direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of

1) s. 22, Act I of 1877. 2) ib. 3) s. 12, ib. 4) ib.

the defendant. When a part of a contract, which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot and ought not to be specifically performed, *the Court may a direct specific performance of the former part.*[5]

Contracts which cannot be specifically enforced.—(*a*) a contract for the performance of which compensation in money is an adequate relief; (*b*) a contract which runs into such minute or numerous details, or which is so dependant on the personal qualifications or volitions of the parties, or otherwise from its nature, is such, that the Court cannot enforce specific performance of its material terms: *e.g.*, contracts to render personal service, to employ on personal service, to complete a literary work, to paint a picture; (*c*) a contract, the terms of which the Court cannot find with reasonable certainty; (*d*) a contract which is in its nature revocable: *e.g.*, a contract to become partners, the contract not specifying the duration of the proposed partnership. If the contract were specifically enforced either A or B might at once dissolve the partnership; (*e*) a contract made by trustees either in excess of their powers or in breach of their trust; (*f*) a contract made by or on behalf of a corporation or **public company** created for special purposes, or by the promoters of such company, which is *ultra vires*, *i.e.*, in excess of its powers; (*g*) a contract, the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date; (*h*) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.[6] See also "*Arbitration.*"

Defective title of vendor or lessor.—See "*Title.*"

Who may obtain specific performance of a contract.—(*a*) Any party thereto; (*b*) the representative in interest, (*i.e.*, assignee of contract or legal representative of contractor on his death) or the principal, of any party thereto, provided that, when the learning, skill, solvency, or any personal quality of such party is a material ingredient in the contract, or when the contract provides that his interest shall not be assigned, his representative in interest or his principal will not be entitled to specific performance of the contract, unless where his part thereof has already been performed; (*c*) where the contract is a **settlement on marriage**, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder: with regard to **family compromises** it has been laid down that "an agreement entered into to secure the peace of a family, though resting on contract, will be supported and enforced

5) ss. 14, 15, 16, ib.

6) s. 21, ib.

at the instance of any one of the persons who are to take a benefit under the arrangement and those claiming under him, though the party seeking to enforce it may not have contributed any portion of the consideration ";[7] (*d*) when the contract has been entered into by a tenant for life in due exercise of a power, the remainder-man; (*e*) a reversioner in possession when the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant; (*f*) a reversioner in remainder, when the agreement is such a covenant, and the reversioner is entitled to the benefit thereof, and will sustain material injury by reason of its breach; (*g*) when a **public company** has entered into a contract, and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation; (*h*) when the promoters of a public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company.[8]

Specific performance of a contract cannot be enforced in favour of a person.—(*a*) who could not recover compensation for its breach; (*b*) who has become incapable of performing, or violates, any essential term of the contract that remains on his part to be performed; (*c*) who has already chosen his remedy, and obtained satisfaction for the alleged breach of contract; or (*d*) who previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force,[9] *e.g.*: A out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to B, a stranger, who has notice of the settlement. B cannot enforce specific performance so as to override the settlement, and thus prejudice the interests of the persons claiming under it.

Vendors without title.—See "*Title.*"

For whom contracts cannot be specifically enforced except with a variation.—When a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases, namely: (*a*) where by fraud, or mistake of fact, the contract of which the performance is sought, is in terms different from that which the defendant supposed it to be when he entered into it; (*b*) where by fraud, mistake of fact, or surprise, the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff; (*c*) when the defendant,

7) 2 Spence's Eq., 288. 8) s. 23, Act I of 1877. 9) s. 24, ib.

knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part, which adds to the contract, but which he refuses to fulfil; (*d*) when the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce; (*e*) when the parties have, subsequently to the execution of the contract, contracted to vary it.[1]

Against whom contracts may be specifically enforced.—Against (*a*) either party to the contract; (*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferree for value who has paid his money in good faith and without notice of the original contract; (*c*) any person claiming under a title which, though prior to the contract, and known to the plaintiff, might have been displaced by the defendant; (*d*) when a **public company** has entered into a contract and subsequently becomes almagamated with another public company the new company which arises from the amalgamation; (*e*) when the promoters of a public company have, before its incorporation, entered into a contract, the company: provided the company has ratified and adopted the contract, and the contract is warranted by the terms of the incorporation.[2]

Against whom contracts cannot be specifically enforced.—Specific performance of a contract cannot be enforced against a party thereto in any of the following cases:—(*a*) if the **consideration** to be received by him is so **grossly inadequate** with reference to the state of things existing at the date of the contract, as to be either by itself, or coupled with other circumstances, evidence of fraud, or of undue advantage taken by the plaintiff; (*b*) if his assent was obtained by the **misrepresentation** (whether wilful or innocent), concealment, circumvention, or **unfair practices** of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; (*c*) if his assent was given under the influence of **mistake** of fact, misapprehension, or surprise: provided that, when the contract provides for compensation in case of mistake, compensation may be made for a mistake within the scope of such provision, and the contract may be specifically enforced in other respects if proper to be so enforced.[3]

Liquidation of damages is not a bar to specific performance.—A contract, therefore, which is otherwise proper to be specifically enforced, may be thus enforced, though a sum be.

1) s, 26, ib. 2) s. 27, ib. 3) s. 28, ib.

named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.[4]

Compensation. — Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance, and the Court will either grant a decree for specific performance and compensation, or specific performance only, or compensation only, according to the nature of the case made out.[5] But if the plaintiff sues for specific performance only of a contract or part thereof, and his suit is dismissed, such dismissal bars the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be.[6]

Awards and directions to execute settlements.—The foregoing provisions as to contracts, apply *mutatis mutandis* to awards and to directions in a will or codicil to execute a particular settlement. See "*Arbitration.*"[7]

Rescission of Contracts.

Mode of rescinding voidable contract.—The rescission of a voidable contract may be communicated or revoked in the same manner and subject to the same rules as apply to the communication or revocation of a proposal.[8] (v. *ante.*)

Compensation.—A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract: *e.g.*, A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her Rs. 100 for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.[9]

Consequences of rescission.—When a person at whose option a contract is voidable, rescinds it, the other party need not perform any promise therein contained. The party rescinding must, so far as may be, restore any benefit received thereunder from another party to such contract to the person from whom it was received. So also when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or make compensation for it to the person from whom he received it: *e.g.*, A pays B Rs. 1,000, in consideration of B's promising to marry C, A's daughter. C is dead at the time of the

4) s. 20, ib.
5) s. 19, ib.
6) s. 29, ib.
7) s. 30, ib.
8) s. 66, Contract Act.
9) s. 75, ib.

promise. The agreement is void, but B must repay A the Rs. 1,000.[1]

When it may be adjudged.—Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely:—(*a*) where the contract is voidable or terminable by the plaintiff; (*b*) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff; (*c*) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums, which the Court has ordered him to pay.[2] On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any **compensation** to the other which justice may require.[3]

Mistake.—Rescission of a contract in writing cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.[4]

Rectification and Cancellation of Instruments.

Rectification of instruments.—When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party or his representative in interest may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been *fraud or mistake in framing* the instrument, and ascertain the real intention of the parties in executing the same, the Court may, in its discretion, rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.[5] In rectifying a written instrument, the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.[6] But for the purpose of rectifying a contract in writing, the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.[7] A contract in writing may be first rectified, and then, if the plaintiff has so prayed in his plaint, and the Court thinks fit, specifically enforced.[8]

Cancellation of instruments.—Any person against whom a written instrument (contractual or otherwise) is void or voidable,

1) ss. 64, 65, Contract Act.
2) s. 35, Act I of 1877.
3) s. 38, ib.
4) s. 36, ib.
5) s. 31, ib.
6) s. 33, ib.
7) s. 32, ib.
8) s. 34, ib.

who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it, and order it to be delivered up and cancelled.[9] But when an instrument is evidence of different rights or different obligations the Court may, in a proper case, cancel it in part, and allow it to stand for the residue.[1] On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require. A plaintiff may in a suit for specific performance pray that if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled.[2]

See "*Limitation*" and "*Injunction.*"

9) s. 39, ib. 1 s. 40, ib. 2) s. 41, 37, ib.

COPYRIGHT.

AUTHORTIES—5 & 6 Vic. c. 45 : Act XX of 1847 (partly repealed and amended) Contract Act: The Law of Copyright by T. E. Scrutton (1890): Act XXV of 1867 (repealed partly by Act 14 of 1870 and X of 1890): Act XV of 1877 : and cases cited.

BOOKS AND PERIODICALS.

5 & 6 Vic. c. 45 : Act XX of 1847 (as amended) : Act XXV of 1867 (as amended) : Contract Act : Cases cited.

Copyright means the sole and exclusive liberty of printing or otherwise multiplying copies of any "book."[1]

"Book" means and includes every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart or plan separately published.[2]

Qualities required in copyright work—For an intellectual work to be capable of protection as copyright it must be (A) **Innocent**, *i.e.* (1) not seditious or libellous (the libel being against the State ; (2) not immoral ; (3) not blasphemous ; (4) not fraudulent. Thus a work of devotion professing falsely to be translated from the work of a celebrated German writer was not protected. (B) **The work must have literary value** : thus an album for holding photographs, seven of the pages of which bore pictures of castles with short letter-press descriptions, and which was called the "Castle Album" was held not to be a "book" within the Act as not being a "literary work." **Catalogues** will be protected as copyright unless they are merely a dry list of names or a simple announcement of the sale of goods which everybody might sell and announce for sale. As to **titles** (v *post*). (C) **The work must be original.** An author republishing a non-copyright work with **annotations and additions** may obtain copyright in his additions if they are of a substantial nature.[3]

Rights in unpublished works.—The rights of the author before publication are these : "he has the undisputed right to the MSS : he may withhold or communicate it, and communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases on the use of it ; and the fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation.[4] The author may prevent the publication of his work until he himself has

1) 5 and 6, Vic., c. 45, s. 2.
2) ib.
3) Scrutton, pp. 104—113 ; v. also, I. L R., 13 Bom., 358.
4) 4 H. L. C., 562.

made it public. The Common Law gives a man who has composed a work a right to that composition, just as he has a right to any other part of his personal property.[5] This right which is sometimes called "Copyright at Common Law" is really an incident of property and not copyright in the strict sense.[6] But though a man has this right, the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of for ever copying his own composition, *after he has published it to the world* is a totally different thing.[7] Copyright is the exclusive right of multiplying copies of a work *already published* and is regulated by statute.[8]

A selection of poems of numerous English authors of various periods is the subject matter of copyright.[9]

Limitation.—Suits for compensation for infringing copyright or any other exclusive privilege must be brought within three years of the date of the infringment.[1]

Duration of copyright.—The copyright in a book published in the lifetime of its author within British India after the passing of the Act of Parliament, 3 & 4 Wm., 4, c. 85, endures for the natural life of such author and for the further term of seven years commencing at the time of his death and is the property of the author and his assigns. If, however, the above term of seven years expires before the end of 42 years from the publication of the book, the copyright endures for 42 years. The copyright of a book published after the death of its author and after the passing of the above Act endures for 42 years from the first publication thereof and is the property of the proprietor of the author's manuscript from which such book is first published, and his assigns.[2]

Provisions against suppression of books of importance.—The Governor-General in Council may on complaint made to them that the proprietor of the copyright in any book published after December 18th 1847, has after the death of its author refused to republish, or to allow the republication of the same, and that by reason of such refusal, such book may be withheld from the public, grant a license to such complainant to publish such book in such manner and subject to such conditions as they may think fit.[3]

A book of registry, wherein may be registered the proprietorship in the copyright of books and assignments thereof

5) ib., 979.
6) 19 Q. B. D., 629 ; Scrutton, p. 148.
7) 4 H. L. C., 979.
8) ib., 954.
9) I. L. R., 17 Cal., 951.

1) Act XV of 1877, Art. 40, Sched II. See I. L. R., 3 Cal., 17.
2) Act XX of 1847, s. 1.
3) s. 2, ib.

and licenses affecting such copyright is kept in the office of the Secretary to the Government of India for the Home Department and is open to the inspection of any person on payment of eight annas for every entry which is searched for or inspected. A certified copy of any entry in such book may be obtained on payment of Rs. 2. Such certified copies will be received in evidence in all Courts and in all summary proceedings, and are *primâ facie* proof of the proprietorship or assignment of copyright or license as therein expressed, but subject to be rebutted by other evidence.[4]

Registration of name.—The proprietor of copyright in any book published after the passing of the abovementioned Act may make an entry in the Registry Book of the title of such book, the time of its first publication, and the name and place and abode of the publisher and of the proprietor of the copyright upon payment of Rs. 2.[5]

Assignment of copyright.—Every registered proprietor of copyright may assign his interest, or any portion of his interest in a book so registered as abovementioned, by making entry in the Registry Book of such assignment, and of the name and place of abode of the assignee on payment of Rs. 2. Such assignment so entered is effectual in law to all intents and purposes whatsoever, and is of the same force and effect as if such assignment had been made by deed.[6]

If any person is aggrieved by any entry made under colour of this act in the Registry Book, he may apply by motion to the High Court of Calcutta, or if the Court is not sitting to a Judge of such Court sitting in Chambers for an order that such entry may be expunged or varied.[7] "A person aggrieved" has been defined as "a person who can shew that the entry is inconsistent with some right that he sets up in himself, or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application."[8]

Infringement of copyright.—Literary property can be invaded in three ways and in three only: (1) by publishing and selling an unauthorized edition of a work in which copyright exists: that is, open piracy; (2) where a man pretending to be the author of a book illegitimately appropriates the fruits of a previous author's literary labour, that is, literary larceny. These are the only two modes of invasion against which the copyright acts have protected an author.

4) ib., s. 3.
5) ib., s. 5.
6) ib., s. 5.
7) ib., s. 6.
8) L. R., 4 Q. B., 715, 724.

Titles.—The third mode is irrespective of copyright legislation, that is, (3) where a man sells a work under the name and title of another man or another man's work; that is not an invasion of copyright. It is Common Law fraud.[9]

Suit for infringment.—If any person prints or causes to be printed either for sale or exportation, any book in which there is subsisting copyright, without the consent in writing of the proprietor thereof, or has in his possession for sale or hire any such book so unlawfully printed without such consent, such offender is liable to a suit in the highest local Court exercising original civil jurisdiction.[1] Suits for infringement of copyright in the mofussil are triable in the Court of the District Judge.[2] In a suit for infringment of copyright the defendant must give notice in writing to the plaintiff of any objections on which he means to rely at the trial of the action,[3] and must state in his written statement all such matters as he means to rely on.[4] Registration is necessary in order to maintain a suit under the Act; v. *post.*

Reviews and periodicals.—When any publisher or other person, within British India projects, conducts, or carries on, or is the proprietor of any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts, or any book whatsoever, and employs any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, etc., are composed under such employment, on the terms that the copyright therein belong to such proprietor, etc., and are paid for by him, the copyright in every such encyclopædia, review, etc., so composed and paid for is the property of such proprietor, etc., who has the same term of copyright as is given to the authors of books. *Except* only that in the case of essays, articles, or portions forming part of, and first published in reviews, magazines or other periodical works of a like nature, after the term of 28 years from the first publications thereof respectively, the right of publishing the same in a separate form reverts to the author for the remainder of the term. Provided always that during the 28 years the proprietor, publisher, etc., may not publish any such essay, article, or portion separately or singly without the previous consent of the author or his assigns. These provisions do not affect the rights of an author who may have reserved to himself the right of publishing his composition in a separate form.[5]

Registration of reviews, periodicals, etc.—The proprietor of the copyright in any encyclopædia, review, magazine

9) 18 Ch. Div., 76, 90.
1) Act XX of 1847, s. 7.
2) I. L. R., 6 Cal., 499.
3) Act XX of 1847, s. 8.
4) s. 9, ib.
5) s. 10, ib.

periodical work, or other work published in a series of books or parts, is entitled to all the benefits of registration, on entering in the registry book (v. *ante*) the title of such encyclopædia, review, etc., the time of the first publication of the first volume, number or part, and the name and place of abode of the proprietor and publisher, when the publisher is not the proprietor.[6]

Piratical copies.—All copies of any *registered* book wherein there is copyright, and which has been unlawfully printed without the consent in writing of the registered proprietors of the copyright, are the property of the registered proprietor of such copyright, who is entitled after demand thereof in writing, to sue for and recover the same, or to damages for the detention thereof.[7]

Effect of registration.—Registration is not compulsory, but no proprietor of copyright in any book may sue for any infringement of such copyright unless he has made an entry in the Registry Book and in the manner above mentioned : provided that the omission to make such entry does not affect the copyright in any book, nor the right to sue or proceed in respect of the infringement thereof, except the right to sue or proceed in respect of the infringement thereof, under the provisions of this act.[8] Where it was contended that because the infringement of copyright took place *before* registration, no suit would lie, it was held that this was not so, and that the title to copyright is complete before registration, which is only a condition precedent to the right to sue.[9]

Contracts relating to libellous and immoral publications.—An action cannot be sustained on a contract for the printing or publishing of an immoral work.[1] Neither author or publisher of a libellous or immoral work has any copyright therein ; nor can he maintain an action against any person for publishing a pirated edition of such a work.[2] A promise to indemnify plaintiff, in consideration of his having published a libel, and defended an action brought against him for it at defendant's request, is void.[3] See "*Agency.*"

Printing presses and newspapers.—Every book or paper printed in British India must bear the name of the printer and publisher.[4] "Book" includes every volume, part or division of a volume and pamphlet in any language, and every sheet of music, map, chart or plan separately printed or lithographed.[5] The above-mentioned Act, which was passed for the purpose of regulating printing presses and newspapers, and for the preservation of

6) s. 11, ib.
7) s. 12, ib.
8) s. 14, ib.
9) I. L. R., 17 Cal., 962.
1) R. and Moo., 337. Contract Act s. 23.
2) 5 B. and C., 173.
3) 2 Bing. N. C., 634 : s. 224, Contract Act.
4) Act XXV of 1867, s. 3.
5) s. 1, ib.

copies of books printed in British India and for the registration of such books, provides for a declaration in prescribed form of the possessor of a press[6] and a similar declaration from the printer and publisher of periodicals, etc., and a new declaration on change of place, etc., and of printer and publisher: and directs what is to be done with the declaration which the public are entitled to inspect and makes **an office copy of the declaration sufficient evidence**, as against the person whose name shall be subscribed to such declaration, that the said person was printer or publisher, or printer and publisher (as the words of the declaration may be) of every portion of every periodical work, whereof the title shall correspond with the title of the periodical work mentioned in the declaration.[7] Copies of every book printed or lithographed in British India together with all maps, prints or other engravings belonging thereto, must be delivered *gratis* to Government.[8]

Registration of books.—A book called a "Catalogue of Books printed in British India" is by the Act (XXV. of 1867) directed to be kept, wherein must be registered a memorandum of every book delivered to Government (v. *ante*). The memorandum must contain the name and residence of the proprietor of the **copyright**, or any portion of such copyright.[9] Every registration under this section is (on payment of Rs. 2 to the officer keeping the catalogue) deemed to be an entry kept under Act XX. of 1847 (Copyright Act: v. *ante*) and the provisions contained in that Act as to the Book of Registry apply *mutatis mutandis* to the catalogue.[1] The memoranda registered during each quarter must be published in the local Gazette after the end of each quarter.[2]

Designs.

AUTHORITY—Act V of 1888.

A design means some peculiar shape, configuration or form given to an article, or arrangement of lines, or the like used on, or with an article, but not the article itself.[3]

Copyright means the exclusive right to apply a design to an article.[4]

Registration.—Any person whether a British subject or not, claiming to be the proprietor of any new and original design not previously published in British India, may apply to the Governor-General in Council, for an order for the registration of the design. The application must be in writing in the required form and must contain a statement of the nature of the design, and be accompanied by as many copies of drawings, photographs, or tracings thereof, not being fewer than four, as may be required by the rules

6) s. 4, *ib.* 7) *ib.*, ss. 3—8. 8) Act X of 1890, ss. 9—11. 9) s. 18, *ib.*
1) *ib.* 2) s. 19, *ib.* 3) Act V of 1888, s. 50, *ib.* 4) *ib.*

in force. The application must be left with or sent by post to the secretary, appointed to discharge the functions of Secretary under the Act.[5] The Governor-General in Council may, upon such application and after such enquiry as he thinks fit, make an order authorizing the design to be registered in the Register of Designs.[6]

Acquisition and duration of copyright.—When a design is registered, the proprietor has, subject to the other provisions of the Act, copyright in the design for five years from the date of registration.[7] When copyright in a design has ceased, an entry to that effect is made in the Register of Designs.[1]

Articles to be marked "registered."—Before the delivery on sale of any article to which a registered design has been applied, the proprietor of the design must cause the article to be marked with the word "registered" either in full or in an abbreviated form. If he fails to do so, his copyright in the design will cease unless he shows that he took all proper steps to ensure the marking of the article.[9]

Effect of exhibiting unregistered designs at exhibitions.—If the proprietor of a design exhibited at an industrial or international exhibition, certified as such by the Governor-General in Council, applies for an order for the registration of the design, within six months from the date of the admission of the design into that exhibition, the design will not be deemed not to be a new and original design not previously published in British India, by reason only of its having been exhibited at the exhibition.[1]

Mutation of names in register.—Any person in whom the copyright in a design has become vested may apply to the Secretary for the entry of his name in the Register of Designs as proprietor of the copyright, and the Secretary may, if he sees fit, cause the entry to be made.[2]

Suit for infringement of copyright.—The registered proprietor of a design may institute a suit in the District Court (which includes the High Court, Original Side) for the recovery of any damages arising from the application by any person to any article of the design, or of any fraudulent or obvious imitation thereof for the purpose of sale, or from the publication, sale or exposure for sale, by any person of any article to which the design or any fraudulent or obvious imitation thereof, has been applied, that person knowing or having reason to believe that the proprietor had not given his consent to such application. When a decree is made by the Court in such suit, a copy of such decree is sent to the

5) s. 51, ib.
6) s. 52, ib.
7) s. 53, ib.
8) s. 58, b.
9) s. 54, ib.
1) s. 55, ib.
2) s. 56, ib.

Secretary, who will thereupon cause an entry thereof to be made in the register of designs.[3]

Rectification of Register of Designs.—A High Court may, on the application of any person aggrieved by an entry in the Register of Designs, or by the omission of an entry therefrom, make such order for the rectification of the register as it thinks fit. A copy of such order is to be sent to the Secretary, who will thereupon cause an entry thereof to be made in the Register of Designs. The order may declare copyright in the design not to have been acquired.

Meaning of word "proprietor."—The author of any new and original design is considered the proprietor thereof, unless he executed the work on behalf of another person for a good or valuable consideration, in which case that person is considered the "proprietor," and every person acquiring for a good or valuable consideration a new and original design, or the right to apply the same to an article, either exclusively of any other person or otherwise, and also every person on whom the property in the design or the right to the application thereof shall devolve, is considered the "proprietor" of the design in the respect in which the same may have been so acquired and to that extent but not otherwise.[4]

3) s. 57, ib.

4) s. 50 (3), ib.

CORONER AND INQUESTS.

AUTHORITIES—Act IV of 1871 amended by Act X of 1881 : Act V of 1889 : Criminal Procedure Code.

INQUESTS IN CALCUTTA AND BOMBAY.

Coroner's jurisdiction.—A Coroner is appointed to have authority under the Act (Act IV of 1871) within the local limits of the ordinary Original Civil Jurisdiction of each of the High Courts of Calcutta and Bombay.

Inquiry into deaths.—When a Coroner has reason to believe that the death of any person has been caused by accident, homicide, suicide, or suddenly by means unknown, or that any person being a prisoner has died in prison, and that the body is lying within the place for which the Coroner is so appointed, the Coroner must inquire into the cause of death ; every such inquiry is deemed a judicial proceeding.[1]

Coroner's jury.—*On receiving notice of any such death* the Coroner must summon a jury for the purpose of enquiring when, how, and by what means the deceased came by his death. For the purpose of such inquest the Coroner may order a body to be disinterred.[2] Such inquest may be held on a Sunday.[3]

The inquest.—The Coroner opens the Court by proclamation and calls over the names of the jurors. If a sufficient jury is in attendance, each juror is sworn, and the Coroner proceeds with the jury *to view the body ;* and makes such observations to the jury as the appearance of the body requires. He then makes proclamation for the attendance of witnesses, or calls in separately such as know anything concerning the death. It is the duty of all persons acquainted with the circumstances attending the death to appear before the inquest as witnesses. The Coroner can for the purposes of the inquest summon witnesses to give their evidence on the inquest. He may direct the performance of a *post-mortem* examination by any medical witness summoned to attend the inquest. All evidence must be taken on oath, and the Coroner is bound to receive evidence on behalf of the party (if any) accused of causing the death of the deceased person. He may adjourn the inquest from time to time, and from place to place. After all the witnesses have been examined, and the Coroner has summed up the evidence to the jury, the latter consider their verdict. When the verdict is delivered the Coroner draws up the inquisition in

1) Act IV of 1871, s. 8. 2) s. 12, ib. 3) s. 12, ib.

accordance with the finding of the jury, or, when the jury is not unanimous, in accordance with the opinion of the majority. Such inquisition must be signed by the jurors, and the Coroner, and must set forth—(1) when, where, and before whom the inquisition is holden; (2) who the deceased is; (3) where his body lies; (4) the names of the jurors, and that they present the inquisition upon oath; (5) where, when, and by what means the deceased came by his death; and (6) if his death was occasioned by the criminal act of another, who is guilty thereof.[4]

Disclosure of crime.—When the verdict is one of culpable homicide amounting to murder, or culpable homicide, or one of death by a rash or negligent act not amounting to culpable homicide, the Coroner must bind by recognisance any person knowing or declaring anything material touching such murder, homicide, or act, to appear at the next Criminal Sessions at which the trial is to be, then and there to prosecute or give evidence against the party charged. The Coroner must also, when the verdict justifies him in so doing, issue his warrant for the apprehension of the person accused and commit him to prison, until trial, or if he be already in prison, issue a detainer to the officer in charge of the jail in which he is, or if the verdict is not of murder the Coroner may enlarge him on sufficient bail.[5]

Warrant for burial.—When the proceedings are closed, or before, if it be necessary to adjourn the inquest, the Coroner must give his warrant for the burial of the body on which the inquest has been taken.[6]

A juror who has been properly summoned may be fined Rs. 50 for non-appearance, but a juror after service at an inquest is exempted (unless in case of necessity) from attendance for the period of a year.[7]

Inquests in British India outside the Towns of Calcutta, Madras, Bombay.

By whom held.—All District Magistrates or Sub-divisional Magistrates, and any Magistrate especially empowered in this behalf by the Local Government, or the District Magistrate, are empowered to hold inquests in cases similar to those already referred to.[8]

Enquiry by the police.—Every officer in charge of a police-station on receiving information that a person—(*a*) has committed suicide; or (*b*) has been killed by another, or by an animal, or by machinery, or by an accident; or (*c*) has died under circumstances raising a reasonable suspicion that some other person

4) ss. 13—24, ib.
5) ss. 25—27, ib.
6) s. 28, ib.
7) ss. 31, 34, ib.
8) s. 174, Cr. Pr. Code.

has committed an offence, must immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted. The report must be signed by such Police-officer and other persons, or by so many of them as concur therein, and must be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate. When there is any doubt regarding the cause of death, or when for any other reason the Police-officer considers it expedient so to do, he is bound to forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other medical officer appointed in this behalf by the Local Government, if the state of the weather and the distance admits of its being so forwarded without risk of such putrefaction on the road as would render such examination useless. In the presidencies of Madras and Bombay, investigations under this section may be made by the head of the village.[9]

Power to summon persons.—For the purpose of the above-mentioned investigation an officer in charge of a police-station may, by order in writing, summon two or more persons and any other person who appears to be acquainted with the facts of the case. Every person so summoned is bound to attend and to answer truly all questions other than questions the answer to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.[1]

Inquiry by Magistrate.—When any person dies while in the custody of the Police the nearest Magistrate empowered to hold inquests *must* and in any other case mentioned in clauses (*a*), (*b*) and (*c*) (v. *ante.*) any Magistrate so empowered *may* hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the Police-officer; and, if he does so, he has all the powers in conducting it which he would have in holding an enquiry into an offence. The Magistrate must record such evidence as may be given, and when ever he considers it expedient to make an examination of the dead body of any person who has already been interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.[2]

9) s. 174, ib. 1) s. 175, ib. 2) s. 176, ib.

Inquests in Town of Madras.

In 1889 the office of Coroner was abolished in the town of Madras, and the provisions of the Criminal Procedure Code (v. *ante*) adopted in a modified form. Intimation is given and the report forwarded to (v. *ante*) the Commissioner of Police. The enquiry mentioned in the last paragraph is conducted by Presidency Magistrates.[3]

3) Act V of 1889.

CUSTOM AND USAGE.

AUTHORITIES—Viner's Abridgement: Bacon's Abridgment: Mayne's Hindu Law, 5th ed.: Indian Evidence Act: Indian Contract Act: and cases cited.

Custom is such a usage as has obtained the force of law and is in truth a binding law to such particular places, persons and things which it concerns. It is *jus non scriptum* (unwritten law) made by the people only of such place where the custom is.[1] The frequent repetition of an act, which at first was assented to by the people of a certain place for their mutual conveniency and advantage is a custom.[2] "A belief in the propriety, or the imperative nature, of a particular course of conduct, produces a uniformity of behaviour in following it; and a uniformity of behaviour in following a particular course of conduct, produces a belief that it is imperative, or proper, to do so. When from either cause, or from both causes, a uniform and persistent usage has moulded the life and regulated the dealings, of a particular class of the community, it becomes a custom which is a part of their personal law. Such a custom deserves to be recognised and enforced by the Courts, unless it is injurious to the public interests, or is in conflict with any express law of the ruling power."[3] "The fullest effect is given to custom both by our Courts and by legislation, and all the recent acts which provide for the administration of law dictate a similar reference to usage, unless it is contrary to justice, equity, or good conscience, or has been actually declared to be void."[4]

There are various customs in every part of India in respect of incidents of tenures of land, right of fishing in *bils* or other natural waters, right of inheritance in a particular family, &c. As the "common law" or "custom of the realm in England" is proved to exist by showing that it has been affirmed by the Courts, or at least has been recognised in the writings of acknowledged legal authorities, the Hindu and Mahommedan Law, as administered by the British Courts, is such portion of the customs of the Hindus and Mahomedans which has, from time to time, received legal and judicial recognition. "Under the Hindu system of law, clear proof of usage will outweigh the written text of the law."[5] But apart from the Hindu and Mahommedan Law, there

1) Viner's Abridgment, Vol. VII, p. 164.
2) Bacon's Abridgement, Vol. 2, p. 564.
3) Mayne's Hindu Law, 5th ed., p. 47, and cases cited: Perry O. C., 110: ib., 535: 3 Mad., H. C., 56: 11 Bom., H. C., 249: 4 Bom., 545.
4) Mayne, p. 41.
5) 12 Moo., I. A., 436.

are other various local customs which have received the recognition of the Courts in India. Customs which have not received such recognition must possess a certain character, and must be established by positive and clear proof before any relief on the basis of their existence will be granted. *v. next paragraph.*

Requisites of custom.—A custom must in order to receive the recognition of the Courts, and so acquire legal force, possess a certain character and satisfy certain necessary conditions. It must be ancient, continued and acquiesced in, reasonable and certain,[6] invariable, and established by clear, positive, certain, distinct and unambiguous evidence.[7] There must be satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district of country; and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty.[8] A custom must not be immoral: it cannot be created by agreement. There may be a usage of a single family.[9] The custom must be definite so that its application in any given instance may be clear and certain and reasonable.[1]

How proved.—"The evidence should be such as to prove the uniformity and continuance of the usage, and the conviction of those following it that they were acting in accordance with law, and this conviction must be inferred from the evidence. There must be evidence of acts of the kind: acquiescence in those acts; decisions of Courts or even of punchayets upholding such acts; the statements of competent and experienced persons of their belief that such acts were legal and valid, will all be admissible: but the statements should be supported by actual examples of the usage asserted."[2] A custom being in derogation of the general rules of law, must be construed strictly.[3]

Usage of trade.—The law merchant is a customary law relating to trade. Certain portions of it have received recognition at the hands of the Legislature, and been embodied in statute, *e.g.*, the law as to negotiable instruments, bills of lading, &c. Others portions have been, and if they are of a certain character, will be, recognized by Courts of Justice. Many contracts are construed by the course of business in the particular trade. When trade usage is imported into a contract, it is

6) I. L. R., 2 All., 49.
7) W. R. 1864, p. 39: ib., 1864, p. 20: 15 W. R. P. C., 47: 14 M. I. A., 585: 1 Cal., 186: 9 M. I. A., 243.
8) 3 Mad. H. C., 75, 77, affirmed on appeal: 14 M. I. A., 570: 10 Bom. H. C., 234.
9) Mayne, pp. 49, 50, 52, and cases there cited.
1) 1 All., 440: 2 All., 49.
2) 7 Mad. H. C., 250, ss. 13, 48, 49, Evidence Act.
3) L. R., 3 I. A., p. 285.

because it tacitly forms part of it, like those contracts in which are found the words "and other usual terms." They then form part of the contract itself. The contract expresses what is peculiar to the bargain between the parties and the usage supplies the rest.[4] Thus a contract to pay interest is frequently implied from usage.[5] The extent of an agent's authority is also determined by usage.[5] So also an implied warranty of goodness or quality may be established by the custom of a particular trade.[6]

Requisites of usage.—A usage, even if universal, which is not according to law cannot be set up to control the law.[7] If contrary to established rules of law or equity, or contrary to, or excluded by, the express terms of a contract, or if unreasonable,[8] a custom or usage of trade will not bind the parties to a contract. Further, it must not be inconsistent with the provisions of the Contract Act.[9] By sec. 1 of the latter Act, nothing in the Act is deemed to affect any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of the Act.

Proof of mercantile usage needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect fo all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in that it may reasonably be presumed to have been an ingredient tacitly imported by the parties into their contract.[1]

4) Contract Act, s. 9: 16 Scott's Rep., N. S., 660, 661: 7, Moo., I. A., 282.
5) 10 Moo., I. A., 229.
6) Contract Act, s. 110.
7) 16 Scott's Rep., N. S., p. 660.
8) 8 Bom. H. C., p. 19.
9) Act IX of 1872, s. 1: 14 B. L. R., 76.
1) 7 Moo., I. A., 282.

DEFAMATION.

AUTHORITIES—Indian Penal Code: Criminal Procedure Code: Act I of 1872: (Evidence): Act I of 1877 (Specific Relief): Odger's Libel and Slander, 1890: Cases cited.

Its nature.—Defamation is both a criminal offence and a civil wrong. The term "defamation" as used in the Indian Penal Code includes both libel and slander considered as offences under English law. In India the term is properly applied to the criminal offence only, the civil wrong being called "libel" when the defamatory matter is written, and "slander" when spoken.

Remedy against.—A defamed person has two remedies. He may either prosecute the offender under the Penal Code for having committed an offence, or sue him in a Civil Court for damages. He may also do both. If a person threatens to publish matter which would be punishable as defamatory under the Indian Penal Code the Court may grant an injuction to restrain the publication.[1]

DEFAMATION AS A CRIMINAL OFFENCE.

Definition of.—Whoever by works either *spoken* or intended to be *read*, or by *signs* (*e.g.*: A is asked who stole B's watch: A points to Z, intending to cause it to be believed that Z stole B.'s watch) or by visible *representations* (*e.g.*: A draws a picture of Z running away with B's watch with the same intention), makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe, that such imputation will harm the reputation of such person, is said (*except* in the cases mentioned below in the paragraph "Exceptions") to defame that person." There are thus two classes of persons who may be guilty of the offence: (1) persons who first say or produce defamatory matter; (2) those who promulgate it. No evidence is necessary of intention to harm, or of knowledge that harm would follow where the words are in themselves defamatory. No imputation is said to harm a person's reputation unless that imputation directly or indirectly in the estimation of others, lowers the moral or intellectual character of that person in respect of his caste, or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered disgraceful.[2] An imputation in the form of an alternative, or expressed ironically

1) Act I of 1877, s. 55.

2) s. 499, Indian Penal Code.

may amount to defamation, *e.g.*: A says Z is an honest man: he never stole B's watch, intending to cause it to be believed that Z did steal B's watch: unless this falls within one of the exceptions it is defamation.[3] Defamatoiy matter is "published" if communicated to a single person other than the person defamed, *e.g.*: to the latter's wife.[4] The offence is compoundable by the person defamed.[5]

Defamation of a deceased person.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives. The defamatory matter in such a case must be such that the deceased might himself have complained of it. Genuine criticism of a dead person made in a *bonâ-fide* history or biography is permissible.[6]

Of companies, associations and collections of persons.—It may also amount to defamation to make an imputation concerning a company, or collection of persons as such. The "*Nil Durpan*" case which arose out of the publication of defamatory matter upon the indigo planters is an instance of defamation of this kind.[7]

Exceptions.—There are certain cases in which imputations against, or expression of opinion on another is permissible, and the person making it protected. **It is not defamation** (1) to impute anything which is *true* against any person, if it be for the **public good** that the imputation should be made or published; (2) to express in good faith any opinion whatever respecting the conduct of a **public servant** in the discharge of his public functions, or respecting his character so far as his character appears in that conduct and no further:[8] nothing is said to be done or believed in "*good faith*" which is done, or believed without due care and attention;[9] the burden of proving good faith lies on the accused person;[1] (3) to express in *good faith* any opinion whatever respecting the conduct of any person touching any **public question** and respecting his character, so far as his character appears in that conduct and no further:[2] *e.g.*, expressing an opinion on Z's conduct in calling a meeting on a public question, presiding at such meeting, &c.; (4) to publish a substantially true **report of the proceedings of a Court** of Justice or of the result of any such proceedings; (5) to express in *good faith* any opinion whatever respecting the merits of any **case, civil or criminal,**

3) s. 499, ib.
4) I. L. R., 1 Bom., 477.
5) Schd. II, Cr. Pr. Code.
6) Penal Code, s. 499.
7) ib.
8) ib.
9) s. 52, ib.
1) Evidence Act, s. 105.
2) Penal Code, s. 499.

which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness, or agent, in any such case, or respecting the character of such person as far as his character appears in that conduct and no further; (6) to express *in good faith* any opinion respecting **the merits of any performance, which its author has submitted to the judgment of the public**, or respecting the character of the author, so far as his character appears in such performance and no further: *e.g.*, a person who makes a speech or publishes a book, submits that speech or book to the judgment of the public; so too an actor or singer, who appears on a public stage, submits his singing or acting to the judgment of the public. The following are illustrations of innocent and criminal statements as to the character of an author: A says of a book published by Z "Z's book is foolish and indecent, Z must be a weak man, and a man of impure mind." This is not defamation if said in good faith, inasmuch as the opinion A expresses of Z respects Z's character only, so far as it appears in Z's book and no further. It would, however, be defamation if A were to say: "I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine," inasmuch as the opinion expressed of Z's character is an opinion not founded on Z's book. (7) For a person having over another any authority either conferred by law, or arising out of a lawful contract made with that other, to pass in good faith any **censure** on the conduct of that other in matters to which such lawful authority relates: *e.g.*, a schoolmaster censuring his pupils, or a master his servant, or the head of a department those under his orders; (8) **to prefer** *in good faith* **an accusation** against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation; *e.g.*, A in good faith accuses Z before a Magistrate, or complains of the conduct of X, a servant, to X's master. (9) **To make an imputation** on the character of another, provided that the imputation be made *in good faith* **for the protection of the interests of the person making it, or of any other person, or for the public good**: *e.g.*, B, a shopkeeper, says to A, who manages his business, "Sell nothing to Z on credit, for I have no opinion of his honesty." This is not defamation if said by A in good faith and for the protection of his own interests; or, again, B, a Magistrate, in making a report to his superior officer casts an imputation on the character of Z, the imputation is not defamatory if made in good faith and for the public good. Under this exception come the privileges of counsel, attorneys, vakils, and witnesses in judicial proceedings. (10) **To convey caution** *in good faith* to one person against another, provided that such caution be intended for the good of the person to whom

it is conveyed, or of some person in whom that person is interested, or for the public good : *e.g.*, communications regarding the character of servants or communications made in discharge of a moral or social duty. The privilege must be used in good faith, and no further than absolute necessity requires.[3]

Punishment.—Defamation is punishable with a maximum of two years' simple imprisonment, or with fine, or with both.[4] Persons printing or engraving any matter which they know or have good reason to believe is defamatory, and persons selling or offering for sale a printed or engraved substance containing defamatory matter, knowing that it contains such matter are similarly punishable.[5]

Defamation as a Civil Wrong.

Libel is the publication of false defamatory matter in writing, in a print, picture, or the like. Generally speaking, matter which would be considered defamatory within the definition of the Penal Code (v. *ante*) would be considered libellous in a civil action. One of the main differences between a criminal prosecution for defamation and a civil action for libel lies in the fact that in the latter the truth of the libel is always a complete defence, and this is so because the law will not permit a man to recover damages in respect of an injury to character, which he either does not, or ought not to possess.[6] Written matter may be either obviously libellous; as where the words are in themselves of a libellous character, or, though not obviously libellous, it may be capable of bearing, and intended to bear, a libellous signification, *e.g.*, where there is innuendo or irony. In the latter case the plaintiff must establish that the libellous words did in fact mean what he alleges, not merely that they were capable of bearing such a meaning.[7]

The plaintiff must prove in a suit for libel (1) that the matter is libellous; (2) that the defendant published it. Although in common parlance "publishing" may be confined in its meaning to making the contents of a libel known to the public, yet its meaning is not so limited in law; for the making of it known to but one individual other than the plaintiff himself (*e.g.*, to his wife) is a publishing, and the mere parting with a libel with intent to scandalize a party, by which the defendant loses his power of control over it, is an uttering.[8] If the plaintiff proves these two points, the Court will infer that the publication was malicious.

Defences.—The defendant in a civil action may take any of the following defences: (1) that the matter is not libellous; (2) that if it is so, it is true; (3) that he did not publish the libel; (4) that if he did so publish, his publication was "privileged."

3) ib.
4) s. 500, ib.
5) ss. 501-502, ib.
6) 10 B. & C., 272.
7) I. L. R., 1 Bom., 477.
8) ib.

Privileged publication in the civil law relating to libel corresponds to those exceptions in the criminal law in which it is permissible to publish what would be (but for the exception) defamatory. Generally speaking, publication under the circumstances which excuse from defamation excuse from libel. Shortly stated the law as to "privileged" communications is as follows: From the mere publishing of libellous matter the law *presumes* malice on the part of the person publishing and an intent to injure the person defamed. But where the circumstances of publication are such as to exclude this presumption then it is excluded, unless actual express malice is shown. Such circumstances exist where publication of otherwise libellous matter is made by a person in discharge of some public or private duty (whether legal or moral), or in the conduct of his own affairs in matters where his interests are concerned, if made to a person having some corresponding interest or duty.[9] If fairly warranted by any reasonable exigency or occasion such communications are protected or "privileged." Even if a privileged communication be untrue it will not be libellous, if honestly made with belief in its truth. Examples of privileged communications are reports of military and naval officers on military matters to their military superiors, words spoken in office by witnesses, counsel, jury and Judge in civil or criminal proceedings, and reports of these proceedings, communications as to the character of servants, communications of a confidential nature, or made in self-defence to protect one's private interests, statements provoked or invited by previous words of the plaintiff, and the like.[1]

Instances of libel.—Generally speaking, any words which expose the plaintiff to hatred, ridicule, contempt, or obloquy, or tend to injure him in his profession or trade, or cause his neighbours to avoid and shun him are libellous.[2] It has been held to be libellous to write and publish of a person that he is "an infernal villain," "an impostor," "a great defaulter," "a black leg," "a blacksheep," "a hypocrite," "a rogue and a rascal," "a dishonest man," "a mere man of straw," "a desperate adventurer," "that he is insolvent and cannot pay his debts," and the like.[3] Ironical praise may also be a libel as calling an attorney "an honest lawyer."[4] A caricature, painting, or statue may be libellous.[5]

Damages—When words are in themselves obviously libellous, and are such as must injure the reputation of the plaintiff, they are actionable without proof of special damage: actual pecuniary damage need not be proved: the injury to the reputation is legal damage. Where words, on the other hand, are used which merely

9) ib.
1) Odgers, pp. 181—268.
2) ib., p. 19.
3) ib., p. 20.
4) ib., p. 116.
5) ib., p. 6.

might tend to injure the reputation, the fact that they were so injurious and the special damage caused by them must be shown.[6]

Slander is defamation by word of mouth. In England the rule of law is that a civil action for slander can always be brought when the words (1) charge the plaintiff with the commission of a crime punishable by law; (2) impute to him a contagious disorder tending to exclude him from society; (3) are spoken of him in the way of his profession or trade, or disparage him in an office of public trust: because in all these cases the words which are said to be "actionable *per se*" clearly tend to injure the plaintiff's reputation. Therefore to sustain an action in these cases it is not necessary to prove *special* damage resulting to the plaintiff from the slander: from the slanderous words *damage* is presumed. In all other cases according to English law special damage must be shown. In India the question is not so well settled. The preponderance of authority, however, is against the English rule and in favour of giving relief to a plaintiff where the defamation is such as would cause substantial pain and annoyance to the person defamed, although actual proof of damage estimable in money may not be forthcoming.[7] Therefore a suit for damages may be brought for verbal abuse of a gross character without proof of special damage. The use of every kind of abusive language is not actionable. But language which, having regard to the definition of defamation in the Indian Penal Code, is calculated to injure the reputation—language which having regard to the respectability and position of the person abused is calculated to outrage his feelings, lower the estimation in which he is held by persons of his own class and bring him into disrepute is actionable[8] (*i.e.*, such that a *civil* action may be brought for damages.) Mere "hasty expressions" spoken in anger or vulgar abuse to which no hearer would attribute any set purpose to injure character are not actionable.[9] The same rules as to inference of malice, "privileged" communications, and truth of the defamatory matter, apply as well to slander as to libel.

6) Ib., p. 290.
7) I. L. R., 8 Mad., 175.
8) I. L. R., 12 Cal., 110.
9) I. L. R., 8 Mad., 175.

DIVORCE, AND MATRIMONIAL LAW.

AUTHORITIES—Act IV of 1869 (Indian Divorce) as amended and repealed: extends to the whole of British India and (so far only as regards British subjects) to the dominions of Princes and States in India in alliance with Her Majesty: Act XXI of 1866: Act XV of 1865: Civil Procedure Code: Browne and Powles On Divorce, 5th edition: Cases cited.

English and Indian Law.—Generally speaking, and subject to the special provisions of the Indian Act, the Indian Courts are obliged to act and to give relief under the Act, on principles and rules as nearly as may be conformable to the rules and principles on which the English Courts of Divorce act. Except in a few particulars, the Law of Divorce in India and in England is the same.[1]

DIVORCE.

Jurisdiction.—Divorce can only be granted where the petitioner (1) professes the Christian religion; (2) resides in India at the time of presenting the petition; (3) where husband and wife have both at some time resided in India, *and* only in the following cases:—(*a*) where the marriage was solemnized in India; or (*b*) where the adultery, rape, or unnatural crime complained of was committed in India; or (*c*) where the husband has since the solemnization of the marriage exchanged his profession of Christianity for the profession of some other form of religion. The marriage sought to be disolved need not necessarily have been a Christian marriage. So where the petitioner and respondent were married, while professing the Hindu faith, and afterwards became converts to Christianity, it was held, on the application of the petitioner for dissolution of marriage on the ground of the wife's adultery, that being a person professing Christianity at the time of presenting the petition, he was entitled to a divorce under the Act. A non-Christian marriage is not dissolved by the mere fact of the conversion of one or both of the parties to Christianity, and may therefore be dissolved in accordance with the provisions of the Divorce Act.[2]

Petition by husband.—Any husband may present a petition to a District Court, or to the High Court praying for divorce on the ground that his wife has since marriage committed adultery.[3]

Petition by wife.—Any wife may similarly present a petition on the grounds that her husband has since marriage (1) *exchanged*

1) I. L. R. 4 Cal., 260: 8 Bom., O.C., 48: s. 7, Act IV of 1869.
2) 3 B. L. R., O. C., 67: 14 W. R., 416: I. L. R., 10 Bom., 422: I. L. R., 18 Cal., 252: but see I. L. R., 14 Mad., 382: s. 2, Act IV of 1869.
3) s. 10, ib.

his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman [*e.g.*, where a Hindu convert to Christianity has made a Christian marriage and afterwards reverts to Hinduism and marries a second wife]; or has been guilty of (2) *incestuous adultery* ["incestuous adultery" means adultery commited by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity (whether natural or legal) or affinity]; or of (3) *bigamy with adultery* [*i.e.*, adultery with the person with whom the bigamy is committed], or of marriage with another woman with adultery [*e.g.*, where there is bigamy with one woman and adultery with another]; or of (4) *rape*; (5) *sodomy or bestiality*; or of (6) *adultery coupled with such cruelty* as without adultery would have entitled the wife to a divorce *a mensâ et toro* (*i.e.*, what is now called 'judicial separation'); cruelty must be specifically pleaded, and if it is not, the Court will not allow the issue to be raised or evidence given of it; or of (7) *adultery coupled with desertion* without reasonable excuse for two years or upwards.[4]—v. *post*. As to offences against marriage, see "*Marriage.*"

The co-respondent.—When any petition for divorce is presented by a husband, he must make the alleged adulterer a co-respondent to the petition, unless he is excused from so doing on one of the following grounds to be allowed by the Court:—(1) that the wife (respondent) is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed; (2) that the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover it; (3) that the alleged adulterer is dead.[5] Every person against whom adultery is alleged in the petition must be made a co-respondent; but a husband is not compelled to charge adultery in the petition with every person with whom his wife may have committed adultery.

Court must be satisfied of absence of aid, connivance and condonation.—When a petition for divorce is presented, the Court will satisfy itself not only as to the facts alleged, but also whether or not the petitioner has been in any manner—(1) accessory to the adultery, *i.e.*, has aided in producing or contributing to produce the adultery; or (2) has connived at the going through of the form of marriage (*e.g.*, where bigamy is charged), or the adultery; or (3) has condoned the same. The

4) ib.: 3 B. L. R., Ap. 6: I. L. R., 12 Cal., 706: (Prohibited degrees) I. L. R., 17 Cal., 324. (ib.)
5) s. 11, Act IV of 1869: 3 B. L. R., Ap. 9.

Court will also enquire into any countercharge which may be made against the petitioner.[6]

Dismissal of petition.—In case the Court finds that there has been either aid, connivance, or condonation, *or* that the case has not been proved, *or* that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the Court will dismiss the petition. When, however, a petition is dismissed by a District Court, the petitioner may, nevertheless, present a similar petition to the High Court.[7]

Decree of divorce.—If, on the contrary, the Court is satisfied that the petitioner's case is proved, and that there has been no aid, connivance, condonation, or collusion, the Court will pronounce a decree *nisi* declaring the marriage of the petitioner dissolved.[8] A decree *nisi* is a conditional decree; it declares that the marriage is dissolved unless within six months next following cause is shown why the marriage should not be dissolved. If no one shows cause the petitioner must move to have the decree made absolute (see later).

Proviso.—The Court is not bound to pronounce a decree of divorce if it finds that the petitioner has (1) during the marriage been guilty of adultery; or (2) of unreasonable delay in presenting or prosecuting his petition; or (3) of cruelty towards the other party to the marriage; or (4) of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse; or (5) of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery. Where a husband separated himself from his wife, who up to the time of his doing so was a virtuous woman, and did not write to her, or go to see her, or make her an allowance proportionate to his income after he had done so, it was held upon a petition by the husband for dissolution of his marriage on the ground of his wife's adultery, such adultery having been committed during such separation, that his conduct towards his wife disqualified him from obtaining the relief sought.[9]

Decree nisi by High Court.—Every decree for dissolution of marriage made by a High Court [not being a confirmation of a decree of a District Court—see later] is, in the first instance, a decree *nisi* not to be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order may direct.[11]

Intervention.—During the period between the passing of the decree *nisi* and the making of the decree *nisi* absolute, any person

6) s. 12, Act IV of 1869.
7) s. 13, ib.
8) s. 14, ib.
9) ib., 3 B. L. R., O. C., 136: I. L. R., 5 All., 71: 8 Bom., O. C., 48: I. L. R., 3 Cal., 688 (Delay): 7 Mad., 284 (ib.)
11) s. 16, Act IV of 1869.

is at liberty to intervene and show cause why the decree *nisi* should not be made absolute, by reason of its having been obtained by collusion, or by reason of material facts not being brought before the Court.[2]

Decree absolute.—If nobody intervenes during the period appointed, the Court will make the decree *nisi* absolute on the parties moving the Court to that effect. If the parties fail to more within a reasonable time to make the decree absolute, the High Court may dismiss the suit. Where the petitioner has tried in vain to discover the respondent and co-respondent in order to serve them with notice of the decree *nisi*, the Court will make the decree absolute without such service, which is not necessary. Where in the case of a compromise the petitioner and respondent applied that the decree *nisi* should not be made absolute, the Court granted the application.[3]

Decree by District Court.—Every decree of divorce made by a District Judge is subject to confirmation by the High Court. On its being brought before the High Court for confirmation the latter may either confirm it, or make such order as it think fit; provided that no decree can be confirmed till after the expiration of such time not less than six months from the pronouncing thereof, as the High Court may from time to time direct.[4]

Intervention in District Court.—During the progress of a suit in the Court of a District Judge any person suspecting that any parties to the suit are, or have been acting in collusion for the purpose of obtaining a divorce, may apply to the High Court to remove the suit: if the High Court thinks fit it will remove the suit from the District Court and try it itself: in which case the provisions apply which are laid down as applicable in the case of suits originally commenced in the High Court: or it may direct the District Judge to take such steps in respect of the alleged collusion, as may be necessary to enable him to make a decree in accordance with the justice of the case.[5]

What is 'cruelty.'—Generally speaking, what is meant by 'cruelty' is actual violence of such a character as to endanger personal health or safety, or threats of violence, or conduct such as to cause reasonable apprehension of danger to personal health or safety.[6] The Courts will not wait until the hurt is actually done, but the apprehension must be reasonable.[7] Where one act of violence is of such a character as to found a reasonable apprehension of further violence in case of cohabitation, legal

2) ib.: I. L. R., 6 Bom., 416: I. L. R., 17 Cal., 570.
3) ib.: 9 B. L. R., Ap. 39: 4 B. L. R., O. C., 52: I. L. R., 8 Cal., 756: I. L. R., 10 All., 559.
4) s. 17, Act IV of 1869.
5) ib.
6) 1 S & T., 168: 1. Hagg. Cons., 35.
7) 28 L. J. P. & M., 55: 37 L. J. P. & M., 77: 1. Hagg. Cons., 35.

cruelty is established entitling the party injured to relief from the Court.[8] But merely one act committed under excitement, and not producing any considerable injury to the person, has been held, though unwarrantable, insufficient to found a decree.[9] There are cases which go to show that under certain aggravated circumstances less even than that above stated is sufficient to constitute legal cruelty. Where a man assaulted his wife in the public street without inflicting personal injury, but by his conduct and filthy language led a passer by to take her for a common prostitute and to insult her, he was held to have been guilty of "the grossest and most abominable cruelty."[1] Spitting in the face is an act of cruelty.[2] It was held that a system of moral coercion, short of personal violence which had broken down the wife's health and rendered serious malady imminent was cruelty.[3] So, too, the taking away from a wife, with the mere intent to distress her,[4] of her only child by a husband who had treated the wife with the greatest neglect insult and indignity, was held to be a clear act of deliberate cruelty. Words of menace if they raise a reasonable apprehension of danger to the person, whether addressed to the wife or a third person, constitute legal cruelty.[5] Wilful communication of venereal disease by a husband to his wife amounts to cruelty.[6] In one case though there had been no actual violence amounting to cruelty, the conduct of the husband in repeated acts of adultery under the roof of the house in which his wife was living, in consequence of which indignities her health gave way, was held sufficient to found a sentence of dissolution of marriage on the ground of the husband's cruelty and adultery.[7] Cruelty to the children in the presence of the mother may be cruelty to her.[8] Cruelty committed by an insane person is no ground for divorce. The remedy lies in the restraint of the husband, not in the release of the wife.[9] Acts of violence committed under the influence of an acute disorder such as brain fever, where the disorder having been subdued, there is no danger of their recurrence, are not "cruelty," but it is otherwise if the result of such disorder were a new condition of the brain rendering the party liable to ungovernable fits of passion, which would make further cohabitation dangerous.[1] So where a man had recovered from an attack of *delirium tremens* under the influence of which he had committed acts of cruelty against his wife, the Court

8) 3 Sw. & Tr., 139: 1 Hagg. Cons., 453.
9) 2 Sw. & Tr., 397.
1) 31 L. J. P & M., 159.
2) 1 Hagg. 776: 2. Sw & Tr.,584.
3) L. R. 2 P & D., 59.
4) 2 Phill., 207.
5) 1 Hagg. Cons., 148: 1. Hagg. Ecc., 776.
6) 1 L. R. P. & D., 46.
7) 4 Sw. & Tr., 135.
8) 1 Sw. & Tr., 489.
9) 3 Sw. & Tr., 348.
1) 27 L. J. P & M., 73.

having expressed itself satisfied on the evidence that the wife could not live with the husband without peril of bodily injury, pronounced a decree of judicial separation. If the acts of a husband under suspicion of insanity, but not yet declared by his medical attendant to be insane, are such as to show that the wife may not be safe in returning to live with the husband, the Court will grant a decree.[2] The Court will not grant a decree to protect the wife from mere unhappiness resulting from an ill-assorted marriage, nor from the destruction of domestic comfort caused by drunkenness.[3] Nor do habitual drunkenness, occasional violent conduct (not amounting to personal violence) and neglect, constitute legal cruelty.[4] A false charge by a husband against his wife of adultery, although such charge is made wilfully, maliciously, and without reasonable and probable cause, is not an act amounting at law to cruelty, so as to entitle the wife to judicial separation.[5] Even if each of a series of acts taken separately is insufficient of itself to enable a Court of Justice to give relief, yet "cruelty in the sense in which the Court holds it proved as the ground of separation or divorce, lies in the *cumulative* ill conduct which the history of the married life discloses. This aggregate is made up of those acts of personal violence or degrading conduct which are spoken of in the books as 'acts of cruelty,' palliated or inflamed as the case may be by the respective language, demeanour, and bearing of the parties, and the whole considered in the connection with the general treatment which the party complaining may have received."[6]

What is "desertion."—To sustain this charge the act relied on must have been done without reasonable excuse and contrary to the will of the person charging it,[7] who must prove affirmatively that the absence of her husband commenced and continued against her consent and lasted for two years or upwards.

Nothing will justify a man in deserting and living apart from his wife except the commission of some distinct matrimonial offence, such as adultery or cruelty. "It is not easy to define 'desertion.' To desert is to forsake or abandon. But what degree or extent of withdrawal from his wife's society, constitutes a forsaking or abandonment of her? This is easily answered in some cases, not so easily in others, for the degree of intercourse which married persons are able to maintain with each other is various. It depends on their walk in life, and is not a little at the mercy of external circumstances. The position of

2) 29 L. J. P & M., 106.
3) 3 Sw. & Tr., 314.
4) 1 L. R. P. & D., 47.
5) I. L. R., 4 All., 374.
6) 4. Sw. and Tr., 173.
7) I. L. R., 4 Cal., 260: I. L. R., 3 Cal., 485: Act IV of 1869, ss. 3, 10.

some, and indeed the large majority, admits of that intimate cohabitation which completely fulfills the ends of matrimony. Short of that, all degrees of matrimonial intercourse present themselves in the world. To some it is given to meet only at intervals, though of frequent occurrence. It is the lot of others to be separated for years, or to meet only under great restrictions. The fetters imposed by the professions of the Army and Navy, the requirements of commercial enterprise, and the call to foreign lands, which so frequently attends all branches of industrial life, make these restrictions often inevitable. But perhaps on no class do they fall so heavily as on those who devote themselves to domestic service for the means of life. And yet matrimony is made for all: and matrimonial intercourse must accommodate itself to the weightier considerations of material life. From these considerations it is obvious that the test of finding a home for the wife and living with her, is not universally applicable in pronouncing 'desertion' by the husband. Nor does any other criterion suitable to all cases present itself to the mind of the Court. To neglect opportunities of consorting with a wife is not necessarily to desert her. Indifference, want of proper solicitude, illiberality, denial of reasonable means, and even faithlessness, are not desertion. Desertion seems pointed at a breaking off, more or less completely, of the intercourse which previously existed. Is the husband, then, bound to avail himself of all means at his disposal for increasing the intimacy of this intercourse, on the peril of being pronounced guilty of desertion? Or, on the other hand, is he free from that peril so long as he maintains any intercourse at all? These are the two extremes. The former proposition is easily solved in the negative. It may be doubted whether the latter ought not to be answered in the affirmative. But thus far, at least, the Court may go, and it is enough for the decision of this case: *so long as the husband treats his wife as a wife by maintaining such degree and manner of intercourse as might naturally be expected from a husband of his calling and means, he cannot be said to have deserted her.*"[8]

It has been held in England that where a husband by his conduct evidenced an intention that his wife should not live with him, and brought about his wife's leaving the house, that he had "deserted" her within the meaning of the Act.[9]

Connivance implies acquiescence—a willing mind.[1] To constitute connivance it is sufficient that the petitioner knew that adultery would follow from certain transactions that he approved of and consented to. It must be shown from his conduct that he

8) 3 Sw. and Tr., 547. 9) 3 Sw. and Tr., 350. 1) 3 Sw. & Tr., 335.

expected and intended that adultery would result from the acquaintance of his wife with the co-respondent.[2] Mere negligence, inattention, dulness of apprehension, or indifference will not suffice, but there must be an intention by either husband or wife that adultery should be committed.[3] There must be actual knowledge of the adultery or improper familiarities.[4] Delay, unless explained, may lead to the conclusion that the petitioner had either connived at the adultery, or was wholly indifferent to it.[5] See "*Marriage.*"

Condonation is forgiveness of a conjugal offence with the full knowledge of all the circumstances.[6] Under the Indian Act no adultery is deemed to have been condoned unless conjugal cohabitation has been resumed or continued.[7] But condonation means forgiveness with a condition, that is, a condition that the party in the wrong shall behave well in all respects in future. If that party does not, **the wrong condoned is revived** by the subsequent wrong.[8] Thus supposing adultery to have been condoned, subsequent cruelty will revive the adultery so as to found a sentence of divorce.

Collusion is "a concert and a conspiracy, or understanding and agreement between the petitioner, or persons acting on his behalf to get up or suppress evidence." Even though the case be a true one, collusion exists, if the parties concur in getting it up.[9]

Dissolution of marriage of non-Christians under Act III of 1872.—See "*Marriage.*"

JUDICIAL SEPARATION.

Jurisdiction.—The Court may grant a decree for judicial separation (1) if the petitioner professes the Christian religion; and (2) resides in India at the time of presenting the petition; and (3) if husband and wife have both at some time resided in India [1]

Judicial separation.—A husband or wife may, on petition to the District or High Court, obtain a decree of judicial separation on the ground of (1) adultery; or (2) cruelty; or (3) desertion without reasonable excuse for two years or upwards. The Court may, on being satisfied of the truth of the statements in the petition, make a decree unless there exist any legal ground why it should not do so: such as adultery and cruelty by the petitioner, connivance, condonation, collusion, desertion, wilful separation.[2]

2) 32 L. J. P & M., 17.
3) 30 L. J. P & M., 2.
4) 1 Roberts, 162.
5) I. L. R., 3 Cal., 688 : 7 Mad., 284.
6) 2 Sw. & Tr., 438.
7) Act IV of 1869, s. 14.
8) I. L. R., 5 Mad., 118 : 34 L. J. P. & M., 118.
9) See I. L. R., 11 Cal., 651.
1) Act iv. of 1869, ss. 2, 3.
2) Browne and Powles On Divorce, 5th ed., p. 126.

Reversal of decree of separation.—Any husband or wife upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may at any time thereafter present a petition to the Court by which the decree was pronounced, praying for a reversal of such decree, on the ground (1) that it was obtained in his or her absence; and (2) that there was reasonable excuse for the alleged desertion where desertion was the ground of such decree.[3] If the Court is satisfied with the truth of the allegations of such petition it may reverse the decree accordingly.

Nullity of Marriage.

Jurisdiction.—The Court may grant a decree of nullity of marriage where (1) the petitioner professes the Christian religion; (2) resides in India at the time of presenting the petition; (3) husband and wife have both at some time resided in India; and (4) only where the marriage has been solemnized in India.[4]

Any husband or wife may present a petition to the District Court, or to the High Court praying that his or her marriage may be declared null and void: a decree may be made on the following grounds: (1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit; (2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity; (3) that either party was a lunatic or idiot at the time of the marriage; (4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.[5]

Force and fraud.—The High Court will also make a decree of nullity of marriage if it be shewn that the consent of either party was obtained by force or fraud. It should be noted however in this connection, that mere deceit as to the position or circumstances of one of the parties is insufficient to invalidate the marriage. Every decree of nullity of marriage made by a District Judge is subject to confirmation by the High Court and subject, *mutatis mutandis*, to the provisions applicable in the cases of a decree of divorce (v. *ante*.)[6]

Restitution of Conjugal Rights.

Jurisdiction.—The Court may grant relief where the petitioner (1) professes the Christian religion; (2) resides in India at the

3) Act IV of 1869, s. 26.
4) ss. 2, 3, ib.: 13 B. L. R., 109.
5) ss. 18, 19, ib.: I. L. R., 16 Bom., 639 (Impotency: Parsis.)
6) s. 20, Act IV of 1869.

time of presenting the petition ; and (3) where husband and wife have both at some time resided in India.[7]

Petition.—When either the husband or wife has without reasonable excuse withdrawn from the society of the other, either wife or husband may apply by petition to the District Court or to the High Court for restitution of conjugal rights, and the Court may on being satified of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, such as adultery, cruelty, or desertion, decree restitution of conjugal rights accordingly.[8] It is plain, however, that all that the Court can, or pretends to enforce, is conjugal cohabitation, not marital intercourse. Nothing can be pleaded in answer to a petition for restitution of congugal rights, which would not be ground for a suit for judicial separation, or for a decree of nullity of marriage.[9]

Execution of decree.—Under the Code of Civil Procedure[1] when the party against whom a decree for restitution of conjugal rights has been made, has had an opportunity of obeying it, and has wilfully failed to do so, the decree may be enforced by imprisonment, or attachment of property, or of both.

Other Relief.

Jurisdiction.—All other relief under the Act may be granted where (1) the petitioner professes the Christian religion ; (2) resides in India at the time of presenting the petition ; (3) husband and wife have both at some time resided in India.

Damages and costs.—Any husband may either in a petition for divorce, or judicial separation, or in a petition limited to that object only, claim damages from any person on the grounds of his having committed adultery with his wife.[2] The amount claimed must be stated in the petition.[3] The Court may direct that the whole or any part of such damages shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife.[4] Whenever in any petition presented by a husband, the alleged adulterer has been made a co-respondent, and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the costs of the proceedings; but the co-respondent cannot be ordered to pay the petitioner's costs: (1) if the wife was at the time of the adultery living apart from her husband and leading the life of a prostitute ; or (2) if the co-respondent had not at the time of the adultery

7) ss. 2, 3, ib.
8) s. 32, ib.
9) s. 33, ib.

1) C. Pr. C., s. 260.
2) Act IV of 1869, s. 34.
3) 31 L, J. P & M., 96.
4) Act IV of 1869, s. 39 (*c*).

reason to believe the respondent to be a married woman.[5] An intervenor (v. *ante*, "*Intervention*") may, if he has intervened without grounds, or on insufficent grounds, be ordered to pay the whole, or any part of the costs occasioned by his or her application.[6]

The husband is, as a general rule, liable for his wife's costs, and is required to deposit in Court a sum sufficient to meet them, except where she has separate property of her own sufficient for their payment.[7]

Alimony.—Alimony (generally speaking) is the allowance made to a wife out of her husband's estate for her support, either during a matrimonial suit, or at its termination when she proves herself entitled to a separate maintenance, and the fact of a marriage is established. It is of two kinds—(1) alimony during the suit; and (2) permanent alimony.

Alimony pendente lite.—In any suit for divorce, judicial separation, restitution of conjugal rights, or nullity of marriage, whether instituted by a husband or a wife, the latter may apply by petition on notice to the husband for alimony pending the suit.[8] On such an application the Court will consider whether the wife has means of her own or not: if she has, alimony during the suit will be refused. Alimony will not exceed one-fifth of the husband's average nett income for the three years next preceding the date of the order, and continues in the case of a decree of divorce or nullity until the decree is made absolute or confirmed, as the case may be, and in suits for judicial separation or restitution of conjugal rights, until the final decree on the original hearing. Where the wife at the time of presenting the petition is living with the co-respondent, or living apart from the husband under such circumstances that she does not pledge his credit, alimony *pendente lite* will be refused. Alimony *pendente lite* cannot be granted after the decree *nisi*.[9]

Permanent alimony.—The High Court may, on a decree absolute of divorce, or judicial separation obtained by the wife, and the District Judge may, on the confirmation of any decree for divorce, or any decree of judicial separation obtained by the wife, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not excceding her own life as having regard to her fortune (if any) and to the ability of the husband,

5) s. 35, ib.
6) ib.
7) 3 B. L. R., Ap. 5: 5 B. L. R., Ap. 9; I. L. R., 9 Mad., 12: but see I. L. R., 5 Cal., 357: I. L. R., 14 Cal., 580.
8) Act IV of 1869, s. 36.
9) 3 B. L. R., Ap. 13: 3 B. L. R., Ap. 4: I. L. R., 11 Cal., 354: I. L. R., 14 Mad., 88.

and to the conduct of the parties it thinks reasonable, and may make order for monthly or weekly payment: provided that if the husband afterwards from any cause becomes unable to make such payments, the Court may discharge, or modify the order, or temporarily suspend it as to the whole, or any part of the money, and again revive it in whole, or in part as it thinks fit. Permanent alimony cannot be granted until an application is made to make the decree absolute.[1]

The usual amount allowed as permanent alimony is one-third of the husband's average income.[2] When the Court directs alimony to be paid, it may direct payment to the wife, or to any trustee on her behalf, and may give it subject to any terms or restrictions it thinks expedient.[3]

Settlements.—When the Court pronounces a decree of divorce, or judicial separation on account of the adultery of a wife, it may, if the wife is entitled to any property, order it, or a part of it, to be settled for the benefit of the husband, or children of the marriage, or of both.[4] The High Court and District Court (after confirmation) may further, after a decree of divorce or nullity of marriage, enquire whether there are any ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole, or a portion of the property settled, whether for the benefit of the husband, or the wife, or of the children (if any) of the marriage, or of both children and parents as it thinks fit.[5]

Custody of children.—In suits for judicial separation, divorce, or nullity of marriage the Court may make *interim* and final orders as to the custody, maintenance, and education of the minor children. "Minor children" mean, in the case of sons and daughters of Native fathers, boys who have not completed the age of 16 years, and girls who have not completed the age of 13 years: in other cases it means unmarried children who have not completed the age of 18 years. The Court looks at the merits and demerits of the parties. Where the wife is the innocent party she will not be deprived of the solace of having the custody of her children. But when the marriage is dissolved on account of the adultery of the wife, she is not entitled to have access to the children of the marriage.[6] But she is only entitled

1) s. 37, ib.: I. L, R., 11 Cal., 354: as to the principle on which the Court grants permanent alimony, see 5 B. L. R., Ap. 34: I. L. R., 4 Cal., 260: 5 B. L. R., Ap. 153: 5 B. L. R., 71.
2) 4 Sw. & Tr., 178.
3) Act IV of 1869, s. 38.
4) s. 39, ib.
5) s. 40, ib.: 14 B. L. R., Ap. 6.
6) 6 B. L. R., 318: 5 B. L. R., 71: 1 Sw. & Tr., 492: 2 Sw. & Tr., 275: 3 Sw. & Tr., 248.

to this when free from blame. Where neither husband nor wife are fit to have charge of the children, the Court may direct them to be placed in the custody of relatives.[7]

Miscellaneous Provisions.

Lunatics.—When the husband or wife is a lunatic, or idiot, any matrimonial suit (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the person or persons entitled to his or her custody.[8]

Minors.—Where the petitioner is a minor, he or she must sue by a next friend to be approved of by the Court: no petition presented by a minor under the Act will be filed until the next friend has undertaken in writing to be answerable for costs.[9]

Re-marriage.—When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired, or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its Appellate Jurisdiction, or when any such appeal has been dismissed, or when in the result of any such appeal any marriage is declared to be dissolved, *but not sooner*, it is lawful for husband and wife to marry again.[1] If either marry before the expiration of such period, or before the time for appealing against the decree for dissolution has expired, their marriage is null and void.[2]

Procedure.—The proceedings under the Act are to be regulated by the Code of Civil Procedure.[3]

Appeal.—All decrees and orders made by the Court in any suit or proceeding under the Indian Divorce Act may be enforced and appealed from, in the like manner as the decrees and orders of the Court made in the exercise of its Original Civil Jurisdiction are enforced and may be appealed from, under the laws, rules, and orders for the time being in force. There is, however, no appeal from a decree of a District Judge for divorce or nullity of marriage, nor from the order of the High Court confirming, or refusing to confirm such decree. Neither is there any appeal on the subject of costs only.[4]

Witnesses in matrimonial suits.—See "*Oaths, Evidence and Witnesses.*"

Suits in Camerâ.—The whole or any part of any proceeding may be heard, if the Court thinks fit, with closed doors.[5]

7) 1. L. R., & D., 39.
8) Act IV of 1869, s. 48.
9) s. 49, ib.
1) s. 57, ib.
2) 3 Sw. & Ti., 223 : ib., 509.
3) Act IV of 1869, s. 45 : 4 B. L. R.,O. C., 51.
4) Act IV of 1869, s. 55 : as to appeals see 5 B. L. R. 71 : I. L, R., 6 Bom., 487 : I. L. R,, 4 All., 306.
5) Act IV of 1869, s. 53.

Lower Burmah. — References made to the High Court should as regards Lower Burmah be read as meaning the Special Court constituted under the Lower Burmah Court's Act (XI of 1889): and "District Judge" as meaning a Commissioner of Division, except in the areas for the time being comprised within the local limits of the Ordinary Civil Jurisdiction of the Recorder of Rangoon, and of the Civil Jurisdiction of the Court of the Judge of the town of Moulmein.

The Punjab.—In the Punjab "High Court" as used in this Act means the Chief Court of the Punjab.

Non-regulation Provinces and Allied States.—In —— "High Court" means the High Court, or Chief Court to whose Original Criminal Jurisdiction the petitioner is for the time being subject, or would be subject if he or she were an European British subject of Her Majesty: and "District Judge" means in Sindh the Judicial Commissioner, and in Allied States such officer as the Governor-General appoints by notification in the *Gazette of India*, and in the absence of such officer, the High Court above mentioned.[6]—v. *passim* "*Marriage.*"

Dissolution of Marriage of Native Converts.

Authority—Act XXI of 1866 (as partly repealed).

Meaning of word "Native."—"Native husband" and "Native wife" means a married man, or woman, domiciled in British India, who is not a Christian, Mohammedan, or Jew, and who has completed the age of 16 years and 13 years respectively. "Native law" means law governing persons domiciled in British India who are not Christians, Mohammedans, or Jews.

Suit for conjugal society.—If a Native husband, or wife, changes his or her religion for Christianity, and if in consequence of such change, the husband or wife for the space of six continuous months deserts or repudiates his or her wife or husband, the deserted wife or husband may sue for conjugal society.

Dissolution of marriage.—If either the husband (in answer to the questions of the Court) refuses to cohabit with his wife, or the wife with her husband, and if the Judge is of opinion that the ground for such refusal is the petitioner's change of religion, he will adjourn the case for one year. If during that time the parties do not cohabit, and at the end of that year either the husband or wife, as the case may be, refuses to do so, the Judge will declare the marriage between the parties to be dissolved. On such dissolution the parties may marry again.

Dismissal of suit.—The suit will, however, be dismissed if the husband at its institution was under 16, or the wife under 13

6) I. L. R., 10 Bom., 422: (suit for divorce arising in Native State).

years old, or if the petitioner and respondent are cohabiting as man and wife, or if the Court is satisfied that the respondent is ready and willing to cohabit with the petitioner, or if it be proved that the respondent has deserted the petitioner solely or partly in consequence of the petitioner's cruelty or adultery, or if the petitioner being a male, has at the time of the institution of the suit two or more wives and is cohabiting with one of such wives as man and wife, or if one of such wives is ready and willing to cohabit with him.

Children.—A dissolution of marriage under this Act does not deprive the respondent's children (if any) of their status as legitimate children, or of any right or interest which they would have had according to the native law applicable to them by way of maintenance, inheritance, or otherwise, in case the marriage had not been dissolved.

Alimony.—If a suit is instituted under the Act, and the wife has not sufficient separate property to enable her to maintain herself and to prosecute and defend the suit, the Court may order the husband during the suit to furnish the wife with sufficient funds to conduct the suit and to maintain herself. If the suit is brought by a husband against a wife the Court may order him to make her an allowance for maintenance during the remainder of her life. The allowance, however, will cease on the subsequent marriage of the wife.

Roman Catholics.—This Act does not apply to native converts to Roman Catholicism.

MATRIMONIAL SUITS BY PARSIS.

AUTHORITY—Act XV of 1865.

Nullity of marriage.—A suit for nullity of marriage may be brought by a Parsi husband and wife if (1) the husband or wife was at the time of his or her marriage a lunatic, upon proof that the lunacy existed at the time of the marriage, and still continues; but not if the plaintiff at the time of the marriage, knew that the respondent was a lunatic; (2) in case of non-consummation owing to physical causes.[6]

Divorce may be obtained by a husband or wife on the ground (1) that the husband or wife has been continually absent from his or her wife or husband for the space of seven years, and has not been heard of as being alive within that time by those who would have naturally heard of him or her, had he or she been alive;[7] (2) by a husband for his wife's adultery; (3) by a wife on the ground that the husband has been guilty of adultery with a married, or fornication with an unmarried woman not being a

6) Act XV of 1865, ss. 27, 28. 7) s. 29, ib.

prostitute, or of bigamy coupled with adultery, or of adultery coupled with cruelty, or of adultery coupled with wilful desertion for two years or upwards, or of rape, or of an unnatural offence.[8]

Co-respondent and costs.—In every suit for divorce on the ground of adultery the plaintiff must, unless he obtains the leave of the Court, make the person with whom the adultery is alleged to have been committed a co-defendant; and in any suit by the husband the Court may order the adulterer to pay the whole or any part of the costs of the proceedings.[9]

Judicial separation may be obtained by a wife if (1) the husband treat his wife with such cruelty or personal violence as to render it in the judgment of the Court improper to compel her to live with him, or (2) if his conduct afford her reasonable grounds for apprehending danger to life, or serious personal injury, or (3) if a prostitute be openly brought into, or allowed to remain in the place of abode of a wife by her own husband.[1]

Bars to suits for divorce or judicial separation are condonation, collusion, connivance, aid, and unnecessary and improper delay in instituting the suit, or other legal ground why relief should not be granted (v. *ante*).

Alimony.— In any suit for divorce or separation if the wife has not an independent income sufficient for her support and expenses of the suit, the Court may order the husband to pay her monthly or weekly during the suit such sum, not exceeding one-fifth of the husband's net income, as the Court thinks reasonable; and the Court may in any decree for divorce or judicial separation order the husband to secure to the wife such gross sum, or such monthly, or periodical payments of money for a term not exceeding her life as having regard to her own property (if any), her husband's ability, and the conduct of the parties, it shall deem just. The wife can enforce her right by a suit for damages. Payment of alimony may be ordered to be made to the wife or a trustee on her behalf.[2]

Restitution of conjugal rights.—Where (1) a husband or wife deserts, or without lawful cause ceases to cohabit with his or her wife or husband, the Court may make a decree for restitution where there is no just ground why relief should not be granted (v. *ante*). The decree may be enforced by imprisonment of one month, or fine of Rs. 200, or both.[3]

No suit can be brought to enforce any marriage, or any contract connected with marriage, if at the date of the institution of the suit the husband has not completed the age of 16 years, or the wife 14 years.[4]

8) s. 30, ib.
9) ib.
1) s. 31, ib.
2) ss. 33 34, 35, ib.
3) s. 36, ib.
4) s. 37, ib.

Re-marriage.—When the time limited for appealing against any decree dissolving a marriage has expired (3 months) and no appeal has been presented, or when such appeal has been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, the respective parties may marry again.[5]

Children.—The Court may in any suit for divorce, separation, or nullity pass *interim* and final orders as to the custody, maintenance, and education of the children under 16 years of age as it thinks proper, and may when a decree of divorce or separation is made on account of the wife's adultery (if the wife has property) order a settlement of it, or any part of it, for the benefit of the children of the marriage, or any of them.[6]

5) s 43, ib.

6) ss. 44 45, ib.

DOGS AND FEROCIOUS ANIMALS.

AUTHORITIES—Indian Penal Code : The law relating to dogs, by F. Lupton 1888: and cases cited.

Dogs.—Whoever suffers an injury from a dog has, in certain circumstances, a remedy by action for damages. Every dog is considered harmless by the law until the contrary is proved.[1] When therefore a dog becomes **ferocious, dangerous**, or **mischievous**, it is, as a general rule, necessary for the aggrieved party in order that he may successfully maintain an action for damages to prove what is called "**scienter,**" *i.e.*, that the defendant knew and was well aware that the dog was ferocious, dangerous, or mischievous as the case may be.[2] To maintain the action the plaintiff should show[3] (1) that the defendant kept or harboured the dog; (2) *scienter*; (3) that the plaintiff has suffered damage. If it can be shown that the defendant knew of the savage nature of the dog, it is not necessary to show that any one else had been bitten.[4] It is not necessary to prove "*scienter*" of the defendant personally. If the servant having charge of the dog knew of its ferocity that will be sufficient.[5] It is not necessary to prove negligence in keeping the dog, the gist of the offence being keeping with knowledge: this when followed by injury to the plaintiff is sufficient ground for an action.[6] An action may be brought for the destruction of a dog. The mere circumstance of its being ferocious and at large is not a sufficient justification for killing it. A dog may only be killed in actual self-defence, but not after the danger has ceased.[7]

Ferocious animals.—In an action for damages for injuries caused by an animal naturally ferocious such as lions, bears, tigers, &c., it is not necessary to prove negligence or "*scienter.*" Where the injury arose from a savage monkey it was said that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril: if it does mischief, negligence is presumed; the negligence is in keeping such an animal after notice.[8] The knowingly keeping a savage animal is itself a wrongful act for which an action will lie whenever injury results therefrom. Where the animal is naturally ferocious, knowledge will be presumed on the part of the defendant.[9]

1) Lupton, p. 2.
2) ib., pp. 4, 7.
3) ib., p. 6.
4) ib., p. 8 : 1 F. F., 92.
5) ib., p. 10 : 7 L. R. Ex., 325.
6) 17 L. J. C. P., 124.
7) Lupton, p. 82 : 1 C. & P., 104 : 4 C. & P., 350.
8) 9 Q. B., 112.
9) ib.

Criminal negligence with respect to any animal.—Whoever knowingly or negligently omits to take such order with any animal in his possession, as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal, is punishable with imprisonment (simple or rigorous) for a term which may extend to six months, or with fine which may extend to Rs. 1,000, or with both.[1]

Mischief to animals—v. "*Animals.*"

Watch-dogs.—Every man has a right to keep a dog for the protection of his garden or house. So where a man got into the garden of another by night, and was there injured by a dog, and it appeared that the dog was kept for the protection of the garden, and was tied up all day, but was let loose at night, it was held that the animal had been properly let loose, and that the injury had arisen from the plaintiff's own fault in uncautiously going into the defendant's garden after it had been shut up.[2]

1) Indian Penal Code, s. 289. 2) 1 Esp., 203.

DOMICILE.

Authority—Act X *of* 1865.

Domicile.—A person is said to be domiciled in any place when he resides there and intends to make it his home. The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth, his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death. The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.[1] The domicile of origin prevails until a new domicile has been acquired.[2] A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin. A man is not to be considered as having taken up his fixed habitation in British India merely by reason of his residing there in Her Majesty's Civil or Military service, or in the exercise of any profession or calling.[3] Nor is domicile acquired by residence in a country merely as the representative of a foreign Government, or by residence with such representative as part of his family, or as a servant.[4] A new domicile continues until the former domicile has been resumed, or another has been acquired.[5]

Minors.—The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin, with this exception that the domicile of a minor does not change with that of his parent, if the minor is married, or holds any office or employment in the service of Her Majesty, or has set up with the consent of the parent in any distinct business.[6] Except in the cases above provided for, a person cannot during minority, acquire a new domicile.[7]

Women.—A woman by marriage acquires the domicile of her husband, if she had not the same domicile before, and her domicile during the marriage follows that of her husband, except where they are separated by decree of Court, or where the husband is undergoing a sentence of transportation.[8]

An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person.

Special mode of acquiring domicile.—Any person may acquire a domicile in British India by making and depositing in

1) Act X of 1865, ss. 7, 8.
2) s. 9, ib.
3) s. 10, ib.
4) s. 12, ib.
5) s. 13, ib.
6) s. 14, ib.
7) s. 17, ib.
8) ss. 15, 16, ib.

an office in British India fixed for that purpose a declaration in writing under his hand of his desire to acquire such domicile, provided he has been resident in British India for one year immediately preceding the time of his making such declaration.[9]

Succession to the immoveable property in British India of a person deceased is regulated by the law of British India, wherever he may have had his domicile at the time of his death.[1] "Immoveable property" includes land, incorporeal tenements, and things attached to the earth, or permanently fastened to anything which is attached to the earth.[2] See "*Intestacy*."

Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death.[3] If, however, a man dies leaving moveable property in British India, *in the absence of proof of any domicile elsewhere*, succession to the property is regulated by the law of British India.[4] A person can only have one domicile for the purpose of succession to his moveable property.[5] "Moveable property" means property of every description except immoveable property.[6] See "*Intestacy*."

Payment of debts of deceased.—If the domicile of a deceased person was not in British India, the application of his moveable property to the payment of his debts is regulated by the law of British India.[7]

Administration where property left in British India.—Where a deceased person has left property in British India letters of administration must be granted according to the rules of the Succession Act (see "*Administration*"), although he may have been a domiciled inhabitant of a country in which the law relating to testate and intestate succession differs from the law of British India.[8]

9) s. 11, ib.
1) s. 5, ib.
2) s. 3, ib.
3) s. 5, ib.
4) s. 19, ib.
5) s. 6, ib.
6) s. 3 ib.
7) s. 283, ib.
8) s. 207, ib.

DONATIO MORTIS CAUSA.

AUTHORITIES—Act X of 1865 (Indian Succession), Part XXVIII (does not apply to Hindus or Mahommedans): Act IV of 1882 (Transfer of Property): and cases cited.

Donatio mortis causa is a gift made in contemplation of death. A gift is said to be made in contemplation of death, where a man who is ill and expects to die shortly of his illness, delivers to another the possession of any moveable property, to keep as a gift in case the donor shall die of that illness[1]: *e.g.*, A being ill and in expectation of death, delivers to B the key of a trunk, or the key of a warehouse in which goods of bulk belonging to A are deposited, with the intention of giving him the control over the contents of the trunk, or over the deposited goods, and desires him to keep them in case of A's death. A dies of the illness during which he delivered these articles. B is entitled to the trunk and its contents, or to A's goods of bulk in the warehouse.[2] The law of India follows, generally speaking, that of England on the subject of *donationes mortis causa*. The provisions of the Transfer of Property Act relating to gifts (v. "*Gifts*") do not affect gifts made in contemplation of death.[3]

Its nature.—It is essential to a valid *donatio mortis causa* that it should be made "in such a state of illness or expectation of death as would warrant a supposition that the gift was made in contemplation of that event." It is always made on the condition, expressed or implied, that the gift shall be absolute only in case of the donor's death, and shall therefore be revocable during his life. Therefore, if the donor recovers from the illness during which the gift was made, or if he resume the possession of the gift, the gift will be defeated. The gift will also fail if the donor of the gift survives the person to whom it was made.[4]

Delivery is essential.—For, if the intention be expressed in writing, but no delivery takes place, even though the document be signed by the donor, it will be ineffectual as a *donatio mortis causa*, for in such a case the gift is a legacy, and the writing a testamentary document, which, if it is not attested by two witnesses, as is necessary in the case of a will, is void. But if there is an effectual delivery, with or without writing, the gift will be good, although the writing should not be attested at all. It is well settled, that if a donor intends to make a testamentary gift which turns out to be ineffectual, that gift will not

1) Act X of 1865, s. 178
2) ib.
3) Act IV of 1882, s. 129.
4) Act X of 1865, s. 178.

be supported as a *donatio mortis causa*. It is also well settled that if the donor intends to make a gift *inter vivos* which is ineffectual, it cannot be supported as a *donatio mortis causa*. The following is an example of a *donatio* void for want of delivery:—A being ill, and in expectation of death, puts aside certain articles in separate parcels, and marks upon the parcels respectively the names of B and C. The parcels are not delivered during the life of A. A dies of the illness during which he set aside the parcels; B and C are not entitled to the contents of the parcels.[5]

What is a sufficient delivery.—If any moveable property be actually given by the donor himself to the donee, or by some other person at the donor's request into the hands of the donee, or to some other person as trustee or agent for the donee, a good delivery is constituted. Where the thing itself has not been delivered, the delivery, of some effective means of obtaining it (v. illust. *ante*) is however sufficient; but not the delivery of a mere ineffective symbol.

What may be given.—Any *moveable* property may be given, which could have been disposed of by will;[6] *e.g.*, a bank note, promissory note of the Government of India endorsed in blank and a bill of exchange endorsed in blank; also a mortgage-debt on immoveable property by delivery of the mortgage-deeds;[7] so also a policy of insurance on the life of the donor.[8] So also promissory notes and bills of exchange payable to bearer[9] or to order, though not endorsed by the donor;[1] but the delivery of the title-deeds to an estate will not operate to convey the estate. A gift of a cheque or draft upon a banker is not a good *donatio mortis causa* unless it be cashed or negociated before the donor's death.[2]

Gift subject to debts of donor.—Where there is a deficiency of assets a *donatio mortis causa* is subject to payment of the debts of the donor.[3]

5) ib. 7) ib. 9) 3 P. Wms., 356. 2) L. R., 6 Eq., 19.
6) ib. 8) 33 Beav., 619. 1) 27 Beav., 309. 3) 1 Kay, 658.

EASEMENTS AND LICENSES.

AUTHORITIES—Act XV of 1877 (Limitation): Act V of 1882 (Easements): Act VIII of 1891: J. L. Goddard: The Law of Easements, 4th Edition: The Law of Easements and Licenses in India, by R. B. Michell, 1891: Roscoe's Digest of the Law of Light, 2nd Edition: Criminal Procedure Code: Cases cited.

The law of easements for the territories respectively administered by the Governors of Bombay and Madras, the Lieutenant-Governor of the N.-W. Provinces, and the Chief Commissioners of the Central Provinces, Oudh, and Coorg, is contained in the Indian Easements Act, which is in the main a codification of the English Law, on the subject of easements and *profits à prendre* appurtenant.[1] The law for the rest of British India is partly contained in the Indian Limitation Act;[2] the remaining portion of the law relating to easements is mainly the same as the law of England relating thereto.*

An easement is according to English law "a privilege, without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former;[3] *e.g.*, a right of way. It is a *privilege* and not a right to land, nor to any corporeal interest in land: and thus a grant of a right of way does not convey the soil over which the way passes to the grantee.[4] It is secondly said to be *without profit*; a right by which one person is entitled to remove and appropriate for his own use any part of the soil belonging to another man, or anything growing in, or attached, or subsisting upon his land for the purpose of the profit to be gained from the property thereby acquired in the thing removed, has always been considered in law a different species of right from an easement, and is commonly called a **profit a prendre**: *e.g.*, a right to turn cattle into a lane for the purpose of obtaining pasture.[5] An easement *in gross*, i.e., as easement to which a person is entitled *irrespective* of any land he possesses, does not exist.[6]

Meaning of word in India is more extensive than in England since[7] (1) in those portions of India governed by the Indian Easements Act it includes a *profit à prendre* appurtenant (*i.e.*, annexed to the ownership of immoveable property, known prior

* NOTE.—As to licenses v. *post* and "*Trespass.*"

1) Act V of 1882. See Act VIII of 1891 and Michell, op. cit.
2) Act XV of 1877.
3) Goddard, p. 2.
4) ib., p. 5.
5) ib., p. 8.
6) ib., p. 9.
7) I. L. R., 5 Cal., 945.

to Act XV of 1877 as "an interest in immoveable property, appurtenant to land.") Thus a right in A *as* the owner of a house and farm to graze a certain number of his own cattle on B's field is an easement;[8] and (2) in the portions not so governed it includes a *profit à prendre in gross*,[9] *i.e.*, one not appurtenant to property, and which can be enjoyed by a person not in the possession of enjoyment or occupation of any dominant tenement. So it has been held that a prescriptive right of fishing is an easement if a user of over 20 years without interruption is proved, even though the person entitled may not possess any dominant tenement.[1]

Nature of easements.—Easements are restrictions on the rights incidental to ownership of land: an easement has been said to be a definite portion or fragment taken or detached from the indefinite right of user of the owner of property: *e.g.*, every owner of land in a town may build on such land, subject to any municipal law for the time being in force. The erection of a building by A may exclude the access of light to the windows of the house of B, a neighbouring landowner, or be otherwise detrimental to B: but A cannot be restrained from building.[2] If, however, B has acquired an easement against A, say to light and air, which would be interfered with by the building of A, A may be restrained from exercising his right of building in any manner which may injuriously affect B's easement.[3] The land for the beneficial enjoyment of which the right exists (in the example given, the land of B) is called the **dominant heritage**, and the owner or occupier thereof the dominant owner: the land on which the liability is imposed is called the **servient heritage**, and the owner or occupier thereof the servient owner.[4] An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.[5] Easements may be acquired (1) by grant or contract; (2) by prescription (v. *post*); (3) by implication of law, as in the case of easements of necessity (v. *post*); (4) by local custom; (5) by long user.

Natural rights.—Easements are either created at the will of a land owner affected by them for the benefit of a neighbour, or otherwise acquired by one person as against another person

8) Act V of 1882, s. 4.
9) Act XV of 1877, s. 3.
1) I. L. R., 5 Cal., 945.
2) N. W. P. H. C. R., 182: I. L. R., 6 Bom., 660: 11 H. L. C., 290.
3) Act V of 1882, s. 7.
4) ib., s. 4.
5) ib., s. 6.

who is a land-holder. But a natural right is a right inherent in the possession of land, and given by law to every owner as a matter of course. Such as the right inherent in every owner of soil to necessary **support** from adjacent or subjacent soil,[6] the right of every owner of land that the **air** passing thereto shall not be unreasonably polluted by other persons; the right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by **noise** or **vibration** caused by any other person; the right of every owner of land to so much **light** and **air** as pass vertically thereto. (A right to light and air passing laterally can only be acquired as an easement).

Natural rights with regard to water.—See "*Rivers and Waters.*"

License.—Where one person grants to another, or to a definite number of other persons, a right to do, or to continue to do in or upon the immoveable property of the grantor something which would in the absence of such right be *unlawful*, and *such right does not amount to an easement* or an interest in the property, the right is called a license. Unlike an easement a license is personal (as opposed to praedial), *i.e.*, it is acquired and held not by virtue of the acquirer being an owner or occupier of immoveable property, and in inseparable connection with such property, and it is immaterial whether he is or is not the owner or occupier of any immoveable property. The strictly personal nature of the right is shown by the fact that (except in the case of a license to attend a place of public entertainment) a license cannot, unless the license expressly or by necessary implication authorizes it, be transferred or exercised by the licensee's servant or agent: *e.g.*, A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immoveable property of B. The right cannot be transferred. Any one may grant a license in the circumstances, and to the extent in and to which he may transfer his interests in the property affected by the license. The grant may be express, or implied from the conduct of the grantor, as also may be the revocation of the license. A license to do a thing implies a license to do all things necessary for the enjoyment of any interest or exercise of any right given by the license. A license may be revoked by the grantor, unless (1) it is coupled with a transfer of property and such transfer is in force; (2) the licensee acting upon the license, has executed a work of a permanent character and incurred expenses in the execution. A license may be revoked, though granted for a consideration. The obligation on the licensor being a personal one, the grant does not outlast the

6) Goddard, pp. 2, 3. Act V of 1882, s. 7: I. L. R., 6 Bom., 660.

licensor's interest in the property, and is revoked by the alienation of his interest.[7]

Classes of easements.—(1) Easements are either continuous or discontinuous, apparent or non-apparent. A *continuous easement* is one whose enjoyment is, or may be continual without the act of man: *e.g.*, a right annexed to B's house to receive light by the windows without obstruction by his neighbour A. A discontinuous easement is one that needs the act of man for its enjoyment: *e.g.*, a right of way annexed to A's house over B's land. An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him: *e.g.*, rights annexed to A's land to lead water thither across B's land by an aqueduct, and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. A non-apparent easement is one that has no such sign: *e.g.*, a right annexed to A's house to prevent B from building on his own land.

Who may acquire easements.—An easement may be acquired by the owner of the immoveable property for the beneficial enjoyment of which the right is created, or on his behalf, by any person in possession of the same. One of two or more co-owners of immoveable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.[8]

Easements of necessity.—It frequently happens that property the subject of a grant or bequest is so situated that, unless the person to whom it is granted or bequeathed is permitted to make some use of other land of the grantor or testator, the property granted or bequeathed would be unusable and worthless. An easement of necessity is a permission to make this use: *e.g.*, A grants or bequeaths to B a piece of land adjoining to, and entirely surrounded by, the land of A and of third persons. B may not trespass on the land of these third persons; he cannot, therefore, unless permitted to pass over the land of A, get to his own land. In this case the easement provided by the law is a right or way called "a way of necessity" over A's land. If, on the other hand, it was under similar circumstances impossible to get to A's land except over the land granted or bequeathed to B, A or his representatives would have a "way of necessity" over the lands granted or bequeathed to B. Again, if A grants land to B for the purpose of building a house thereon, B is entitled to

7) Act V of 1882, ss. 52, 53, 54, 56, 59, 60, 61: Michell, p. 139, 144: 1 M. & W., 838. I. L. R. 8 All., 69, 70.
8) Act V of 1882, s. 12, ib.

such amount of lateral and subjacent support from A's land as is necessary for the safety of the house. A similar rule obtains on the partition of the joint property of several persons: if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter is entitled to such easement.[9] In order that an easement of necessity may be created there must be necessity in the strict sense of the term; inconvenience however great, is not sufficient.[1] An easement of necessity is extinguished when the necessity comes to an end.[2] The mode and extent of enjoyment of an easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.[3]

Quasi-easements.—There exist also certain quasi-easements arising out of a qualified and not strict necessity. In the case of easements which are apparent, *and* continuous, the rule is that when one person transfers or bequeaths property to another, if an easement in other immoveable property of the transferor or testator is necessary for enjoying the subject of the transfer or request *as it was enjoyed when the transfer or bequest took place*, the transferee or legatee will *unless* a different intention is expressed or necessarily implied, be entitled to such easement: *e.g.*, A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land. A similar rule applies in the case of partition of joint property,[4] and (though in this there is a departure from English law) in favour of the transferor or legal representatives of the testator.

Acquisition of easements by prescription.—In the territories in which the Easement Act is in force, (v. *ante*) where the access and use of **light or air** to and for any building have been *peaceably* enjoyed therewith (v. *post*) *as* an easement, *without interruption* and for 20 years; and where **support** from one person's land, or things affixed thereto, has been *peaceably* received by another person's land subjected to artificial pressure, or by things affixed thereto, *as* an easement, *without interruption* and for 20 years; and where a **right of way or any other easement** has been *peaceably* (*i.e.*, not only without force but without contest by litigation or otherwise with the party against whom it

9) Act V of 1882, s. 13. The law is the same in those parts of India in which this Act is not in force: see I. L. R., 8 Cal., 956.
1) 10 Exch., 824.
2) s. 41, Act V of 1882.
3) s. 28, ib.: L. R., 13 Ch. Div., 798.
4) Act V of 1882: the rule is the same in the territories not governed by the Act—See I. L. R., 8 Cal., 956: 15 B. L. R., 367: I. L. R., 14 Bom., 452: L. R., 10 App., Cas., 590: Roscoe, pp. 10, 11.

is claimed) *and openly* enjoyed by any person claiming title thereto, *as* an easement, and as of right, (*i.e.*, notoriously, not secretly or by sufferance or permission), *without interruption*, and for 20 years the right to such access and use of light or air, support or other easement is absolute. Each of the periods of 20 years is taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested. "Next before" means that the 20 years must continue to the day on which the action is began. When the property over which a right is claimed belongs to Government the period is 60, and not 20 years.[5] Under certain conditions an exclusion of time is made in favour of the reversioner of a servient heritage. Nothing is an "**enjoyment**" which is had in pursuance of an agreement, from which it appears that the right has not been granted *as* an easement, or if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.[6] Nothing is an "**interruption**" unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made. Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption.[7] In the case of an **easement to pollute water**, the period of 20 years begins when the pollution first prejudices perceptibly the servient heritage.[8] The extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose.[9]

Rights which cannot be acquired by prescription.—(*a*) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed; (*b*) a right to the free passage of **light or air** to an open space of ground; (*c*) a right to **surface water** not flowing in a stream and not permanently collected in a pool, tank, or otherwise; (*d*) a right to **underground water** not passing in a defined channel.[1]

Acquisition of rights to easements under Act XV of 1877.—In those parts of India not subject to the provisions of the Easements Act (v. *ante*) where the access and use of **light** or **air** to and for any building have been *peaceably* enjoyed therewith,

5) Act V of 1882, s. 15 : 8 Cl. and F., 242.
6) ib.
7) ib.
8) ib.
9) s. 28, ib. . L. R., 2 Ch. App., 478.
1) s. 17, ib. : L. R., 6 Eq., 311 ; 7 H. L. C., 385.

as an easement, and as *of right* (*i.e.*, the possession must not be merely permissive ; v. *ante*) without *interruption*, and for 20 years; and where any **way** or **watercourse**, or the use of any water, **or any other easement** (whether affirmative or negative) has been *peaceably* and *openly* enjoyed by any person claiming title thereto *as* an easement and as *of right* without interruption, and for 20 years, the right to such access and use of light or air, way, watercourse, use of water, or other easement is absolute and indefeasible. Each of the periods of 20 years is taken to be a period ending within two years next before (v. *ante*) the institution of the suit wherein the claim to which such period relates is contested. Nothing is an **interruption** within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to, or acquiesced in, for one year after the claimant has notice thereof and of the person making or authorising the same to be made.[2] An extension of time is made under certain conditions in favour of the reversioner of a servient tenement.

Transfer of dominant heritage.—On any transfer by act of parties, or operation of law, of immoveable property, the existing easements (if any) annexed to the property pass to the transferee by force of the transfer itself of the property, unless a contrary intention is expressed or necessarily implied.[3]

Incidents of easements.—Subject to any contract between the dominant and servient owners relating to the servient heritage, and subject to the provisions of the document or decree, if any, by which any easement was imposed and provided, easements are controlled by the following rules: provided that when the easement is customary any incident of the easement is not inconsistent with these rules (1) an easement must not be used for any purpose not connected with the enjoyment of the dominant heritage: *e.g.*, A, as owner of a farm Y, has a **right of way** over B's land to Y. Lying beyond Y, A has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z; (2) the dominant owner must exercise his right in the mode which is least onerous to the servient owner, and when the exercise of an easement can, without

2) Act XV of 1877, ss. 26, 27. It is not necessary that the enjoyment should be personal, or that the building in respect of which light has been enjoyed should have been completed, or used for the full period. (1 Bom., H. C. R. O. J., 148); the existence of the window or other aperture constitutes enjoyment of the light through the apertue (Michell, p. 98). L. R., 4 Ex. 126.

3) Act V of 1882, s. 19. Act IV of 1882, s. 8, contains a similar provision with regard to transfers by act of parties.

detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise must, at the request of the servient owner be so confined: *e.g.*, A has a **right of way** over B's field. A must enter the way at either end and not at any intermediate point. A has a right annexed to his house to cut thatching grass in B's swamp; A, when exercising his easement, must cut the grass so that the plants may not be destroyed; (3) subject to the above rule, the dominant owner may, from time to time, alter the mode and place of enjoying the easement provided that he does not thereby impose any additional burden on the servient heritage: *e.g.*, A, the owner of a saw-mill, has a right to a **flow of water** sufficient to work the mill. He may convert the saw mill into a corn-mill, provided that it can be worked by the same amount of water. A as the owner of a paper-mill, acquires a **right to pollute a stream** by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature of the pollution. But if A has acquired a right to pollute a stream by throwing sawdust into it, this does not entitle A to pollute it by discharging into it poisonous liquor. But the dominant owner of a **right of way** cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage (v. *post* "Ancient Lights" and "Air"); (4) the dominant owner has a right as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement (called an accessory right), but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage: *e.g.*, A has an easement to lay pipes in B's land for the **conveyance of water** to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state. If A has a **right of way** over B's land, which B renders impassable, A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable. If the way is out of repair, he may enter on the land to repair it. If the way is blocked as by a fallen tree, he may remove it. A has an easement of **support** from B's wall. The wall gives way, A may enter on B's land, and repair the wall; (5) the expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement must be defrayed by the dominant heritage; (6)

when an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.[4]

Servient owner's position.—The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement: but he must not do any act tending to restrict the easement, or to render its exercise less convenient: *e.g.*, A, as owner of a house, has a right to lead water and send sewage through B's land. B is not bound as servient owner to clear the watercourse, or scour the sewer.[5]

Extent and mode of enjoyment of easements.—The extent of any easement other than one of necessity (v. *ante*), and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired. In the absence of evidence as to such intention and purpose (1) a **right of way** of any one kind does not include a right of way of any other kind; (2) the extent of a right to the passage of **light or air** to a certain window, door or opening, imposed by a testamentary or non-testamentary instrument, *is the quantity of light or air that entered the opening at* the time the testator died, or the non-testamentary instrument was made; (3) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening *is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period* irrespectively of the purposes for which it has been used; (4) as to pollution (v. *ante*); (5) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.[6]

Increase of easement.—The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement: *e.g.*, A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the **water** of a stream, A alters the machinery of his mill. A cannot thereby increase his right to divert water; (v *ante*, and "Ancient Lights" and "Air," *post.*)[7]

Right to privacy.—A right of privacy exists by usage or custom in the North-West Provinces among those Hindus and Mahommedans who observe the purda. A similar right obtains in Gujarat.[8] The owner (A) of a house entitled to an easement of

4) ss. 20—26, ib.
5) s. 27, ib.
6) s. 28, ib.
7) s. 29, ib.
8) I. L. R., 10 All., 358: 6 Bom. H. C. R. (A. C. 143).

privacy has a right against the owner (B) of the adjacent house that he shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation.[9]

Ancient lights are windows in respect to which a prescriptive right to light has been acquired by 20 years or more of enjoyment. "A person begins to acquire a right to light against a neighbour by mere occupancy." But this right may at any time within 20 years be defeated by the neighbour's building on his land. If, however, light is enjoyed under the necessary conditions for 20 years (v. *ante*), the right to light becomes indefeasible, and any building thereafter by the neighbour against whom the right is acquired, by which light is obstructed, is an actionable wrong for which a suit will lie. The light must have been received through the same aperture, or one in substantially the same position.[1] The easement "is always limited to the particular window or aperture through which the light has had access."[2] Where a building with right of ancient light is pulled down, the easement is not thereby extinguished. Evidence must be preserved of the position of the lights in the old building.[3] The windows in the new building must be in such a position as to substantially receive the same light as was received by the old building. An ancient light may also be put back in a parallel line: the mere putting of it back is not an abandonment of the light.[4] But the building must not be put back so far that the windows of the new building do not enjoy the same light as was enjoyed by the old windows. When a new window in a building cannot be obstructed without interference with an existing right to light, the owner of the servient tenement cannot obstruct the new window, and in due time a right is created in respect of the aperture.[5] Where in the case of a building which is demolished, but which the owner intends to restore with its ancient lights, another building is erected which would interfere with the ancient lights of the former when restored, the Court will grant an injunction to restrain the erection of the building, so causing a disturbance of the easement.[6] The entrance of light through windows need not be continuous. In the case of windows with moveable shutters, it is a sufficient user and access of the light, if the owner opens the shutters occasionally, at any time he pleases for the admission of light, and if there is no such obstruction

9) Act V of 1882, s. 18, illust. *b*.
1) L. R., 53, Ch. D., 238.
2) L. R., 4, C. P. D., 178.
3) 14 Ch. Div., 213: 51 L. J., Ch., 443: 11 H. L. C., 290.
4) 6 Ch. Div., 757.
5) 14 Ch. Div., 713: L. R., 3 Ch. D., 554: 11 H. L. C., 290: L. R., 27 Ch. Div., 43: s. 31, Act V of 1882.
6) 14 Ch. Div., 213.

to, and interruption of, access over the servient land as would defeat the claim.[7] The owner of ancient lights may improve his light, but must not increase it. He may alter his light, but cannot acquire any right to additional light by the alteration,[8] until he has enjoyed the passage of light through the added portion for a period of 20 years. The right to ancient lights is abandoned by closing them up with that intention, as by erecting a blank wall in the place of that in which the ancient windows were.[9] (v. *ante*, *passim*.)

Air.—A prescriptive right to air can only be acquired for the passage of air through a particular aperture through which the air has had access.[1] The air must come in a defined channel, not indefinitely. A right to unobstructed access of the **south breeze** or any other wind, as such, cannot be acquired by prescription, though it may be acquired by express grant.[2] Injunctions will be granted to prevent obstructions and impediments to ventilation, particularly if the obstruction not only impedes the passage of air but pollutes it.[3]

Disputes concerning easements, etc. — Whenever any Magistrate is satisfied that a dispute *likely to cause a breach of the peace* exists concerning the right to do, or prevent the doing of anything in or upon any tangible immoveable property situate within the local limits of his jurisdiction, he may inquire into the matter, and may, if it appears to him that such right exists, make an order permitting such thing to be done, or directing that such thing shall not be done, as the case may be, *until* the person objecting to such thing being done, or claiming that such thing may be done, obtains the decision of a competent Civil Court adjudging him to be entitled to prevent the doing of, or to do such thing, as the case may be: Provided that no such order can be passed permitting the doing of anything where the right to do such thing is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry; or, where the right is exercisable only at particular seasons, unless the right has been exercised during the season next before such institution.[4]

Disturbance of easement.—The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a **suit for compensation** for the disturbance of the easement, or of any right accessory thereto; provided that the disturbance has actually caused *substantial* **damage** to the plain-

7) See Michell, p. 62.
8) 11 H. L., 290 : Act V of 1882, s. 23.
9) 3 B. C., 332 : Act V of 1882, s. 38.
1) L. R., 4 C. P. D., p. 178.
2) 3 B. L. R., O. C., 45 : I. L. R., 14 Cal., 839, 854.
3) 8 Jur. N. S., 987 : L.R., 2 Eq., 242.
4) Crim. Pr. Code, s. 147.

tiff, as by effecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, or (in the case of an easement of **light**) interfering materially with the physical comfort of the plaintiff, or preventing him from carrying on his accustomed business as beneficially as before. In the case of an easement of **air** damage is substantial if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.[5] The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.

Subject to the provisions of the Specific Relief Act (see "*Injunctions*") an **injunction** may be granted to restrain disturbance (*a*) if the easement is actually disturbed, when compensation for such disturbance might be recovered; (*b*) if the disturbance is only threatened or intended, when the act threatened or intended must necessarily, if performed, disturb the easement;[6] v. *post.* These are the remedies open to the dominant owner: he may not himself abate a wrongful obstruction of an easement.[7]

Limitation.—Suits for compensation for obstructing a way, or obstructing or diverting a water-course must be brought within three years of the date of the obstruction or diversion. Suits for compensation for disturbance of other easements must be brought within two years of the disturbance.[8] Where the disturbance is continued, a fresh period of limitation commences to run at every moment of the continuance of the disturbance.[9]

5) s. 33, 34, ib. In those portions of India to which this Act does not apply, no suit will lie for disturbance of a right to light, unless there is an interference with such an amount of light "as was reasonably necessary for the convenient and comfortable habitation of the house:" (3 B. L. R., O. J. 18, 45: I. L. R., 14 Cal. 839, 855), nor (following the English decisions) for disturbance of a right to air unless "the obstruction is a nuisance or injurious to health."—(15 B. L. R., 361, 367, and the cases cited above.)

6) s. 35, ib.

7) s. 36, ib. The rule as to abatement would appear to be otherwise in those parts of India where the Act is not in force: see I. L. R., 7 Cal. 665.

8) Act XV of 1877, Sch. II, Arts, 37, 36.

9) s. 23, ib.

EUROPEANS AND EUROPEAN BRITISH SUBJECTS.

AUTHORITIES—Criminal Procedure Code. Act IX of 1874 (European Vagrancy): Act XI of 1856 (European Deserters.)

European British subjects means—(1) Any subject of Her Majesty born, naturalised, or domiciled in the United Kingdom of Great Britain and Ireland, or in any of the European, American, or Australian Colonies or possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope, or Natal: (2) Any child or grandchild of any such person by legitimate descent. In all civil matters, European British subjects are subject, in the same manner, to the same tribunals, and to the same procedure as persons who are not European British subjects. The law of Criminal Procedure however contains special provisions applicable to European British subjects only. A European British subject who after being determined to be a vagrant, or who on being convicted of having returned to India without special permission within five years from the date of his embarkation in violation of his agreement to that effect, or of begging, remains in India, loses his privilege under the Code of Criminal Procedure of being treated as such.

What Magistrates may try.—No Magistrate unless he is a Justice of the Peace, and (except in the case of a District Magistrate, or a Presidency Magistrate), unless he is a Magistrate of the first class and an European British subject, can inquire into or try any charge against an European British subject.[1] But this rule does not prevent any Magistrate from taking cognisance of an offence committed by any European British subject in any case in which he could take cognisance of a like offence if committed by another person; provided that, if he issues any process for the purpose of compelling the appearance of an European British subject accused of an offence, such process must be made returnable before a Magistrate having jurisdiction to inquire into or try the case.[2]

Sentence which may be passed by Magistrates.—No Magistrate, other than a District Magistrate or Presidency Magistrate, can pass any sentence on an European British subject other than imprisonment for a term which may extend to three months, or fine which may extend to Rs. 1,000, or both; and a District Magistrate cannot pass any such sentence other than one of imprisonment for a term which may extend to six months, or fine

1) Cr. Pr. Code, s. 443. 2) s. 445, ib.

which *may extend to* Rs. 2,000, or both.[3] When an European British subject is accused of an offence before a Magistrate, and such offence cannot, in the opinion of such Magistrate, be adequately punished by him, and is not punishable with death or with transportation for life, such Magistrate must, if he thinks that the accused ought to be committed, commit him to Court of Session, or in the case of a Presidency Magistrate, to the High Court. When the offence which appears to have been committed is punishable with death, or with transportation for life, the commitment must be to the High Court.[4]

What Sessions Judges may try.—No Judge presiding in a Court of Session, except the Sessions Judge, can exercise jurisdiction over a European British subject, unless he himself is an European British subject; and, if he is an Assistant Sessions Judge, unless he has held the office of Assistant Sessions Judge for at least three years, and has been especially empowered in this behalf by the Local Government.[5]

Sentence which may be passed by Court of Session.—No Court of Session can pass on any European British subject any sentence other than a sentence of imprisonment for a term which may extend to one year, or fine, or both. If at any time after the commitment and before signing judgment, the presiding Judge thinks that the offence which appears to be proved cannot be adequately punished by such a sentence, he must record his opinion to that effect, and transfer the case to the High Court.[6]

Jury and Assessors.—In trials of European British subjects before a High Court or Court of Session, if before the first juror is called and accepted. or the first assessor is appointed, as the case may be, any such subject requires to be tried by a mixed jury, the trial must be by a jury of which not less than *half* the number must be Europeans or Americans, or both Europeans and Americans. When any such trial before a Court of Session would in the ordinary course be with the aid of assessors, the European British subject accused may, *instead* of claiming to be tried by a mixed jury, require that not less than *half* the number of the assessors shall be Europeans or Americans, or both Europeans and Americans.[7] In trials of Europeans British subjects before a District Magistrate, any such subject may, in a summons case before he is heard in his defence, or in a warrant-case before he enters on his defence, claim that the trial shall be by a mixed jury so composed as aforesaid.[8]

3) s. 446, ib.
4) s. 447, ib.
5) s. 444, ib.
6) s. 449, ib.
7) s. 451, ib.
8) s. 451A, ib.

European British subject and native jointly accused.—In any case in which an European British subject is accused jointly with a person not being an European British subject, and such British subject is committed for trial before a High Court or Court of Session, such subject and person may be tried together, and the procedure on the trial must be the same as it would have been had the European British subject been tried separately. But if the European British subject claims to be tried by a mixed jury or mixed set of assessors and the person not being an European British subject requires to be tried separately, the latter person must be tried separately.[9]

When any person claims to be dealt with as an European British subject, he must state the grounds of such claim to the Magistrate before whom he is brought for the purposes of the inquiry or trial. The Magistrate must thereupon inquire into the truth of such statement, and allow the person making it a reasonable time within which to prove that it is true, and then decide whether he is or is not an European British subject, and deal with him accordingly. When any such person is committed by the Magistrate for trial before the Court of Session, and such person before such Court claims to be dealt with as an European British subject, such Court must, after such further inquiry (if any) as it thinks fit, decide whether he is or is not an European British subject and deal with him accordingly. When the Court before which any person is tried decides that he is not an European British subject, such decision is a ground of appeal from the sentence or order passed.

Failure to claim right.—But if an European subject does not claim to be dealt with as such by the Magistrate before whom he is tried, or by whom he is committed, or if when such claim has been made before, and disallowed by, the committing Magistrate, it is not again made before the Court to which such subject is committed, he will be held to have relinquished his right to be dealt with as such European British subject, and will not be allowed to assert it in any subsequent stage of the case. Unless the Magistrate has reason to believe that any person brought before him is not an European British subject, the Magistrate is bound to ask such person whether he is such a subject or not.[1] If an European British subject relinquishes his right, his case is determined under the ordinary law, and jurisdiction (appellate and revisional) depends accordingly.[2]

Direction in the nature of a writ of habeas corpus.—See "*Habeas Corpus.*"

9) s. 452, ib. 1) s. 454, ib. 2) I. L. R., 12 Bom., 561.

Other Europeans and Americans.—In every case triable by jury or with the aid of assessors, in which an European (not being an European British subject) or an American is the accused person, or one of the accused persons, not less than half the number of jurors or assessors must, if practicable, and if such European or American so claims, be Europeans or Americans. If such European or American is tried before the Court of Session jointly with a person not an European or American, and is tried with mixed jury or mixed set of assessors, the latter person may claim to be tried separately.[3]

Appeal.—Every sentence passed on an European British subject by an Assistant Sessions Judge, or Magistrate (not a Presidency Magistrate) is appealable to the High Court or Court of Session, at his option.[4] But a sentence passed on such a person by a Presidency Magistrate is appealable, only if it be one of imprisonment exceeding six months, or of fine exceeding Rs. 200, and then only to the High Court.[5] All appeals from the Court of Session lie to the High Court.[6]

Justices of the Peace.—See "*Justice of the Peace.*"

Offences committed out of British India.—When an European British subject commits an offence in the dominions of a Prince or State in India in alliance with Her Majesty he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found; but no charge as to any such offence can be inquired into in British India unless the Political Agent, if there be one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India.[7]

Vagrant Europeans.—'Vagrant' means a person of European extraction (this does not include Eurasians) found asking for alms, or wandering about without any employment or visible means of subsistence. By Act IX of 1874, certain provisions are made for the production by the Police of a person who is apparently a vagrant before a Police Magistrate in the Presidency Towns, and before a Justice of the Peace outside the Presidency Towns, and for a declaration by such Magistrate or Justice of the Peace that such person is a vagrant. The Act further provides that such person may either be sent to a Government workhouse, or if the vagrant be likely to find employment in any place subject to the Local Government, be forwarded to such place, and assisted in finding employment there. If the vagrant fails to obtain employment within 15 days of his arrival, he will be forwarded to a

3) ss. 460, 461, Cr. Pr. Code.
4) s. 408.
5) ib., s. 411.
6) s. 410, ib.
7) s. 188, ib.

workhouse. If after the lapse of a reasonable time no suitable employment is obtainable for any such vagrant the Local Government may either (on certain terms set out in the Act) cause him to be removed from British India, the cost of such removal being paid by Government, or it may release him. A persistent vagrant, or one who has been convicted under the Act, is deprived of his privileges as an European British subject.[8] The provisions of ss. 109, 110, Criminal Procedure Code, relating to the taking of security for good behaviour, from vagrants and suspected persons and from habitual offenders, do not apply to European British subjects in cases where they may be dealt with under the Vagrancy Act.[9]

Importers of Europeans.—Whenever any person of European extraction lands in India, or being a non-commissioned officer, or soldier in the army, leaves the army in India, under an engagement to serve any other person, or any company, association or body of persons in any capacity, and becomes chargeable to the State as a vagrant within one year after his arrival in India, or leaving the army (as the case may be), then the person or company, &c., is liable to pay to the Government the cost of his removal under the Act and all other charges incurred by the State in consequence of his becoming a vagrant.[1]

Sailors.—Whenever a sailor of European extraction, not being a British subject, is discharged from his ship in any British Indian port, and becomes chargeable to the State as a vagrant within one year after his discharge from the ship, the person who at the date of the discharge is the owner or agent of the ship is liable as above mentioned.[2]

European in charge of animals.—When any person of European extraction lands in India, being or having been during his passage to India, or from one Indian port to another, in charge of, or in attendance upon, any animal, becomes chargeable to the State as a vagrant within a year after his arrival, then the consignee of such animal, or the agents in India for its sale, or if the consignee and agents cannot be found, the agent of the ship is liable as above mentioned. The consignee or agent is entitled to charge the consignor for any payment made to Government under this section.[3]

European deserters.—If any officer or soldier of the land forces in India has been concealed on board any merchant vessel, and the master or person in charge is ignorant of the same through neglect of his duty, or want of proper discipline, he is liable to a fine not exceeding Rs. 500.[4]

8) Act IX of 1874.
9) Cr. Pr. Code, s. 111.
1) s. 31, Act IX of 1874.
2) ib.
3) s. 32, ib.
4) Act XI of 1856.

EXCHANGE.

AUTHORITY—Act IV of 1882 as amended (Transfer of Property).

Definition.—When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an *exchange.* A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.—See "*Sale.*"[1]

Registration.—It follows therefore that if the value of the thing exchanged is Rs. 100 and upwards, and the thing is tangible immoveable property, an instrument in writing, which must be registered, is necessary to complete the exchange.[2]

Rights and liabilities of parties.—*In the absence of a contract* to the contrary, the party deprived of the thing, or part thereof, he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation, or to the return of the thing transferred by him.[3] Save as above provided, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.[4]

On an exchange of money each party thereby warrants the genuineness of the money given by him.[5]

1) s. 118, Act IV of 1882.
2) s. 54, ib.
3) s. 119, ib.
4) s. 120, ib.
5) s. 121, ib.

EXECUTION.

AUTHORITIES—Civil Procedure Code : Cases cited.

What it is.—Execution is the enforcement, by the power and hand of the law, of decrees passed by Courts of Justice. *A decree is a mere adjudication upon a right claimed in a Civil* Court. Where the judgment-debtor, *i.e.*, the person against whom a decree or order has been passed, has failed, or refused to obey the decree, the Court will enforce its decree either by the delivery of property specifically decreed, by the arrest and imprisonment of the judgment-debtor, by the attachment or seizure of his property, or otherwise, as the nature of the relief sought may require.[1]

A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. The Court executing a decree sent to it has the same powers as if it had been passed by itself.[2]

Application for execution.—When the holder of a decree desires to enforce it, he must apply to the Court which passed the decree, or, if the decree has been sent to another Court, then to such Court The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor. Where an application to execute a decree for the payment of money, or delivery of other property, has been made and granted, no subsequent application to execute the same decree will be granted after the expiration of 12 years, except when the judgment-debtor has, by fraud, or force, prevented the execution of the decree, within 12 years immediately before the application from any of the following dates (namely) :—(*a*) the date of the decree sought to be enforced, or, of the decree (if any) on appeal affirming the same ; or (*b*) when the decree, or any subsequent order, directs any payment of money, or, the delivery of any property to be made at a certain date, the date of the default in making the payment, or delivering the property.[3]

Order for execution.—If the application is in proper form it will be admitted by the Court, and entered in the register of the suit.

Notice in certain cases.—If (*a*) more than one year has elapsed between the date of the decree and the application for its execution ; or (*b*), if the enforcement of the decree be applied

1) s. 223, Civ. Pr. C. 2) s. 228, ib. 3) s. 230, ib.

for against the legal representative of a party to the suit, in which the decree was made, notice will be given to the judgment-debtor, requiring him to show cause: no such notice however is necessary in case (*a*) if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed, or of the last order against the party against whom execution is applied for, passed on any previous application for execution; or, in case (*b*) if upon a previous application for execution against the same person, the Court has ordered execution to issue against him. In default of appearance, or cause shown, execution will be ordered.[4]

Application for execution by joint decree-holder.—If a decree has been passed jointly in favour of more persons than one, any one or more of such persons, or his or their representatives, may apply for the execution of the whole decree for the benefit of them all, or, when any of them has died, for the benefit of the survivors and the representative in interest of the deceased.[5]

By transferee of decree.—If a decree be transferred by assignment in writing, or by operation of law, from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it; provided that:—(*a*) when the decree has been transferred by assignment, written notice of the application will be given to the transferor and the judgment-debtor, and the decree will not be executed until the Court has heard their objections (if any) to execution; (*b*) where a decree for money against several persons has been transferred to one of them, it cannot be executed against the others.[6] The proper remedy for the transferee is to sue his co-judgment-debtors in a regular suit, for contribution, and to compel them to pay him their shares of the amount for which the decree was purchased. Every transferee of a decree holds it subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.[7] Any answer which would have been good to the claim of the transferor will be good to the claim of his transferee.

Against legal representative.—If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it, to execute the same against the legal representative of the deceased, who will be liable only to the extent of the property of the deceased which has come to his hands, and has not been duly disposed of.[8]

4) s. 248, ib.
5) s. 231, ib.
6) s. 232, ib.
7) s. 233, ib.
8) s. 234, ib.

Of staying execution.—The Court to which a decree has been sent for execution will, upon sufficient cause being shown, stay the execution to enable the judgment-debtor to apply to the Court by which the decree was made, or to any Court having appellate jurisdiction in respect of the decree or its execution, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto; and in case the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution or discharge of such property or person pending the result of the application for such order.[9] Before passing an order of this nature the Court may require the judgment-debtor to give such security, or impose such conditions upon him as it thinks fit.[1] No discharge under an order of this kind, of the property or person of a judgment-debtor, prevents it or him from being re-taken in execution of the decree sent for execution.[2] If a suit be pending in any Court against the holder of a decree of such Court on the part of the person against whom the decree was passed, the Court may stay execution on the decree either absolutely or on such terms as it thinks fit, until the pending suit has been decided.[3]

Decree how enforced: for money.—Every decree or order directing a party to pay money, as compensation or costs, or as the alternative to some other relief granted by the decree or order, or otherwise, may be enforced by the imprisonment of the judgment-debtor, or by the attachment and sale of his property, or by both.[4] Women are, however, exempted from liability to arrest or imprisonment, in execution of a decree for money.[5]

For mesne profits.—If the decree be for mesne profits or any other matter, the amount of which in money is to be subsequently determined, the property of the judgment-debtor may, before the amount due from him under the decree has been ascertained, be attached as in the case of an ordinary decree for money.[6]

For sum under Rs. 1,000.—When a decree is passed for a sum of money only, not exceeding Rs. 1,000, the Court may, when passing the decree, on the oral application of the decree-holder, order immediate execution either against the person of the judgment-debtor, if he is within the local limits of the jurisdiction of the Court, or against his moveable property within the same limits.[7]

9) s. 239, ib.
1) s. 240, ib.
2) s. 241, ib.
3) s. 243, ib.
4) s. 254, ib.
5) s. 245A, ib.
6) s. 255, ib.
7) s. 256, ib.

For specific moveables or recovery of wives.—If the decree be for any specific moveable, or for any share in a specific moveable, or for the recovery of a wife, it may be enforced by the seizure, if practicable, of the moveable or share, and by its delivery to the party to whom it had been adjudged, or by the imprisonment of the judgment-debtor, or by attaching his property, or by both imprisonment and attachment, if necessary. When any attachment has been in force for six months, if the judgment-debtor has not obeyed the decree, the decree-holder may apply to have the attached property sold. If no application has been made at the end of six months the attachment will be released.[8]

For specific performance or restitution of conjugal rights.—When the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for the performance of, or abstention from any other particular act, has been made, has had an opportunity of obeying the decree or injunction, and has wilfully failed to obey it, the decree may be enforced by his imprisoment, or by the attachment of his property, or by both. When any attachment has remained in force for one year, if the judgment-debtor has not obeyed the decree, the decree-holder may apply to have the attached property sold. If at the end of the year no application has been made to have the property sold, the attachment will be released.[9]

For execution of conveyances or endorsements of negotiable instruments.—If the decree be for the execution of a conveyance, or for the endorsement of a negotiable instrument, and the judgment-debtor neglects or refuses to comply with the decree, the decree-holder may prepare the draft of a conveyance or endorsement in accordance with the terms of the decree, and deliver it to the Court. The Court will thereupon serve the draft on the judgment-debtor, together with a written notice stating that his objections, if any, thereto must be made within a certain time. The decree-holder may also tender a duplicate of the draft to the Court for execution; on proof of service, the Court will execute the duplicate so tendered, or, as altered by it, in order to bring it into accordance with the terms of the decree. If any party objects to the draft served on him, he must, within the time fixed, state his objections in writing: they will then be argued before the Court.[1]

For immoveable property.—If the decree be for the delivery of any immoveable property, possession will be given to the party to whom it has been adjudged, and, if need be, by removing

8) s. 259, ib. 9) s. 260, ib. 1) s. 261, ib.

any person bound by the decree who refuses to vacate the property.[2]

Delivery of immoveable property when in occupancy of tenant.—If the property is in the occupancy of a tenant or other person entitled to occupation, and not bound by the decree to relinquish such occupancy, the Court will order delivery to be made by affixing a copy of the warrant on the property, and proclaiming to the occupant, the substance of the decree in regard to the property or, if the occupant can be found, by serving a notice on him containing such substance.[3]

For partition or separation of share.—If the decree be for the partition, or for the separate possession of a share of an undivided estate paying revenue to the Government, the partition of the estate, or the separation of the share, is made by the Collector.[4]

Mode of paying money.—All money payable under a decree must be paid either into the Court whose duty it is to execute the decree; or out of Court to the decree-holder, or otherwise as the Court which made the decree directs.[5]

Agreement to give time and for satisfaction.—Every agreement to give time for the satisfaction of a judgment-debt is void unless made for consideration, and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable. Every agreement for the satisfaction of a judgment-debt, which provides for the payment, directly or indirectly, of any sum in excess of the sum due, or to accrue due under the decree, is void unless it is made with the like sanction. Any sum paid in contravention of these provisions will be applied to the satisfaction of the judgment-debt; the surplus, if any, is recoverable by the judgment-debtor.[6]

Payment to decree-holder.—If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part, to the satisfaction of the decree-holder, or if any payment is made in pursuance of an agreement of the nature mentioned in the last paragraph, the decree-holder must certify such payment or adjustment to the Court whose duty it is to execute the decree. The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, why such payment or adjustment should not be recorded as certified; and if, after due service of the notice, the decree-holder fails to appear on the day fixed, or to show cause, the Court will record the same accordingly. Unless such a payment or adjustment has

2) s. 262, ib. 3) s. 264, ib. 4) s. 265, ib. 5) s. 257, ib. 6) s. 257A, ib.

been certified as above, it will not be recognized as a payment or adjustment of the decree by any Court executing the decree.[7]

Sales in Execution of Decrees.

General rules.—Such sales are conducted by a public officer and made by public auction, except in the case of negotiable instruments and shares in public companies, which may be sold through a broker at the market rate of the day. When any property is ordered to be sold, a proclamation of sale is made specifying the time and place of the sale, a copy of which is fixed up in the Court-house, and in the case of land paying revenue to Government, also in the Collector's office. Except in the case of perishable articles, no sale can take place, without the consent in writing of the judgment-debtor, until after the expiration of at least 30 days, in the case of immoveable, and of 15 days in the case of moveable property, from the date on which the proclamation was fixed in the Court-house. Officers concerned in execution-sales cannot bid for, or buy property sold: nor can the decree-holder do so without the express permission of the Court: if he does so, either by himself or through another person, the sale may be set aside on the application of the judgment-debtor,[8]

Power to adjourn and stop of sale.—The Court may adjourn any sale (other than a sale by the Collector) to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for so doing: provided that when the sale is made in, or within the precincts of, the Court-house, no such adjournment can be made without the leave of the Court. Whenever a sale is adjourned more than seven days, a fresh proclamation must be made, unless the judgment-debtor consents to waive it. Every sale must be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court that ordered the sale.[9]

Proceeds of sale how applied.—Whenever assets are realized by sale, or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction, the assets, after deducting the costs of the realization, are divided rateably among all such persons: provided that:—(*a*) when any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer will not as such be entitled to share in any surplus arising from such sale; (*b*) when any

7) s. 258, ib. 8) s. 286, ib., *et seq.* 9) s. 291, ib.

property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold; (*c*) when immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale will be applied—*first*, in defraying the expenses of the sale: *secondly*, in discharging the interest and principal-moneys due on the incumbrance: *thirdly*, in discharging the interest and principal-moneys due on subsequent incumbrances (if any): and *fourthly*, rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which made the decree ordering such sale, for execution of such decrees, and have not obtained satisfaction.[1]

Irregularity does not vitiate sale of moveable property.—No irregularity in publishing, or conducting the sale of moveable property vitiates the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person be the purchaser) for the recovery of the specific property, and for compensation in default of such recovery.[2]

What Courts may order sales of land.—Sales of immoveable property in execution of a decree may be ordered by any Court other than a Court of Small Causes.[3]

Postponement of sale.—When an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by mortgage, or lease, or private sale of such property, or some part thereof, or of any other of his immoveable property, the Court may, on his application, postpone the sale in order to enable him to raise the amount, at the same time, granting him a certificate authorizing him to make the proposed mortgage, lease, or sale. No mortgage, &c., is absolute until confirmed, and all moneys payable under such mortgage, &c., must be paid into Court, and not to the judgment-debtor.[4]

Setting aside of immoveable property on ground of irregularity.—The decree-holder, or any person whose immoveable property has been sold may, where he has sustained substantial injury, apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; if no such application is made, or if made is disallowed, the Court

1) s. 295, ib. 2) s. 298, ib. 3) s. 304, ib. 4) s. 305, ib.

will confirm the sale as regards the parties to the suit and the purchaser. No sale of immoveable property is absolute until it has been confirmed. A certificate of sale is given to the purchaser, and if the sale is set aside the price is returned to him.[5]

Resistance to execution.—If, in the execution of a decree for the possession of property, the officer charged with the execution is resisted or obstructed by any person, the decree-holder may complain to the Court at any time within one month from the time of such resistance or obstruction. The Court will fix a day for investigating the complaint, and will summon the party against whom the complaint is made to answer it. If it then appears that the obstruction or resistance is occasioned by the judgment-debtor, or by some person at his instigation, and if after order made by the Court in regard to such obstruction, it is continued without just cause, the judgment-debtor may be imprisoned for a term which may extend to 30 days.[6]

Procedure in case of obstruction by claimant in good faith.—If the resistance or obstruction has been occasioned by any person other than the judgment debtor, claiming in good faith to be in possession of the property on his own account, or on account of some person other than the judgment-debtor, the claim is numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant.[7]

Case of person dispossessed disputing decree-holder's right to possession.—If any person other than the judgment-debtor is dispossessed of any property in execution of a decree, and such person disputes the right of the decree-holder to dispossess him of such property under the decree, on the ground, that the property was *bonâ fide* in his possession on his own account, or on account of some person other than the judgment debtor, and that it was not comprised in the decree, or that, if it was comprised in the decree, he was not a party to the suit in which the decree was passed, he may apply to the Court. If the Court finds the grounds of objection well-founded, it will make an order that the applicant recover possession of the property; otherwise it will dismiss the application. The party against whom an order is passed may institute a suit to establish the right which he claims to the present possession of the property, but subject to the result of such suit, if any, the order is final. The provisions in this and the preceding paragraph do not apply in the case of persons to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree is made.[8]

Registering possession of immoveable property.—If

5) s. 311, ib., *et seq.* 6) ss. 328—330 ib. 7) s. 331, ib. 8) ss. 332, 333, ib.

the purchaser of any immoveable property sold in execution of a decree be resisted, or obstructed by the judgment-debtor, or any one on his behalf in obtaining possession of the property, the above-mentioned provisions, relating to resistance or obstruction to a decree-holder in obtaining possession of the property adjudged to him, are applicable. If the purchaser of any such property is resisted, or obstructed by any person other than the judgment-debtor, claiming in good faith a right to its present possession, or if, in delivering possession, any such person is dispossessed, the Court, on the complaint of the purchaser or the person so dispossessed, will inquire into the matter of the resistance, obstruction, or dispossession, as the case may be, and pass such order thereon as it thinks fit. The party against whom such order is passed may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order is final.[9]

Sovereign princes, ruling chiefs, ambassadors, and envoys.—See "*Aliens*," p. 46.

Execution of decree of Appellate Court.—When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in first or second appeal desires to obtain execution, he must apply to the Court which passed the decree against which the appeal was preferred.

Execution by the Collector.—Where the execution of any class of decrees has been conferred on the Collector by the Local Government by notication in the Gazette, that official acts under certain special rules.[1]

Resistance to bailiff: breaking doors.—The officer of the Court is always justified in breaking open doors, in order to give over possession of real or immoveable property, or to execute process in criminal cases. In all cases when the door is open the bailiff may enter the house and do execution at the suit of any subject, either of the body or of the goods.[2] But a Civil Court's bailiff, in executing a process against the moveable property of a judgment-debtor, has no authority to use force, or break open a door or gate.[3] Resistance however would probably be punishable, and would certainly be so if any personal violence was used to the bailiff.[4] If a bailiff break open the doors of a third person, in order to execute a decree against a judgment-debtor, he is a trespasser if it turn out that the person or goods are not in the house.[5] As to the penalty for resisting the taking of property by the lawful authority of a public servant, see "*Contempt of Court and of authority of Public Servants.*"

9) ss. 334, 335, ib.
1) See s. 320, ib., *et seq.*
2) 7 Bom. H. C., C. C., 83.
3) 7 Suth. Cr., 12.
4) Mayne, Penal Code, p. 165.
5) 7 Bom. H. C., *supra*.

EXECUTOR.

AUTHORITIES—Act X of 1865 (Succession Act): Act V of 1881 Probate and Administration Act): Act XII of 1855: Act XIII of 1855: Civil Procedure Code: Act XV of 1877.

Nature of the offices of executors and administrators.—Upon the death of a person who leaves property it is necessary that there should be some one legally entitled to take possession of his estate, receive what was due to him, be liable to pay what was due by him, and empowered to distribute the residue left, after all payments on account of the estate have been made, among the persons entitled thereto. Most wills name a person, or several, who is, or are, to perform the duties already referred to in respect of the testator's estate. Such a person so named or appointed by a will is called an *executor*. **An executor means** a person to whom the execution or carrying out of the last will of a deceased person is by the testator's appointment confided.[1] He is the legal representative of the deceased for all purposes, and all the property of the deceased person vests in him as such.[2] The property of the deceased is considered to belong to him for the purpose of paying the debts of the deceased and the legacies given by him, and for distribution of the residue of the property among the persons entitled. The executor appointed by a will is generally entitled, as a matter of course, to be recognized by the Courts as such and to obtain from a competent Court a written recognition of his executorship authorizing and empowering him in pursuance thereof to perform all the above-mentioned duties in respect of the estate of the deceased. Such a written authority is called **probate**. When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.[3] On the other hand (1) if a person dies intestate; or (2) has failed to appoint or indicate who is to act as executor of his will; or (3) the executor appointed renounces, that is to say, refuses to act, it is necessary that some other person be appointed by a competent Court to perform all the duties of an executor in respect of the estate of the deceased. The person so appointed is called an *administrator*, and the authority by which he is appointed is called **letters of administration** simply (in the case of intestacy), and letters of administration "with the will annexed," where the testator has left a will, but has not appointed

1) s. 3, Act X of 1865: s. 3 Act V of 1881.

2) s. 179, ib.: s. 4, ib.

3) s. 186, ib.: s. 11, ib.

an executor, or the latter renounces the executorship. Speaking generally, the persons who are entitled to the grant of letters of administration are (in the case of intestacy) the heirs, and (in the cases of a will appointing no executor, &c.) the beneficiaries under the will.

The law relating to executors is mainly contained in the Indian Succession Act (X of 1865) which constitutes the law of India in the case of all persons, except Hindus, Mahommedans and Buddhists. The latter. are governed by the Probate and Administration Act (V of 1881), Succession Certificate Act (VII of 1889) and in the case of wills by Hindus, Jains, Sikhs and Buddhists in the Lower Provinces of Bengal, and in the Towns of Madras and Bombay by the Hindu Wills Act (XXI of 1870). The provisions of Act V of 1881 are nearly the same as those of Act X of 1865 on the subject of executors. The points in which they differ have been noted below.

Necessity of probate.—In cases governed by the Indian Succession Act, no right as executor or legatee can be established in any Court unless probate has been granted of the will under which the right is claimed, or administration has been granted with copy annexed of authenticated copy of will in the case of a will proved abroad.[4] In the case of Hindus, Mahommedans, and Buddhists who are not governed by this Act, it is necessary to obtain either probate, or administration, or a succession certificate before recovery can be had through the Courts of debts due from debtors of a deceased person by any person claiming to be entitled to the effects of a deceased person, or to any part thereof.

Executor may renounce.—A person appointed executor cannot be compelled to accept the office, but he may be called upon to accept or refuse. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing: when made, it precludes him from ever thereafter applying for probate of the will appointing him executor.[5] An executor cannot in part refuse. He must refuse entirely, or not at all.[6] If an executor renounces or fails to accept the executorshio within the time limited for acceptance, administration will be granted to others.—See "*Administration.*"

Who may be.—As a general rule, any person may be appointed an executor. If a minor is appointed, probate will not be granted to him during his minority;[7] but an administrator will be appointed who will administer the estate until the majority of

4) s. 187, Act X of 1865.
5) s. 194, Act X 1865: s. 17, Act V of 1881.
6) Williams on Executors, 286.
7) s. 183 Act X 1865; s. 8, Act V of 1881.

the executor. A married woman may be executrix, but in cases to which the Succession Act applies, probate will not be granted to her without the previous consent of her husband.

Appointment of an executor may be express, or by necessary implication: *e.g.*, A wills that C be his executor if B will not. B is appointed executor by implication.[8]

Executor de son tort.—A person who intermeddles with the estate of a deceased person, or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an *executor de son tort* or executor of his own wrong. But intermeddling (for the purpose of preservation) with the goods of the deceased, or providing for his funeral, or for the immediate necessities of his family or property, or dealing in the ordinary course of business with goods of the deceased received from another, does not constitute a man *executor de son tort*.[9] An *executor de son tort* is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands, after deducting payments made to the rightful executor or administrator, and payments made in due course of administration.[1]

Powers of executors and administrators.—(1) *Power to sue.* They have the same power to sue in respect of all causes of action that survive the deceased, and to distrain for all rents due to him at the time of his death, as the deceased had when living.[2] All demands and rights of action in favour of, or against the deceased survive to and against his executor or administrator; except causes of action for defamation, assault, or other personal injuries not causing the death of the party: and except also cases where, after the death of the party, the relief sought could not be enjoyed, or if granted would be nugatory: *e.g.*, A sues for divorce. A dies: the cause of action does not survive. As to actions for compensation and on account of certain wrongs—v. *infra*.[3] (2) *Power of disposition.* They have power to dispose of the property of the deceased, either wholly or in part, in such manner as they may think fit: *e.g.*, the deceased has made a specific bequest of part of his property; the executor not having assented (v. *infra*) to the bequest, sells the subject of it; the sale is valid. So also if an executor mortgages part of the immovcable estate of the deceased, the mortgage is valid.[4]

8) s. 182, ib.: s. 7, ib.
9) s. 265, Act X of 1865.
1) s. 266, ib., this and the preceding section have not been incorporated in Act V of 1881.
2) s. 267, Act X of 1865: s. 88, Act V of 1881.
3) s. 268, ib.: s. 89, ib.
4) s. 269, Act X of 1865.

Limitation of powers in the case of Hindus, Mahommedans, and Buddhists.—The powers of executors and administrators are not in this case so wide, being limited in the following manner : (1) The power of an *executor* to dispose of immoveable property is subject to any restriction which may imposed by the will appointing him, unless probate has been granted to him and the Court which granted the probate, permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order, in a manner permitted by the order. (2) An *administrator* may not, without the previous permission of the Court by which the letters of administration were granted : (*a*) mortgage, charge, or transfer by sale, gift, exchange, or otherwise any immoveable property for the time being vested in him ; or (*b*) lease any such property for a term exceeding five years. A disposal of property by an executor or administrator in contravention of the above provisions is voidable at the instance of any other person interested in the property. Subject however to these provisions, an executor or administrator has power to dispose as he thinks fit, of all or any of the property vested in him as such.

Purchases by.—If an executor or administrator purchases either directly, or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.[5]

Powers of several executors or administrators.—When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will, or taken out administration. However numerous they may be they are considered in the light of an individual person. Upon the death of one or more of several executors or administrators, all the powers of the office become vested in the survivors or survivor.[6]

A married executrix has, when probate has been granted to her, all the powers of an ordinary executor.[7]

Duties of an executor or administrator.—It is the duty of an executor to perform the **funeral** of the deceased, or (in the case of Hindus, Mahommedans, and Buddhists) to provide funds for the performance of the necessary funeral ceremonies of the deceased, in a manner suitable to his condition, if he has left property sufficient for the purpose. It is the duty of an executor and administrator (1) to file within six months, or within such further time as may be ordered from the grant of probate or administration, an **inventory** of the property in possession, credits

5) s. 270, Act X of 1865 : s. 91, Act V of 1881.

6) ss. 271, 272, ib : ss. 92, 93, ib.

7) s. 275, ib. : s. 96, ib.

and debts, and within one year or such further time as may be ordered, an **account** showing the assets which have come to his hands, and the manner in which they have been applied or disposed of; (2) to **collect** with diligence the **property** of the deceased and the **debts** due to him at the time of his death.[8]

Order of administration.—The following is the order prescribed for payment of debts and expenses by executors and administrators: (1) **funeral** expenses to a reasonable amount according to the degree and quality of the deceased, and **death-bed charges,** including fees for medical attendance, and **board and lodging** for one month previous to his death. After payment of these, (2) expenses of obtaining **probate** or letters of **administration,** including the costs incurred for, or in respect of, any judicial proceeding that may be necessary for administering the estate; then (3) **wages** due for services rendered to the deceased within three months next preceding his death, by any labourer, artizan, or domestic servant; then (4) the **other debts** of the deceased, which are to be paid equally and rateably.[9]

Application of property when domicile not in British India.—If the domicile of the deceased was not in British India, the application of his *moveable* property to the payment of his debts is to be regulated by the law of British India.[1] No creditor who has received payment of a part of his debt by virtue of the last preceding provision will be entitled to share in the proceeds of the immoveable estate of the deceased unless he brings such payment into account for the benefit of the other creditors: *e.g.*, A dies, having his domicile in a country where instruments under seal have priority over instruments not under seal, leaving moveable property to the value of Rs. 5,000, and immoveable property to the value of Rs. 10,000, debts on instruments under seal to the amount of Rs, 10,000, and debts on instruments not under seal to the same amount. The creditors holding instruments under seal receive half of their debts out of the proceeds of the moveable estate. The proceeds of the immoveable estate are to be applied in payment of the debts or instruments not under seal until one-half of such debts has been discharged. This will leave Rs. 5,000, which are to be distributed rateably amongst all the creditors without distinction, in proportion to the amount which may remain due to them.[2]

Debts of every description must be paid before any legacy. Save as above-mentioned (see last paragraph but one) no creditor

8) *ss. 276, 277, 278, ib.: ss. 97, 98, 100, ib.*
9) ss. 279, 280, 281, 282, ib.: ss. 101, 102, 103, 104, 105, ib.
1) Act X of 1865, s. 283.
2) s. 284, ib.

has any right of priority over another, by reason that his debt is secured by an instrument under seal, or on any other account. But the executor or administrator must pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend.[3]

Grant of probate to executor.—See "*Probate.*"

Liablity for devastation.—An executor or administrator who misapplies the estate of the deceased, or subjects it to loss or damage, is liable to make good the loss or damage so occasioned. If loss is caused to the estate by the neglect of an executor or administrator to get in any part of the property of the deceased, he is liable to make good the amount.[4]

Distribution of assets.—Where an executor or administrator has given notices in the appointed form to creditors and others to send in to him their claims against the estate of the deceased, he may at the expiration of the period therein named for sending in the claims, distribute the assets in discharge of such lawful claims as he knows of. He will not be liable for the assets so distributed to any person of whose claims he has not had notice at the time of such distribution. A creditor or claimant may however follow the assets, or any part of them, in the hands of any person who may have received them. If a creditor does not come in until after the executor has paid away the residue he must, in order to recover his debt, sue the legatees.[5] A suit to compel a refund by a person to whom an executor or administrator has distributed assets, must be brought within two years of the date of distribution.[6]

Compensation for death by actionable wrong.—Whenever the death of a person is caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages with respect to it, the party (including bodies, politic and corporate) who would have been liable if death had not ensued, is liable to an action or suit for damages, notwithstanding the death of the person injured, and even though the death shall have been caused under such circumstances as to amount in law to felony or other crime: *e.g.*, A by a negligent act injures B. B has a right of action. Suppose however A by the same act had killed B, then in so far as B could, had he not been killed, have recovered damages from A for any injury caused by the act, B's executor can bring a similar suit for the benefit of B's family.[7]

3) Act X of 1865, ss. 282, 285 : Act V of 1881, ss. 104, 105.
4) ib. ss. 327, 328 : ib. ss. 146, 147.
5) ib. s. 320 : ib. s. 139.
6) Act XV of 1877, Sch. II, Art. 43.
7) Act XIII of 1855, s. 1.

Such a suit to be brought by the executor or administrator.—Every such action or suit must be for the benefit of the wife, husband, parent, and child, if any, of the deceased, and must be brought by, and in the name of, the executor, administrator, or representative of the person deceased. Only one suit can be brought in respect of the same subject-matter of complaint. The plaint must give full particulars of the persons on whose behalf the suit is brought, and the nature of the claim in respect of which damages are sought to be recovered.[8]

Damages in such an action.—The Court will give such damages as it may think proportioned to the loss resulting from such death to the parties respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting all costs and expenses, will be divided amongst them in such shares as the Court may direct. The executor, &c., may, in addition to other damages claimed, claim damages for loss to the estate of the deceased occasioned by the wrongful act. If recovered, they form part of the assets of the estate of the deceased.[9]

Suits by and against executors, &c., for certain wrongs committed in the lifetime of the deceased.—An action may be brought by an executor, administrator, or representative of a person deceased, for any wrong committed in the lifetime of such person which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death, and the action is brought within one year after the death of such person. Damages when recovered form part of the personal estate of such person. Similarly, an action may be maintained against the executors, administrators, and representatives of any person deceased for any wrong committed by the deceased in his lifetime within one year before his death, for which he would have been subject to an action, provided the action is brought within two years after the committing of the wrong. No action commenced under this Act will abate by reason of the death of either party: it may be continued by or against the representatives of the party deceased.[1]

Joinder of claims by or against executor, administrator, and heir.—See "*Administration.*" pp. 30, 31.

Suits by and against.—See "*Administration.*" p. 30.

Bequests to an executor.—If a legacy is bequeathed to a person who is named as executor of the will, he cannot take the legacy unless he proves the will, or otherwise manifests an intention to act as executor: *e.g.*, a legacy is given to A, who

8) ss. 1, 2, 3, ib. 9) ss. 2, 3, ib. 1) Act XII of 1855.

is named an executor. A orders the funeral according to the directions contained in the will, and dies a few days after the testator, without having proved the will. A has manifested an intention act as executor.[2] When the executor is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person, and his assent may in like manner be express or implied (v. *next paragraph*). Assent will be implied if in his manner of administering the property he does any act which is referable to his character of legatee, and is not referable to his character of executor: *e.g.*, an executor takes the rent of a house, or the interest of Government securities bequeathed to him, and applies it to his own use. This is assent.[3]

The executor's assent to a legacy.—(1) The assent of the executor is necessary to complete a legatee's title to his legacy: *e.g.* (*a*) A by his will bequeaths to B his Government paper, which is in deposit with the Bank of Bengal. The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor. (*b*) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor.[4] (2) The assent of the executor to a legacy gives effect to it from the death of the testator: *e.g.* (*a*) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser, and completes his title to the legacy. (*b*) A bequeaths Rs. 1,000 to B with interest from his death. The executor does not assent to his legacy until the expiration of a year from A's death. B is entitled to interest from the death of A.[5] (3) The assent of an executor to a legacy may be conditional, and if the condition be one which he has a right to enforce, and it is not performed, there is no assent: *e.g.* (*a*) A bequeaths to B his lands of Sultanpur, which at the date of the will, and at the death of A, were subject to a mortgage for Rs. 10,000. The executor assents to the bequest, on condition that B shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent. (*b*) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.[6] The assent of the executor to a specific bequest is sufficient to divest his interest as

2) Act X of 1865, s. 128. This section applies to Hindus, &c., in the Lower Provinces of Bengal and the towns of Madras and Bombay: Act XXI of 1870, s. 2,

3) s. 295, Act X of 1865: Act V of 1881, s. 115.

4) s. 292, ib.: s. 112, ib.

5) s. 296, ib.: s. 216, ib.

6) s. 294, ib.: s. 214, ib.

executor therein, and to transfer the subject of the bequest to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way. This assent may be verbal, and it may be either express or implied from the conduct of the executor: *e.g.* (*a*) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied. (*b*) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest. (*c*) A bequest is made of a fund to A, and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B. (*d*) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed. (*e*) A person to whom a specific article has been bequeathed takes possession of it, and retains it without any objection on the part of the executor. His assent may be presumed.[7]

Executor when to deliver legacies.—An executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death: *e.g.*, A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.[8]

Indemnity on payment of legacy.—If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.[9]

Abatement of legacies.—(1) If the assets, after payment of debts, necessary expenses, and specific legacies (see "*Legacy and Bequest,*") are not sufficient to pay all the general legacies in full, the latter will abate or be diminished in equal proportions, and the executor has no right to pay one legatee in preference to another, nor to retain any money on account of a legacy to himself, or to any person for whom he is a trustee. (2) Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement. (3) Where there is a demonstrative legacy (see "*Legacy and Bequest,*") and the assets are sufficient for the payment of debts and necessary expenses, the legatee has a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted, and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the

7) s. 293, ib.: s. 113, ib. 8) s. 297, ib.: s. 117, ib. 9) s. 286, ib.: s. 106, ib.

remainder against the general assets as for a legacy of the amount of such unpaid remainder. (4) If the assets are not sufficient to answer the debts and the specific legacies, an abatement will be made from the latter rateably in proportion to their respective amounts: *e.g.*, A has bequeathed to B a diamond ring, valued at Rs. 500, and to C a horse, valued at Rs. 1,000. It is found necessary to sell all the effects of the testator, and his assets, after payment of debts, are only Rs. 1,000. Of this sum Rs. 333-5-4 are to be paid to B, and Rs. 666-10-8 to C. (5) For the purpose of abatement, a legacy for life, a sum appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, are treated as general legacies.[1]

Refund of legacy.—When an executor has paid a legacy under the order of a Judge, he is entitled to call upon the legatee to refund, in the event of the assets proving insufficient, to pay all the legacies. But when an executor has voluntarily paid a legacy, he cannot call upon a legatee to refund in the event of the assets proving insufficient to pay all the legacies.[2]

When the executor has paid away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion.[3]

Other rules with regard to refunding of legacies.—(1) When the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the executor has thereupon, without fraud, distributed the assets; in such case, if further time has been allowed for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor, but those to whom he has paid it are liable to refund the amount.[4] (2) **A creditor who has not received payment of his debt may call upon a legatee who has received payment of his legacy to refund** whether the assets of the testator's estate were, or were not sufficient at the time of his death to pay both debts and legacies; and whether the payment of the legacy by the executor was voluntary or not. A suit to compel a refund by a person to whom an executor or administrator has paid a legacy must be brought within two years of the date of payment.[5] (3) If the assets were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has

1) ss. 287—291, ib.: ss. 107—111, ib.
2) ss. 316, 317, ib:. ss. 135, 136, ib.
3) s. 319, ib.: s. 138, ib.
4) s. 318, ib.: s. 137, ib.
5) s. 321, ib.: s. 140, ib.: Act XV of 1877, Sch. II, Art. 43.

been compelled to refund under the last preceding clause, cannot oblige one who has received payment in full to refund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor. (4) If the assets were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy must, before he can call on a satisfied legatee to refund, first proceed against the executor, if he is solvent; but, if the executor is insolvent, or not liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion. (5) The refunding of one legatee to another will not exceed the sum by which the satisfied legacy ought to have been reduced if the estate had been properly administered: *e.g.*, A has bequeathed Rs. 240 to B, Rs. 480 to C, and Rs. 720 to D. The assets are only Rs. 1,200, and if properly administered would give Rs. 200 to B, Rs. 400 to C, and Rs. 600 to D. C and D have been paid their legacies in full, leaving nothing to B. B can oblige C to refund Rs. 80, and D to refund Rs. 120. (6) The refunding will, in all cases, be without interest.[6]

Residuary legatee.—The surplus or residue of the deceased's property, after payment of debts and legacies, will be paid to the residuary legatee when any has been appointed by the will.[7]

Transfer of assets from India to executor in country of domicile for distribution.—Where a person not having his domicile in British India has died leaving assets both in British India and in the country in which he had his domicile at the time of his death, and there have been a grant of probate or letters of admininistration in British India with respect to the assets there, and a grant of administration in the country of domicile with respect to the assets in that country, the executor or administrator, as the case may be, in British India, after having given the proper notices, and after having discharged, at the expiration of the time therein named, such lawful claims as he knows of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto, transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.[8]

See "*Legacy and Bequest.*"

6) ss. 322—325, ib. : ss. 141—144, ib. 7) s. 326, ib. : s. 145, ib.
8) s. 326A, ib. : s. 145A, ib.

FACTORIES.

AUTHORITY—Act XV of 1881 amended by Act XI of 1891.

"**Factory**" means any premises (other than indigo factories or premises situated on, and used solely for the purposes of, a tea or coffee plantation) wherein is carried on, for not less than four months on the whole in any one year, any process for, or incidental to, making, altering, repairing, ornamenting, finishing, or otherwise adapting for use, transport, or sale, any article or part of an article; and (*a*) wherein steam, water, or other mechanical power is used in aid of any such process; and (*b*) wherein subject to the provisions of s. 20 not less than 50 persons are on any day simultaneously employed in any manual labour in, or incidental to, any such process.[1] Section 20 empowers the Local Government by notification in the Gazette to declare any premises which fulfil the other conditions of the definition to be a factory, if the number of persons be less than 50, and not less than 20.

Children.—A child is defined to be a person under the age of 14 years; a person is "employed" who works in a factory whether for wages or not.[2] No child can be employed who is under the age of 9 years: nor before 5 in the morning, and 8 in the evening: nor for more than 7 hours in one day: a child, if employed for more than 6 hours must be allowed rest for at least half an hour: no child must clean any part of the mill gearing or machinery when in motion, or work between the fixed and traversing parts of any self-acting machine when in motion by the action of a steam-engine, water-wheel, or other mechanical power. Registers of children employed may be directed to be kept.[3]

An inspector of factories may enter any factory, examine the premises and the registers, and may order that any person shall not be employed in a factory when he has reason to believe that such employment would be in contravention of the Act, until the age of such person has been certified (v. *post*) to be above 9 years; or, for more than the time allowed for the employment of children, until his age has been so certified to be above 14 years.[4]

The certifying surgeons.—The Civil Surgeon or person appointed by the Local Government, called the "certifying surgeon" must at the request of any person employed, or desirous of being employed in a factory, or of the parent, or guardian of such person, examine such person, on payment of the fee, if any,

1) s. 2, Act XV of 1881.
2) ib.
3) ss. 7, 8, 9, ib.
4) s. 4, ib.

prescribed, and grant him a certificate stating whether his age is above or below 9 years or 14 years, as the case may be.[5]

Holidays.—No operative in any factory (not specially exempted in this behalf) must be employed on a Sunday: provided that he may be so employed if he has had, or will have a holiday for a whole day on one of the three days immediately preceding or succeeding the Sunday.

Women.—Except in any factory specially exempted in this behalf, no woman must be employed for more than 11 hours: and if actually employed for 11 hours must be allowed at least 1½ hours' rest, and to a proportionately less time if employed less than 11 hours.[6]

Employment in two factories.—No occupier of a factory may employ on any day any woman or child, who has to his knowledge already been employed on the same day in another factory.[7]

Fencing.—(*a*) Every fly-wheel directly connected with a steam-engine, water-wheel, or other mechanical power in any part of a factory, and every part of a steam-engine or water-wheel; (*b*) every hoist or teagle near which any person is liable to pas or be employed; and (*c*) every other part of the machinery or mill-gearing of a factory which may, in the opinion of the local inspector, be dangerous if left unfenced, and which he may have ordered to be fenced must while the same is in motion be securely fenced.[8]

Accidents.—Notice must be given to the authorities, and in the manner prescribed by the factory rules, of any accident causing death or bodily injury to any employé, by which he is prevented from returning to his work for 48 hours.

Notice of occupation of factory.—A person beginning to occupy a factory must within one month of his beginning to occupy the factory send a written notice to the local inspector containing the name of the factory, the place where it is situate, the address to which he desires his letters to be addressed, the nature of the work performed in such factory, the nature and amount of the moving power therein, and the name of the person under whom business is to be carried on.[9]

Fencing: water-ventilation: overcrowding.—Any person who in breach of the Act, or of the rules made thereunder, neglects to fence machinery, to maintain a supply of water for the use of persons employed, to ventilate and keep the factory in cleanly state and free from effluvia arising from any drain, privy, or other nuisance, or suffers the factory to be so overcrowded while

5) s. 5, ib.
6) s. 6, ib.
7) s. 11, ib.
8) s. 12, ib.
9) s. 14, ib.

work is going on, as to be injurious to the health of the persons employed, is punishable with fine which may extend to Rs. 200.[1]

The occupier is primarily liable for breaches of the Act, or of orders or rules made thereunder; but he may discharge himself by showing that the breach was committed by some other person without his knowledge and consent.[2]

Any rules made by the Local Government must be consistent with the provisions of the Act.[3]

1) s. 15, b. 2) s. 17, ib. 3) s. 18, ib.

FERRY.

AUTHORITIES—Cases cited.

Classification of ferries.—Ferries are of three kinds: (1) ferries which are let in farm; (2) ferries held under the khas management of the officers of Government; and (3) ferries held by private individuals without payment of revenue.

Private ferry.—The right of establishing a private ferry and levying tolls is recognized in British India.[1] As any man may set up a ferry over a river which passes between his own village and that of another riparian owner, no one who works such a ferry can exclude his neighbour from doing the like thing unless the former has acquired a right of property in the working of his own ferry. The right of ferry may be acquired by a person as against his neighbour by a grant from him or his predecessors in title, granting the right of embarking and disembarking passengers on his land, or it may be acquired, as against all the world, by proof of long uninterrupted user. Twenty years is the shortest period within which such a right of ferry can be established by user.[2] If it be held[3] that a right of private ferry cannot be established as an indefeasible right by long user, yet long uninterrupted user may be evidence of a lost grant, or immemorial custom giving rise to the inference that the right had a legal origin.[4] A right to *julkur* does not necessarily carry with it a right of ferry.[5] Nor does the mere fact of being owner of both banks of a river give the right of ferry.[6]

Infringement of right of ferry may be remedied by a suit for damages and for an injunction restraining the defendant from infringing the plaintiff's established right. Proprietary rights in a private ferry are of such a nature that another party may not interfere with the profits arising therefrom by running a boat, if not exactly in the same line, at least within such a distance as for all practical purposes would be the same as if it were on the same line.[7] The plaintiff who was owner of a ferry granted under a Government settlement, and on which he levied tolls sued for an injunction restraining the defendant from running a ferry over the same spot. It appeared on the evidence that the defendant levied no tolls on his ferry, but it was not shown that it was used

1) I. L. R., 6 Cal., 610.
2) 613, ib.
3) As per Mitter, J., 619, ib.
4) ib.
5) All. H. C. Rep., 1873, p. 97.
6) 2 W. R., 286.
7) 16 W. R., 281.

only for the conveyance of his own servants and ryots. It was held that if the defendant had proved that the service of the boats which he maintained was limited to the purpose only of conveying his own servants, ryots, and other persons coming upon his business, the plaintiff would have no ground of action: but that the facts were otherwise. That the defendant took no tolls for the conveyance of passengers made no difference, as although the defendant did not gain, the plaintiff lost, for if these persons were not gratuitously taken by the defendant, they would have had to pay to the plaintiff, and that therefore the latter had suffered damage for which a suit was maintainable.[8]

8) I. L. R., 4 Cal., 599, 602.

FISHERY.

AUTHORITIES—Cases cited : Tagore Law Lectures 1889 : Act II of 1889 B. C. : Act XV of 1877 : Act V of 1882 : Criminal Procedure Code.

In territorial waters.—The right of the public to fish in the sea, whether it and its subjacent soil be or be not vested in the Crown, is common, and is not the subject of property. That right may, in certain portions of the sea, be regulated by local custom. Members of the public, exercising the common right to fish in the sea, are bound to exercise that right in a fair and reasonable manner, and not so as to impede others from doing the same; and conduct which prevents another from a fair exercise of his equal right, if special injury thereby results to him, is actionable.[1]

In navigable rivers.—In India, the right of fishing in navigable rivers *primâ facie* belongs to the public, provided the bed of the river forms part of the public domain, and is not the private property of any individual.[2] This public right must, however, be exercised in a reasonable manner and be consistent with a similar enjoyment thereof by the public at large.[3] Further, the mode of enjoyment may be subject to a local custom, and in that case, the right must be exercised in accordance with that custom.[4]

Grant and prescription.—An exclusive fishery in navigable rivers may be obtained by grant from Government, or by prescription,[5] or probably by enjoyment for such length of time as would suffice for the acquisition of a right to an easement against the Crown.[6] Such grants, however, being in their nature in derogation of the right of the Crown and of the public, must be supported by clear and conclusive evidence. The mere grant of an exclusive right of fishery in a navigable river does not give a right to the subjacent soil.[7]

Change of channel.—If a river (whether navigable or otherwise) has arms or inlets, or, by flooding adjoining lands belonging to third persons, causes lakes or *bils* to be formed therein, or shifts its course leaving such lakes or other pieces of water in its old bed, the grantee of a general right of fishery in the river (and

1) I. L. R., 2 Bom., 19.
2) I. L. R., 11 Cal., 434 : I. L. R., 8 Mad., 467 : I. L. R., 4 Cal., 53 : I. L. R., 2 Bom., 19.
3) I. L. R., 2 Bom., 19 : I. L. R., 8 Mad., 467.
4) I. L. R., 12 Mad., 43.
5) See cases cited *ante*.
6) I. L. R., 8 Mad., 467.
7) Cal. S. D., 1859, p. 1357 : I. L. R., 4 Cal., 53.

perhaps the public at large if there is no such grant), is entitled to fish not only in the main channel of the river, but also in all such arms, inlets, lakes, or *bils*, so long as any communication between them and the main channel remains open during all seasons of the year.[8]

In non-navigable rivers or streams.—The right of fishing *primâ facie* belongs exclusively to the person over whose land it flows as an incident of the ownership of the soil. He may either enjoy this right personally, or part with it in favour of a stranger for a definite term, or in perpetuity, reserving to himself the right to the soil. In the former case, it is called a territorial fishery, belonging to the proprietor of the soil; in the latter, it exists in the grantee as an incorporeal right, exerciseable over the soil of the grantor. And this incorporeal right of fishery may be acquired either by grant from the owner of the soil, or by prescription.[9]

In stream between two estates.—If a non-navigable river or stream runs through the common boundary of two estates, the presumption is that the right of fishery therein does not belong to the proprietor of either estate exclusively. It belongs to such proprietors either in common or in severalty, *usque medium filum aquae*, *i.e.*, to the middle thread of the stream.[1]

Right to soil in non-navigable streams.—A right of fishery in non-navigable waters does not impart a right to the soil, and does not therefore entitle the holder of the fishery to the possession of the land when the waters dry up. But this right may be conveyed in such terms as to confer on the grantee a sight to the soil also.[2]

In ponds and lakes. — If ponds, pools, or lakes (whether large or small, navigable or non-navigable) are situate in the land of a single proprietor, the right of fishing in their waters, *primâ facie*, belongs to him alone. If they are situated in the land of more proprietors than one, the right of fishing belongs to them all. If the lake is connected by an inlet with a flowing river, the right of fishery in the lake belongs to the owner of the fishery in the river.[3]

The remedy for disturbance of right of fishery is by civil action, or criminal proceedings. (I) *Civil remedies.* The principal remedies are an action (*a*) for the recovery of possession of a fishery; (*b*) for a declaration of right thereto; (*c*) for an injunction: or (*d*) damages for catching and removing fish. (II) *Criminal proceedings* (*a*) In Bengal proceedings may be taken

8) Tagore Law Lectures, 1889, p. 374 and cases there cited.
9) ib. 376.
1) ib.
2) ib.
3) ib. pp. 381, 382,

under the Private Fisheries Act against persons wrongfully fishing in private waters (v. *post*). Elsewhere the law is that fish in flowing rivers, in lakes, or in open irrigation tanks, and even in closed tanks or reservoirs at a time when the floods are high, are not in the legal possession of any one, and that, therefore, any person who catches and carries away fish from such places and under such circumstances, is not guilty of theft, criminal trespass, criminal misappropriation, or mischief, as defined by the Indian Penal Code.[4] (*b*) Whenever a District Magistrate, Sub-divisional Magistrate, or Magistrate of the first class is satisfied that a dispute likely to cause a breach of the peace exists concerning any right of territorial fishery (*i.e.*, a right claimed by virtue of the ownership of the soil) proceedings may be taken under s. 145 of the Code of Criminal Procedure (v. *post* "*Possession*"). If the right of fishery concerning which the dispute has arisen is of an incorporeal character (*i.e.*, exercised or enjoyed over soil belonging to another person) proceedings may be taken under s. 147; the Court will enquire into the matter, and may, if it appears to it, that such right exists, make orders as to the exercise or non-exercise of the right until a Civil Court has decided the question in dispute.—See "*Easements and Licenses.*"

Private Fisheries Act.—By this Act[5] any person who (*a*) fishes in any private waters not having a right to fish therein; (*b*) erects, maintains, or uses any fixed engine in private waters, or puts any matter therein for the purpose of catching or destroying fish without the permission of the person to whom the right of fishery belongs, is guilty of an offence and is punishable for a first offence with fine not exceeding Rs. 50, and for a subsequent offence with imprisonment (simple or rigorous) for a term not exceeding one month, or with a fine not exceeding Rs. 200, or both, *unless* the act done is done in the exercise of a *bonâ-fide* claim of right. The fixed engines and fish caught are forfeited. Entry upon the land of another, or upon private waters with intent to commit an offence is punishable with a maximum fine of Rs. 50. Offences under the Act are "cognizable" as defined in the Criminal Procedure Code. "Private waters" means waters—(*a*) which are the exclusive property of any person; or (*b*) in which any person has an exclusive right of fishery, and in which fish are not confined but have means of ingress or egress.

Angling with rod and line.—The Act does prevent any person from angling with a rod and line, or with a line only in any portion of a navigable river.[6]

Easements of fishery.—A prescriptive right of fishery is an "easement" as defined by Act XV of 1877, and may be

4) *ib. p. 379, and cases there cited.* 5) Act II of 1889, B. C. 6) s. 3.

claimed by any one who can prove a "user" of it, that is to say, that he has of right claimed and enjoyed it without interruption for a period of 20 years, although he does not allege, and cannot prove, that he is, or was, in the possession, enjoyment, or occupation of any dominant tenement ;[7] a prescriptive right therefore may be established in regard to a fishery *in gross* (v. "*Easements and Licenses*"). In the territories governed by the Easement Act,[8] a prescriptive right of fishery *appurtenant* to land may be acquired by 20 years' user, but there are no provisions in the Act relating to the acquisition of a right of fishery *in gross*. If regarded as "an interest in immoveable property," a right to a fishery *in gross* will in these territories be acquired by adverse enjoyment for 12 years.—See "*Easements and Licenses*" and "*Rivers and Waters.*"[9]

7) I. L. R., 5 Cal., 945. 8) Act V of 1882.
9) Act XV of 1877. Sch. II, Art, 144.

FRAUD.

AUTHORITIES—Act IX of 1872 : Addison on Torts, 5th Ed. : Act XV of 1877 : Pollock on Torts, 2nd Ed.: Draft Indian Civil Wrong's Bill : Cases cited.

Right of action for fraud.—Fraud is a wrong independent of contract (see *Introduction*), for which any person who has suffered injury thereby may maintain an action to recover compensation on account of such injury. Thus where the plaintiff sent some goods to the defendant for the purpose of getting orders from him, and the defendant falsely and knowingly told him that the design on the goods was a registered one, and that the owner was going to proceed against him for an injunction, whereupon the plaintiff was put to considerable expense in proceeding to London to make enquiries, and was otherwise damnified, it was held that the plaintiff was entitled to damages for the false and misleading statement of the defendant.[1] So also where the plaintiff's property had been fraudulently transferred, it was held, that he was entitled to recover damages on such account from the actual transferor, and from the person who was found to be the prime mover and instigator of the transaction, as well as from his own agent who had consented to such transfer, and from the purchaser who, being aware of circumstances, sufficient to create suspicions, dealt with persons who had no authority to sell.[2] The remedy in tort for fraud is an action for damages for deceit. When a contract has been entered into, induced by the fraud of the defendant, the plaintiff has various remedies (see "*Contract.*") But if the plaintiff's own conduct has been fraudulent, he is not entitled to relief.[3]

Ground of action.—"The right of action in case of fraud is ultimately grounded upon the general moral duty to hurt no one by word; but it is more immediately founded upon the general principle of expediency, that one who intentionally excites expectations of advantage in the mind of another, and thereby influences his conduct, should be compelled to make these expectations good, if they have been excited by a promise of something to be done in the future, or by a culpably false representation of the present existence of some fact. The right of action, therefore, in a case of fraud is remotely connected with other torts arising from words used by the wrong-doer, but more nearly resembles the right of action arising from a breach of contract."[4] Fraud

1) 9 Q. B., 197.
2) Agra H. C. R., N.-W. P., 96.
3) I. L. R., 11 Bom., 708 : 18 W. R., 230.
4) Addison on Torts, 5th Ed., p. 674.

will not be presumed without good and probable grounds.[5] A party cannot allege or plead his own fraud.[6]

Effect of fraud on contract.—See "*Contract,*" pp. 155, 156, 165.

Definition of deceit.—"The definition of cheating in the Penal Code (*s.* 415) through very wide does not completely cover the ground of deceit as a Civil wrong. For in some cases an action for deceit will lie without any bad intention, and even in spite of good intention, on the part of the defendant; on the other hand the Penal Code does cover all ordinary cases of fraud."[7]—See "*Offences.*"

Constructive fraud: undue influence.—See "*Contract:*" and "*Legal and Medical Practitioners.*"

Fraud of agent and servant.—A principal is answerable for the acts of his agent in the course of his master's business and for his master's benefit; there is no distinction between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the business and for the master's benefit. It may be that the master has not authorized the particular act complained of, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.[8]

Fraudulent and unfair bargains and unconscionable contracts.—See "*Contract:*" "*Legal and Medical Practitioners:*" "*Minority and Minors.*"

Lapse of time is no bar to remedy for fraud.—So long as a party is without notice of a fraud his remedy is not affected by lapse of time. A suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud must be brought within three years of the time when the fraud becomes known to the party wronged[9]—See "*Limitation:*" and *Index.*

5) 6 W. R., 235.
6) 3 W. R., 92.
7) Pollock, pp. 554, 555, Indian Civil Wrongs Bill, ss. 39, 40.
8) L. R., 2 Ex., 259, followed by the Privy Council, L. R., 5 I. A., 130.
9) Act XV of 1877, Sch. II, Art. 95.

GAMING AND WAGERING.

AUTHORITIES—Act III of 1867 : Contract Act, section 30 : Indian Penal Code : Cases cited.

Gambling is not ordinarily punishable as an offence. The Public Gambling Act passed to make provision for the punishment of public gambling in the N.-W. P., Punjab, Oudh, Central Provinces, Lower (and as since extended) Upper Burmah, makes gambling an offence when it takes place in a "common gaming house" or when the gambling takes place in a public street or place.[1] Gambling in a private house is not an offence under the Act.[2] A common gaming house may constitute a public nuisance if it cause an annoyance to the public.[3] Common gaming houses are houses in which instruments of gambling are kept, or used for the profit or gain of the owner or occupier, whether by way of charge for the use of the instrument of gaming, or of the houses, or otherwise howsoever.[4] Gambling of the above-mentioned nature has also been prohibited by various local and provincial acts : *e.g.*, in Calcutta by Act IV of 1866 (Calcutta Police), and in the territories subject to the Lieutenant-Governor of Bengal by Act II of 1867 (B. C.). As to money lent for gambling—v. *post.*

Agreements by way of wager are void; and no suit can be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.[5] As to horse racing—v. *post.*

But not illegal.—The Act does not declare wagering contracts unlawful, but merely annuls them and prohibits the parties from suing on them. A wagering contract is unenforceable, but a contract collateral to it may be so, and therefore the agent of a wagerer is not precluded from maintaining against the latter a suit for moneys paid by the agent to the other wagerer, or his agent, in respect of the loss of the wager, nor from recovering fees and brokerage due to him as agent in effecting, or for services in connection with, the wagering transaction.[6] In Bombay however, all contracts made for the purpose of carrying out wagering agreements, all contracts by way of security for such agreements, or for commission, brokerage, fee, or reward in respect of them are declared to be void.[7] Though a wagering contract is not made illegal by the Act, it is yet *void* even if the agreement to which

1) Act III of 1867, ss. 4, 13.
2) N.-W. P., 289.
3) 7 Bom. H. C. R., 74.
4) s. 1, Act III of 1867.
5) s. 30, Contract Act.
6) 12 Bom. H. C, 51.
7) Bombay Act III of 1865.

it relates is legal. Thus a walking match is not illegal, yet an agreement to walk a match for £200 a side, the money being deposited with a stakeholder, is null and void.[8] So where A and B each deposited £500 with C on an agreement that if B on or before the 15th March 1870, proved the convexity or curvature to and fro of the surface of any canal, river, or lake by actual measurement and demonstration to the satisfaction of C, B should receive the two sums deposited, but if B failed in doing this, the two sums were to be paid to A, the agreement was held to be a wager.[9]

Betting.—An action will not lie against a betting agent for a breach of contract to make bets. So where the plaintiff employed the defendant to bet on commission, and the defendant having failed to make certain bets pursuant to the plaintiff's instructions, the plaintiff sued the defendant for breach of contract as his agent, claiming as damages the excess of gains over losses which should have been received by the defendant, had the bets in question been made, after deducting the amount of his commission, it was held that as the bets could not have been recoverable from a third party by the betting agent, the plaintiff could not maintain the action.[1] If a betting agent or any person on behalf of another makes a bet, wins, and, is paid the money, he must pay the money over to his principal.[2] If he makes the bet, loses, and pays the money, his principal must recoup him.[3] So where a betting agent made bets in his own name for the defendant at his request, and, after the bets were made and lost, the defendant revoked the authority to pay conferred upon the agent, but the agent nevertheless paid the bets, it was held that he was entitled to recover the moneys so paid inasmuch as the authority to pay was irrevocable.[4] Betting at horse races is not illegal in the sense of tainting any transaction connected with it. Even though a contract is void, money paid in discharge of it by one person at the request of another is recoverable from the latter. So where A sued C, the executor of B, for a sum of money which was due by B to the Honorary Secretary of the Calcutta Races on a lottery account, and which A paid for B at his request, the money paid by A was recovered by him.[5] The debt due by B could not have been recovered from him by the Honorary Secretary of the races, but the agreement between A and B was of a quite different character.[6] If two persons make bets at a race on joint account, and one receives the winnings and gives the other a bill for his share, the latter can recover on the bill.[7]

8) 2 Ex. Div., 422 · 5 App. Cas., 342.
9) L. R., 1 Q. B. D., 189.
1) 22 Q. B. D., 680.
2) 1 Ex. D., 13 : 15 Q. B. D., 363.
3) 13 Q. B. D., 779.
4) ib., and s. 204, Contract Act.
5) I. L. R., 5 All., 443. But cf. *Tatam* v. *Reeve*, L. R., Q. B., Nov. 3, 1892, and 55, 56, Vic. cap. 9.
6) ib.
7) 1 Ex. D., 18.

Money lent for gambling.—When gambling is not prohibited by law, money lent for the purpose of gambling is recoverable, but it is otnerwise when gambling, or a certain mode of gambling is made illegal by any act in force.[8] Money *knowingly* lent for the purpose of enabling the borrower to game or play therewith at an *illegal* game,[9] or in an illegal manner, is not recoverable: *e.g.*, money lent for the purpose of gaming in a private house is recoverable, but money knowingly lent for the purpose of gaming in a public gaming-house (such gaming being an offence) is not recoverable.

Keeping lottery office.—Keeping any office, or place, for the purpose of drawing any lottery not authorized by Government, is an offence punishable with imprisonment (rigorous or simple) for a term which may extend to six months, or with fine, or with both. Whoever publishes any proposal to pay any sum on any event or contingency relative or applicable to the drawing of any ticket, lot, number, or figure in any such lottery is punishable with fine which may extend to Rs. 1,000.[1] Nothing in the Contract Act,[2] will be deemed to legalise any transaction connected with horse racing, to which the foregoing provisions apply.[3]—v. *post.*

Recovery of money deposited to abide wager.—Money so deposited may be recovered by the *depositor* from the stakeholder, if demanded *before* the money is paid over. But the winner of a sum deposited by the other party to abide an event cannot recover it from the stakeholder.[4] An action against a stakeholder may be instituted by a depositor even after the determination of the event unfavourably to him, provided the money has not been paid over to the other party, without notice to the contrary being received by the stakeholder from the depositor.[5] If a stakeholder pays over money without authority from the party, and in opposition to his desire, he does so at his own peril.[6]

Horse racing. — The Contract Act (s. 30) does not render unlawful a subscription or contribution or agreement to subscribe or contribute, made or entered into for or toward any plate, prize, or sum of money, of the value or amount of Rs. 500 or upwards, to be awarded to the winner or winners of any horse race.[7] In order to bring a case within the exception to s. 30 there must be a winner. Therefore this exception in favour of racing does not apply to a bet with a person that his horse will not trot 18 miles an hour.[8]

8) cf. I. L. R., 7 Mad., 301 : s. 23, Contract Act.
9) 8 Ch. Div., 754.
1) s. 294A, Indian Penal Code.
2) s. 30.
3) s. 294A, Penal Code.
4) 1 Q. B. D., p. 196.
5) ib.
6) 8 B. & C., 225.
7) s. 30, Contract Act.
8) 1 C. P. D., 573.

GIFTS.

AUTHORITY—Ch. VII, Act IV of 1882 (does not affect any rule of Mahommedan Law, or save as provided by s. 123, any rule of Hindu or Buddhist Law).

"**Gift**" is the transfer of certain existing moveable, or immoveable property made voluntarily and without consideration, by one person called the donor, to another, called the donee, and accepted by, or on behalf of, the donee. Such acceptance must be made during the lifetime of the donor, and while he is still capable of giving. If the donee dies before acceptance the gift is void.[1] A gift must be complete. An incomplete gift cannot be enforced by the donee. If a gift is intended, and something remains to be done by the donor to make it legally complete, the transaction is inoperative, and the intended donee has no remedy. The donor may either actually transfer the property, or constitute himself, or some third person trustee of that property for another.

Mode of transfer.—For the purpose of making a gift of immoveable property, the transfer must be effected by a *registered* instrument signed by, or on behalf of, the donor and attested by at least *two* witnesses. For the purpose of making a gift of moveable property, the transfer may be affected *either* by a registered instrument *or* by delivery. Such delivery may be made in the same way as goods sold may be delivered.[2] See "*Sale.*"

Of future property.—A gift comprising both existing and future property is void as to the latter.[3]

If a gift is made to two or more donees and one does not accept it the share of those who accept are not increased by the share of him who refuses. The gift is void as to the interest which he would have taken had he accepted.[4]

Suspension and revocation.—The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor, a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly, or in part, as the case may be. A gift may also be revoked in any of the cases (save in the case of want, or failure of consideration), in which, if it were a contract, it might be rescinded, *e.g.*, in the case of coercion, undue influence, fraud or misrepresentation. Save as aforesaid a gift cannot be revoked: *e.g.*: (1) A gives a field to B, reserving to himself, with B's assent, the right

1) Act IV of 1882 s. 122 See "*Transfer of Property.*"
2) s. 123, ib., v. *supra.*
3) s. 124, ib.
4) s. 125, ib.

to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field. (2) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong A.[5] A gift may also be made subject to the performance of a condition and revocable accoidingly. Although as between donor, and donee the property may on the happening of a certain event, be resumable by the donor, such condition will not operate against a purchaser for value from the donee taking without notice of the condition.[6]

Onerous gifts.—Where a gift is in the form of a *single* tranfer to the same person of several things, of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it *fully*: *e.g.*, A has shares in X, a prosperous joint-stock company, and also shares in Y, a joint-stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint-stock companies. B refuses to accept the shares in Y. He cannot take the shares in X. But where a gift is in the form of two or more *separate and independent* transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous; *e.g.*, A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money. A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract, and being aware of the obligation, he retains the property given, he becomes so bound.[7] See "*Minority and Minors.*"

Universal donee.—Subject to the foregoing provisions, where a gift consists of the donor's whole property, the donee is personally liable for all the **debts** due by the donor at the time of the gift to the extent of the property comprised therein.[8]

Death-bed gifts.—None of the foregoing provisions relate to gifts made in contemplation of death.[9] See. "*Donatio mortis causa.*"

5) s. 126, ib.
6) ib.
7) s. 127, ib.
8) s. 128, ib.
9) s. 129, ib.

GUARDIAN AND WARD.

AUTHORITY—Act VIII of 1890 (Extent: whole of British India, inclusive of Upper Burmah and British Baluchistan).

The law of guardian and ward is now contained in the above mentioned consolidating Act, except as to matters and cases within the jurisdiction of Courts of Wards and Chartered High Courts. The Act applies to minors of all creeds and races; and provides that, in the selection of guardians and other matters, regard should be had to the personal law of the minor.

Minor means a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority.[1] See "*Minority and Minors.*"

Guardian means a person having the care of the person of a minor, or of his property, or of both his person and property.[2]

Ward means a minor for whose person or property, or both, there is a guardian.

European British subject has the meaning assigned to the expression in the Criminal Procedure Code and includes any Christian of European descent. See "*Europeans and European British Subjects.*"

Appointment of guardians by parents.—Where a minor is an European British subject, a guardian or guardians of his person and property, or both, may be appointed by will or other instrument to take effect on the death of the person appointing (*a*) by the father of the minor; or (*b*) if the father is dead or incapable of acting, by the mother. Where guardians have been appointed by both parents they will act jointly.[3] In the case of a minor who is not an European British subject a guardian of his person or property, or both, may be appointed by will or otherwise if such appointment is valid under the law to which the minor is subject.[4]

Appointment by the Court.—Where the Court is satisfied that it is for the welfare of a minor that an order should be made —(*a*) appointing a guardian of his person, or property, or both; or (*b*) declaring a person to be such a guardian, the Court may make an order accordingly. An appeal lies to the High Court from an order appointing, or declaring, or refusing to appoint or declare a guardian.[5] An order so made as aforesaid will imply the removal of any guardian who has not been appointed by will

1) Act VIII of 1899, s. 4.
2) ib.
3) s. 5, ib.
4) s. 6, ib.
5) s. 47, ib.

or other instrument, or appointed or declared by the Court. But where a guardian has been appointed by will or other instrument, or appointed or declared by the Court, an order appointing or declaring another person to be guardian in his stead will not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act (v. *post*). Such order as aforesaid will not, however, be made except on the application of—(*a*) the person desirous of being, or claiming to be, the guardian of the minor; or (*b*) any relative or friend of the minor; or (*c*) the Collector of the district or other local area within which the minor ordinarily resides, or in which he has property; or (*d*) the Collector having authority with respect to the class to which the minor belongs.[6] A Court may not appoint a guardian of the property of a minor whose property is under the superintendence of the Court of Wards: nor appoint a guardian of the person—(*a*) of a minor who is a married female, and whose husband is not, in the opinion of the Court, unfit to be guardian of her person; or (*b*) subject to the provisions of this Act relating to European British subjects, of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor; or (*c*) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.[7]

Application where to be made.—If the application is with respect to the guardianship of the *person* of the minor, it must be made to the District Court (and a High Court in the exercise of its original jurisdiction is a District Court under the Act) having jurisdiction in the place where the minor ordinarily resides. If the application is with respect to the guardianship of the *property* of the minor, it may be made either to the District Court having jurisdiction in the place where the minor ordinarily resides, or to a District Court having jurisdiction in a place where he has property. But if the application last mentioned is made to a District Court other than that having jurisdiction in the place where the minor ordinarily resides, the Court may return the application if, in its opinion, the application would be disposed of more justly or conveniently by any other District Court having jurisdiction.[8] The application must be made by petition in the form prescribed by s. 10, and must be accompanied by a declaration of the willingness of the proposed guardian to act, and the declaration must be signed by him and attested by at least two witnesses.[9]

Order for protection of person and property.—Pending the hearing of the application the Court may direct the person,

6 ss. 7, 8, ib. 7) s. 19, ib. 8) s. 9, ib. 9) s. 10, ib.

if any, having the custody of the minor to produce him, and may make orders for the temporary custody and protection of the person and property of the minor.[1]

Appointment of several guardians.—If the law to which the minor is subject admits of his having two or more joint guardians of his person or property, or both, the Court may, if it thinks fit, appoint or declare them. Separate guardians may be appointed or declared of the person and of the property of a minor. If a minor has several properties the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties.[2]

Mother joint guardian.—On the death of a father who is an European British subject, and who has, by will or other instrument to take effect after his death, appointed a guardian of his minor child, the Court may appoint the mother to be guardian of the child jointly with the guardian appointed by the father.[3]

Adverse claims of father and mother.—As between parents who are European British subjects adversely claiming the guardianship of the person, neither parent is entitled to it as of right, but other things being equal, if the minor is a male of tender years or a female, the minor will be given to the mother, and if the minor is a male of an age to require education and preparation for labour and business, then to the father.[4]

A minor is incompetent to act as guardian of any minor except his own wife, or child or, where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family.[5]

General duties and rights of guardian.—No person can be appointed a guardian against his will.[6] A guardian stands in a fiduciary relation to his ward, and, save as provided by the will or other instrument, if any, by which he was appointed, or under the Act (v. *post*), he must not make any profit out of the office. Such fiduciary relation extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent.[7]—See "*Contract*" pp. 155, 156. A guardian appointed or declared by the Court is entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties. But when an officer of Government, as such officer, is so appointed or declared to be guardian, such fees will be paid to the

1) s. 12, ib.
2) s. 15, ib.
3) ib.
4) s. 17, ib.
5) s. 21, ib.
6) s. 17, ib.
7) s. 20, ib.

Government out of the property of the ward, as the Local Government, by general or special order, directs.[8] If a guardian appointed or declared by the Court desires to resign his office he may apply to the Court to be discharged.[9]

Rights and duties of a guardian of the person.—He is charged with the custody of the ward, and must look to his support, health, and education, and such other matters as the law to which the ward is subject requires.[1] If a ward leaves, or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered to the guardian. The residence of a ward against the will of his guardian with any person does not terminate the guardianship of the person of the ward. A guardian of the person appointed or declared by the Court, unless he is the Collector or is a guardian appointed by will or other instrument, must not without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed by any rules in force under the Act.[2] A guardian who removes his ward for the purpose, or with the effect of preventing the Court from exercising its authority in the manner last aforesaid may be fined by the Court to the extent of Rs. 1,000, or imprisoned in the civil jail for a term which may extend to six months.[3] See "*Habeas Corpus.*"

Rights and duties of a guardian of property.—He is bound to deal with the property of the ward as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of the Act, he may do all acts which are reasonable and proper for the realisation, protection, or benefit of the property.[4] He may be required to give security and furnish a statement of the property in his charge and exhibit accounts from time to time. He may also be required to pay into the Court the balance due on such accounts. He must apply such portion of the income of the property of his ward as the Court from time to time directs, and, if the Court so directs, the whole or any part of that property for the maintenance, education, and advancement of the ward and his dependants, and for the celebration of ceremonies to which the ward, or any of those persons may be a party.[5] Where a guardian is appointed by will or other instrument, his power to mortgage, sell, or alienate immoveable property belonging to his ward, is subject to

8) s. 22, ib. 1) s. 24, ib. 3) s. 44, ib. 5 s. 34, ib.
9) s. 40, ib. 2) s. 26, ib. 4) s. 27, ib

any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the Court which made the declaration, permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order, in a manner permitted by the order.[6] Where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he cannot, without the previous permission of the Court, (*a*) mortgage, charge, sell, or alienate any part of the immoveable property of the ward; or (*b*) lease any part of that property for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor.[7] An appeal lies from the District Court to the High Court from an order refusing permission.[8] A disposal of property in contravention of either of the above-mentioned provisions is voidable at the instance of any other person affected thereby.[9]

The Court may from time to time by order, define, restrict or extend the powers of the guardian (when the latter is not a Collector) with respect to the property of the ward.[1] The guardian may apply by petition to the Court for its opinion, advice, or direction on any present question respecting the management or administration of the property of the ward.[2] The guardian stating in good faith the facts in the petition, and acting upon the opinion, advice, or direction given by the Court, is deemed, so far as regards his own responsibility, to have performed his duty as guardian in the subject-matter of the application.[3]

Suits against guardian of property.—When a security bond has been taken (v. *ante*) from the guardian for the due administration of the ward's property, and the engagement of the bond has not been kept, the Court may assign the bond to some person to sue and recover upon it as trustee for the ward.[4] Where no bond has been given, any person, with the leave of the Court, may as next friend, during the minority of the ward, institute a suit against the guardian, or (if he is dead) his representative for an account. In addition to these remedies the ward or his representative has all remedies against the guardian and his representative which a beneficiary has against a trustee.[5]

Death of one of several joint guardians.—On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors until a further appointment is made by the Court.[6]

6) s. 28, ib.
7) s. 29, ib.
8) s. 47, ib.
9) s. 30, ib.
1) s. 32, ib.
2) s. 33, ib.
3) ib.
4) s. 35, ib.
5) s. 37, ib.
6) s. 38, ib.

Termination of guardianship.—The powers of a guardian of the person or property cease (1) by death, removal, or discharge; (2) by the Court of Wards assuming superintendence of the person of the ward; (3) by the ward ceasing to be a minor, and (4) in the case of a guardian of the person of a female ward, by her marriage to a husband who is not unfit to be her guardian; (5) in the case of a ward whose father was unfit to be his, guardian, by the father ceasing to be so.[7]

Removal of guardian.—The Court may, on the application of any person interested, or of its own motion, remove a guardian appointed by Court, by will, or by other instrument for any of the following causes:—(*a*) for abuse of his trust; (*b*) for continued failure to perform the duties of his trust; (*c*) for incapacity to perform the duties of his trust; (*d*) for ill-treatment, or neglect to take proper care of his ward; (*e*) for contumacious disregard of any provision of the Act, or of any order of the Court; (*f*) for conviction of an offence implying a defect of character which unfits him to be the guardian of his ward; (*g*) for having an interest adverse to the faithful performance of his duties (this clause does not apply to a guardian appointed by will or other instrument unless the adverse interest accrued after the death of the person who appointed him, or it is shown that that person made and maintained the appointment in ignorance of such adverse interest); (*h*) for ceasing to reside within the local limits of the jurisdiction of the Court (this does not apply to a guardian appointed by will or other instrument unless such guardian has taken up a residence which renders it impracticable for him to discharge the functions of guardian); (*i*) in the case of a guardian of the property, for bankruptcy or insolvency; (*j*) by reason of the guardianship ceasing, or being liable to cease, under the law to which the minor is subject.[8] An appeal lies from the District Court to the High Court from an order of removal of a guardian.[9]

An order regulating the conduct or proceedings of any guardian appointed or declared by the Court may be made by the Court on the application of any person interested.[1]

Disagreement amongst guardians.—Where there are more guardians than one of a ward, and they cannot agree upon a question affecting his welfare, any of them may apply to the Court for its direction.[2] An appeal lies to the High Court from an order made under this section.[3]

The Court of Wards, which was originally established more for the purpose of ensuring the collection of the revenue than for that of protecting minor proprietors, now exists for the

7) s. 41, ib.
8) s. 39, ib.
9) s. 47, ib.
1) s. 43, ib.
2) ib.
3) s. 47, ib.

purpose of protecting, superintending, and directing, minor, female, lunatic, or otherwise incapable proprietors of lands which are borne on the revenue roll of a Collector as liable for the payment of land revenue to the Government. In the territories under the administration of the Lieutenant-Governor of Bengal the Court of Wards is the Board of Revenue. Where the Board has delegated its power to a Commissioner, Collector, or other person, the Commissioner, Collector, or other person is the Court. Nothing contained in the Court of Wards Act affects the jurisdiction as respects infants of any High Court of Judicature.[4]

Chartered High Courts.—The Act saves the jurisdiction of any High Court established under 24 and 25 Vic., cap. 104. The High Court at Calcutta has the like power and authority with respect to the persons and estate of infants, idiots, and lunatics as that which the Supreme Court possessed.[5] By its Charter of 1774,[6] the Supreme Court was empowered to appoint guardians and keepers for infants and their estates, according to the order and course observed in England. The High Court at Allahabad (N.-W. P.) has the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the N.-W. Provinces, as that exercised by the Calcutta High Court, but *subject* to the provisions of any laws or regulations in force at the time of the grant of the Letters Patent.[7] In addition to the special powers of appointing guardians to infants given to the High Courts by their Charters and the powers given by this Act[8] they may, within the limits of their ordinary original civil jurisdiction, acting as a Court of equity, appoint and remove guardians, provide for the maintenance of infants, the management and disposition of their property, and their marriage.

Next friends and guardians ad litem.—See "*Minority and Minors.*"

4) See Act IX of 1879 (B.C.)
5) cl. 17, Letters Patent, 1865 : the Letters Patent for the Bombay and Madras High Courts contain the same provision.
6) cl. 25.
7) cl. 12, Letters Patent, March 17th, 1866.
8) VIII of 1890.

HABEAS CORPUS.

AUTHORITIES—Criminal Procedure Code, Ch. XXXVII: Cases cited.

Remedies against deprivation of liberty.—Generally speaking, in cases where a person is illegally deprived of his liberty he has three remedies: *first*, by civil action; *secondly*, by indictment; and thirdly, by the writ *habeas corpus*.[1] Wrongful confinement is both a civil wrong or tort (known as false imprisonment) for which an action for damages may be brought, since everybody has a right to freedom of action from place to place at his pleasure, and also an offence under the Penal Code[2] for which the offender may be prosecuted. See "*Wrongful Confinement and Restraint.*"

Nature of the writ of habeas corpus.—The writ of *habeas corpus ad subjiciendum* (that you have the body to answer) is in its aim single. It has for its object the vindication of the right of personal liberty. It is issued for the purpose of taking care that no subject of the Queen shall be illegally confined against his will.[3] It is issued, on behalf of the person said to be illegally confined. It is addressed to the person who detains another in custody, and commands him to produce the body, and to do, submit to, and receive whatever the Judge or Court shall order. It is not issued for the purpose of lending the arm of the law to any person claiming to have authority over him. It is only when the person confined is under any personal disqualification, that the guardian or protector is looked to in the enquiry, and in such a case, the Court considers that it sets the person confined at liberty by handing him over to the charge of his rightful guardian.[4]

The plenary jurisdiction of issuing writs of *habeas corpus* which the High Courts possessed in all cases where a person within the local limits of their ordinary jurisdiction, or a British subject without those limits[5] complained of wrongful confinement, and of inquiring into the matter as to whether such complaint was wrongful or not, no longer exists. In the place of that jurisdiction certain powers of issuing directions in the nature of a writ of *habeas corpus* are conferred on the High Courts by the Code of Criminal Procedure enabling them to grant relief only in certain specified cases and within a certain limited local jurisdiction. This power to grant relief is further subject to the provisions of

1) 6 B. L. R., 444.
2) ss. 340—348.
3) 5 B. L. R., 427.
4) ib. p. 428.
5) 6 B. L. R., 447.

certain Regulations and Acts[6] which enable the Governor-General in Council to detain anybody for any political offence in any place that the Governor-General determines for such confinement. The High Courts have further special powers in respect of the illegal detention of European British subjects.—(*v post.*)

Directions in the nature of habeas corpus.—Any of the High Courts at Calcutta, Madras, and Bombay, whenever it thinks fit, may direct :—(*a*) that a person within the limits of its ordinary original civil jurisdiction be brought up before the Court to be dealt with according to law; (*b*) that a person illegally or improperly detained in public or private custody, within such limits, be set at liberty; (*c*) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending, or to be inquired into, in such Court; (*d*) that a prisoner detained as aforesaid be brought before a Court-Martial, or any Commissioners acting under the authority of any Commission from the Governor-General in Council for trial, or to be examined touching any matter pending before such Court-Martial or Commissioners respectively; (*e*) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and (*f*) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment : (*cepi corpus et paratum habeo i.e.*, I have taken the body and have it ready ;—a return made by the Sheriff upon an attachment under a warrant of arrest, when he has the person against whom the process was issued in custody[7]). The High Courts are empowered to frame, and have framed rules to regulate the procedure in cases under this section.

Unlawful detention of European British subject.—When any European British subject is unlawfully detained in custody by any person, such subject, or any person on his behalf, may apply to the High Court which would have jurisdiction over such European British subject in respect of any offence committed by him at the place where he is detained, or to which he would be entitled to appeal from any conviction for any such offence, for an order directing the person detaining him to bring him before the High Court to abide such further order as it may pass.[8]

Search for persons wrongfully confined.—If any Presidency Magistrate, Magistrate of the first class or Sub-divisional

6) Cr. Pr. Code, s. 491, (Bengal Reg. III of 1818 · Madras Reg. II of 1819 : Bombay Reg. XVX of 1827 : Acts XXXIV of 1850 and III of 1858.

7) Cr. Pr. Code, s. 491.
8) ib. s. 456. See I. L. R., 1 All. 1.

Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined, and such search must be made in accordance therewith, and the person, if found, must be immediately taken before a Magistrate who is empowered to make such order as in the circumstances of the case seems proper.[9]

Unlawful detention of women.—Upon complaint made to a Presidency Magistrate or Deputy Magistrate on oath, of the abduction or unlawful detention of a woman, or of a female child under the age of 14 years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian, or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.[1] Both the detention *and* the purpose must be unlawful.—So the detention of an adult girl against the wishes of her guardian, so as to induce her to become a Christian was held not to be sufficient cause for the Magistrate's action under this section.[2] See "*Wrongful Confinement and Restraint.*"

9) Ib. s. 100. 1 Ib. s. 551. 2) I. L. R., 16 Cal., 487.

HIGHWAYS AND WAYS.

AUTHORITIES—Cases and Acts cited : Pratt's Law of Highways, 12th edition.

Ways are either highways, or private ways. There are commonly said to be three kinds of highways : (1) a footway for foot passengers only ; (2) horse and bridleway for horses and cattle as well as foot passengers ; and (3) a cart or carriage way, which includes both footway and horseway. The nature of a private-way depends, in the case of a way acquired by grant, on the terms of the grant, and in the case of a way acquired by prescription, on the nature, extent, and purpose of the user. See "*Easements and Licenses.*"

A right of way strictly means a private way, *i.e.*, a privilege which (*a*) an individual or (*b*) a particular description of persons may have of going over another's ground. Such a right is a discontinuous easement (v "*Easement and Licenses*"). Using the word in its most extended sense there are in India three classes of rights of way : (1) private rights in the strict sense of the term vested in particular individuals, or the owners of particular tenements ; (2) rights belonging to certain classes of persons, certain portions of the public, such as the inhabitants of a village ; (3) public rights in the full sense of the term which exist for the benefit of all the Queen's subjects.[1] There is no such thing as a *natural* right of way. The right is not a right to land or to any corporeal interest in land. The right given is that of using the soil for the purpose of passage : in the case of a highway, all the Queen's subjects possess this right ; in the case of a private way, the right is limited to a particular person, or to a particular class of persons. Rights of way may be *general*, i.e., usable for all purposes, or *limited* to a particular purpose. Thus there may be a right of way for agricultural purposes only,[2] for the carriage of coals only,[3] or for the carriage of all articles except coals.[4]

Origin of rights of way.—The *first* class of rights (v. *ante*) commonly have their origin in grant or prescription (v. "*Easements and Licenses*") ; the *second* class in custom ; and the *third* in dedication, statute, or prescription[5] (v. *post*).

Highways.—A highway is a way which exists for the benefit of all the Queen's subjects without distinction. Except where a highway is created by the express enactment of the Legislature,

1) I. L. R, 15 Cal., 464.
2) Willes, 282.
3) 1 Ld. Raym., 486.
4) 7 B. & C., 257 ; 4 M. & W., 245.
5) I. L. R., 15 Cal., 464.

it derives its existence from a *dedication* to the public by the owner of the land over which the highway extends, of a right of passage over it, and this dedication, though it be not made in express terms, as indeed it seldom is, may and will be *presumed* from an uninterrupted use by the public of the right of way claimed. It is sufficient if acts of user by the public are shown to have been acquiesced in by the owner or owners of the land over which the road passes, and that those acts are of such a character as to warrant the inference that the owner or owners intended to make over to the public the right to use the land as a public highway. No particular time is necessary for evidence of dedication. If the act of dedication be unequivocal, it may take place immediately. The duration of the public user, which limits the rights of the owner of the soil, is not so important in this respect as the nature of the acts done by the owner of the soil, and of the adverse acts acquiesced in by him, as well as the intention indicated by those acts.[6] A navigable river is deemed to be a highway, and so also in some respects is a ferry. It is not necessary that a highway should be a thoroughfare.[7] The privilege once granted to the public by the owner of the soil is irrevocable. There can be no temporary dedication to the public, on the maxim "Once a highway always a highway" until stopped by operation of law.[8]

Dedication.—The mere laying out of a road, though an accommodation to the public, does not give them a right of way.[9] There must be an *intention* on the part of the owner to dedicate it to their use;[1] but an express formal dedication is not necessary. If the owner throws open a way and marks by no visible distinction (*e.g.*, by a bar gate), his wish to exclude the public, and suffers them to use it without interruption, an intention to dedicate will be presumed.[2] The user must have existed with the consent of the owner of the soil: the assent of a tenant for life is not sufficient, still less that of a mere lessee.[3] As there cannot be temporary dedication of a way to the public, so there can be none to a limited portion of the public. A dedication may be limited to a special purpose: *e.g.*, a right of footway only may be granted. It may be dedicated subject to an obstruction, or to a partial and occasional interference.[4]

Rights in soil of public roads.—By dedication the owner does not relinquish his property in the land over which the highway passes: he is entitled to the subsoil absolutely, and to the

6) 6 Cal. L. R., pp. 284, 285.
7) 21 L. J. Q. B., 406.
8) 18 L.J.M.C., 220: 8 C.B. (N. S.), 848.
9) Cro. Car., 266.
1) 11 M & W., 827.
2) 1 Campb., 260: 2 Str., 1004 Pratt's Highways, pp. 5, 6.
3) ib.
4) Pratt, pp. 8, 9, 10.

surface soil, subject only to the user of it by the public.[5] Where the land in each side of the highway is the property of one person, the property in the soil of the highway is presumed to belong to that person. Where the land on each side belongs to different proprietors they are each presumed, in the absence of evidence to the contrary, to be entitled to the soil of the road adjoining their land *usque ad medium filum viæ* (to the middle thread of the road). There is nothing in India which prevents the operation of the rule of law, that where a road has been for many years the boundary between two properties, and there is no evidence that the owner of either property gave up the whole of the land necessary for it, the site of the road must be presumed to belong to the adjoining proprietors, half to the one and half to the other, up to the middle of the road.[6] In the Bombay Presidency the soil of every public road is vested in the Secretary of State.[7] The case is the same in Calcutta (in regard to the soil of public streets which is vested in the Commissioners[8]) and in mofussil municipalities.[9] There is however no such law applicable to the province of Bengal generally.

Suits and remedies in respect of highways.—If any one obstructs a public highway he may be liable to a criminal charge of nuisance under the Penal Code[1] or of mischief,[2] if the circumstances be such as to sustain either of these charges. Any one who sustains *special* injury by reason of an obstruction to a highway may bring a suit, claiming damages, and any other appropriate relief. See "*Nuisance.*" Further, under the Criminal Procedure Code[3] summary proceedings may be taken by a Magistrate to prevent or remove any such obstruction injurious to the public. An order by a Magistrate directing the removal of an obstruction from a place held by him to be a highway is not final and conclusive upon the question of highway or no highway.[4] If a man owns land, and anybody trespasses upon it, claiming a right to use it as a public highway, a suit for damages will lie, and an injunction may be granted. The owner may also bring a suit for the declaration of his right against any one who has formally claimed to use the land as a public road, and thereby endangered his title.[5]

Processions on highways.—"*Primâ facie*" every individual has a right to pass along the public highways in any manner, and with any number of attendants, he chooses, provided he

5) p. 10, ib.
6) I. L. R., 4 Cal., 206.
7) s. 37, Act V of 1879, Bom.
8) s. 202, Cal. Mun. Consol. Act, 1888.
9) s. 30, Act III of 1884, Bengal.

1) s. 283, Penal Code.
2) s. 431, ib.
3) s. 133, *et. seq.*
4) I. L. R., 15 Cal., 469.
5) ib. 467, 468, and s. 42, Specific Relief Act.

does no injury to any one else, and the fact that he has never done so before is no reason why he should not do so now. On the other hand the persons who exercise this right must not interfere with the ordinary use of the streets by the public and must submit to such directions as the Magi-trates may lawfully give to prevent obstructions of the thoroughfare, or breaches of the public peace, or to maintain the corresponding rights of other religious sects.[6]

Rights of way belonging to certain classes of persons, *e.g.*, to the inhabitants of a village. This class of right exists in India as in England.[7] With regard to rights vested in classes there are some remedies open to them additional to those open to persons entitled to a private right of way strictly so called.[8]

Private rights of way.—The rights of way may either be for general purposes, or limited to special purposes as for the purpose of a footway, or for the passage of sweepers,[9] or for driving cattle, or for the passage of boats over water, or for particular seasons of the year only. A right of way over land is a right to pass in a particular line and not to vary it at pleasure.[1] A person who has a right of way from one place to another over a particular line, cannot be compelled to use a different and substituted way.[2] See *Easements and Licenses.*

6) Mayne's Penal Code, pp. 171, 172 · 1 Mad. H. C. R., 50: I.L.R., 5 Mad., 304: I.L.R., 2 Mad., 140: I. L. R., 6 Mad. 203: s. 188, Penal Code.
7) I. L. R., 15 Cal., 465: Specific Relief Act, s. 42, illust. A: s. 54, illust. *B.*
8) *v.* I. L. R., 15 Cal., 465, 466.
9) L. R., 13, I. A., 77.
1) 4 W. R., 49.
2) 15 W. R., 496.

HORSES.

AUTHORITIES—Oliphant's Law of Horses, 4th Edition: Act XX of 1879: Act IX *of 1872 (Contract): and cases cited.*

"**Soundness.**"—A horse is sound "when he is free from hereditary disease, is in the possession of his natural and constitutional health, and has as much bodily perfection as is consistent with his natural formation." A man who buys a horse "warranted sound" must be taken as buying him for immediate use, and has a right to expect him to be capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if, at the time of sale, the horse has any disease, which either actually diminishes the natural usefulness of the animal, so as to make it less capable of work of any description; or which, in its ordinary progress, will diminish the natural usefulness of the animal; or if the horse has either from disease, (whether such disease be congenital or arises subsequently to its birth,) or from accident, undergone any alteration of structure, that either actually does at the time, or in its ordinary effect, will diminish the natural usefulness of the horse, such a horse is *unsound.*[1] The buyer ought, however, to know whether a horse from its form will suit him, and should try it in regard to strength, endurance, or manner of going; the fact that a horse is soon knocked up, or that it is very slow or is liable to stumble will not amount to "unsoundness." "The word 'sound' means what it expresses, namely, that the animal is sound and free from disease at the time he is warranted sound. If, indeed, the disease were not of a nature to impede the natural usefulness of the animal for the purpose for which he is used, as, for instance, if a horse had a slight pimple on his skin, it would not amount to an '*unsoundness*; but even if such a thing as a pimple were on some part of the body where it might have that effect, as, for instance, on a part which would prevent the putting on of a saddle or bridle on the animal, it would be different. It is no answer, to say that the disease is slight and can be easily cured. If we once let in considerations of that kind, where are we to draw the line? A horse may have a cold, which may be cured in a day, or a fever, which may be cured in a week or a month; and it would be difficult to say where to stop; of course, if the disease be slight, the unsoundness is proportionately so, and so also ought to be the damages; to constitute unsoundness there must be either some alteration in

1) Oliphant, p. 71: 9 M. and W., 670: 2 M. and Rob., 137.

the structure of the animal, whereby it is rendered less able to perform its work, or else there must be some disease." [2]

"The word 'sound' means *sound*, and the only qualification of which it is susceptible arises from the purpose for which the warranty was given. If, for instance, a horse is purchased to be used in a given way, the word 'sound,' means that the animal is useful for that purpose; and 'unsound' means that he, at the time, is affected with something which will have the effect of impeding that use: if the disease be one easily cured, that will only go in mitigation of damages. It is, however, right to add to this definition of unsoundness, that the disqualification for work may arise either from disease or accident." [3]

All horses are unsound whilst suffering from acute diseases, such as fevers, inflammations, etc [4] It is not necessary to constitute unsoundness, that the disorder, whether from disease or accident, should be permanent and incurable: it may be only temporary; it is sufficient if the disorder render the animal for the time being unfit for service, *e.g.*, a cough.[5] Any infirmity therefore which renders a horse less fit for present use and convenience is an "unsoundness."

What is "vice."—A vice is a bad habit, shewn in the temper of the animal, so as to make him dangerous, or a habit decidedly injurious to his health, or tending to impair his usefulness.[6]

Examples of unsoundness—The following diseases, defects, or alterations of structure have been held to constitute unsoundness: *Blindness, cataract of the eye, opacity of the crystalline lens, bone-spavin, broken wind, cough* (whether permanent or temporary), *contraction of the hoof* (when produced by inflammation, or accompanied by disease in the foot, or any alteration in its natural structure; though it may not cause lameness at the time of sale, yet if lameness be produced afterwards by it, it is an unsoundness). *Crib-biting* (if it has produced disease or alteration in structure, otherwise it is a vice). *Curb*, (but not curby hocks for a defect in the form of a horse which has not occasioned lameness at the time of the sale, although it may render the animal more liable to become lame at some future time, is no breach of a warranty of "soundness.") *Dropsy of the skin, dropsy of the heart, glanders, glaucoma* (dimness or obscurity of sight from an opacity of the vitreous humour). *Kidney-dropping, lameness*, (whether temporary or permanent,) *laminitis, liver-disease, lung-disease, navicular-joint-disease* (nerved horse) *rheumatism*,

2) 9 M. and W., 670.
3) ib.
4) Oliphant, p. 74.
5) 4 Camp. 281: 1 Stark, N. P. C., 127: 2 M. and Rob., 137: 9 M. and W., 670.
6) Oliphant, p. 74.

ossification of the cartilages, *roaring* (proceeding from disease, or organic infirmity rendering a horse incapable of performing his usual functions,) *saddle galls*, (if in such a situation as to prevent the putting on of a saddle or harness,) *scab*, *shying* (the result of defective sight,) *side-bones*, *spavin* (*bone*), *splint* (in the neighbourhood of a joint interfering with its action and pressing upon any ligament or tendon,) *stringhalt* (if bad), *warts*, (if they prevent saddle or harness being put on,) *wheezing*, *whistling*. The following diseases and defects are considered by Mr. Oliphant, to constitute unsoundness. *Blood and bog spavin*, *bronchitis*, *canker*, *chest founder*, *cloudiness of the eye*, *broken knees* (when unhealed, or when healed, if the action of the joint is impaired thereby) *capped hocks* (when the consequence of sprain in the hock, or accompanied by enlargement of it), *chest founder*, *corns*, *enlarged glands*, *enlarged hocks* (unless a mere blemish the result of external injuries) *false quarter*, *common and water farcy*, *fever in the feet*, *or acute founder*, *grease* (when it renders a horse unfit for immediate use), *grogginess* (when it exists in such a degree as to diminish the natural usefulness of the horse). *Gutta serena* or glass eye, *lampas* (only while interfering with the horse's usefulness), *mallender*, *nasal gleet*, *ring bone*, *sand crack*, *strangles* (while the horse is ill with it), *thrush*, *ulcerated parotid gland*, *poll-evil*, *pumiced feet*, *quittor*, *sallenders*, *thoroughpin* (causing lameness), *wind galls* (causing lameness, or when so large and numerous as to make it likely that they will soon cause it), *weak foot* (when the result of disease), and *jaundice* while it lasts.[7]

Examples of vice.—The following have been held to be, or are considered by the same writer to be "vices:" *Backing and jibbing*, *biting* (when dangerous), *crib-biting*, *kicking* (either in the stall or in harness), *not lying down* (when decidedly injurious to health and tending to impair usefulness), *rearing* (which is unprovoked by bruising and laceration of the mouth) *rolling in the stable* (when inveterate may be a vice), *running away* (from vicious propensity alone), *confirmed shying*, *vicious to clean or to shoe* (when it exists in such a decree as to be dangerous), *weaving* (when it injures a horse's health, or makes him dangerous) and *wind-sucking*.[8]

Warranty.—A person who buys a horse as any other object of sale, does so at his own risk: if the horse turns out unsound or unfit for use, he has no remedy unless there is an express warranty of soundness and fitness, or in the case of fraud. No special words are required for a warranty; any representation by the seller at the time of sale is a warranty if so intended;

7) ib pp. 74—111. 8) ib.

as if he should say: "This horse is sound." It is safer, however, to take a written warranty as to age, soundness, and freedom from vice.

Warranties are either general, qualified, or limited: The first being an unconditional undertaking that the horse is sound; the second conditional, as if a seller were to say of a horse: "He is sound as far as I know." In this case an action for breach of warranty could only be maintained, if the purchaser proved that the seller knew of the unsoundness; limited warranties are often given at auctions. They are to the effect that notice of breach of warranty must be given within a certain time: therefore, except in the case of fraud, no action can be brought except within this time. If a person sells a horse for a particular purpose, as for a lady, he is understood to warrant it reasonably fit for that purpose.—See "*Warranty*."

Patent defects.—A warranty does not cover patent defects, so that if a horse be warranted perfect, and it is minus an eye, the purchaser has no remedy, unless he had no opportunity of inspecting the horse. But the defects which the warranty does not cover, must be so manifest as to be necessarily within the knowledge of the purchaser. The defect must also constitute an "unsoundness" or be such as will necessarily lead to it.

Seller when not responsible for patent defects.—See "*Warranty*."

Requisites of action for fraud or breach of warranty.—In an action for fraud, it is necessary to show that the representation was false in fact to the knowledge of the person making it, and that the representation was the cause of the contract.—See "*Contract*," pp. 155, 156. In an action for breach of warranty, it is only necessary to prove the warranty, and that it was broken. If it is proved that the horse was unsound at the time of sale, the seller is liable to the buyer in damages. Except in the case of fraud, or an express agreement authorizing the return of the horse, or the rescission of the contract, the seller is not bound, on a breach of the warranty, to take the horse back again if it has been delivered to and accepted by the buyer; but the buyer is entitled to compensation from the seller for loss caused by the unsoundness; and if the seller sues for the price, the breach of warranty will be taken in mitigation of damages.[9] When a breach of warranty has occurred, the buyer should tender the horse to the seller, or give notice of the breach; if the seller refuses to take back the horse, it should be sold as soon as possible by public auction. One portion of the damages will then be the difference of price at which the horse was bought

9) Act IX of 1892, s. 117, see illust.

and at which it was sold. The seller receiving notice of a breach of warranty should have the horse at once examined by a vet. or other person to ascertain the state of the case; if the warranty has been broken, he can then come to terms with the buyer; if not, he can call the person who examines the horse to give evidence in his favour. See "*Warranty*" and "*Contract*," *passim*.

Glanders and farcy in horses.—The Glanders and Farcy Act[1] extends to the whole of British India, except the Madras and Bengal Presidencies. "Horse" includes ponies, asses, mules, and jennets. "Diseased" means affected with glanders or farcy. An inspector appointed under this Act may seize any horse which he has reason to believe, from personal knowledge or from information, is diseased, and for the purpose of making such seizure, enter or search any field, building, or other place, where he has reason to believe the horse is to be found. The horse is then examined by the Veterinary Surgeon and destroyed if found diseased. When a diseased horse has been in any building or other enclosed place, the inspector may direct the owner or person in charge thereof to disinfect it, and destroy any internal fittings and other articles therein. On failure to do so, the building will be disinfected, and the articles destroyed by the inspector at the owner's expense. An owner or person in charge of a diseased horse must give immediate information to an inspector or officer of police. No person in charge of any horse which has been with diseased horses may remove it except to prevent infection, or under a license from the inspector. An inspector who makes vexatious and unreasonable entries, searches, and seizures, is liable to a maximum term of imprisonment for six months, or to a maximum fine of Rs. 500, or to both.

Mischief to horses.—See "*Animals*."

Cruelty to horses.—See "*Animals*."

1) Act XX of 1879.

HURT.

AUTHORITIES—Indian Penal Code; and cases cited.

What is hurt.—Whoever causes bodily pain, disease, or infirmity to any person is said to cause **hurt.** The following kinds of hurts only are "**grievous**": (1) Emasculation; (2) permanent privation of the sight of either eye; or (3) of the hearing of either ear; (4) privation of any member or joint; (5) destruction, or permanent impairing of the powers of any member or joint; (6) permanent disfiguration of the head or face; (7) fracture or dislocation of a bone or tooth; (8) any hurt which endangers life, or which causes the sufferer to be, during the space of *20 days*, in severe bodily pain, or unable to follow his ordinary pursuits.[1]

Offence of causing hurt.—Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt." Whoever voluntarily causes hurt, if the hurt which he intends to cause, or knows himself to be likely to cause, is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt." But a person cannot be said to cause grievous hurt except when he both causes grievous hurt, and intends, or knows himself to be likely, to cause grievous hurt. But he is said to voluntarily cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind: *e.g.*, A intending, or knowing himself to be likely, permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of 20 days. A has voluntarily caused grievous hurt.[2]

Special forms of the offence are voluntarily causing hurt or grievious hurt: (1) by dangerous weapons or means; (2) to extort property or to constrain to an illegal act; (3) administering poison and drugs with intent to cause hurt or to commit an offence: *e.g.*, administering a drug to a woman with intent to excite her sexual passions, in order that connection may be had with her[3]: (4) to extort confession, or to compel restoration of property; (5) to deter public servant from his duty.[4]

1) Penal Code, ss. 319, 320.
2) s. 322, ib.
3) v. 31 L. J. M. C., 72: ib., 145.
4) ss. 324, 327, 328—333.

Acts endangering life or the personal safety of others. —Whoever does any act so rashly or negligently as to endanger human life, or the personal safety of others is punishable with imprisonment (rigorous or simple) for a term which may extend to three months, or with fine up to Rs. 250, or with both. Causing hurt and grievous hurt by an act which endangers life or the personal safety of others are offences punishable more severely. Accordingly, a person who sends an article of a dangerous nature by a carrier is bound to take reasonable care that its nature should be communicated to those who have to carry it.[5]

5) Penal Code, ss. 336—338. 31 L. J. C. P., 137.

HUSBAND AND WIFE.

AUTHORITIES—Act X of 1865 (Succession): III of 1874 (Married Women's Property), 45 and 46 Vic., cap. 75: IX of 1872 (Contract): IV of 1869 (Divorce), 11 and 12 Vic., cap. 21: (Insolvency) Indian Penal Code: Act XXI of 1865, Evidence Act: Criminal Procedure Code and cases cited.

Rights of property of husband and wife domiciled in British India.—In the case of marriages contracted after 1st January 1866 by parties both of whom are domiciled[1] in British India, the wife is absolute owner of all her property possessed by her at the time of marriage, or acquired subsequently thereto. The husband acquires no interest in the property of his wife by marriage. No person by marriage acquires any interest in the property of the person whom he or she marries, or becomes incapable of doing any act in respect of his or her property which he or she could have done if unmarried.[2] This section does not apply to any marriage, one or both of the parties to which professed at the time of the marriage the Hindu, Mahommedan, Buddhist, Sikh, or Jaina religion.[3]

Marriage of persons one of whom has an Indian domicile.—If a person whose domicile is *not* in British India marries *in British India* a person whose domicile *is* in British India, neither party acquires by the marriage, any rights in respect of any property of the other party not comprised in a settlement made previous to marriage, which he or she would not acquire thereby, if both were domiciled in British India at the time of the marriage: *e.g.*, A domiciled in England marries in India after 1st January 1866, B, who is domiciled in India, and who possesses property. A has no rights in or to any property of B, his wife, not comprised in a settlement made previous to marriage. B, the wife, is absolute owner of such property.[4] The section only applies to marriages contracted in British India; therefore in the case given, if the marriage had been contracted in England, the wife would have acquired by marriage the domicile of her husband,[5] and the right of the parties to the marriage would be determined by English law.[6]

Marriage of parties having an English or non-Indian domicile.—Where both parties are domiciled in England, or elsewhere than in British India, the rights of the parties to the marriage in respect of their own and of each other's property is determined by the English law, or the law of the country in

1) I. L. R., 1 Cal., 412.
2) Act X of 1865, s. 4.
3) s. 2, Act III of 1874.
4) s. 44, Act X of 1865.
5) s. 15, ib.
6) I. L. R., 1 Cal., p. 420.

which they are domiciled, and this whether the marriage was contracted in or out of British India.

The law in England relating to husband and wife is now similar in most respects to the law in India. Prior to the various acts dealing with the property of married women, the effect of marriage, according to English law, was to bestow on a husband absolute ownership of his wife's personal property and a life interest in her real property. By the Married Women's Property Act, 1882,[7] a married woman is made capable of acquiring and holding, and disposing by will or otherwise, of any real or personal property as her separate property, as if she was unmarried,[8] without the intervention of any trustee. Every woman married after the 1st January 1883, is entitled to hold as her separate property, and to dispose of by will or otherwise, all real and personal property belonging to her at the time of her marriage, or acquired by or devolving upon her after her marriage; including any wages, earnings, money, and property acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.[9] Women who were married prior to the 1st January 1883 are entitled to hold and dispose of, as their separate property, all real and personal estate, their title to which whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of the Act, including wages, earnings, money, and property so gained or acquired by them as aforesaid.[1] Similar provisions are enacted by the Indian Act (v. *post*). All deposits in any savings or other bank, and all annuities, stocks, or funds, which, at the commencement of the Act, are standing in the sole name of a married woman, and all shares, stocks, debentures, &c., of or in any corporation, company, or otherwise, or of any industrial or benefit society so standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman[2] and as to any such which shall be allotted to, placed, registered or transferred into the sole name of a married woman, the same shall be deemed, until the contrary be shown, to be her separate property, in respect of which, and so far as any liability may be incident thereto, her separate estate shall alone be liable.[3] Gifts or deposits by a husband to or with a wife in fraud of creditors are invalid.[4] In regard to the remedies of married women for the protection and security of their separate property, the Act declares[5] that every woman married either before or after the Act shall with certain provisions have in

7) 45, 46 Vic., cap. 75.
8) s. 1, ib.
9) s. 2, ib.
1) s. 5, ib.
2) s. 6, ib.
3) s. 7, ib.
4) s. 10, ib.
5) s. 12, ib.

her own name against all persons, including her husband, the same remedies, civil and criminal, as if such property belonged to her as an unmarried woman. Married women trading are liable to the Bankruptcy Laws. With regard to contracts and torts or civil wrongs (*e.g.*, assault, libel, trespass, &c.), a married woman is made capable of entering into and rendering herself liable in respect of and to the extent of her separate property, on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were an unmarried woman; any damages or costs recovered by her in any such action or proceeding are her separate property: any such recovered against her are payable out of her separate property, and not otherwise.[6]

Wages and earnings of a woman married before 1st January 1866 (v. *post*) acquired or gained after the 24th February 1874 in any employment, occupation, or trade, carried on by her and not by her husband, and any money or other property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all savings from, and investments of, such wages, earnings, and property are her separate property, for the receipt of which she can give a good discharge.[7] The Act does not apply to women at the time of their marriage professing the Hindu, Mahommedan, Buddhist, Sikh, or Jaina religion, or whose husbands professed at that time any of those religions: it applies to persons having an English domicile.[8]

A married woman may take legal proceedings in her own name for the recovery of property of any description which by force of the Indian Succession Act, or of this Act, is her separate property: she has in her own name the same remedies, both civil and criminal, against all persons for the protection and security of such property, as if she were unmarried, and is *liable* to such suits, processes, and orders in respect of such property as she would be liable to if she were unmarried.[9]

Wife's liability for debts contracted after marriage.—If a married woman (whether married before or after the 1st January 1866) possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such a contract will be satisfied out of her separate property, such person will be entitled to sue her, and to the extent of her separate property, to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract, and continued unmarried at the execution of the decree.[1] This

6) s. 1, sub-sec. 2, ib.
7) Act III of 1874, s. 4.
8) I. L. R., 4 Cal., 140.
9) Act II of 1874, s. 7.
1) s. 8, ib., 8 B. L. R., 372.

provision does not affect the liability of a husband for debts contracted by his wife's *agency* express or implied.[2] (See next page.)

Ante-nuptial debts.—A husband married after the 31st December 1865 is not by reason only of such marriage liable to the debts of his wife contracted before his marriage, but the wife is liable to be sued for, and is liable, to the extent of her separate property, to satisfy such debts as if she had continued unmarried. This provision, however, does not invalidate any contract into which a husband may, before the passing of this Act, have entered in consideration of his wife's ante-nuptial debts.[3]

Insurances by wives and husbands. — Any married woman may effect a policy of insurance on her own behalf and independently of her husband; the policy and all benefit from it, if expressed on the face of it to be so effected, enures as her separate property. The contract evidenced by such policy is as valid as if made with an unmarried woman.[4] A policy of insurance effected by a husband on his own life and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, enures as, and is deemed a trust for, the benefit of the wife, or wife and children, or any of them (according to the interest so expressed), and is not, so long as any object of the trust remains, subject to the control of the husband, or to his creditors, nor does it form part of his estate.[5] These provisions do not operate to destroy or impede the rights of any creditor to be paid out of the proceeds of any policy of insurance which may have been effected with intent to defraud creditors.

Policy money to be paid to Official Trustee.—When the sum secured by the policy (v. *ante*) becomes payable, it must, unless special trustees are duly appointed to receive and hold it, be paid to the Official Trustee (see "*Trusts and Trustees*") of the Presidency in which the office at which the insurance was effected is situate. It will be received and held by him upon the trusts expressed in the policy, or such of them as are then existing.[6]

Effect of marriage and marriage settlements on property.—The husband surviving his wife has the same rights in respect of her property, if she die intestate, as the widow has in respect of her husband's property, if he die intestate.[7] (See "*Intestacy.*") The property of a minor may be settled in contemplation of marriage, provided the settlement be made by the minor with the approbation of the minor's father, or, if he be dead

2) Act III of 1874, s. 8.
3) s. 9, ib.: (See ss. 13, 14: 45 and 46 Vic., cap. 75.)
4) s. 5, ib,
5) s. 6, ib.: (See s. 11: 45 and 46 Vic., cap. 75.)
6) ib.
7) Act X of 1865, s. 43. This rule does not apply to Parsis, (s. 8, Act XXI of 1865.)

or absent from British India, with the approbation of the High Court.[8]

Revocation of will by marriage.—Every will is revoked by the marriage of the maker *except* a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised, would not, in default of such appointment, pass to his or her executor, or administrator, or to the person entitled in case of intestacy. A "power of appointment" is defined as follows: where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.[9] This rule does not apply to Hindus, Jainas, Sikhs, or Buddhists.[1]

Exclusion of widow from share of husband's estate, and her rights on intestacy—See "*Intestacy*."

Wills by married women—See "*Wills*."

Grant of probate and administration to married women—See "*Probate*" and "*Administration*."

Contracts by women.—A married or unmarried woman is (unless disqualified from contracting by any law to which she is subject) competent to contract, if she is of sound mind and of the age of majority according to the law to which she is subject.[2]

The liability of a husband for his wife's debts depends on the principles of agency (see "*Agency*"), and a husband can only be made liable when it is shown that he has expressly or impliedly sanctioned what the wife has done.[3] The agency is said to be implied in the case of contracts by a wife living with her husband for *necessaries* with which her husband was obliged to supply her. If the husband fail so to supply his wife, he impliedly makes her his agent to purchase them. But this presumption of authority on the part of the wife to pledge her husband's credit for necessaries is one of fact, and may be rebutted by proof that she had no such authority.[4] If the wife is not living with the husband, there is no presumption that she has authority to bind her husband for necessaries. If a man allows a woman to whom he is not married to use his name and pass for his wife, and in that character to contract debts, he will be liable to pay for goods furnished to her, even by a tradesman who knew the parties were not married.[5]

Contracts of married women with tradesmen.—A tradesman therefore cannot recover from a husband the price of goods sold on credit to his wife unless he can show an express or implied assent by the husband to the contract made by the wife.

8) s. 45, Act X of 1865.
9) s. 56, ib.
1) s. 3, Act XXI of 1870.
2) Contract Act, s. 11.
3) I. L. R., 9 All., 155.
4) 5 Q. B. D., 402.
5) 2 Esp., 637.

A tradesman, without notice of the husband's prohibition, and without having had previous dealings with the wife with his assent, cannot maintain an action against him for the price of articles suitable to her station in life, and supplied to her upon his credit, but without his knowledge and assent. But if the wife has had dealings with a tradesman, and the husband has paid the tradesman without objection or demur in respect of such dealings, the tradesman has a right to assume in the absence of notice to the contrary, that the authority of the wife, which the husband has recognised, continues.[6]. The husband's quiescence is tantamount to acquiescence.

Insolvent married women.—The provisions of the Indian Insolvent Act (see "*Insolvency*") extend to married women. The vesting order extends to and operates upon her interests in any property, subject to any rights of her husband therein; and to all property over which she has any beneficial power of disposition, notwithstanding her marriage, to the extent of the benefit she might acquire therein by the exercise of such power: the vesting order does not, however, extend to her wearing apparel, bedding, and other such necessaries not exceeding on the whole the value of Rs. 200.[7]

Domicile of married woman—See "*Domicile.*"

Executrix and administratrix — See "*Executor*" and "*Administration.*"

Position of wife and husband after judicial separation.—The wife is considered whilst the separation continues as unmarried with respect to property of every description she may acquire, or which may devolve upon her after the date of the sentence. Such property may be disposed of by her by will as though she were unmarried, and will go on her decease, in case she dies intestate, as the same would have gone if her husband had been then dead.[8] The wife whilst so separated is considered as an unmarried woman for the purpose of contract, wrongs and injuries, and suing and being sued in any civil proceeding; and her husband is not liable in respect of any contract, act, or costs, entered into, done, omitted, or incurred by her during the separation; provided that where, upon separation, alimony has been ordered to be paid to the wife, and is not duly paid by the husband, the latter is liable for necessaries supplied for her use.[9] These provisions do not prevent a wife from joining at any time during such separation, in the exercise of any joint power given to herself and her husband.[1]

Protection orders.—Any wife to whom the 4th section of the

6) 5 Q. B. D., 394.
7) 11 & 12 Vic., cap. 21, s. 63.
8) Act IV of 1869, s. 24.
9) s. 25, ib.
1) ib.

Succession Act does not apply (v. *ante*) may, when deserted by her husband, petition the District Court or High Court for an order to protect any property she may acquire after such desertion against her husband, or his creditors, or any person claiming under him.[2]

Order for maintenance of wives and children.—If any person having sufficient means, neglects or refuses to maintain his wife or his legitimate *or* illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate, or a Magistrate of the first-class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, not exceeding Rs. 50 in the whole, as such Magistrate thinks fit, and to pay the same to such persons as the Magistrate from time to time directs. Such allowance is payable from the date of the order. If any person, so ordered, wilfully neglects to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided by the Code of Criminal Procedure for levying fines, and may sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month: provided that if such person offers to maintain his wife on condition of her living with him, and she **refuses to live with** him, such Magistrate may consider any grounds of refusal stated by her; and may make an order under this section notwithstanding such offer, if he is satisfied that such person is living in **adultery**, or that he has habitually treated his wife with **cruelty**. No wife will be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are **living separately by mutual consent**. On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate must cancel the order. All evidence taken in these matters must be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader.[3]

Alteration in allowance.—On proof of a change in the circumstances of any person receiving an allowance, or so ordered to pay a monthly allowance to his wife or child (v. *supra*), the Magistrate may make such alteration in the allowance as he thinks fit, provided the monthly rate of Rs. 50 be not exceeded.[4]

2) s. 27, ib., & ss. 28—31. 3) s. 488, Cr. Pr. Code. 4) s. 489, ib.

Enforcement of order of maintenance.—A copy of the order of maintenance will be given without payment to the person in whose favour it is made, or to his guardian (if any), or to the person to whom the allowance is to be paid; and such order will be enforceable by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the advance due.[5]

Communications during marriage.—No person who is or has been married can be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married: nor will he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, *except* in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.[6]

Separation deeds.—See "*Marriage.*"

Husband and wife as witness.—In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, are competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, is a competent witness.[7]

Birth during marriage.—See "*Marriage.*"

Offences relating to marriage.—See "*Marriage.*"

Provisions of the Penal Code relating to husbands and wives.—A man cannot commit rape on his wife if she is over ten years old.[8] He may, however, be indicted for aiding and abetting in a rape committed by others.[9] The provisions of the Penal Code making it an offence to harbour (1) deserters[1]; (2) offenders[2]; (3) an offender who has escaped from custody, or whose apprehension has been ordered,[3] do not extend in the case of (1) to the harbouring by the wife; or in the case of (2) and (3) to the harbouring by the husband or wife of the offender or fugitive respectively. Under English law criminal acts not being heinous felonies, if committed by the wife in the presence of her husband, were presumed to be committed, under his coercion, and the husband only was punishable. Under the Penal Code these facts furnish no defence.[4] When property is in the possession of a person's wife on account of that person, it is in that person's possession within the meaning of the Penal Code.[5]—See *passim* "*Marriage*" and "*Divorce and Matrimonial Law.*"

5) s. 490, ib.
6) Evidence Act, s. 122.
7) s. 120, ib.
8) Penal Code, s. 375.
9) 3 St. Tr., 401.
1) s. 136, Penal Code.
2) s. 212, ib.
3) s. 216, ib.
4) Mad. H. C. Rul., 12th April 1870, cited in Mayne's Penal Code, p. 64.
5) Penal Code, s. 27.

INCOME TAX.

AUTHORITY—Act II of 1886.

The Act extends to the whole of British India, and applies also, within the dominions of Princes and States in India in alliance with Her Majesty, to British subjects in those dominions who are in the service of the Government of India or of a local authority established by the Governor-General in Council in the exercise of powers in that behalf.[1]

What is "salary."—It includes allowances, fees, commissions, perquisites, or profits received, in lieu of, or in addition to, a fixed salary in respect of an office or employment of profit, but subject to any rules prescribed in this behalf, it does not include travelling, tentage, horse, or sumptuary allowance, or any other allowance granted to meet *specific* expenditure.[2]

Income means income and profits accruing and arising, or received in British India, and includes, in the case of a British subject within an allied State in India, any salary, annuity, pension, or gratuity payable to that subject by the Government or local authority established by the Governor-General in Council.[3]

What is not liable to income tax.—(1) **rent** or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue, or subject to a local rate assessed and collected by officials of the Government as such; or (2) income derived from **agriculture**, or the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him when he does not keep a shop or stall for the sale of such produce (*e.g.*, an indigo or tea planter who manufactures indigo or tea grown by himself or received as rent and derives an income therefrom would be exempted: but the incomes of employés of tea or indigo concerns who are paid fixed salaries are liable to taxation: the income of an employé is not exempt merely by reason that his employer is exempt[4];) (3) any **building** owned and occupied by the receiver of the rent or revenue of any such land as is referred to in clause (1), or by the cultivator or the receiver of rent-in-kind, of any land with respect to which or the produce whereof any operation mentioned in clause (2) is carried

1) Act II of 1886, s. 1. 2) s. 2, ib. 3) ib. 4) s. 5 (2), ib.

on, provided that the building is in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue, or the cultivator or the receiver of the rent-in-kind, by reason of his connection with the land requires as a dwelling house, or as a store-house, factory, or other out building; or (4) any profits of a **shipping company** incorporated or registered out of British India, and having its principal place of business out of India, and its ships ordinarily engaged in sea-going traffic out of Indian waters; or (5) any income derived from property solely employed for **religious or charitable** purposes; (6) any income which a person enjoys as a member of a **company** or of a **firm** or of a **Hindu undivided family**, when the company or the firm or the family is liable to the tax; or (7) subject to any conditions and restrictions prescribed in this behalf, such portion not exceeding one-sixth of the income in respect of which a person would, but for this exception, be chargeable, as is deducted from the salary of the person under the authority or with the permission of Government for the purpose of securing a deferred **annuity to him, or a provision to his wife or children** after his death, or is paid by the person to an insurance company in respect of an **insurance**, or deferred annuity on his own life, or on the life of his wife; or (8) any interest on **stock notes**; or (9) **salary of any officer, warrant officer, non-commissioned officer, or private of H. M.'s forces or H. M.'s Indian forces** who is not in an employment which, according to the ordinary practice, is held indifferently by military persons and civilians, and whose salary does not exceed Rs. 500 per mensem; or (10) **any person, whose income from all sources is less than Rs. 500 per annum.** An officer or servant is not exempt from taxation by reason only of the income of his employer being exempt therefrom under this section.[5]

Revision of assessment: petition to Collector.—If any person objects to the amount at which he is assessed, or denies his liability to be assessed under clause 5 of the preceding table, he should apply by petition to the Collector to have the assessment reduced or cancelled. The petition should ordinarily be made within 30 days of assessment. It should be, as nearly as circumstances admit, in the form given in the following paragraph. The Collector will then fix a day and place for hearing and pass an order on the application.[6]

Form of petition.—See page 306.

5) s. 5, ib. 6) ss. 25, 26, ib.

Source of income.	Amount taxed.	Tax.	When payable.	REMARKS.
Any salary, annuity, pension, or gratuity paid in British India to, or on behalf of, any person residing in British India, or serving on board a ship plying to or from British Indian ports, whether on account of himself or another person.	If the income amounts to Rs. 2,000 per annum, or upwards, or Rs. 166-10-8 per mensem, or upwards.	5 pies in the rupee.	The tax in respect of salaries, &c., paid by a company, or public body, or association (not being a local authority or company), or a private employer must be paid at the time when any portion of the salary, &c., is paid.[7]	The Collector may enter into an arrangement with any company, &c., or private employer with respect to the recovery by the company, &c., on behalf of Government of the tax payable by those who receive salaries, &c., from the company, &c.[8] Companies, public bodies, and every association (not being a public body or company) must make an annual return to the Collector on or before the 15th April, showing (*a*) the name of every person who is receiving at the date of the return any salary, annuity, or pension, or has received during the year ending on that date any gratuity, as the case may be, and the address of every such person; and (*b*) the amount of the salary, &c., so received by each person, and the time at which the same becomes payable, or, in the case of a gratuity, was paid.[9]
	If the income is less than Rs. 2,000 per annum, or Rs. 166-10 8 per mensem.	4 pies in the rupee.		
Ditto paid by the Government, or by a local authority established by the Governor-General, to or on behalf of a British subject within the dominions of a Prince, or State in India in alliance with Her Majesty.	If the income amounts to Rs. 2,000 per annum, or Rs. 166-10 8 per mensem, or upwards.	5 pies in the rupee.		The Government or local authority deduct the income tax before payment of salary.[1]
	If the income is less than Rs 2,000 per annum, or Rs. 166-10-8 per mensem.	4 pies in the rupee.		The local authority must make an annual return, on or before the 15th April, of the names and salaries of its employés (v. *supra*).

7) s. 9 (1), ib. 8) s. 9 (2), ib. 9) s. 10, ib. 1) ss. 7, 8, ib.

Source of income.	Amount taxed.	Tax.	When payable.	REMARKS.
3. Profits of a company.	The whole of the nett profits made in British India by the company during the year ending on the day on which the company's accounts have been last made up, or, if the company's accounts have not been made up within the year ending on the 31st March in the year immediately preceding that for which the assessment is to be made, then on the whole of the nett profits so made during the year ending on the said 31st day of March.	5 pies in the rupee.	The tax, where the Collector accepts the annual statement of nett profits as correct, is payable on or before the 1st of June, and where the Collector requires the production of accounts, the tax is payable on a date to be fixed by the Collector, which will ordinarily not be more than 15 days from the date of his order.[2]	The Principal Officer in British India of every company must prepare on or before the 15th of April of each year, and deliver to the Collector, a statement in writing signed by him of the nett profits made in British India by the company during the year ending on the day on which the company's accounts have been last made up, or if the company's accounts have not been made up within the year ending on the 31st of March in the year immediately preceding that for which the assessment is to be made, then of the nett profits so made during the year ending on the said 31st March.[3] If the Collector has reason to believe that the statement delivered is incorrect or incomplete, he has power to require the officer to produce the accounts of the company which refer to the year to which the statement relates.[4]
4. Interest becoming due on or after the 1st April 1886, and payable in British India on—— (*a*) Promissory notes, debentures, stock or other securities of the Government of India, *v. remark column* (*a*). (*b*) Bonds or debentures charged by the Imperial Parliament on the revenues of India. (*c*) Debentures or other securities for money issued by or on behalf of a local authority or company.	(1) If the annual income from all sources is less than Rs. 500, *v. remark column* (*b*). (2) If the annual income from all sources is less than Rs. 2,000, *v. remark column* (*b*). (3) In all other cases.	No deduction is made from the interest. 4 pies in the rupee on such interest. 5 pies in the rupee.	When the interest is payable by the Government of India the tax is payable on the same day as the payment of interest is made.[5] In case of securities the interest on which is not payable by the Government, the tax must be paid within one week from date on which interest is paid,[6] *v. remark column* (*c*).	(*a*) Including securities of the Government of India, on which interest is payable out of British India, by draft on any place in British India. (*b*) A certificate must be produced signed by the Collector that the income is less than Rs. 500, or Rs. 2,000 respectively. (*c*) The tax is, and must be, deducted by the person empowered to pay the interest and be paid by their person to the credit of the Government of India, or as the Governor-General in Council directs.

2) ss. 11, 12, 29, ib. 3) s. 11, ib. 4) s. 12, ib. 5) s. 13, G. I Rules. 6) s. 29, Act II of 1886.

Source of income.	Amount taxed.	Tax.	When payable.	REMARKS.
5. Any source of income not included in (1), (2), (3), or (4).	If the annual income is assessed at (1) Not less than Rs. 500 but less than Rs. 750	Rs. 10.	At the time appointed in that behalf, in or under the Act, or if a time is not so appointed, then on the 1st of June in each year.[7]	The assessment is made on the income accruing to the person during the year ending on the day on which his accounts have been last made up, or if not made up within the year ending on the 31st March in the year immediately preceding that for which the assessment is to be made, then upon the income accruing during the year ending on the said 31st day of March.[8] Persons are invited by a general notice to submit a return of their income to the Collector, and if they fail to do so within a stated time, the Collector may assess them on such information as he has been able to obtain through assessors: notice of assessment is given, and a reasonable time allowed for the person to object. **Non-residents:** Any person not resident in British India, whether a British subject or not, being in receipt through an agent of any income chargeable under this part is chargeable in the name of the agent in the same way as he would be chargeable if resident in India, and in direct receipt of that income.[9] Occupying owners: If a building is occupied by its owner it is a "source of income," and if liable to be assessed, will be assessed at $\frac{5}{6}$ths of the gross annual rent at which it may reasonably be expected to let, and in the case of a dwelling-house may be expected to let unfurnished. "Owner" here means the person who would be entitled to receive the rent of the building if the building were let to a tenant.
	,, Rs. 750 ,, 1,000	,, 15.		
	,, ,, 1,000 ,, 1,250	,, 20.		
	,, ,, 1,250 ,, 1,500	,, 28.		
	,, ,, 1,500 ,, 1,750	,, 35.		
	,, ,, 1,750 ,, 2,000	,, 42.		
	(2) If the annual income is assessed at Rs. 2,000 or upwards.	5 pies in the rupee on the income.		

7) s. 15, ib. 8) s. 21, ib. 9) s. 24, ib.

Form of petition.—To the Collector of.....
The.....day of.....189...
The Petition of A. B.
of.....

Sheweth as follows:

1. Under Act No. II of 1886 your petitioner has been assessed in the sum of.....rupees for the year commencing the first day of April 189....

2. Your petitioner's income and profits accruing and arising from [*here specify petitioner's trade, or other source or sources of income or profits, and the place or places at which such income or profits accrues or arise*] for the year ending the..... day of ....last were.....rupees [as will appear from the documents of which a list is presented herewith].[1]

3. Such income or profits actually accrued and arose during a period of.....months and.....days [*here state exact number of months and days*].

4. During the said year your petitioner had no other income or profits.

Your petitioner therefore prays that he may be assessed accordingly [*or* that he may be declared not to be chargeable under the said Act].

(Signed) A. B.

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

(Signed) A. B.

Appeal to Commissioner.—If a person feels himself aggrieved by the order of the Collector he may appeal to the Commissioner of the Division if the amount of the assessment to which the petition relates is Rs. 250 or upwards. The Commissioner has also discretion to go into the matter if the assessment is below this sum.[2]

Composition.—If a company or person desires to compound for the tax assessable under clause 3 or 5 of the table, as the case may be, the Collector may agree with the company or person for a composition for the tax on such terms and for such period as he thinks fit.[3] The contract is a purely personal one and ceases, with the death, or insolvency of the person compounding: it does not relieve from liability to assessment a purchaser or assignee of the contractor.

1) NOTE.—These words are to be inserted if the petitioner relies on documents. The list, if the petitioner so wishes, may be presented in a sealed envelope.

2) s. 27, ib.
3) s. 31, ib.

No suit can be brought in any Civil Court to set aside or modify any assessment made under this Act.[4]

Information to be given.—Any person so required must give information respecting the name of every inmate or lodger resident in any house used by him as a dwelling-house or let by him in lodgings and the name of employés in his service receiving salaries or emoluments amounting to Rs. 41-10-8 per mensem, or Rs. 500 per annum, or upwards, whether resident in any such house or not.[5] Trustees, &c., and agents must furnish information, if required, of the names of the persons for whom they are trustees, &c., or principals, and make returns of the income liable to assessment under clause 5 of the table.[6] An officer or person exercising all or any of the powers of a Collector under the Act may, at the instance of any person respecting whose assessment, or the amount thereof, any doubt exists, require any person to furnish the necessary information.[7] If the person who is required to furnish the information does not do so he is liable to imprisonment for one month, or to a fine extending to Rs. 500, or to both.[8] If the information given is false to his knowledge or belief, he is liable to imprisonment for six months, or to a fine extending to Rs. 1,000, or to both.[9]

4) s. 39, ib.
5) s. 41, ib.
6) ss. 42. 43, ib.
7) s. 44, ib.
8) s. 45, ib.
9) ib.

INDEMNITY AND GUARANTEE.

AUTHORITIES—Act IX of 1872 (Contract), Chapter VIII: Act XXVI of 1881 (Negotiable Instruments).

INDEMNITY.

What is a contract of indemnity.—It is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person[1]: *e.g.*, A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of Rs. 200. This is a contract of indemnity. A contract of indemnity may be express or implied, as in the case of an implied contract of indemnity between the assignee and assignor of a lease in respect of demands which may be made on the assignor by the lessor.[2]

Rights and liabilities of indemnity holder when sued.—The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor, (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies; (2) all costs which he may be compelled to pay in any such suit, if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit; (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.[3]—See "*Agency*," "*Guarantee*."

GUARANTEE.

A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the **surety**, the person in respect of whose default the guarantee is given is called the **principal debtor**, and the person to whom the guarantee is given is called the **creditor**. A guarantee may be either oral or written.[4]

Consideration for guarantee.—Anything done, or any promise made for the benefit of the principal debtor, may be a

1) s. 124, Act IX of 1872.
2) I. L. R., 5 Cal., 811.
3) s. 125, Act IX of 1872.
4) s. 126, ib.

sufficient consideration to the surety for giving the guarantee[5]: *e.g.*, B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee payment. C guarantees the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise, because benefit to the surety himself is not necessary to support the consideration for his promise.[5]

The liability of the surety is co-extensive with that of the principal debtor, *unless* it is otherwise provided by the contract: *e.g.*, A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill, but also for any interest and charges which may have become due on it.[6]

A continuing guarantee is one which extends to a series of transactions: *e.g.*, A guarantees payment to B, a tea dealer, to the amount of £100 for any tea he may, from time to time, supply to C. B supplies C with tea to above the value of £100, and C pays B for it: afterwards B supplies C with tea to the value of £200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100.[7] A continuing guarantee may at any time be revoked by the surety, as to *future* transactions, by notice to the creditor,[8] and the death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards *future* transactions.[9] A continuing guarantee, given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guarantee was given.[1]—See "*Bonds*."

Private agreement between co-sureties.—When two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence[2]: *e.g.*, A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

5) s. 127, ib.
6) s. 128, ib.
7) s. 129, ib.
8) s. 130, ib.
9) s. 131, ib.
1) s. 200, ib.
2) s. 132, ib.

Discharge of surety.—(1) Any variance made without the surety's consent, in the terms of the contract between the principal and creditor, discharges the surety as to transactions *subsequent* to the variance[3]; (2) the surety is discharged by any contract between the creditor and the principal debtor, by which the principal is released, or by any act or omission of the creditor, the legal consequences of which is the discharge of the principal debtor.[4] This rule is based on the principle that the engagement of a surety is accessory to a principal obligation, and that as an accessory obligation cannot exist without its principal, the extinction of the latter necessarily induces that of the former; (3) a contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue the principal debtor discharges the surety, unless the latter assents to such contract.[5] (4) But when the holder of an accepted bill of exchange enters into any contract with the acceptor which, under ss. 134 or 135 (v. *ante*), would discharge the other parties, the holder may expressly reserve his right to charge the other parties, and in such case they are not discharged.[6] (5) If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is impaired, the surety is discharged.[7]

A surety, however, is not discharged in the following cases: (1) where a contract to give time to the principal debtor, is made by the creditor with a third person and not with the principal debtor, the surety is not discharged: *e.g.*, C, the holder of an over-due bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged[8]; (2) mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him does not discharge the surety, in the absence of any provision in the guarantee to the contrary[9]; (3) when there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties. It is therefore not necessary in India for a creditor who wishes to release one surety, and, at the same time, to maintain the guarantee given by the other sureties, either to reserve his remedies against the latter or to obtain their consent.[1]

3) s. 133, ib.
4) s. 134, ib.
5) s. 135, ib.
6) Act XXVI of 1881, s. 40.
7) s. 139, Act IX of 1872.
8) s. 136, ib.
9) s. 137, ib.
1) s. 138, ib., see Cunningham and Shephard's Contract Act, p. 308, 6th edition.

Right of surety on payment or performance.—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.[2] He is also entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.[3]

A guarantee is invalid—(1) when it has been obtained by means of **misrepresentation** made by the creditor, or with his knowledge or consent, concerning a material part of the transaction; (2) when the creditor has obtained it by means of **keeping silence** as to a material circumstance; (3) where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.[4]

Indemnification of surety.—In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.[5]

Contribution of co-sureties.—Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, *as between themselves*, to pay each an *equal* share of the whole debt, or of that part of it which remains unpaid by the principal debtor. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.[6]

Suretyship in the case of negotiable instruments.—The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor, are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties as sureties for the maker, drawer, or acceptor, as the case may be. As between the parties so liable

2) s. 140, ib., see "*Mortgage*," "*Bills of Exchange and Promissory Notes*," and "*Transfer of Property*."
3) s. 141, ib.
4) ss. 142, 143, 144, ib.
5) s. 145, ib.
6) ss. 146, 147, ib.

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as sureties, each prior party is, in the absence of a contract to the contrary, also liable thereon as a principal debtor in respect of each subsequent party: *e.g.*, A draws a bill payable to his own order on B, who accepts. A afterwards indorses the bill to C, C to D, and D to E. As between E and B, B is the principal debtor, and A, C and D are his sureties. As between E and A, A is the principal debtor and C and D are his sureties. As between E and C, C is the principal debtor, and D is his surety[7]—(v. *ante*) "Discharge of Surety."

7) ss. 37, 38, Act XXVI of 1881.

INJUNCTIONS.

AUTHORITIES—Civil Procedure Code, Ch. XXXV: Act I of 1877 (Specific Relief).

Specific relief is a form of relief which is given (*a*) by taking possession of certain property and delivering it to a claimant (see "*Possession*"); (*b*) by ordering a party to do the very act which he is under an obligation to do, *i.e.*, by ordering "specific performance" (see "*Contract*"); (*c*) by determining and declaring the rights of parties otherwise than by an award of compensation as by a "declaratory decree" (see "*Judgments and Decrees*"); (*d*) by appointing a receiver (see "*Receivers*"); (*e*) by *preventing a party from doing that which he is under an obligation not to do.* Specific relief granted in this form is called **preventive relief,**[1] and preventive relief is granted at the discretion of the Court by an order called an **injunction** which may be either temporary or perpetual.[2] It is entirely a matter of discretion with the Court either to grant, or to refuse to grant, an injunction. But this discretion is not arbitrary, but such that it can be corrected by a Court of Appeal.

TEMPORARY INJUNCTIONS.

Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and may be applied for on an interlocutory motion in the suit upon notice to the other side. They are regulated by the Code of Civil Procedure.[3] In certain urgent cases notice may be dispensed with.[4] An order for an injunction may be discharged, or varied, or set aside by the Court on application by any party dissatisfied with the order.[5] An injunction to a corporation is binding on its members and officers.[6]

When granted: (a) against waste during the suit.—If it is proved in any suit (*a*) that any property in dispute in the suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or (*b*) that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors, the Court may grant a temporary injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting,

1) Act I of 1877, s. 5.
2) s 52, ib.
3) Act I of 1877, s. 53.
4) Civ. Pr. Code, s, 494.
5) s. 496, ib.
6) s. 495, ib.

damaging, alienation, sale, removal, or disposition of the property, as the Court thinks fit.[7]

(b) To restrain breach of contract or injury.—A plaintiff may in any suit for restraining the defendant from committing a breach of contract or other injury (whether compensation be claimed in the suit or not), at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right. In case of disobedience, this or the injunction mentioned in the last paragraph may be enforced by the imprisonment of the defendant for a term not exceeding six months, or the attachment of his property, or both. If the property is attached, the attachment will not remain in force for more than one year, at the end of which time, if the defendant has not obeyed the injunction, the property attached may be sold, and out of the proceeds the Court may award to the plaintiff such compensation as it thinks fit, and pay the balance, if any, to the defendant. Any injunction may be discharged, varied, or set aside by the Court.[8]

Compensation for issue of.—If it appears to the Court that an injunction which it has granted was applied for on insufficient grounds, or if, after the issue of the injunction, the suit is dismissed, or judgment is given against the plaintiff by default or otherwise, and it appears to the Court that there was no probable ground for instituting the suit, the Court may, on the application of the defendant, award against the plaintiff in its decree a sum, not exceeding Rs. 1,000, as compensation to the defendant for the expense or injury caused to him by the issue of the injunction. The Court cannot award a larger amount than it might decree in a suit for compensation. An award so given bars any suit for compensation in respect of the issue of the injunction.[9]

Perpetual Injunctions.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit. The defendant is perpetually enjoined by such injunction from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.[1]

It may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. When such obligation arises from contract, the question

7) s. 492, ib. 8) ss. 493, 496, ib. 9) s. 497, ib. 1) Act I of 1877, s. 53

becomes one of specific performance of contract, and the Court will be guided by the rules and provisions relating thereto (see "*Contract*"). Apart from contract, when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases,[2] *viz.*: (1) Where the defendant is a trustee of the property for the plaintiff: *e.g.*, A, a trustee for B, is about to make an imprudent sale of a small part of the trust property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.[3] (2) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion: *e.g.*, A, a Hindu widow in possession of her deceased husband's estate, threatens to cut down certain ornamental trees in a park belonging to the estate: she may be restrained by a perpetual injunction at the instance of the heir-expectant.[4] (3) Where the invasion is such that pecuniary compensation would not afford adequate relief: *e.g.*, A, B, and C are members of an undivided Hindu family. A cuts timber growing on the family property, and threatens to destroy part of the family-house and to sell some of the family utensils. B and C may sue for an injunction to restrain him.[5] (4) Where it is probable that pecuniary compensation cannot be got for the invasion: *e.g.*, A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the Official Assignee, and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at considerable expense, to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.[6] (5) When the injunction is necessary to prevent a multiplicity of judicial proceedings: *e.g.*, A improperly uses the trade-mark of B. B may (if his use of the trade-mark is honest) obtain an injunction to restrain the user, besides claiming damages for a particular infringement or infringements.[7]

An injunction cannot be granted (1) to stay a **judicial proceeding** pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings; (2) to stay proceedings in a Court not subordinate to that from which the injunction is sought; (3) to restrain persons from applying to any legislative body; (4) to interfere with the **public duties** of any department of the Government of India, or the Local Government, or with the **sovereign acts** of a Foreign Government; (5) to stay proceedings in any **criminal** matter; (6) to prevent the breach of a con-

2) s. 54, ib.
3) illust. f, ib.
4) illust. m, ib.
5) illust. n, ib.
6) illust. o, ib.
7) illust. w, ib.

tract, the performance of which would not be specifically enforced (see "*Contract*"). But when a contract comprises an affirmative agreement *to do* a certain act, coupled with a negative agreement, express or implied, *not to do* a certain act, the Court will grant an injunction to perform the negative agreement, although it may not be able to compel specific performance of the affirmative agreement, provided that the applicant has not failed to perform his part of the contract[8]; *e.g.*, A contracts with B to sing for 12 months at B's theatre, and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing (v. "*Contract*"); but he is entitled to an injunction restraining A from singing at any other place of public entertainment[9]; (7) to prevent on the ground of **nuisance**, an act of which it is not reasonably clear that it will be a nuisance; (8) to prevent a continuing breach in which the applicant, has acquiesced; (9) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust; (10) where the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court; (11) where the applicant has no personal interest in the matter.[1]

Mandatory injunction.—The ordinary object of injunctions is prevention only. But when, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may, in its discretion, grant an injunction to *prevent* the breach complained of, *and also to compel performance* of the requisite acts[2]: *e.g.*, A, by new buildings, obstructs lights, to the access and use of which B has acquired a right. B may obtain an injunction not only to restrain A from going on with the buildings, *but also to pull down* so much of them as obstructs B's lights.[3]

8) s. 57, ib.
9) illust. c, ib.
1) ss. 56, 57, ib.
2) s. 55, ib.
3) illust. a, ib.

INSOLVENCY.

AUTHORITIES—11 and 12 Vic., cap. 21 (Indian Insolvent Act): and Civil Procedure Code.

IN CALCUTTA, MADRAS, AND BOMBAY.

Traders and non-traders.—There is no distinction made between traders and non-traders in the present English Law of Bankruptcy. In the Indian Insolvent Act, however, such a distinction is made both in the provisions as to adjudications of insolvency obtained by creditors, and as to the circumstances under which the Court will grant an order of final discharge.

Order of proceedings in insolvency.—(1) **Petition** for declaration of insolvency made either by the debtor himself or his creditors; (2) **vesting order,** vesting all the insolvent's property in the Official Assignee; (3) filing of insolvent's **schedule,** setting out the amount of his property and the number of his creditors and debtors; (4) **interim order of protection,** protecting the insolvent from arrest until the hearing; (5) **hearing** of the petition; (6) **personal discharge** of the insolvent, *i.e.*, further protection from arrest and (if necessary) immediate discharge from custody; (7) **final discharge** of the insolvent.

Petition by insolvent debtor.—Any person being a trader or non-trader who: (1) is in prison within the respective limits of the towns of Calcutta, Madras, and Bombay for any debt, damages, costs, or money liable to be paid either solely or jointly with another, or for contempt of Court for non-payment of money only, or of costs taxed or untaxed; or who (2) resides within the jurisdiction of any of the High Courts in the above-mentioned towns, and being indebted on account of any such liability, is in insolvent circumstances, may at any time apply by petition to the Court for the relief of insolvent debtors within the presidency, in which he may then be, for the benefit of the provisions of the Insolvent Act. Persons jointly indebted may apply jointly by petition.[1]

Acts of insolvency of non-trader on which creditor may petition.—An insolvent not being a trader, who lies in prison in the above-mentioned towns for debt, damages, costs, or contempt for non-payment of costs, and does not make satisfaction within 21 days, commits an act of insolvency on which any of his creditors entitled to payment of the debt, &c., may present a petition praying that the debtor be **adjudicated an**

1) s. 5, 11 and 12 Vic., cap. 21.

insolvent. The Court may decide that the debtor has committed an act of insolvency, and may also on the petition of the debtor, and upon proof of notice to the creditors or creditor upon whose petition he has been adjudged an insolvent, **revoke** or confirm such **adjudication.**[2]

Acts of insolvency of trader on which creditor may petition.—Any person being a trader who: (1) has been in prison for 21 days for debt; or (2) with intent to delay or defeat his creditors either (*a*) departs from the limits of the jurisdiction of any of the High Courts; or (*b*) (with like intent) departs from his usual place of business or abode within the limits of the said jurisdiction; or (*c*) (with like intent) makes a fraudulent gift, grant, conveyance, or transfer of any of his lands, money, or goods; or (*d*) fraudulently (and with like intent) allows his lands, money, or goods to be taken in execution, attached, or sequestered, may, on the petition of a creditor, or of two or more persons being partners in trade and creditors to the amount of Rs. 500, or of any two creditors to the amount of Rs. 700, or of any three or more creditors to the amount of Rs. 1,000, be **adjudicated an insolvent.** The Court may, however, upon the petition of the person so adjudged to be insolvent, and upon proof of notice to the creditor or creditors upon whose petition such adjudication has been made, **revoke** or confirm **such adjudication.**[3]

Vesting order.—Upon the filing of any petition by a debtor, or adjudication by the Court, property of every kind belonging to the debtor (*except* the wearing apparel, bedding, and other such necessaries of himself and his family, and the working tools and implements of himself and his family not exceeding the value of Rs. 300) vest in the Official Assignee of the Court, who has full powers thereby to possess himself of all the property of the debtor and to recover any debt or property that may be due to him.[4]

Effect on vesting order of dismissal of petition.—If after a vesting order has been made, the petition of insolvency is dismissed or the adjudication set aside, the vesting order becomes null and void, but all acts done by the Official Assignee whilst it was in force are good and valid.[5]

Schedule.—A debtor when petitioning for relief, or when adjudicated an insolvent by his creditors, must deliver to the Court a schedule, in one portion setting out his property (called the "estate paper") and in another a list of his debtors and creditors, and the amount of the debts due from, or owing to them

2) s. 8, ib. 3) s. 9, ib. 4) s. 7, ib. 5) ib.

Interim order of protection.—The Court may, if it thinks fit, after the necessary schedule has been filed, make an *interim* order for the protection of the insolvent from arrest. Such an order may apply either to all the debts or liabilities mentioned in the schedule, or to any of them as the Court thinks fit. **The effect of the order** is to protect the insolvent from being arrested, or detained in prison for any debt or liability to which the order applies, *until* the hearing of the case.[6]

The hearing.—After the petition and schedule of the insolvent have been filed, or after adjudication and filing of the schedule, the creditors are served with a notice appointing a day for hearing the petition of the insolvent and any other applications in the matter of the insolvency. On the day appointed, the insolvent or any creditor will be heard in support of, or in opposition to, the petition, or against, or in support of, the order of adjudication. The Court may, either on the day of hearing or any other day, summon the insolvent's wife, or any person who may be known or suspected to be indebted to the insolvent, or to have any property of the insolvent in his possession, or any one who may be able to give information respecting the estate or dealings of the insolvent. The debtor is then either declared an insolvent or not, as the case may be, and a day fixed for **proof of such claims** by the creditors as are not admitted by the insolvent. Subsequently a day is fixed, on notice, for the making of a **dividend** (if any). On this day all parties interested are heard, as also all objections to the schedule of the insolvent and to the account and conduct of the assignee. The claims of any creditor not previously heard or determined are dealt with by the Court. A dividend is either then declared, or its declaration postponed, as the case may be.[7]

Personal discharge.—The Court may declare that an insolvent is entitled to his personal discharge. The **effect** of such a declaration is to protect the person of an insolvent from arrest in respect of all demands inserted in the schedule or established in the same Court.[8] The granting of personal discharge is within the discretion of the Court. It will depend mainly on the conduct of the insolvent in the incurring of the **debts** which have brought about his insolvency. An insolvent who fraudulently **conceals** his effects, **destroys** or **falsifies** his books, gives **undue preference** to any of his creditors, may be punished with imprisonment for a period not exceeding two years, and his personal discharge postponed until the expiration of that period.[9] An insolvent who **fraudulently contracts debts,** or raises a

6) s. 13, ib.
7) ss. 35—41, ib.
8) s. 47, ib.
9) s. 50, ib.

vexatious or frivolous defence is not entitled to his discharge.[1] Any creditor may oppose the personal discharge of an insolvent. An order of discharge (except in cases of appeals) is final and conclusive, unless obtained fraudulently, or, issued erroneously.[2] An insolvent though discharged may be at any time (at the request of the Official Assignee) further examined touching his estate.[3]

Final discharge of non-trader.—An insolvent *not* being a trader may, whenever his estate has sufficed to pay one-third of his debts, *or* where the majority in number and value of his creditors consent to such an application, apply for an order of final discharge.[4]

Final discharge of trader.—The Court may, on the application of an insolvent *trader* (provided he has filed his schedule) *at any time* make an order for his final discharge.[5]

Procedure in making order.—An order *nisi* is first made and notices issued to the creditors. On the further hearing the Court will either dismiss the petition for final discharge, or make the former order absolute. Any creditor may oppose the final discharge.

The effect of a final discharge differs in the case of traders and non-traders. In the case of the former the effect of the order, generally speaking, is to discharge the insolvent trader personally and also his after-acquired property from all demands, except debts due to the crown, and debts and liabilities incurred by fraud or fraudulent breach of trust.[6] In the case of a non-trader the effect of the order is to discharge the insolvent personally and all his after-acquired property from the demands only of those creditors named in the order *nisi*.[7]

Special Assignee.—In each of the presidencies there is an **Official Assignee**, who is generally the assignee of every insolvent's estate and effects. If, however, at any time after the making of a vesting order any creditor or creditors of the insolvent wish the property of the insolvent to be invested in some person or persons chosen by them, they may present a petition to that effect to the Court. The latter will appoint a time and place for **election** when all creditors whose debts amount to Rs. 100 or upwards who are included in the schedule, or who have proved their debts, are entitled to vote.[8] The person or persons so chosen will be appointed by the Court Special Assignee or Assignees of the estate of the insolvent. Special Assignees may be **removed** by order of Court in case of unwillingness to act, removal from out

1) s. 51, ib.
2) s. 56, ib.
3) s. 58, ib.
4) s. 59, ib.
5) s. 60, ib.
6) ib.
7) s. 59, ib.
8) s. 17, ib.

of the jurisdiction of the Court, incapacity or misconduct.[9] The **remuneration** of the special assignee must be fixed by the creditors at the time of election.[1]

After the vesting order, no distress for rent previously due can be made by the landlord on the goods and effects of the insolvent.[2] The landlord must prove for the amount due, and is entitled only to receive a dividend with the other creditors. He will be entitled to distrain if the insolvent's petition is dismissed or the adjudication set aside.

Property in the order and disposition of an insolvent deemed his property.—In order to protect the general creditors of a trader from the consequences of false credits which might be obtained by an insolvent, if allowed to have the possession and disposition of property not really his own, any goods which at the time of petition or adjudication are in the possession, order, or disposition of an insolvent, by the consent and permission of the true owner, and of which property such insolvent is reputed owner, or of which he has taken upon him the sale, alteration, or disposition as owner, is deemed to be his property, and will, on the making of a vesting order, become vested in the Official Assignee.[3]

Void and fraudulent conveyances.—A voluntary conveyance, assignment, or transfer of any estate, goods, or effects whatever to any creditor, or to any person in trust for any creditor by an insolvent, if made by him when in insolvent circumstances, and within two months before the date of the petition or adjudication of insolvency, *or* if made with the view or intention of petitioning the Court for his discharge from custody or of committing an act of insolvency, is fraudulent and void against the assignee of such insolvent.[4]

Wages of servants and clerks.—See "*Masters, Servants and Apprentices.*"

Position of parties indebted to the insolvent.—Persons indebted to, or holding property (except stocks) of an insolvent after his petition or adjudication and before his final discharge may, upon the petition of any assignee or creditor whose debt has been proved, be compelled to deliver over such property, or pay such debts, to the assignee. Such delivery and payment is a good discharge against all persons whatsoever to all intents and purposes.[5]

Insolvent married women.—See "*Husband and Wife.*"

Pending suits in any Court in British India against an insolvent at the time of insolvency, and all proceedings therein

9) s. 18, ib.
1) s. 19, ib.
2) s. 22, ib.
3) s. 23, ib.
4) s. 24, ib.
5) s. 26.

may be stayed so far as relates to debts contained in the insolvent's schedule.[6]

Insolvent lunatics.—See "*Lunacy.*"

Appeals.—Any person aggrieved by any adjudication order or proceeding of any Insolvent Court may appeal within one month.[7]

In the Mofussil.

Authority—Civil Procedure Code, Ch. XX.

Application for declaration of insolvency.—Any judgment-debtor arrested or imprisoned in execution of a decree for money, or against whose property an order of attachment has been made in execution of such a decree, may apply in writing to be declared an insolvent. Any holder of a decree for money may apply in writing that the judgment-debtor may be declared an insolvent. Every such application must be made to the District Court within the local limits of whose jurisdiction the judgment-debtor resides, or is in custody,[8] or to such other Court as the Local Government has by notification invested with insolvency jurisdiction.[9]

Contents of application by judgment-debtor.—The application, when made by the judgment-debtor, must be signed and verified and must set forth (*a*) the fact of his arrest or imprisonment, or that an order for the attachment of his property has been made, the Court by whose order he was arrested or imprisoned, or by which the order of attachment was made, and, where he has been arrested or imprisoned, the place in which he is in custody; (*b*) the amount, kind, and particulars of his property, and the value of any such property not consisting of money; (*c*) the place or places in which such property is to be found; (*d*) his willingness to put it at the disposal of the Court; (*e*) the amount and particulars of all pecuniary claims against him; and (*f*) the names and residences of his creditors, so far as they are known to, or can be ascertained by, him.[1]

By decree-holder.—The application when made by the holder of a decree for money must be signed and verified, and must set forth the date of the decree, the Court by which it was passed, the amount remaining due thereunder, and the place where the judgment-debtor resides or is in custody.[2]

Procedure at hearing.—The Court will fix a day for hearing after notice given to the holder of the decree, and the other creditors where the applicant is the judgment-debtor or (where the applicant is the decree-holder) on the judgment-debtor and other persons claiming to be creditors. On the day so fixed, the Court

6) s. 49.
7) s. 73.
8) s. 344, Civ. Pr. C.
9) s. 360, ib.
1) s. 345, ib.
2) ib.

will examine the judgment-debtor, in the presence of the persons on whom notice has been served or their pleaders, as to his then circumstances and as to his future means of payment, and will hear the said decree-holder, the other creditors mentioned in the application, and any other persons alleging themselves to be creditors, in opposition to the judgment-debtor's discharge; and will, if it thinks fit, grant time to the decree-holder and other creditors or persons to adduce evidence showing that the judgment-debtor is not entitled to be declared an insolvent.[3]

Declaration of insolvency.—If the Court is satisfied (*a*) that the statements in the application are substantially true; (*b*) that the judgment-debtor has not, with intent to defraud his creditors, concealed, transferred, or removed any part of his property since the institution of the suit in which was passed the decree in execution of which he was arrested or imprisoned, or the order of attachment was made, or at any subsequent time; (*c*) that he has not, knowing himself to be unable to pay his debts in full, recklessly contracted debts or given an unfair preference to any of his creditors by any payment or disposition of his property; (*d*) that he has not committed any other act of bad faith regarding the matter of the application, the Court may declare him to be an insolvent, and may also, if it thinks fit, make an order appointing a receiver of his property, or, if it does not appoint such receiver, may discharge the insolvent. If the Court is not so satisfied it will make an order rejecting the application.[4]

Proof of debts.—The creditors mentioned in the application, and any other persons alleging themselves to be creditors of the insolvent, must then produce evidence of the amount and particulars of their respective pecuniary claims against him; the Court will by order determine the persons who have proved themselves to be the insolvent's creditors and their respective debts; and will frame a schedule of such persons and debts; the declaration of insolvency then becomes, and has the effect of, a decree in favour of each of the creditors for their respective debts.[5]

Partners.—A partner in an insolvent firm, or, when he has died before the insolvency, his legal representative, cannot prove in competition with the creditors of the firm.[6]

Creditor not mentioned in schedule.—Any creditor of the insolvent who is not mentioned in the schedule may apply to the Court for permission to produce evidence of the amount and particulars of his pecuniary claims, against the insolvent, and if he proves his claim, his name will be inserted in the schedule.[7]

3) ss. 347, 350, ib.
4) s. 351, ib.
5) s. 352, ib.
6) ib.
7) s. 353, ib.

Alteration of schedule. — Any creditor mentioned in the schedule may apply to the Court for an order altering the schedule so far as regards the amount, nature, or particulars of his own debt, or to strike out the name of another creditor, or to alter the schedule so far as regards the amount, nature, or particulars of the debt of another creditor.[8]

Effect of appointing receiver. — An order appointing a receiver has the effect of vesting in the receiver *all* the insolvent's property (except properties not liable to attachment or sale—See "*Attachment*," p. 72), whether set forth in his application or not.[9]

His duties. — The receiver must give security and possess himself of all the property of the insolvent (not specially excepted as above) and must proceed under the direction of the Court (*a*) to convert the property into money; (*b*) to pay thereout debts, fines, and penalties (if any) due by the insolvent to Government; (*c*) to pay the decree-holder's costs; (*d*) to discharge, according to their respective priorities, all debts secured by mortgage of the insolvent's property; (*e*) to distribute the balance among the scheduled creditors rateably according to the amounts of their respective debts, and without any preference. The receiver is entitled to a commission, to be fixed by the Court, not exceeding the rate of five per centum upon the amount of the balance so distributed. The surplus, if any, must be given to the insolvent or his legal representative. In local areas where the execution of decrees has been placed in the hands of the Collector, the powers of the receiver are specially defined and limited.[1]

Discharge of insolvent: future liability.—On the receiver certifying that the insolvent has placed him in possession of his property, or has done everything in his power for that purpose, the Court may discharge the insolvent upon such conditions (if any) as it thinks fit.[2] An insolvent so discharged[3] or discharged by order of the Court when it does not appoint a receiver (v. *ante*) cannot be arrested, or imprisoned, on account of any of the scheduled debts.[7] But (subject to the provisions in the next paragraph) his property, whether previously or subsequently acquired (save the particulars exempted from attachment (v. *ante*), and except the property vested in the receiver) will, by order of the Court, be liable to attachment and sale until the debts due to the scheduled creditors are satisfied to the extent of one-third, or until the expiry of twelve years from the date of either of the above-mentioned orders of discharge.[4]

8) s. 353, ib.
9) s. 354, ib.
1) ss. 355, 356, ib.
2) s. 355, ib.
3) s. 357, ib.
4) ib.

Discharge from all future liability. — If the aggregate amount of the scheduled debts is two hundred rupees or a less sum, the Court may, and in any case after the scheduled debts have been satisfied to the extent of one-third, or after the expiry of twelve years from the order of discharge, the Court will declare the insolvent so discharged absolved from further liability in respect of such debts.[5]

Dishonest applicants. — Whenever, at the hearing of an application for declaration of insolvency, it is proved that the applicant has (*a*) been guilty, in his application, of any concealment, or of wilfully making any false statement as to the debts due by him, or respecting the property belonging to him, whether in possession or in expectancy, or held for him in trust; (*b*) fraudulently concealed, transferred, or removed any property; or (*c*) committed any other act of bad faith regarding the matter of the application, the Court will, at the instance of any of his creditors, sentence him to imprisonment for a term which may extend to one year from the date of committal; or may, if it think fit, send him to the Magistrate to be dealt with according to law.[6]

Calcutta, Madras, Bombay.—None of the foregoing provisions apply to any Court having jurisdiction within the limits of the towns of Calcutta, Madras, or Bombay,[7] or extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court.

Administration of insolvent estate.—In the administration by the Court of the property of any person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules are observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being with respect to the estates of persons adjudged insolvent; all persons who in any such case would be entitled to be paid out fo such property may come in under the decree for its administration, and make such claims against it as they may be entitled to do. These provisions apply both in the Mofussil and in the Presidency towns.[8]

5) s. 358, ib. 6) s. 359, ib. 7) s. 360, ib. 8) s. 213, ib.

INSURANCE.

AUTHORITIES—Act IX of 1872 (Contract): Act III of 1874: Act VI of 1882: Act XV of 1877: Act IV of 1882: Act V of 1866; Crawley's Life Insurance: Arnould's Marine Insurance: Evidence Act: and cases cited.

LIFE.

Crawley's Life Insurance: Contract Act: Act III of 1874: Evidence Act: Acts VI of 1882: XV of 1877: IV of 1882, and cases cited.

A life policy is simply a contract that in consideration of a certain annual payment the company will pay at a future time a fixed sum calculated by them with reference to the value of the premiums which are to be paid in order to purchase the postponed payment.[1] It is a contract made once for all with a condition to be performed *de anno in annum*, and if the condition is not performed in any year the contract is at an end.[2] The English Statutes as to marine and other policies do not apply to India.[3]

Who can insure.—Insurance being a contract entered into between the person granting the insurance (the insurer) and the person effecting it (the insured) by an instrument in writing called a policy, any person may insure who may contract, and the general incapacity of infants and lunatics therefore extends to contracts of life insurance. See "*Contract.*" Any married woman may effect a policy of life insurance on her own behalf and independently of her husband.[4] See "*Husband and Wife.*"

Insurance by husband for benefit of wife and children.—See "*Husband and Wife.*"

Insurable interest.—The Statute 14 Geo. III, c. 48, prohibiting the granting of policies of insurance without an interest in the thing insured does not extend to India, but all contracts by way of wagering or gaming are void (v. "*Gaming and Wagering*"), and therefore a person effecting an insurance in India must have an insurable interest in the life assured.[5] Every person is presumed to have an interest in his own life, and to any amount.[6] In the case of insurance of the lives of others, the insurable interest that is required must be a pecuniary one: accordingly a father, as such, has no interest in the life of his son, and cannot insure his son's life for his own benefit.[7] A wife is presumed to have an interest in her husband's life.[8] Both the trustee and the

1) *per* Wood, V. C., 1 K. & J., 223.
2) 5. Ch., 638.
3) 1 Tayl. & Bell, 381.
4) Act III of 1874, s. 5.
5) 1 Tayl. & Bell, 378.
6) 1 M. & Rob., 488.
7) 10 B. & C., 724: 1 Ch. Div., 419.
8) Peake, Add. cases, 70.

cestui qne trust have an insurable interest in the trust-property.[9] A creditor may insure the life of his debtor to the extent of his debt. A surety has an insurable interest in the life of his principal.[1] One of two persons who are jointly liable on a bond has an insurable interest in the life of the other to the extent of half the amount secured by the bond.[2] A contract to employ a person as a clerk at a salary for a fixed term has been held to give the clerk an insurable interest in the life of the employer up to the amount of the salary, for so much of the term as was unexpired at the date of effecting the insurance.[3] A contract of life insurance has nothing in common with a contract of indemnity (*v. post*). The interest in the life of another need not be a continuing one: it is sufficient if the interest exists at the *time of making the policy*: e.g., A insures B's life for Rs. 1,000, the amount of a debt owing by B to A: subsequently B pays A, and afterwards dies. A can, although paid by B, recover the amount insured from the insurers.[4]

Questions in proposal form.—A person wishing to effect an insurance must first fill in a proposal form containing questions as to his health, age, mode of life, habits, &c., and sign a declaration, varying in form in the different companies, but which is generally to the effect that the answers are true, and that the declaration, shall be the basis of the contract, and that any untrue statement, omission, or suppression shall avoid it. The declaration and the policy together form the contract.[5] A declaration of this kind makes truth a condition precedent to liability, and any misstatement, innocent or not, material or not, avoids the policy.[6] Fraud of course vitiates every contract: but in contracts of insurance not only must every statement be true, but nothing material must be kept back. "The question whether any fact should be communicated depends upon whether it is in itself material, and not upon the opinion of the party whether it is so; for policies are entered into upon an implied contract that everything material shall be disclosed by the assured, equity requiring that the two parties should contract *pari passu*, which can only be the case when the knowledge of the assured is so communicated." It is not sufficient to answer the questions in the proposal form correctly if the person about to be insured knows of other material facts concerning which he has not been asked. If he knows of such facts he must state them. The greatest caution is therefore necessary in filling up the proposal form, and, in the absence of specific knowledge, the declarant should speak as to his belief

9) 17 Ves., 253.
1) 5 D. M. & G., 823.
2) 25 W. R. (Eng.), 650.
3) 3 B, & S., 579.
4) 15 C. B., 365.
5) 3 B & S., 917, 927.
6) 4 H. L. C., 502, 509.

only.[7]—(v. "*Contract*," "Fraud," and "Misrepresentation.") On the construction of the questions contained in the proposal, it has been held that "**disorder tending to shorten life**" means a disorder which generally has that tendency, not any disorder of which the assured may afterwards happen to die.[8] "**Afflicted with or subject to fits**" means that the constitution of the assured was naturally liable to fits, or by accidents or otherwise had become so liable, not that the insured never had a fit.[9] **Fainting fits** are not deemed fits by doctors so as to be within the words "epileptic or other fits."[1] "**Afflicted with gout**" means sensibly afflicted with gout, not that the assured has had symptoms which a medical man could detect as denoting the presence of gout in the system.[2] "**Spitting of blood**" means a spitting of blood either from unascertained causes, or as a symptom of a disease tending to shorten life, and does not include spitting of blood from an ulcerated throat or accidental cause.[3] Except when arising from trivial causes, it is advisable to state the fact of spitting of blood to enable the company to ascertain whether it proceeded from serious disease or not. A warranty that a **life is a good one** means that the general state of the health is good, not that there are no seeds of disorder in the system.

References to medical attendant and friend.—The reference should be to the person who is best acquainted by experience with the constitution of the individual, and to the usual or ordinary medical attendant. Where there is a family doctor, but the insured has been lately attended by another doctor, mention should be made of the latter: where the insured had been for many years attended by one doctor, but had lately taken another who had only seen him once or twice, the giving of the name of the latter as the usual medical attendant, without mentioning the circumstances under which the assured was attended was held to vitiate the policy. It is advisable to be explicit on this head, and give all such information as may enable the insurance company to ascertain the state of the health of the assured at the date of proposal. False statements by medical and other referees will not, unless made collusively with the insured, affect the insurance.[4]

Suicide — The words "commit suicide" mean killing, and not merely felonious killing of oneself. It includes every case of self-destruction by a man knowing the probable consequences of his act, and doing the act voluntarily, and intending such consequences to follow. The fact that, at the time of committing

7) Crawley, p. 35: Bunyon's Life Insurance, 2nd ed., p. 30.
8) 4 Taunt., 763.
9) 1 Mo. & R., 498.
1) 1 F. & F., 116.
2) 3 ib., 440.
3) 14 M. & W., 95.
4) Crawley, pp. 39—41. See 3 M. & W., 505: L. R., 6 App. Cas., 634: Bing., 503.

suicide, the assured was of unsound mind, is immaterial. It is not necessary that the man should be able to distinguish between right and wrong, and to appreciate the nature and quality of the act, so as to be a responsible moral agent. A person can, however, in terms insure against suicide while of unsound mind. If there is no condition in the policy for forfeiture in the event of suicide, suicide during insanity, (non-felonious suicide) will not make the insurance void. A condition that, in the event of felonious or wilful suicide, the policy shall remain good, is void as being against public policy.[5]

Previous refusal of life.—The circumstance whether the life has been accepted or declined elsewhere is most material.[6]

Termination of risk.—The loss insured against must occur during the continuance of the risk: *e.g.*, A insures his own life for one year on the 1st January 1891, and in August of the same year receives an injury of which he dies in February 1892: the insurer is not liable.[7]

Forfeiture for non-payment.—In policies there are generally two kinds of stipulations as to payment: (1) that if the premium is not paid by a certain day the policy is void with liberty to the assured to revive the policy on payment within a certain further period; (2) that the insurance shall be valid if the premium is paid within the days of grace. In the first case it is necessary to effect revival of the policy that the assured should be alive at the time of payment;[8] in the latter case, the policy stands good, even if the assured dies within the days of grace, on payment of the premium within that time. Insurance companies, as a general rule, in the case of death during the days of grace before payment of the premium, pay the sum insured less the premium due.

Proof of age and death.—Proof of age, unless already admitted, must be furnished by a certificate of baptism or birth. Proof of death is in general furnished by the certificate of the doctor attending the deceased. "Proof satisfactory to the directors" means reasonable proof.[9]

Absence for seven years.—If a man has not been heard of for seven years, though enquiry and search has been made amongst those who if he were alive would be likely to hear of him, a presumption in law arises that he is dead.[1] There is no presumption that he died at any particular time within the seven years.[2]

5) cf. 4 Bligh., N. S., 194: 30 L. J., Ch., 511: 5 M. & G., 658: 3 C.B., 437.
6) 4 H. L. C., 514: 11 Ch. Div., 370: 18 W. R., 396 (Eng.).
7) 1 T. R., 252.
8) 2 C. B. (N. S.), 257.
9) 4 El. & Bl. 254: 1 B. & S., 782.
1) Evidence Act, s. 108.
2) 5 Ch., 139.

Repayment of premiums.—The insurers may be compelled to repay premiums if the policy is avoided on the ground of the fraud of the insurers, or on the ground of mistake, or for the innocent misrepresentation of the insured,[3] or for illegality: *e.g.*, want of insurable interest.[4] The insurers are, however, entitled to retain the premiums if the condition of the contract is such; or if the policy is avoided for the fraud of the insured.[5]

Accident policies.—Accident policies, which are similar in most respects to ordinary contracts of life assurance, are policies issued insuring a gross sum payable on death and a fixed weekly allowance, as compensation on total or partial disablement, or either a gross sum or weekly compensation alone. Risks are classified according to the nature of the occupation of the insured. They differ from life policies in that no medical examination is required. Contracts issued by the various offices differ in their terms, but the following are general characteristics of an accident policy. No claim is payable in respect of death or injury by accident or violence, unless caused by external and material causes, and unless in case of death, death takes place from such accident or violence within three months from the occurrence of the accident, and in cases of non-fatal injury, disability commences within one month. A limit is fixed to the sum payable on any number of accidents within the year; and when death ensues sums paid for disablement are deducted. Death by suicide, or death or injury by the hand of the law, or while drunk, or by voluntary exposure to unnecessary danger, or by disease caused by injury or injury caused by disease, are excepted from the risks insured against. Engaging in a more hazardous occupation than that in which the assured was, and was stated to be, at the time of the policy, invalidates the policy. Notice in writing of the claim, with full particulars, must be given within the fixed time for so doing from the occurrence of the accident or violence.[6]

Insurable interest.—As in the case of other insurances, an insurance against death by accident requires an insurable interest.

What is an accident.—In the term "accident" some violence, casualty, or *vis major* is necessarily involved: thus disease or death engendered by exposure to heat, cold, or damp, the vicissitudes of climate or atmospheric influences, cannot be considered accident, at all events unless the exposure itself is brought about by circumstances which give it the character of an accident. Thus, if from the exposure to the weather a sailor should catch cold and die, such death would not be accidental,

3) 4 Taunt., 740.
4) 3 Y. & C. (Ex.), 175.
5) 3 Burr., 1, 361: Crawley, 138, 139.
6) Crawley, 140—142.

although, if being obliged by shipwreck or other disaster to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold some time, and death ensued therefrom, the death might properly be held to be the result of accident. In one sense disease or death through the direct effect of a known natural cause, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection one man escapes, another succumbs. Yet disease thus arising has always been considered not as accidental but as proceeding from the natural causes.[7]

Sunstroke.—Where the insured, who was the mate of a ship, died of sunstroke received off Aden in the ordinary discharge of his duties, it was said: "The disease called sunstroke, though the name would at first seem to imply something of external violence, is so far, as we are informed, an inflammatory disease of the brain brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased in the discharge of his ordinary duties about his ship became thus affected and so died. We think for the reasons we have given (*see preceding paragraph*) that his death must be considered as having arisen from a natural cause, and not from accident within the meaning of this policy."[8]

Railway accident.—A railway accident is an accident occurring in the course of travelling by railway and arising out of the fact of the journey: it does not necessarily depend on any accident to the railway, or machinery connected with it.[9]

Drowning.—Death by drowning, *i.e.*, by the action of water causing asphyxia, is death by "accident."[1]

Statement by insurance company.—Every insurance company must, before it commences business, and on the 1st Monday in February and in August in every year, make a statement shewing the capital, the number of shares, calls, liabilities, and assets of the company on the 1st day of the month preceding, and put it up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on. Every member and every creditor of the company is entitled to a copy of the statement on payment of a sum not exceeding eight annas.[2]

7) *Per* Cockburn, C.J., 30 L.J.Q.B., 77.
8) ib.
9) 10 Exch., 45.
1) 6 H. & N., 839.
2) s. 69, Act VI of 1882.

Limitation.—A suit on a policy of insurance, when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers, must be brought within three years from the time when proof of the death or loss is given to or received by the insurers, whether by or from the plaintiff or any other person. A suit by the assured to recover premia paid under a policy voidable at the election of the insurers must be brought within the same time from the date when the insurers elect to avoid the policy.[3]

Assignment.—A policy of insurance is assignable. No particular form of words is necessary for assignment: any words showing an intention on the part of the transferor to transfer, or appropriate the policy to or for the use of the assignee, are sufficient.[4] The assignment will have no operation against the insurance company until express notice of the assignment is given to them, unless they are a party to, or otherwise aware of, such transfer.[5] The notice must be in writing, signed by the person making the transfer, or by his agent duly authorized on this behalf.[6]

Fire and Marine.

Authorities—Arnould's Marine Insurance, 5th edition: Act V of 1866: Contract Act: Act IV of 1882: and cases cited.

The contract of marine insuranee is a contract whereby one party for a stipulated sum undertakes to indemnify the other against loss arising from certain peculiar sea-risks to which his ship, merchandise, or other interest may be exposed during a certain voyage, or a certain period of time.[7] Similarly, a contract of fire insurance is a contract to indemnify the insurer against any loss or damage to his property, which may happen during a particular period through fire. The indemnity will not exceed a specified amount. Both contracts are in their nature and incidents contracts of indemnity (in this respect unlike the contract of life insurance), and therefore if the insured is not actually damnified, he has no cause of action on a policy. Whatever be the amount insured for the insured can only recover from the insurers such sum as represents his actual loss. No profit can in any circumstance be made from a policy of marine or fire insurance. An insurable interest, of appreciable commercial value, on the subject of insurance is necessary in order to be able to recover upon the contract.[8] The insurers in the case of a contract of marine insurance are called underwriters, because

3) Act XV of 1877, Arts. 86 and 87, Sch. II.
4) 31 Beav., 351: 1 De G. M. & G., 763.
5) Act IV of 1882, s. 131.
6) s. 132, ib.
7) Arnould, p. 16.
8) 2 B. & P., N. R., 269.

they underwrite their names at the foot of the policy, for the purpose of becoming answerable for loss or damage for a certain premium per cent.

Lloyds is an association of underwriters in London who have agents in all the principal ports of the wold, whose business it is to forward to Lloyds accounts of all departures from and arrivals at their ports, and in general such information as may be important in guiding the judgment of the underwriters. Lloyds' underwriters individually sign their names at the foot of the policy, and opposite thereto the sum insured by each in figures and also in words, with the date of so doing. This is technically called underwriting the policy for so much, and each thereby makes a separate contract in the terms of the instrument with the assured of the particular amount set opposite his name. The right of action in the assured is consequently against each separately, and not against all jointly.[9]

Good faith is required in contracts of insurance in a greater degree than in any other contract not made between persons in confidential relations. Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such, that regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.[1] Contracts of insurance come within the proviso: the insured must therefore disclose everything material to the risk. Even an innocent concealment or misstatement will make the policy voidable.—(v. *ante*, "*Life Assurance.*")

Rights under marine and fire policies vest in assignees.—Every assignee, by endorsement or otherwise, of a policy of marine insurance, or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at date of assignment, shall have transferred to and vested in him all rights of suit, as if the contract contained in the policy had been made with himself.[2]

Insurance companies.—See *ante*.

The right of transferee of immoveable property under policy.—Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.[3]

9) Arnould, p. 150.
1) Contract Act, s. 17, v. "*Contract.*"
2) s. 15, Act V of 1866.
3) Act IV of 1882, s. 49.

INTEREST.

AUTHORITIES — Act XXXII of 1839: Act XXVIII of 1855 (repealing Usury Laws): Act XXVI of 1881: and Code of Civil Procedure.

Interest upon debts or sums certain.—Upon all debts or sums *certain* payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it thinks fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if (*a*) such debts or sums be payable by virtue of some written instrument at a certain time; or (*b*) if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment.[1]

Rate of interest to be decreed by Courts. — In any suit in which interest is recoverable, the amount will be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable.[2]

Rate of interest upon judgment or decree.—Whenever a Court directs that a judgment or decree shall bear interest, or shall award interest upon a judgment or decree, it may order the interest to be calculated at the rate allowed in the judgment or decree upon the principal sum adjudged, or at such other rate as it may think fit.[3]

Contracts for usufruct of property in lieu of interest.—A mortgage or other contract for the loano f money by which it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, is binding upon the parties.[4]

Rate of interest upon future adjustments of account.—In any case in which an adjustment of accounts may become necessary between the lender and borrower of money upon any mortgage, conditional sale of landed property, or other contract whatsoever, which may be entered into after the passing of this Act,[5] interest will be calculated at the rate stipulated therein; or, if no rate of interest shall have been stipulated, and interest be payable under the terms of the contract, at such rate as the Court may deem reasonable.[6]

1) Act XXXII of 1839.
2) Act XXVIII of 1855, s. 2.
3) s. 3, ib.
4) s. 4, ib.
5) 19th September 1855.
6) Act XXVIII of 1855.

Interest on costs.—See "*Action.*"

Interest with mesne profits.—See *Ibid.*

Interest on sums deposited in Court.—See *Ibid.*

Interest on negotiable instruments.—When the rate of interest is specified on a note or bill, it is calculated at the rate specified on the amount of the principal money due thereon from the date of the instrument until tender or realisation of such amount, or until such date after the institution of a suit to recover such amount as the Court directs. When no rate is specified in the instrument, interest on the amount due thereon is (except in the case of summary suits. *q. v.*) calculated at the rate of 6% from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs. When the party charged is the indorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time he receives notice of dishonour.[7]

7) ss. 79, 80, Act XXVI of 1881.

INTERPLEADER.

AUTHORITY—Civil Procedure Code, Chapter XXXIII.

When interpleader suits may be instituted.—When two or more persons claim adversely to one another, the same payment or property from another person, whose only interest therein is that of a mere **stake-holder**, and who is ready to render it to the right owner, such stake-holder may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to whom the payment or property should be made or delivered, and of obtaining **indemnity** for himself: provided that, if any suit is pending in which the rights of all parties can be properly decided, the stake-holder cannot institute a suit of interpleader.[1]

Plaint in such suit.—In every suit of interpleader the plaint must, in addition to the other statements necessary for plaints, state (*a*) that the plaintiff has no interest in the thing claimed otherwise than as a mere stake-holder; (*b*) the claims made by the defendants severally; and (*c*) that there is no collusion between the plaintiff and any one of the defendants.[2]

Payment of thing claimed into Court.—When the thing claimed is capable of being paid into Court or placed in custody of the Court, the plaintiff must so pay or place it before he can be entitled to any order in the suit.[3]

Procedure at first hearing.—At the first hearing, the Court may (*a*) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or, if it thinks that justice or convenience so requires, (*b*) retain all parties until the final disposal of the suit, and, if it finds that the admissinns of the parties or other evidence enable it, (*c*) adjudicate the title to the thing claimed, or else it may (*d*) direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court: it will then adjudicate on such claims.[4]

When agents and tenants may institute interpleader suits.—None of the provisions mentioned above enable agents to sue their principals or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords:

1) s. 470, Civ. Pr. C.
2) s. 471, ib
3) s. 472, ib.
4) s. 473, ib.

e.g., (*a*) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader suit against A and C; (*b*) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader suit between A and C.[5]

Charge of plaintiff's costs.—When the suit is properly instituted, the Court may provide for the plaintiff's costs by giving him a charge on the thing claimed, or in some other effectual way.[6]

Procedure where defendant is suing stake-holder.—If any of the defendants in an interpleader suit is actually suing the stake-holder in respect of the subject of such suit, the Court in which the suit against the stake-holder is pending must, on being duly informed by the Court which passed the decree in the interpleader suit in favour of the stake-holder, that such decree has been passed, stay the proceedings as against him, and his costs in the suit so stayed may be provided for in such suit; but if, and so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.[7]

5) s. 474, ib. 6) s. 475, ib. 7) s. 476, ib.

INTESTACY.

AUTHORITIES—Act X of 1865 (Succession Act) Parts III, IV, V, and VI
Act XXI of 1865: Act XIX of 1841.

What is.—A man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.[1] See "*Wills.*" Intestacy may happen in several ways, and may be either total or partial. A man may leave no will, in which case intestacy is total, or a will appointing an executor only and containing no other provisions, or a will bequeathing property for an illegal purpose, in both of which latter cases, there is an intestacy as to the distribution of the property; the intestacy may be partial, that is, the will may not dispose of the whole of the testator's property. The property in regard to which a deceased person (not being a Hindu, Mahommedan, Buddhist or Parsi) dies intestate devolves upon the wife or husband, or upon the kindred of the deceased in the order and according to the rules given in the tables on pp. 341-347.

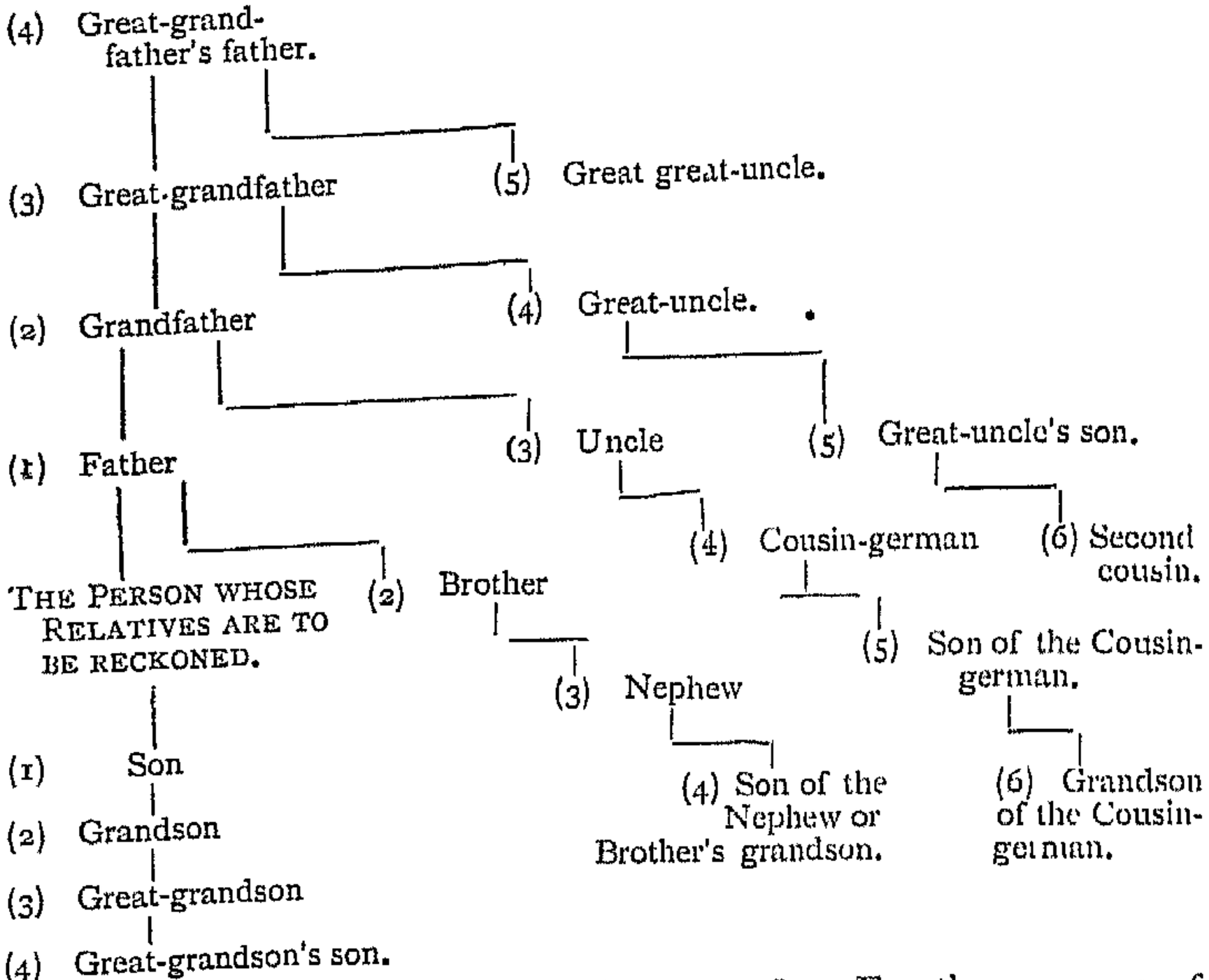
Consanguinity or kindred is the connection or relation of persons descended from the same stock or common ancestor.[2] Consanguinity is lineal or collateral. **Lineal** consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather, and great-grandfather, and so upwards in the direct ascending line; or between a man, his son, grandson, great-grandson, and so downwards in the direct descending line. Every generation constitutes a degree, either ascending or descending. A man's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great-grandfather and great-grandson in the third. **Collateral** consanguinity is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other. For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is proper to reckon upwards from the person deceased to the common stock, and then downwards to the collateral relative, allowing a degree for each person, both ascending and descending.[3]

1) Act X of 1865, s. 25.
2) s. 20, ib., neither this nor the following (ss. 21, 22, 23, 42,) apply to Parsis (see Act XXI of 1865, s. 8).
3) ss. 21, 22, ib.

TABLE OF CONSANGUINITY.

(*Under the Indian Succession Act.*)

Note.—This table shows the degree of kindred. The degrees are computed as far as the sixth and are marked in numerals. The reader will note that under clause 7, Table B, only those who are of nearest, and of the same degree of kindred to the intestate, succeed to his or her property. Therefore, if intestate's grandfather and grandmother (2nd degree) are dead at the time of his death, but his uncles and aunts are living, they being of the 3rd degree will divide all the property between them, to the exclusion of any cousin-germans that may be alive (4th degree), and therefore of any more remote relation. Those kindred marked with the same numeral are of the same degree of relation to the person whose relatives are to be reckoned.



Half-bloods : children in the womb.—For the purpose of succession there is no distinction between those who are related to a person deceased by the full blood, and those who are related by the half-blood ; nor between those who are related to him through his father, and those related through his mother ; not between those who were actually born in his lifetime, and those who at the date of his death were only conceived in the womb (or according to the legal expression *en ventre sa mère*), but who have been subsequently born alive.[4] Every child *en ventre sa mère* is considered as actually born for the purpose of taking any benefit to which, if born, it would be entitled.[5]

4) s. 23, ib.

5) ib.

Hotch-pot.—According to English law where children have any estate by settlement, or have been advanced by the intestate in his lifetime by pecuniary portions, they must bring the amount of their advancement into hotch-pot, so as to make the estate of all the children to be as nearly equal as possible. But in India where a share in an intestate's estate is claimed by a child or his descendant, no money or other property, which the intestate may, during his life have paid, given, or settled to, or for the advancement of, the child by whom the claim is made, will be taken into account in estimating such distributive share.[6]

6) s. 42, ib.

General Table

Showing the distribution of the property of an intestate (other than a Hindu, Mahommedan, Buddhist, or Parsi) under the Indian Succession Act.

If the intestate dies leaving	His property will go as under.	Remarks.
1 Widow[7] or husband.[8] no lineal descendants: no kindred.	Whole to widow or husband.	The widow is not entitled to the provisions made for her in this table, if by a valid contract made by her before her marriage she has been excluded from her distributive share of her husband's estate.[9]
2 Widow or husband, and kindred,* but no lineal† descendants.	½ to widow or husband. ½ to kindred. in the order and according to the rules contained in Table B, v. *post*.	* *i.e.*, relations of the intestate not being lineal descendants. † *i.e.*, sons, daughters, grand-children, and so forth in the direct line.
3 Widow or husband, and lineal descendants.	⅓ to widow or husband. ⅔ to lineal descendants.‡	‡ To be divided according to the rules contained in Table A, v. *post*.
4 Lineal descendants,[1] kindred, and *no* widow or husband.	Whole to lineal descendants.	*v.* Table A, *post*.
5 Kindred, no lineal descendants, and no widow or husband.	Whole to kindred.	*v.* Table B, *post*.
6 No kindred, no lineal descendants, no widow, no husband.	Whole to the Crown.	

7) s. 27, ib. 8) s. 43, ib. 9) s. 26, ib. 1) s. 28, ib.

Table A

Showing distribution of an intestate's property under the Indian Succession Act where there are lineal descendants, after deducting the widow or husband's share (⅓) if he or she has left a widow or husband.

If the intestate dies leaving	His property will go as under.	REMARKS.
1 A child or children[2] but no more remote lineal descendant through a deceased child.	Whole to surviving child, if there be only one; or whole to surviving children to be divided amongst them equally.	
2 No child, but a grandchild or grandchildren[3] and no more remote descendant through a deceased grandchild.	Whole to surviving grandchild if there be only one, or whole to surviving grandchildren to be divided equally among them.	In like manner the property goes to the surviving lineal descendants who are nearest in degree to the intestate, when they are all in the degree of great-grandchildren to him, or are all in a more remote degree.[4] (For distribution when lineal descendants are not all in the same degree of kindred, see clause 3.)
3 Lineal descendants not all standing in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead.[5]	The whole property is divided into equal shares corresponding with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred to him at his decease, or, having been of the like degree of kindred to him, died before him leaving lineal descendants who survived him. One share is allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease: one share to each of such deceased lineal descendants which will be allotted to his child or children or more remote lineal descendants as the case may be, such child, children, or descendants always taking the share which their parents would have been entitled to, had they survived the intestate.[6]	*e. g.*, deceased leaves 1 (*a*) 2 children ... .. ½ or ¼ each. (*b*) 2 grandchildren through deceased child ... ... ¼ or ⅛ each. (*c*) 3 ditto .. ... ¼ or $\frac{1}{12}$ each. As there were originally 4 children the property is divided into four parts: the grandchildren take only the share their father would have taken if he had survived the intestate. 2 (*a*) no children. (*b*) 2 grandchildren through deceased child ... ... ⅔ or ⅓ each. (*c*) great-grandchild through deceased grandchild ... ⅓ 3 (*a*) no children. (*b*) 2 grandchildren ... ⅔ or ⅓ each. (*c*) 2 great-grandchildren through deceased grandchild ... . ⅓ or ⅙ each.

2) s. 30, ib. 3) s. 31, ib. 4) s. 32, ib. 5) s. 33, ib. 6) ib.

Table B

Showing distribution of an intestate's property under the Indian Succession Act, where there are *no* lineal descendants, after deducting the widow's or husband's share (½) if he or she has left a widow or husband.

If the intestate dies leaving	His property will go as under.	Remarks.
1 Father.[7]	Whole to father.	
2 No father, but mother and brothers or sisters, and no child of any deceased brother or sister.[8]	To mother and each living brother or sister in equal shares.	*e.g.*, intestate leaves (*a*) mother ... ... ¼ (*b*) 2 brothers of the whole blood ½ or ¼ each. (*c*) Sister of the half-blood ¼
3 No father, but mother and brother or sister, and child or children of any brother or sister who may have died in the intestate's lifetime.[9]	To mother and each living brother or sister, and the living child or children of each deceased brother or sister in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken, if living at the intestate's death.	*e.g.*, intestate leaves (*a*) mother ... ... 1/5 (*b*) 2 brothers ... ... 2/5 or 1/5 each. (*c*) child of a deceased sister 1/5 (*d*) 2 children of a deceased half-brother (by his father) 1/5 or 1/10 each.
4 No father, but mother: no brothers or sisters, but all or any of them have left children who survived the intestate.[1]	To mother and child or children of each deceased brother or sister in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken, if living at the intestate's death.	*e.g.*, intestate leaves (*a*) no brother or sister. (*b*) mother ... ... ⅓ (*c*) child of deceased sister ... ⅓ (*d*) 2 children of deceased brother ⅓ or ⅙ each.
5 No father, or brother or sister, or child of any brother or sister, but mother.[2]	The whole to the mother.	

7) s. 35, ib. 8) s. 36, ib. 9) s. 37, ib. 1) s. 38, ib. 2) s. 39, ib.

Table B—*continued.*

If the intestate dies leaving	His property will go as under.	Remarks.
6 No lineal descendant, nor father, nor mother, but brothers and sisters, and child or children of deceased brothers or sisters.[3]	The property is divided equally between the brothers and sisters and the child or children* of such of them as may have died before him.	* Such children (if more than one) taking in equal shares, only the shares which their respective parents would have taken if living at the intestate's death.
7 No lineal descendant, nor parent, nor brother, nor sister.[4]	The property is divided equally among those of his relatives who are in the nearest degree of kindred to him.	As to the degrees of kindred see "Table of Consanguinity." *e.g.*, intestate leaves (*a*) a great-grandfather. (*b*) an uncle. (*c*) a nephew. (*d*) no relative standing in a nearer degree of kindred to him. All these being in the third decree take equal shares.

3) s. 40, ib.

4) s. 41, ib.

Table C.

Showing distribution of estate of an Intestate Parsi.

If the intestate dies leaving	The property will go as under.	Remarks.
1 A widow and children.[5]	To the widow and children.	The share of each son will be double the share of the widow, and the share of the widow double the share of each daughter. *See clause* 4, *Remark column*.
2 Widower and children (female intestate).[6]	To the widower and children.	The share of the widower will be double the share of each of the children. *See clause* 4, *Remark column*.
3 Children but no widow.[7]	To the children.	The share of each son will be four times the share of each daughter. *See clause* 4, *Remark column*.
4 Children but no widower (female intestate).[8]	To the children.	In equal shares. If any child of a Parsi intestate shall have died in his or her lifetime, the widow or widower and issue of such child will take the share which such child would have taken if living at the intestate's death in such manner as if such deceased child had died immediately after the intestate's death.[1]
5 A widow or widower, and father or mother, but no lineal descendants.[9]	To the father and mother and widow or widower.	The father and mother, if both are living or one of them if the other is dead will take one moiety, and the widow or widower the other half. Where both the father and mother survive the intestate, the father's share is double that of the mother.

5) Act XXI of 1865, s. 1. 6) s. 2, ib. 7) s. 3, ib. 8) s. 4, ib. 9) s. 5, ib. 1) s. 6, ib.

Table C—*continued.*

If the intestate dies leaving	The property will go as under.	REMARKS.
6 A widow or widower, and relatives *on the father's side but no father*, mother or lineal descendants.[2]	To the intestate's relatives on the father's side and widow or widower.	These relatives take the moiety the father and mother would have taken if they had survived. The next-of-kin will take in the following order: (1) Brothers and sisters and the children or lineal descendants of such of them as shall have predeceased the intestate; (2) Grandfather and grandmother; (3) Grandfather's sons and daughters, and the lineal descendants of such of them as shall have predeceased the intestate; (4) Great-grandfather and great-grandmother; (5) Great-grandfather's sons and daughters and the lineal descendants of such of them as shall have predeceased the intestate. Each male will take double the share of each female standing in the same degree of propinquity.
7 A widow or widower, but no relatives *on the father's side*, no father or mother and no lineal descendants.[3]	To the widow or widower.	Either takes the whole.
8 No widow or widower, no lineal descendants.[4]	To the next-of-kin.	The next-of-kin are entitled to succeed in the order given in the schedule below, each male taking double the share of each female standing in the same degree of propinquity.

2) ib.

3) ib.

4) s. 7, ib.

SCHEDULE SHOWING ORDER OF SUCCESSION OF NEXT-OF-KIN OF A PARSI INTESTATE.

(1) Father and mother.
(2) Brothers and sisters, and the lineal descendants of such of them as shall have predeceased the intestate.
(3) Paternal grandfather and grandmother.
(4) Children of (3) and the lineal descendants of such them as shall have predeceased the intestate.
(5) Paternal grandfather's father and mother.
(6) Paternal grandfather's father's children and the lineal descendants of such of them as shall have predeceased the intestate.
(7) Brothers and sisters by the mother's side, and the lineal descendants of such of them as shall have predeceased the intestate.
(8) Maternal grandfather and maternal grandmother.
(9) Children of the maternal grandfather, and the lineal descendants of such of them as shall have predeceased the intestate.
(10) Son's widow, if she have not re-married at or before the death of the intestate.
(11) Brother's widow, if she have not re-married at or before the death of the intestate.
(12) Paternal grandfather's son's widow if she have not re-married at or before the death the intestate.
(13) Maternal grandfather's son's widow if she have not re-married at or before the death of the intestate.
(14) Widowers of the intestate's deceased daughters, if they have not re-married at or before the death of the intestate.
(15) Maternal grandfather's father and mother.
(16) Children of the maternal grandfather's father, and the lineal descendants of such of them as shall have predeceased the intestate.
(17) Paternal grandmother's father and mother.
(18) Children of the paternal grandmother's father, and the lineal descendants of such of them as shall have predeceased the intestate.[5]

Curators in cases of successions.—Any person claiming right by succession to property (moveable or immoveable) of a deceased person may apply to the Judge of the Court of the District where any part of the property is found or situate, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended. The Judge will then (subject to a regular suit to be thereafter instituted in regard to the right of succession) summarily determine the right to possession, and will deliver possession, accordingly. Curators may be appointed to take charge of the property until the determination of the summary suit where there is reason to apprehend danger of misappropriation, waste, or neglect, and where such appointment is beneficial under all the circumstances of the case. Either the party whose application may have been rejected, or the party who may have been evicted from possession, may institute a regular suit to determine which party is entitled to succeed to the intestate's property.[6]

5) Act XXI of 1865.

6) Act XIX of 1841, ss. 1, 4, 5, 17.

INTIMIDATION, INSULT, AND ANNOYANCE.

AUTHORITIES—Indian Penal Code and cases cited.

Criminal intimidation.—Whoever threatens another with any injury to his person, reputation, or property, or to the person or reputation of any one in whom that person is interested, with intent (1) to cause alarm to that person; or (2) to cause that person to do any act which he is not legally bound to do; or (3) to omit to do any act which that person is legally entitled to do, commits criminal intimidation: *e.g.*, A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house: A is guilty of criminal intimidation. The threat need not be directly addressed to the party whom it is intended to influence. It is sufficient, although it is addressed to others, if it is intended to reach the ears of the party threatened, and is used with any of the intentions stated above.[1] It is not an offence to threaten another with an action or prosecution which might lawfully be preferred against him,[2] though if he obtained money by the threat of an indictment, it would apparently be punishable as being the offence of taking a gift, &c., to screen an offender from punishment, and if the threat of accusation was of an offence punishable with death, or transportation, or imprisonment, for a term extending to ten years, as being the offence of extortion.[3] A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section. The offence of criminal intimidation by an anonymous communication or having taken precaution to conceal the name or abode of the person from whom the threat comes is punishable more severely than the ordinary offence.[4]

Insult and annoyance.—Whoever intentionally insults and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, is punishable with imprisonment (rigorous or simple) for a term extending to two years, or with fine, or with both. To cause an act by inducing a person to believe that he will be rendered an object of the divine displeasure is an offence: *e.g.*, to sit *dharna* at the door of a person with the above-mentioned intention; uttering words or making gestures, or exhibiting any object with the intent of insulting the modesty of a woman, is an offence. Misconduct in a public place, or in any place to enter into which is trespass, is an offence if it cause annoyance to any person.[5]

1) Penal Code, s. 503: Mad. H. C., 1865: 15 Cal., 671.
2) 8 Bom. H. C. C. C., 101.
3) Mayne's Penal Code, p. 461.
4) For the punishment, see ss. 506, 507, ib.
5) Penal Code, ss. 504, 508, 509, 510.

INVENTIONS AND PATENTS.

AUTHORITY—ACT V of 1888.

The law in respect of inventions subsequent to the 1st July 1888 is contained in the Consolidating and Amending Act (V of 1888). The earlier Acts XV of 1859, XIII of 1872, XVI of 1883 are repealed, but any exclusive privilege acquired, or any conditions or restrictions imposed with respect to any such privilege, or any right or liability accrued or incurred under any of those enactments, before the commencement of this Act, or any relief in respect of any such privilege, right, or liability, are not affected by this repeal.[1]

"Invention," "Inventor."—An invention includes an improvement. An "inventor" (under the Act) includes the executors, administrators, and assigns of an inventor. "Manufacture" includes any art, process, or manner of producing, preparing, or making an article, and also any article prepared or produced by manufacture.[2] **An invention is considered new** if it has not before the date of the delivery or receipt of the application for leave to file the specification, been publicly used in any part of British India or of the United Kingdom, or been made publicly known there by means of a written publication.[3] The public use or knowledge of an invention before the above-mentioned date is not deemed a public use and knowledge within the meaning of the above section, if the knowledge has been obtained surreptitiously and in fraud of the inventor, or has been communicated to the public, in fraud of the inventor, or in breach of confidence; provided that the inventor has not acquiesced in the public use of his invention, and that within six months after the commencement of that use he applies for leave to file a specification. Use of an invention in public by the inventor, or by his servant or agent, or by any other person by his license in writing, for a period not exceeding one year immediately preceding the date of the delivery or receipt of his application for leave to file a specification, or knowledge of the invention resulting from such use thereof in public, is not deemed a public use or knowledge within the meaning of the Act.[4] With respect to the filing by a Government servant of a specification of a manufacture invented by him in the course of his employment, or with respect to the extension, in favour of any person, of the

1) Act V of 1888, s. 2.
2) s. 4, ib.
3) s. 21, ib.
4) s. 23, ib.

term of an exclusive privilege, an exclusive privilege acquired under the Act has to all intents the like effect against Her Majesty, as it has against a subject. The authorities may, however, use the invention for the services of Government on terms to be before or after the use thereof agreed on (with the approval of the Governor-General in Council) between the authorities and the inventor, or in default of such agreement, on such terms as may be settled by the Governor-General in Council.[5]

Effect of public use or knowledge in India of patented and unpatented inventions.—If an inventor who has obtained a patent for his invention in the United Kingdom, applies for leave, under this Act, to file a specification within twelve months from the date of the actual sealing of the patent, the invention will be deemed to be a new invention within the meaning of the Act, if it was not publicly used or known in any part of British India at or before the date of the application for the patent, notwithstanding that it may have been publicly used or known in some part of British India or of the United Kingdom before the date of the delivery or receipt of the application for leave to file the specification.[6] If an inventor applies for leave to file a specification under this Act, while his application for a patent is pending in the United Kingdom, and the interval between the date of his application for a patent, and the date of the delivery or receipt of his application under the Act, does not exceed twelve months, the invention will not be deemed to have been publicly used or made publicly known, by reason only of the invention having been used, or a description of it having been published in any part of British India or of the United Kingdom during the interval.[7]

Effect of public use or knowledge of invention after admission to an exhibition.—If the inventor being the exhibitor of his invention at an industrial or international exhibition, certified as such by the Governor-General in Council, applies for leave to file a specification of the invention within six months from the date of the admission of the invention into that exhibition, the invention will not be deemed to have been publicly used or made publicly known by reason only of its having at any time after admission into the exhibition been publicly used or made publicly known.[8]

Application for leave to file specification.—The inventor of a new manufacture, whether he is a British subject or not, may apply to the Governor-General in Council for leave to file a specification thereof. The application must be in writing and signed by the applicant, and in a certain specified form set

5) s. 17, ib. 6) s. 24, ib. 7) s. 25, ib. 8) s. 26, ib.

out in the Act; it must be verified by the applicant, or if absent from India, by his agent,[9] and must state the name, occupation, and address of the applicant, and when a patent has been obtained in the United Kingdom, the date of the patent and the date of the actual sealing thereof, and must describe with reasonable precision and detail, the nature of the invention, and of the particular novelty whereof it consists, and it must be supplemented by such further particulars, and by such drawings or photographs as may be required. The applicant may also be required to furnish a model.[1] Every application for leave to file a specification, and every specification filed must be sent to, or left with, the Secretary appointed under this Act.[2] Application may be made for leave to file an amended specification.[3] If an applicant is absent from British India, the application for leave to file a specification or an amended specification may, instead of being signed by the applicant, be signed by his agent appointed in writing in that behalf.[4] Subject to the provisions of sections 45 and 46 of the Act, and of any other enactment for the time being in force, any act which is required or authorized to be done by any person may be done in his behalf by an agent in British India having authority in writing so to do the act.[5]

Order to file specification.—Upon an application for leave to file, the Governor-General in Council may, after such enquiry as he thinks fit, make an order authorizing the applicant to file a specification.[6] Priority of application gives an applicant a preferential claim for an order.[7] Before making such an order the Governor-General in Council may direct that the application be referred for enquiry and report to any person whom he thinks fit. When such enquiry and report are made by a person who is not in the service of the Government, the applicant must pay his fee and deposit such sum of money as will, in the opinion of the Secretary (under the Act), be sufficient to defray such fee. The fee is determined by the Governor-General after a consideration of the report. If the sum is not deposited, the application may be rejected.[8]

Form and contents of specification.—The specification must be in writing, signed by the applicant, and must set forth the precise invention in respect of which the applicant claims to become entitled to an exclusive privilege. If the specification is of an invention which is an improvement only, it must by explicit language distinguish between what is old and what is claimed to be new. The specification must explain the principle

9) s. 46, ib. 2) s. 10, ib. 4) s. 45, ib. 6) s. 6, ib. 8) s. 6, ib.
1) s. 5, ib. 3) s. 18, ib. 5) s. 47, ib. 7) s. 7, ib.

of the invention and the best mode in which the applicant has contemplated applying that principle, and must describe the manner of making and using the invention, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science, to which the invention appertains or is connected, to make use of the same. Such copies (not being fewer than four) of the specification must be sent as may be required: one is kept by the Secretary, one is sent to the Governor of Madras, one to the Governor of Bombay, one to the Chief Commissioner of Burmah, and the others (if any) to such authorities as the Governor-General may determine. The copies so sent are open to the inspection of the public.[9]

Register of inventions.—In a book called the register of inventions, kept at the office of the Secretary, is entered every application for leave to file a specification, every order made on any such application, every specification filed, and every subsequent proceeding relating to the invention described therein.[1] The register is a public document, and is open to the inspection of the public.[2] An address book is also kept in which the person entitled to an exclusive privilege may have his address entered.[3] Any person aggrieved by any entry in either of these books may apply to the High Court to have it rectified.[4]

Exclusive privilege of inventor.—If within six months from an order to file a specification, or within such further time not exceeding three months, as may on special order be allowed, and on payment of the necessary fees, the applicant files a specification of his invention, he will be entitled, subject to the other provisions of this Act, *to the exclusive privilege of making, selling, and using the invention in British India, and of authorising others so to do, for a period of fourteen years from the date of the filing of the specification.* But the exclusive privilege will cease if the inventor fails to pay any fee prescribed in respect of the continuance of the privilege, unless the failure to pay arose through accident, mistake, or inadvertence, and the Governor-General has, on application to that effect, enlarged the time for making payment.[5] An exclusive privilege will cease if the Governor-General declares the privilege, or the mode in which it is exercised, to be mischievous to the State, or generally prejudicial to the public.[6] It will also cease if a breach of any condition on which the applicant was authorized to file a specification, or on which the term of an exclusive privilege was extended, is proved, and if the Governor-General declares it to have ceased.[7]

9) ss. 9, 10, 11, ib.
1) s. 12, ib.
2) s. 14, ib.
3) s. 13, ib.
4) s. 41 (1), ib.
5) s. 8, ib.
6) s. 27, ib.
7) ib., ib.

An exclusive privilege acquired under the Act in respect of an invention patented in the United Kingdom, ceases on the revocation or expiration of the patent. A similar provision applies in the case of patents acquired elsewhere than in the United Kingdom.[8]

Extension of exclusive privilege.—The inventor of a new manufacture may, at any time, not more than one year and not less than six months before the expiration of the term of fourteen years, apply for an extension of the privilege for a further time. The Governor-General may refer the matter to a High Court; and if the Court reports, or the Governor-General is of opinion that the inventor has been inadequately remunerated by his exclusive privilege, such term may be extended for a further period of seven years, or, in exceptional cases, for a further period of fourteen years from the expiration of the first term of fourteen years. The extended privilege will cease if the inventor fails to pay the prescribed fee in respect of the continuance of the privilege.[9]

Bar to exclusive privilege.—A person is not entitled to an exclusive privilege (*a*) if the invention is of no utility; or (*b*) if at the date of the delivery or receipt of the application for leave to file the specification, it was not a new invention; or (*c*) if the applicant was not the inventor; or (*d*) if the original or any amended specification does not fulfil the requirements of the Act; or (*e*) if the original or any subsequent application relating to the invention, or the original or any amended specification contains a wilful or fraudulent misstatement; or (*f*) if the application for leave to file the specification was made after the expiration of one year from the date of the acquisition of an exclusive privilege in respect of the invention, in any place beyond the limits of British India and the United Kingdom.[1]

Suit for infringement of exclusive privilege.—An inventor may sue, in the District Court, any person who, during the continuance of his exclusive privilege in respect of his invention, makes, sells, or uses the invention without his license, or counterfeits or imitates it. Such a suit cannot be defended upon the ground of any defect or insufficiency of the specification, or upon the ground that the original or any subsequent application relating to the invention, or the original or any amended specification, contains a wilful or fraudulent misstatement, or upon the ground that the invention is of no utility. Nor can it be defended upon the ground that the plaintiff was not the inventor, unless the defendant shows that he himself is the actual inventor,

8) s. 28, ib. 9) s. 15, ib. 1) s. 20, ib.

or has obtained from the actual inventor a right to make, sell, or use the invention, or to counterfeit or imitate it, as the case may be. Nor can it be defended upon the ground that the invention was not new, unless the defendant, or some person through whom he claims, has, before the date of the delivery or receipt of the application for leave to file the specification, publicly or actually used in some parts of British India, or of the United Kingdom, the invention or that part of it with respect to which the exclusive privilege is alleged to have been infringed.[2]

Applications to Court relating to inventions.—Any person may apply to a High Court for an order declaring that an exclusive privilege in respect of an invention has not been acquired by reason of all or any of the following objections :—(*a*) that the invention is of no utility ; or (*b*) that it was not at the date of delivery or receipt of the application for leave to file the specification, a new invention ; or (*c*) that the applicant was not the inventor thereof ; or (*d*) that the original or any amended specification does not fulfil the requirements under the Act ; or (*e*) that the applicant has knowingly or fraudulently included in the application for leave to file the specification, or in the original or any amended specification, as part of his invention, something which was not new, or whereof he was not the inventor ; or (*f*) that the original or any subsequent application relating to the invention, or the original or any amended specification contains a wilful or fraudulent misstatement ; or (*g*) that some part of the invention, or the manner in which that part is to be made and used, as described in the original or any amended specification, is not thereby sufficiently described, and that this insufficiency was fraudulent, and is injurious to the public.[3] Like applications as to part of an invention may be made on the following objections :—(*a*) that that part of the invention is wholly distinct from the other parts thereof, and is of no utility ; or (*b*) that that part of the invention was not, at the date of the delivery or receipt of the application for leave to file the specification, a new invention ; or (*c*) that the applicant was not the inventor of that part of the invention ; or (*d*) that that part of the invention, or the manner in which it is to be made and used, is not sufficiently described in the original or any amended specification, and that the insufficiency is injurious to the public. As to applications to Court on the breach of any condition on which leave to file a specification has been granted, see the section noted below.[4]

Title of actual inventor to exclusive privilege in case of fraud.—If, in a suit brought in the District Court at any time within fourteen years from the date of the filing of a specification

2) s. 29, ib. 3) s. 30, ib. 4) s. 33, ib.

of an invention, the actual inventor proves that the applicant was not the actual inventor, and that at the time of the application for leave to file the specification, the applicant knew or had reason to believe that the knowledge of the invention was obtained by himself or by some other person surreptitiously or in fraud of the actual inventor, or by means of a communication made in confidence by the actual inventor to him, or to any person through whom he derived the knowledge, the Court may make a decree declaring an exclusive privilege in respect of the invention to be vested in the actual inventor for a term of fourteen years from the date on which the specification was filed, and requiring the applicant to account for and pay over to the actual inventor the profits derived by him from the invention, or so much of those profits as the Court, having regard to the degree of diligence exerted by the actual inventor in proceeding under this section, and to all the other circumstances of the case, may seem fit to require the applicant to pay.[5]

Powers of Governor-General to require grant of licenses.—If on the petition of any person interested, it is proved to the Governor-General in Council that, by reason of an inventor who has acquired an exclusive privilege failing to grant licenses on reasonable terms—(*a*) the exclusive privilege is not being worked in British India; or (*b*) the reasonable requirements of the public with respect to the invention cannot be supplied; or (*c*) any person is prevented from working or using to the best advantage, an invention of which he is possessed, the Governor-General in Council may order the inventor to grant, or may himself on behalf of the inventor grant licenses, on such terms as the Governor-General may deem just.[6]

Assignment for particular places.—Any person for the time being entitled to an exclusive privilege under this Act, or to any share or interest in such a privilege in any local area, may, subject to the conditions of his title thereto, assign the privilege or such share or interest, as the case may be, for any place in, or part of, that local area.[7]

Rules, forms, fees, &c.—The schedule of the Act contains the fees payable in respect of proceedings taken under it. The Governor-General is empowered to reduce these fees or to vary or revoke the reduction, and to make rules and prescribe forms for the carrying out of the Act.[8]

5) s. 38, ib. 6) s. 43, ib. 7) s. 44, ib. 8) ss. 48, 49, ib.

JUDGMENTS AND DECREES.

AUTHORITIES—Code of Civil Procedure. Code of Criminal Procedure: Act I of 1872 (Evidence): Act I of 1877 (Specific Relief).

Judgment means the statement given by a Judge of the grounds on which his decree or order is based.[1] Under the Code of Civil Procedure the judgments of all Courts other than the Courts of Small Causes must contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. The judgments of the Courts of Small Causes need not contain more than the points for determination and the decision thereon.[2]

A decree means the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal. **An order means** the formal expression of any decision of a Civil Court, which is not a decree as above defined.[3] The decree must agree with the judgment; it must contain the number of the suit, the names and descriptions of the parties, and particulars of the claims, and must specify clearly the relief granted, or other determination of the suit. The decree must also state the amount of costs incurred in the suit, and by what parties and in what proportions such costs are to be paid.[4]

The judgment of a Criminal Court must contain the point or points for determination, the decision thereon, and the reasons for the decision, and must specify the offence (if any) of which, and the law under which, the accused person is convicted, and the punishment to which he is sentenced. If it be a judgment of acquittal, it must state the offence of which the accused person is acquitted, and direct that he be set at liberty.[5]

Classes of judgments.—Judgment of Civil Courts are usually classified under two heads: (i) judgments *in rem*; and (ii) judgments *in personam* or *inter partes*, although in India these expressions are not generally used. A judgment *in rem* not only binds the parties to the suit in which it is pronounced, but is good against the whole world in respect of the matter litigated and determined. On the other hand a judgment *inter partes* is binding only upon the parties to the suit, or persons claiming through, or under them.

1) Civ. Pr. Code, s. 2.
2) s. 203, ib.
3) s. 2, ib.
4) s. 206, ib.
5) Cr. Pr. Code, s. 367.

Judgments in rem.—Though the term "judgment *in rem*" is not used in the Evidence Act, the latter incorporates the law on the subject as laid down in the undermentioned case.[6] A final judgment, order, or decree of a competent Court, in the exercise of Probate, Matrimonial, Admiralty, or Insolvency Jurisdiction, which confers upon, or takes away from, any person any legal character, or which declares any person to be entitled to any character, or to be entitled to any specific thing, not against any specified person but absolutely, is *conclusive proof* (1) that any legal character which it confers accrued at the time when the judgment, order, or decree came into operation; (2) that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order, or decree, declares it to have accrued to that person; (3) that any legal character which it takes away from any such person ceased at the time from which such judgment, order, or decree, declared that it had ceased or should cease; and (4) that any thing to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order, or decree, declares that it had been or should be his property[7]: *e.g.* (1) A, as B's executor, propounds a will left by B before a Court which exercises Testamentary and Intestate Jurisdiction. The will is proved to have been executed by B, the testator, and probate is issued to A as executor. The probate is conclusive proof of the will and the character of A as executor thereof. (2) A and B are husband and wife. A sues B for divorce in a competent Court, which makes a final decree pronouncing in favour of divorce. The decree for divorce is conclusive proof that the relationship of husband and wife has come to an end. (3) A sues B in a Court of Admiralty for a declaration that the vessel *Manora* was a lawful prize taken by him, and obtains a decree. The decree is conclusive proof of the title to the ship *Manora*. (4) A, a creditor, adjudicates B an insolvent in a Court for the Relief of Insolvent Debtors, and obtains a vesting order. The vesting order is conclusive proof that B is an insolvent.

Judgments other than those referred to in the last paragraph are only binding upon the parties to the suit, or those who are privy with them, but are not conclusive proof of that which they state. There are certain other judgments which occupy an intermediate position between the two classes referred to. **Judgments, orders, or decrees relating to matters of a public nature,** although not conclusive proof in respect thereof, are cogent evidence of that which they state even between persons who were not parties thereto: *e.g.*, A

6) 7 W. R., 339, Civ. Rulings.

7) Evidence Act, s. 41.

sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies. The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land in which C alleged the existence of the same right of way, is proof (though not conclusive) that the right of way exists.[8]

Res judicata.—See "*Action and Actionable Claim.*"

Declaratory decree.—Any person entitled to any legal character, or to any right to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, *and the plaintiff need not, in such suit, ask for any further relief.* But no such declaration will be made where the plaintiff being able to seek further relief than a mere declaration of title omits to do so: *e.g.*, A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A may sue for a declaration that they are not entitled to the right so claimed. A trustee of property is a person "interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee. A declaration made by the Court is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.[9]

See "*Action and Actionable Claim.*"

8) ss. 42, 43, ib.

9) Act I of 1877 (Specific Relief), ss. 42, 43.

JURY AND JURORS.

AUTHORITY—Criminal Procedure Code.

Trials before High Courts.—There is no trial by jury in India in civil cases. All criminal trials before a High Court (including the Chief Court of the Punjab and the Court of the Recorder of Rangoon) are by Jury. Criminal cases transferred to the High Court may, if the High Court so directs, be by Jury.[1] The Jury consists of nine persons,[2] who are chosen by lot from the persons summoned. In Presidency towns—(*a*) if the accused is charged with the commission of an offence punishable with death; or (*b*) if in any other case a Judge of the High Court so directs; the Jurors are chosen from the "**special**" Jury list.[3] No more than 400 persons may at any one time be entered in the special Jurors' list.[4] In Presidency towns, a Juror's book is kept of persons liable to serve: those who are entered in the special list are privileged, and liable to serve only as special Jurors during the year for which the list has been prepared.[5] The Clerk of the Crown before the 1st April in each year, and subject to the rules of the High Court, prepares a list of common Jurors and special Jurors. In preparing the latter list, regard is had to the property, character and education of the persons whose names are entered therein.[6] No person is entitled to have his name entered in the special Jurors' list, merely because he may have been entered in the list for a previous year. In the Calcutta High Court the Governor-General, and in the other High Courts the Local Government, may exempt any salaried officer from serving as a Juror. There is no appeal from the decision of the Clerk of the Crown in the preparation of the lists. The preliminary list is published in the official Gazette before the 15th of April, and the revised list before the 1st of May.[7] For each Sessions, at least 27 special Jurors and 54 common Jurors are summoned. No person can be so summoned more than once in six months unless the number cannot be made up without him.[8] Any person summoned who without lawful excuse fails to attend, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court, after being ordered to attend, is guilty of contempt, and is liable to such fine as the Judge thinks fit, and in default of payment to imprisonment in the civil jail until the fine is paid.[9]

Trials before Sessions Court by Jury or with Assessors.—All trials before a Court of Sessions must be either by

1) ss. 266, 267, Cr. Pr. Code.
2) s. 274, ib.
3) s. 276, ib.
4) s. 312, ib.
5) s. 311, ib.
6) s. 313, ib.
7) s. 314, ib.
8) s. 315, ib.
9) s. 318, ib.

Jury, or with the aid of **Assessors.** In trials with Assessors, two are chosen by the Judge from the persons summoned to act as such. The choice of Assessors lies entirely with the District Judge. The law does not, as in the case of Jurors, provide for objection being made to an Assessor; see "*Europeans and European British Subjects.*" The Local Government may, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by Jury in any district, and may revoke or alter such order.[1] The Jury consists of such uneven number, not less than three or more than nine, as the Local Government may direct.[2] In a trial by Jury of a person not being a European or American, a majority of the Jury must, if he so requires, consist of persons who are neither Europeans nor Americans.[3] As to Jury for trial of Europeans, see "*Europeans and European British Subjects.*" The Jury are chosen by lot from the persons summoned.[4] All male persons between the ages of 21 and 60, with the following exceptions, are liable to serve as Jurors at any trial held within the district in which they reside.[5]

The persons exempted from liability to serve as Jurors or Assessors, are—(1) officers in civil employ superior in rank to a District Magistrate; (2) Judges; (3) Commissioners and Collectors of Revenue or Customs; (4) persons engaged in the Preventive Service in the Customs Department; (5) persons engaged in the collection of the revenue whom the Collector exempts on the ground of official duty; (6) persons actually officiating as **priests** or ministers of their respective religions; (7) persons in the **Army,** except when, by any law in force for the time being, they are specially made liable to serve as Jurors or Assessors; (8) **surgeons** and others who openly and constantly practice the medical profession; (9) persons employed in the Post Office and Telegraph Departments; (10) persons exempted from personal appearance in Court under the provisions of the Civil Procedure Code[6]; (11) other persons exempted by the Local Government from liability to serve as Jurors and Assessors.[7] Lists of Jurors and Assessors are published in the office of the Collector, the Court-houses of the District Magistrate, the District Court, and in some conspicuous place in the town. Objections to the list will be heard by the Sessions Judge and Collector, whose order is final.[8] A Railway servant may be excused attendance if it appears on the representation of the head of the office in which he is employed that he cannot serve as Juror or Assessor without inconvenience to the public.[9] The Court of Session may, for

1) ss. 268, 269, ib.
2) s. 274, ib.
3) s. 275, ib.
4) s. 276, ib.
5) s. 319, ib.
6) Civ. Pr. C., ss. 640, 641.
7) s. 319, Cr. Pr. Code.
8) ss. 322—324, ib.
9) s. 329, ib.

reasonable cause, excuse any Juror or Assessor from attendance at any particular session.[1] The penalty for non-attendance, &c. (v. *ante*) of a Juror or Assessor is fine not exceeding Rs. 100, and in default of recovery of fine, imprisonment for 15 days, unless the fine is sooner paid.[2]

Trial by Jury before District Magistrate—See "*Europeans and European British Subjects.*"

Nuisance cases.—A person against whom a conditional order for the removal of a public nuisance is made (v. "*Nuisance*") must either—(*a*) perform, within the time specified in the order, the act directed thereby; or (*b*) appear in accordance with such order, and either show cause against the same, or apply to the Magistrate to appoint a Jury to try whether the same is reasonable and proper.[3] The Magistrate will then appoint a Jury consisting of an uneven number of persons, not less than five, of whom the Foreman and one-half of the remaining members must be nominated by the Magistrate and the other members by the applicant. The Magistrate will then fix a time within which the Jury are to return their verdict.[4]—See "*Nuisance.*"

Duties of Jurors.—If a Juror or Assessor is personally acquainted with any relevant fact it is his duty to inform the Judge that such is the case, whereupon he may be sworn and examined in the same manner as any other witness.[5] The duty of the Judge is to decide all questions of law[6]: the duty of the Juror to decide all questions of fact.[7] Except with the leave of the Court, no person other than a Juror may speak to, or hold any communication with, any member of a Jury.[8] The presiding Judge may order either that the Jury be locked up pending a trial, or be allowed to return to their homes.[9] When in a case tried before the High Court the Jury are satisfied that they will not be unanimous, but six of them are of one opinion, the Foreman must so inform the Judge.[1]

Verdict.—In trials before a High Court, if there are six Jurors of one opinion, and the Judge agrees with them, judgment will be given in accordance with that opinion: if the Judge disagrees with the majority, the Jury will be at once discharged. If there are not as many as six who agree in opinion, the Jury will, after lapse of a reasonable time, be discharged. In trials before a Sessions Court, if the Sessions Judge disagrees with the verdict of the Jurors or of a majority of the Jurors so completely that he considers it necessary to submit the case to the High Court, he may submit the case accordingly.[2]

1) s. 330, ib.
2) s. 332, ib.
3) s. 135, ib.
4) s. 138, ib.
5) s. 294, ib.
6) s. 298, ib.
7) s. 299, ib.
8) s. 300, ib.
9) s. 296, ib.
1) s. 305, ib.
2) ss. 306, 307.

JUSTICES OF THE PEACE.

AUTHORITY—Criminal Procedure Code, sections cited.

Justices of the Peace are Magistrates who sit to administer summary justice in minor matters. Judges of the superior Courts are also called Justices, *i.e.* officers deputed by the Crown to administer justice by way of judgment. They are also *ex-officio* Justices of the Peace (*v. post*).

In the Mofussil.—The Governor-General in Council, so far as regards the whole or any part of British India *outside* the Presidency towns, and every Local Government, so far as regards the territories subject to its administration (other than the towns aforesaid), may, by notification in the official Gazette, appoint such *European British Subjects* as he or it thinks fit to be Justices of the Peace within and for the territories mentioned in such notification[1]: see "*Europeans and European British Subjects.*"

In Presidency Towns.—The Governor-General in Council or the Local Government, so far as regards the Town of Calcutta, and the Local Government, so far as regards the Towns of Madras and Bombay, may, by notification in the official Gazette, appoint to be Justices of the Peace within the limits of the town mentioned in such notification *any person resident within British India*, and not being the subjects of any foreign State, whom such Governor-General in Council or Local Government (as the case may be) thinks fit.[2] The jurisdiction of a Justice of the Peace so appointed is limited to the Presidency town: his duties and powers are prescribed by various local Acts.

Ex-officio Justices of the Peace.—In virtue of their respective offices, the Governor-General, the Ordinary Members of the Council of the Governor-General, the Judges of the High Courts, and the Recorder of Rangoon are Justices of the Peace within and for the whole of British India; Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of the territories administered by the Local Government under which they are serving[3]; and the Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates.[4]

1) s. 22, Cr. Pr. Code.
2) s. 23, ib.
3) s. 25., ib., as amended by Act III of 1884, s. 1.
4) ib.

LAND.

AUTHORITIES—Acts X of 1870 (as amended) · XVIII of 1885: XXIII of 1863: XI of 1886.

Suits for Land—See "*Action and Actionable Claim.*"
Attachment of—See "*Attachment.*"
Transfer of—See "*Transfer of Property.*"
Sale, Lease, and Mortgage of—See "*Sale,*" "*Lease,*" "*Mortgage.*"
See "*Aliens,*" "*Donatio Mortis Causa,*" "*Contract,*" "*Gifts,*" "*Easements,*" "*Fishery,*" "*Highways and Ways,*" "*Possession,*" "*Rivers and Waters,*" "*Trespass,*" and *Index.*

LAND ACQUISITION (GENERAL).

AUTHORITY—Act X of 1870 (as amended).

Object of the Act.—The Act provides for the acquisition of land for public purposes and by companies registered under the Companies Act of 1882, and determines the amount of compensation to be made on account of such acquisition. The procedure under the Act is as follows.

Preliminary investigation.—Whenever it appears to the Local Government that land (which includes benefits to arise from land and fixtures permanently attached to the earth) in any locality is likely to be needed for any public purpose, a public notification to that effect is published in the local Gazette: the Collector (*i.e.* the Collector of a District, or a Deputy Commissioner, or any officer specially appointed as Collector under the Act) causes public notice of the substance of such notification to be given at convenient places in the locality. Thereupon any officer authorised in that behalf is entitled to enter upon the land with his servants and workmen for the purposes of survey and of making a plan. If the officer desires for the purpose of such survey to enter into any building or enclosed court or garden attached to a dwelling-house, he must give seven days' previous notice to the occupier thereof; and if, for the same purpose, the officer cuts down and clears away any crop, fence, or jungle, he must pay or tender payment for the damage done; and in the event of a dispute as regards the amount, refer the dispute to the Collector, whose decision is final.[1]

Declaration of intended acquisition.—Whenever it appears to such Government that any particular land is actually

1) Act X of 1870, ss. 3, 4.

needed for a public purpose, or for a company, a declaration will be made to that effect under the signature of a Secretary to such Government. But no such declaration can be made unless the compensation to be awarded for such land is to be paid out of public revenues, or out of some municipal fund, or by a company. The declaration is published in the local official Gazette, and upon such publication the declaration is conclusive evidence of the necessity for such acquisition. Thereafter the land must be marked out, measured, and planned, if this has not already been done.[2]

Notice.—Public notice is given at convenient places on or near the land requiring all persons interested in the land (*i.e.*, everybody who claims an interest in the compensation to be made on account of the acquisition of the land,) to appear personally or by agent before the Collector at a specified time and place, and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests. The Collector must serve a similar notice on the occupier (if any) of the land, and on all such persons known or believed to be interested therein, or to be entitled to act for such persons so interested, as reside, or have agents authorised to receive service on their behalf, within the revenue district in which the land is situate. In case any person so interested resides elsewhere, and has no such agent, the notice must be sent by post. The Collector may also require any such person to make a statement as to the names and interests of other persons possessing any interest in the land or any part thereof as co-proprietor, sub-proprietor, mortgagee, or tenant, or otherwise; and every person so required to make a statement is bound to do so: if he does not, he commits an offence punishable under the Penal Code.[3]

Enquiry into value and claims.—On the day so fixed the Collector will enquire summarily into the value of the land, and determine the amount of compensation payable, and tender the same to the persons interested who have attended. If the Collector and the persons interested agree as to the amount of compensation, the Collector will make an award which will be filed in his office, and be deemed conclusive evidence of the value of the land and the amount of compensation payable, as between the Collector and the persons interested. But (1) if no claimant attends; or (2) if the Collector considers that further inquiry in respect of the claim ought to be made by a Civil Court (being the Court of Original Civil Jurisdiction in the locality); or (3) if the Collector is unable to agree with the persons interested as to the compensation to be paid; or (4) if the persons interested raise

2) ss. 6—8, ib.

3) ss. 9, 10, ib.

questions of title of a conflicting character, the Collector must refer the matter to the determination of the Court.[4]

Taking possession.—If, and when, the Collector has made an award or a reference to the Court, he may take possession of the land which thereupon vests absolutely in the Government free of incumbrances; in cases of urgency the Collector may, under the directions of the Government, take possession of the land before any award or reference, after the expiry of 15 days from the publication of the notice.[5]

Reference to Court.—In making the reference, the Collector must state in writing full particulars of the case for the information of the Court. The Court will thereupon serve notice on each of the persons named in the reference, requiring him to state to the Court on a specified day the amount of compensation he claims. The Court will also serve a notice on the Collector and each of the persons interested, requiring them to appoint by a specified day two Assessors (one to be nominated by the Collector, and the other by the persons interested) to assist the Judge of the Court. As soon as the Assessors have been appointed, the Judge and the Assessors will proceed to determine the amount of compensation. The proceeding so taken will be in open Court, and will as far as possible be treated as a suit under the Code of Civil Procedure.[6]

In determining the amount of compensation to be awarded for the land the Judge and Assessors will take into consideration (1) the **market value** of the land; (2) the **damage** (if any) sustained by the person interested by reason of severance of such land from his other land; (3) the damage (if any) sustained by him by reason of the acquisition injuriously affecting his other property, whether moveable or immoveable, in any manner, or his **earnings**; and (4) if, in consequence of the acquisition, he is compelled to change his residence, the reasonable expenses (if any) incidental to such **change of residence.**[7]

But the Judge and Assessors cannot take into consideration (1) the degree of urgency which has led to the acquisition; (2) any disinclination of the person interested to part with the land acquired; (3) any damage sustained by him which, if caused by a private person, would not render such person liable to a suit; (4) any damage which, after the time of awarding compensation, is likely to be caused by, or in consequence of the use to which the land acquired will be put; (5) any increase to the value of the land acquired likely to accrue from the user to which it will be put when acquired; (6) any increase to the value of the other land of the person interested,

4) ss. 11—15, ib. 5) s. 16, ib. 6) ss. 18—23, ib. 7) s. 24, ib.

likely to accrue from the use to which the land acquired will be put; or (7) any outlay or improvements on such land made, commenced, or effected with the intention of enhancing the compensation to be awarded therefor. Further, the Judge must draw the attention of the Assessors to the provisions of the law in this paragraph stated, and must also inform them that (1) where a person interested has made a claim to compensation, the amount to be awarded to him cannot be less than the amount tendered by the Collector, and not more than the amount so claimed; (2) where the person interested has refused to make such claim, or has omitted without sufficient reason to do so, the amount awarded cannot exceed the amount tendered; (3) where, however, such reason for omission is, in the opinion of the Judge, sufficient, the amount awarded cannot be less than, and may exceed, the amount tendered.[8]

Decision of Judge and Assessors.—In case the Judge and one or both of the Assessors agree as to the amount of compensation their decision is final and cannot be appealed against. In case of difference of opinion between the Judge and both of the Assessors (whether or not they agree with each other) as to such amount, the decision of the Judge will prevail subject to an appeal to the Court of the District Judge, unless the Judge whose decision is appealed from is the District Judge, or unless the amount which the Judge proposes to award exceeds Rs. 5,000, in either of which cases the appeal will lie to the High Court. Such appeal will be dealt with as a regular appeal under the Code of Civil Procedure.[9]

Costs and Assessor's fees.—Every assessor, if he is not a Government servant, is entitled to receive a reasonable fee for his services, to be assessed by the Judge, not exceeding Rs. 500, and such fee will be deemed to be costs in the proceeding. All costs of the proceeding must be paid by the Collector in the first instance. But if the amount awarded does not exceed the sum tendered, all such costs must be paid by the person interested. On the other hand, if the amount awarded exceeds the sum so tendered, such costs must be paid by the Collector.[1]

The award must be in writing signed by the Judge and the Assessors. It must specify the particulars of the compensation and the costs to be paid. The award will be treated as a decree under the Code of Civil Procedure.[2]

Apportionment of compensation.—Where there are several persons interested, if such persons agree in the apportionment of the compensation, the particulars of such apportionment will be specified in the award, and as between such persons the award

8) ss. 25, 26, ib. 9) ss. 29, 30, 35, ib. 1) ss. 31, 33, ib. 2) s. 34, ib.

will be conclusive evidence of the correctness of the apportionment. Where the amount of compensation has been settled by the Collector (*v. ante*) if any dispute arises as to the apportionment of the same, or any part thereof, the Collector must refer such dispute to the decision of the Court. Where there is a dispute as to the apportionment of the compensation whether the amount thereof has been settled by the Court, or on reference by the Collector as above-mentioned, the Judge sitting alone will decide the matter. An appeal lies from such decision to the High Court, unless the Judge whose decision is appealed from is not the District Judge, in which case the appeal lies in the first instance to the District Judge.[3]

Payment of the compensation awarded will be made by the Collector according to the award to the persons named therein, but such persons may be liable to pay the same to the rightful owner thereof in a separate suit. In addition to the amount of compensation awarded, the Collector must pay 15% on the market value of the land. When the amount of such compensation is not paid on taking possession, the Collector must pay the amount awarded and the said percentage with interest thereon at the rate of 6% per annum from the time of so taking possession. But the Collector is at liberty to deduct the costs, if any, awarded to him in the proceeding from such amount and percentage. The Collector cannot, however, pay anything, if the award is appealable, until after the expiration of the time allowed for such appeal, or after the determination of such appeal, as the case may be.[4]

Acquisition of land for companies is, practically speaking, governed by the same, or similar rules. But the Local Government must (1) upon enquiry satisfy itself that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public; and (2) require the Company to enter into an agreement with the Secretary of State for India in Council, providing to the satisfaction of the Local Government for the following matters, namely:—(1) The payment to Government of the costs of acquisition; (2) the transfer, on such payment, of the land to the Company; (3) the terms on which the land is to be held by the Company; (4) the time within which, and the conditions on which, the work is to be executed and maintained; and (5) the terms on which the public will be entitled to use the work. Such agreement must be published in the *Gazette of India* and also in the local official Gazette.[5]

The Act further provides for the following matters:— (1) the mode in which the service of notice is to be effected; (2)

3) ss. 37, 39, ib. 4) ss. 40—42, ib. 5) ss. 46—50, ib.

penalties for wilful obstruction to the making of survey; (3) means of enforcing surrender of the land; (4) the compensation to be awarded when the Government does not complete the acquisition; (5) the payment of the Collector's charges by municipal bodies and companies; and (6) the exemption of the award and the agreement under the Act from stamp duty.[6]

No suit can be brought to set aside an award, and no suit or other proceeding may be commenced or prosecuted against any person for anything done under the Act without giving to such person a month's previous notice in writing of the intended proceeding, and of the cause thereof, nor after tender of sufficient amends, nor after the expiration of three months from the accrual of the cause of suit or other proceeding.[7]

Land Acquisition (Mines).

Authority—Act XVIII of 1885.

The object of the Act is to provide for cases in which mines or minerals are situated under land which it is desired to acquire under the Land Acquisition Act (v. *ante*). When the Local Government makes a declaration under this latter Act, it may state therein that the mines of coal, iron-stone, slate, or other minerals lying under the land are not needed. When such statement is not made by the Local Government, the Collector may abstain from tendering compensation for the mines, and make such a statement in his award or in his reference, or when he takes possession of the land, as the case may be. Upon such statement being made in the declaration, award or reference published as aforesaid, the mines will not vest in the Government when the land so vests as is above-mentioned. This Act further provides for 60 days' previous notice to be given before the mines can be worked, and for the manner in which the Local Government may prevent or restrict the working of the mines lying under the land. It lays down rules for the payment of compensation for such prevention or restriction, for the inspection of the mines, when they are allowed to be worked, for the safeguards in the way of mining communications to be observed in working the mines, the means to be adopted for the safety of the land acquired, and the penalty when any of such rules is violated.[8]

Tramways.

Authority—Act XI of 1886.

Acquisition of land for the purpose of a tramway—*See* the Act above cited.

6) ss. 51—57, ib. 7) ss. 57, 58, ib. 8) Act XVIII of 1885, *passim*.

Claims to Waste-Lands.

Authority—Act XXIII of 1863.

Object and provisions of the Act.—The Act makes special provision for the speedy adjudication of claims which may be preferred to waste-lands proposed to be sold or otherwise dealt with on account of Government and of objections taken to the sale or other disposition of such lands. It enacts that when any claim is preferred to any waste-land proposed to be sold or otherwise dealt with on account of Government, or when any objection is taken to the sale or other disposition of such land, the Collector must make an enquiry into the claim or objection, provided the same is preferred within the time mentioned in the advertisement to be issued for the sale or other disposition of such land, which time must not be less than three months. Upon such enquiry the Collector will either allow or reject the claim or objection by an order under his hand. The person affected by such order may, upon service on him thereof, give notice in writing to the Collector that he intends to contest the same. Thereupon the Collector will immediately make a report to the Board of Revenue. If the Board of Revenue does not reverse the order, the claimant or objector may institute a suit in a Court specially constituted under the Act within three years from the date on which the land has been dealt with by Government. If he does not do so, the order of the Board of Revenue is final.[9]

9) Act XXIII of 1863, *passim*.

LEASE.

AUTHORITIES—Act IV of 1882 (Transfer of Property), Chapter V : Shephard and Brown's Commentaries on the same, 2nd ed. : Cases cited.

What it is.—A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the **lessor**, the transferee is called the **lessee**, the price is called the premium, and the money, share, service, or other thing to be so rendered is called the **rent**.[1]

Duration of leases: notice to quit.—*In the absence of a contract or local law or usage to the contrary*, a lease of immoveable property for agricultural or manufacturing purposes will be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy ; and a lease of immoveable property for any other purpose will be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by 15 days' notice expiring with the end of a month of the tenancy. In the absence of notice duly given the tenancy continues Every **notice** must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, (not on the premises let) or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property. The notice must be clear, definite and unambiguous. No notice is necessary where the lease is for a fixed time, or is to determine on the happening of any event.[2]

Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day will be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease. Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease will last during the whole anniversary of the day from which such time commences. Where the time so limited is expressed to be

1) Act IV of 1882, s. 105.
2) ib. s. 106 : I. L. R. 7 All., 598, 899 : I. L. R., 11 Cal. 533 : 4 Ex. D. 201 : Shephard and Brown, pp. 381, 383.

terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, will have such option.[3]—*v. post.*

How made.—A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a **registered** instrument. All other leases of immoveable property (*i.e.*, leases made for a term of one year or less, and those which, under the rule contained in the preceding paragraph, are deemed to be leases from month to month) may be made either by an instrument or by oral agreement.[4]

Rights and liabilities of lessor and lessee.—*In the absence of a contract or local usage to the contrary*, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

A.—Rights and Liabilities of the **Lessor.**

(*a*) The lessor is bound to disclose to the lessee any **material defect** in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover :

(*b*) the lessor is bound on the lessee's request to put him in possession of the property :

(*c*) the lessor will be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption. The benefit of such contract is annexed to and goes with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

B.—Rights and Liabilities of the **Lessee.**

(*d*) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) will be deemed to be comprised in the lease :

(*e*) if by **fire, tempest, or flood,** or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently

3) ib. s. 110. This provision refers to the case where a lease is given "for seven, fourteen, or twenty-one years," or on some similar terms : Shephard and Brown, p. 409.

4) ib. s. 107. Under the Registration Act, to which this section is supplemental, an agreement for a lease is treated as a lease, Shephard and Brown, p. 387 : I. L. R., 10 Bom. 101.

unfit for the purposes for which it was let, the lease will at the option of the lessee, be void: provided that, if the injury be occasioned by the wrongful act or default of the lessee, he will not be entitled to avail himself of the benefit of this provision:

(*f*) if the lessor neglects to make, within a reasonable time after notice, any **repairs** which he is bound to make to the property, (*i.e.*, repairs he has covenanted to make he is not necessarily bound to make any) the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor: the lessee has no right to quit for breach by the lessor of a covenant to repair:

(*g*) if the lessor neglects to make any payment (*e.g.*, a rate or tax) which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor:

(*h*) **the lessee may remove,** at any time during the continuance of the lease, *all* things which he has attached to the earth:[5] provided he leaves the property in the state in which he received it: see however clause (p) *post*:

"Attached to the earth" means—(*a*) rooted in the earth, as in the case of trees and shrubs; (*b*) imbedded in the earth, as in the case of walls or buildings; or (*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached:

(*i*) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the **crops** planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them:

(*j*) **the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property,** and any transferee of such interest or part may again transfer it. *The lessee will not, however*, by reason only of such transfer, *cease to be subject to any of the liabilities attaching to the lease*; nothing in this clause will be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer, or lessee:

(*k*) **the lessee is bound to disclose** to the lessor any fact as

5) ib., ss. 108, 3: 8 App. Cas., p. 204. "All the distinctions made in English law between things which are, and things which are not tenant's fixtures, things which he may, or may not remove, during his tenancy, are thus ignored." Shephard and Brown, pp. 399, 45, 47.

to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest:

(*l*) the lessee is bound to pay or tender, at the proper time and place, the premium or **rent** to the lessor or his agent in this behalf See "*Contract*," pp. 162, 163:

(*m*) the lessee is bound to keep, and on the termination of the lease to restore, the property in as **good condition** as it was in at the time when he was put in possession, subject only to the changes caused by reasonable **wear and tear** or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left:

(*n*) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor:

(*o*) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto:

(*p*) he must not, without the lessor's consent, erect on the property any **permanent structure**, except for agricultural purposes:

(*q*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.[6]

Right of lessor's transferee.—If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, *in the absence of a contract to the contrary*, will possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor will not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him: provided that the transferee is not entitled to arrears of rent due

6) s. 108, ib.

before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee will not be liable to pay such rent over again to the transferee. The lessor, the transferee, and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.[7]

Determination of lease.—A lease of immoveable property determines—(*a*) by efflux of the time limited thereby : (*b*) where such time is limited conditionally on the happening of some event —by the happening of such event : (*c*) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event : (*d*) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right : (*e*) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them : (*f*) by implied surrender : *e.g.*, A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon : (*g*) by ***forfeiture*** ; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void ; the mere breach of a condition does not involve a forfeiture ; the condition must also be one which provides that on breach thereof, the lessor may re-enter, or the lease become void[8] : or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease[9] : A forfeiture is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting : provided that the lessor is aware that the forfeiture has been incurred : provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver[1] : (*h*) on the expiration of a **notice to determine the lease, or to**

7) s. 109, ib.
8) s. 111 ib., Shephard and Brown : p. 412 : I. L. R. 7 Bom. 262 : I. L. R. 9 Cal., 808 : I. L. R. 6 Mad., 327.
9) s. 111, ib.
1) s. 112, ib.

quit, or of intention to quit, the property leased, duly given by one party to the other.[2] A notice given is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting : *e.g.* :—(*a*) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived. (*b*) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.[3]

Relief against forfeiture for non-payment of rent.—Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within 15 days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture ; and thereupon the lessee will hold the property leased as if the forfeiture had not occurred.[4]

Effect of surrender and forfeiture on under-leases.—The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease ; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee will be respectively payable to, and enforceable by, the lessor. The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under the provisions contained in the last paragraph.[5]

Holding over.—If a lessee or under-lessee of property remains in possession after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased (v. *ante*, "Duration of Leases" p. 370) *e.g.* :—(*a*) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100.

2) s. 1, ib. 3) s. 113, ib. 4) s. 114, ib. 5) s. 115, ib.

The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month. (*b*) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.[6]

None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor-General in Council, may by notification published in the local official Gazette declare all or any of such provisions to be so applicable, together with, or subject to, those of the local law, if any, for the time being in force. Such notification will not take effect until the expiry of six months from the date of its publication.[7]

6) s. 116, ib.

7) s. 117, ib.

LEGACY AND BEQUEST.

AUTHORITIES—Act X of 1865 (Indian Succession): Act XXI of 1870 (Hindu Wills) Act: V of 1881 (Probate and Administration).

Specific legacies.—Where a testator bequeaths to any person a *specified* part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific, *e.g.*: A bequeaths to B (*a*) The diamond ring presented to him by C: the legacy is specific; (*b*) a diamond ring: the legacy is not specific; (*c*) his promissory notes of the Government of India for Rs. 10,000 in their 4 per cent loan: the legacy is specific: but if he were to bequeath Rs. 10,000 worth of Government securities the legacy would not be specific. (1) Where a sum certain is bequeathed, the legacy is *not* specific merely because the stocks, funds or securities in which it is invested are described in the will, *e.g.*: A bequeaths to B "Rs. 10,000 of his funded property:" "Rs. 10,000 of his property now invested in shares of the East Indian Railway Company:" "Rs. 10,000 at present secured by mortgage of Rampur factory." No one of these legacies is specific. (2) Where a bequest is made in general terms, of a certain amount of any kind of stock, the legacy is not specific merely because the testator was, at the date of his will, possessed of stock of the specified kind, to an equal or greater amount than the amount bequeathed, *e.g.*: A bequeaths to B Rs. 5,000 five per cent. Government securities; A had at the date of the will five per cent. Government securities for Rs. 5,000. The legacy is not specific. (3) A money legacy is *not* specific merely because the will directs its payment to be postponed until some part of the property of the testator shall have been reduced to a certain form, or remitted to a certain place, *e.g.*: A bequeaths to B Rs. 10,000 and directs that this legacy shall be paid as soon as A's property in India shall be realized in England. The legacy is not specific. (4) Where a will contains a bequest of the residue of the testator's property along with an enumeration of some items of property not previously bequeathed, the articles enumerated are *not* deemed to be specially bequeathed. (5) Where property is specifically bequeathed to two or more persons in succession, it must be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing, *e.g.*: (*a*) A, having a lease of a house for a term of years, 15 of which were unexpired at the time of his death, has bequeathed the lease to B for his life, and after B's

death to C. B is to enjoy the property as A left it, although, if B lives for 15 years, C can take nothing under the bequest. Where, however, property comprised in a bequest to two or more persons in succession is *not* specifically bequeathed, it must, in the absence of any direction to the contrary, be sold, and the proceeds of the sale invested in such securities as the High Court may authorize or direct. The fund thus constituted will be enjoyed by the successive legatees according to the terms of the will: *e.g.*: A, having a lease for a term of years, bequeaths "all his property" to B for life, and after B's death to C. The lease must be sold, and the proceeds invested as above stated, and the annual income arising from the fund is to be paid to B for life At B's death the capital of the fund is to be paid to C. (6) If there be a deficiency of assets to pay legacies, a specific legacy is not liable to abate with the general legacies.[1]—See "*Executor*," pp. 253, 254.

Demonstrative legacies.—Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same, the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative. **The distinction between a specific legacy and a demonstrative legacy consists in this**, that (*a*) where specified property is given to the legatee, the legacy is specific; (*b*) where the legacy is directed to be paid out of specified property, it is demonstrative, *e.g.*:—A bequeaths to B (*a*) Rs. 1,000 being part of a debt due to him from W. He also bequeaths to C Rs. 1,000 to be paid out of the debt due to him from W. The legacy to B is specific; the legacy to C is demonstrative. (*b*) "80 chests of the indigo which shall be made at his factory of Rampur: Rs. 10,000 out of his five per cent. promissory notes of the Government of India: an annuity of Rs. 500 "from his funded property:" Each of these bequests is demonstrative. A bequeaths to B an annuity, and directs it to be paid out of the rents arising from his taluq of Ramnagar. A bequeaths to B "Rs. 10,000 out of his estate at Ramnagar," or charges it on his estate at Ramnagar: "Rs. 10,000 being his share of the capital embarked in a certain business." Each of these bequests is demonstrative.[2] Where a portion of a fund is specifically bequeathed, and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed will first be paid to the legatee, and the demonstrative legacy will be paid out of the residue of the fund,

1) ss. 129—136, Act X of 1865. These ss. apply to wills of Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and the Towns of Madras and Bombay. (Act XXI of 1870, s. 2.)

2) s. 137, ib., applies to Hindus, etc.

and, so far as the residue may be deficient, out of the general assets of the testator, *e.g.* : A bequeaths to B Rs. 1,000 being part of a debt due to him from W. He also bequeaths to C Rs. 1,000 to be paid out of the debt due to him from W. The debt due to A from W is only Rs. 1,500; of these Rs. 1,500, Rs. 1,000 belong to B, and Rs. 500 are to be paid to C. C is also to receive Rs. 500 out of the general assets of the testator.[3]

Ademption.—If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is *adeemed*; that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the will, *e.g.* : (*a*) A bequeaths to B "the diamond ring presented to him by C :" "his gold chain :" "a certain bale of wool :" "a certain piece of cloth :" "all his household-goods which shall be in or about his dwelling-house in M. Street, in Calcutta, at the time of his death." If A, in his lifetime, sells or gives away the ring, converts the chain into a cup, converts the wool into cloth, makes the cloth into a garment, takes another house into which he removes all his goods each of these legacies is adeemed.

No bequest is wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee, *e.g.* : (*a*) A bequeaths Rs. 20,000 to his son B. He afterwards gives to B the sum of Rs. 20,000. The legacy is not thereby adeemed.[4] The removal of the thing bequeathed from the place in which it is stated in the will to be situated does not constitute an ademption, where the place is only referred to in order to complete the description of what the testator meant to bequeath, *e.g.* : A bequeaths to B all the bills, bonds and other securities for money belonging to him then lying in his lodgings in Calcutta. At the time of his death, these effects had been removed from his lodgings in Calcutta. The legacy is not revoked by ademption. Where the thing bequeathed is not the right to receive something of value from a third person, but the money or other commodity which shall be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other commodity by the testator does not constitute an ademption; but, if he mixes it up with the general mass of his property, the legacy is adeemed, *e.g.* : A bequeaths to B whatever sum may be received from his claim on C. A receives the whole of his claim on C, and sets it apart from the general mass of his property. The legacy is not adeemed.[5]

3) ib., s. 138, applies to Hindus, etc.
4) ib., ss. 139, 166, applies to Hindus, etc.
5) ib., ss. 148, 149, applies to Hindus, etc.

Non-ademption of demonstrative legacy.—A demonstrative legacy is not adeemed by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind; but it will in such case be paid out of the general assets of the testator.[6]

Ademption of specific legacies.—(1) Where the thing specifically bequeathed is the right to receive something of value from a third party, and the testator himself receives it, the bequest is adeemed, *e.g.:* A bequeaths to B "his interest in certain policies of life assurance" A in his lifetime receives the amount of the policies. The legacy is adeemed. (2) The receipt by the testator of a part of an entire thing specifically bequeathed operates as an ademption of the legacy to the extent of the sum so received *e.g.:* A bequeaths to B "the debt due to him by C." The debt amounts to Rs. 10,000. C. pays to A Rs. 5,000 the one-half of the debt. The legacy is revoked by ademption, so far as regards the Rs. 5,000 received by A. (3) If a portion of an entire fund or stock be specifically bequeathed, the receipt by the testator of a portion of the fund or stock operates as an ademption only to the extent of the amount so received; and the residue of the fund or stock is applicable to the discharge of the specific legacy, *e.g.:* A bequeaths to B one-half of the sum of Rs. 10,000 due to him from W. A in his lifetime receives Rs. 6,000, part of the Rs. 10,000. The Rs. 4,000 which are due from W to A at the time of his death belong to B under the specific bequest. (4) Where stock which has been specifically bequeathed does not exist at the testator's death, the legacy is adeemed, *e.g.:* A bequeaths to B "his capital stock of £1,000 in East India stock:" A sells the stock, the legacy is adeemed. (5) Where stock which has been specifically bequeathed does only in part exist at the testator's death, the legacy is adeemed so far as regards that part of the stock which has ceased to exist, *e.g.:* A bequeaths to B "his Rs. 10,000 in the 5½ per cent. loan of the Government of India." A sells one-half of his Rs 10,000 in the loan in question. One-half of the legacy is adeemed. (6) A specific bequest of goods under a description connecting them with a certain place is not adeemed by reason that they have been removed from such place from any temporary cause, or by fraud, or without the knowledge or sanction of the testator, *e.g.:* (*a*) A bequeaths to B "all his household goods which shall be in or about his dwelling-house in Calcutta at the time of his death." The goods are removed from the house to save them from fire. A dies before they are brought

6) ib., s. 140, applies to Hindus, etc.

back. The legacy is not adeemed.[7] Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place by operation of law, or in the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change, *e.g.*: (*a*) A bequeaths to B "all the money which he has in the 5½ per cent. loan of the Government of India." The securities for the 5½ per cent. loan are converted during A's lifetime into 5 per cent. stock. (*b*) A bequeaths to B the sum of Rs. 10,000 in promissory notes of the Government of India which he has power, under his marriage-settlement, to dispose of by will. Afterwards, in A's lifetime, the fund is converted into Consols by virtue of an authority contained in the settlement. Neither of these legacies has been adeemed. (8) Where a thing specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change takes place without the knowledge or sanction of the testator, the legacy is not adeemed, *e.g.*: A bequeaths to B "all his 3 per cent. Consols." The Consols are, without A's knowledge, sold by his agent, and the proceeds converted into East India stock. This legacy is not adeemed. (9) Where stock which has been specifically bequeathed is lent to a third party on condition that it shall be replaced, and it is replaced accordingly, the legacy is not adeemed. (10) Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed.[8]

Where a portion of a fund is specifically bequeathed to one legatee, and a legacy charged on the same fund is bequeathed to another legatee; if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy will be paid first, and the residue (if any) of the fund will be applied so far as it will extend in payment of the demonstrative legacy, and the rest of the demonstrative legacy will be paid out of the general assets of the testator, *e.g.*: A bequeaths to B Rs. 1,000, part of the debt of Rs. 2,000 due to him from W. He also bequeaths to C Rs. 1,000 to be paid out of the debt due to him from W. A afterwards receives Rs. 500 part of that debt, and dies leaving only Rs. 1,500 due to him from W. Of these Rs. 1,500, Rs. 1,000 belong to B, and Rs. 500 are to be paid to C. C is also to receive Rs. 500 out of the general assets of the testator.[9]

7) ib., ss. 141—147, applies to Hindus, etc.
8) ib., ss 150—153, applies to Hindus, etc.
9) ib., s. 144, applies to Hindus, etc.

Legacy to creditor.—Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will that the legacy is meant as a satisfaction of the debt, the creditor is entitled to the legacy as well as to the amount of the debt.[1]

Legacy to child portioner.—Where a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child is entitled to receive the legacy as well as the portion, *e.g.*: A, by articles entered into in contemplation of his marriage with B, covenanted that he would pay to each of the daughters of the intended marriage a portion of Rs. 20,000 on her marriage. This covenant having been broken, A bequeaths Rs. 20,000 to each of the married daughters of himself and B. The legatees are entitled to the benefit of this bequest in addition to their portions.[2]

Vesting of legacies.—(1) Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time will, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and will pass to the legatee's representatives if he dies before that time and without having received the legacy. And in such cases the legacy is from the testator's death said to be **vested in interest**, *e.g.*: (*a*) A bequeaths to B Rs. 100, to be paid to him at the death of C. On A's death the legacy becomes vested in interest in B, and, if he dies before C, his representatives are entitled to the legacy. (*b*) A bequeaths to B Rs. 100, to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B. (*c*) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B. (2) Where a bequest is made only to *such members of a class* as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy, *e.g.*: a fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share, to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A who is under the age of 18 has a vested interest in the bequest.[3]

1) ib., s. 164, applies to Hindus, etc.
2) ib., s. 165, applies to Hindus, etc.
3) ib., ss. 106, 108, applies to Hindus, etc.

A legacy bequeathed in case a specified *uncertain* event shall happen does not vest until that event happens. A legacy bequeathed in case a specified *uncertain* event shall not happen does not vest until the happening of that event becomes impossible. In either case, until the condition has been fulfilled, the interest of the legatee is called a **contingent interest**, *e.g.*: (*a*) A legacy is bequeathed to D in case A, B and C shall all die under the age of 18. D has a contingent interest in the legacy until A, B and C all die under 18, or one of them attains that age. (*b*) A sum of money is bequeathed to A "in case he shall attain the age of 18," or, "when he shall attain the age of 18." A's interest in the legacy is contingent until the condition shall be fulfilled by his attaining that age. (*c*) A fund is bequeathed to A if B shall not marry C within five years after the testator's death. A's interest in the legacy is contingent until the condition shall be fulfilled by the expiration of the five years without B's having married C, or by the occurrence, within that period, of an event which makes the fulfilment of the condition impossible. *To the above rule there is the following exception.* Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is *not* contingent, *e.g.*: (*d*) A bequeaths to B Rs. 500 a year upon his attaining the age of 18, and directs that the interest, or a competent part thereof, shall be applied for his benefit until he reaches that age. The legacy is vested.[4]

Executors assent to legacy—See "*Executor*," pp. 252, 253.

Abatement and payment of legacies—See "*Executor*," pp 253, 254.

Onerous bequests.—Where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully, *e.g.*: A having shares in (X), a prosperous joint stock company, and also shares in (Y), a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeathes to B all his shares in joint stock companies. B refuses to accept the shares in (Y). He forfeits the shares in (X). But where a will contains two *separate and independent* bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous, *e.g.*: A having a lease for a term of years of a house at a rent which he and his repre-

4) ib., s. 107, applies to Hindus, etc.

sentatives are bound to pay during the term, and which is higher than the house can be let for, bequeathes to B the lease and a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.[5]

Contingent bequests.—(1) Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens *before* the period when the fund bequeathed is payable or distributable, *e.g.*: (*a*) A legacy is bequeathed to A, and, in case of his death, to B. If A survives the testator, the legacy to B does not take effect. (*b*) A legacy is bequeathed to A, and, in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect. (*c*) A legacy is bequeathed to A when and if he attains the age of 18, and, in case of his death, to B. A attains the age of 18. The legacy to B does not take effect. (*d*) A legacy is bequeathed to A for life, and after his death to B, and, "in case of B's death without children," to C. The words "**in case of B's death without children**" are to be understood as meaning in case B shall die without children during the lifetime of A. (*e*) A legacy is bequeathed to A for life, and after his death to B, and, "in case of B's death," to C. The words "**in case of B's death**" are to be considered as meaning "in case B shall die in the lifetime of A." (2) Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy will go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appear by the will, *e.g.*: Property is bequeathed to A and B, to be equally divided between them, or to the survivor of them. If both A and B survive the testator, the legacy is equally divided between them. If A dies before the testator, and B survives the testator, it goes to B.[6]

Conditional bequests.—(1) **A bequest upon an impossible condition** is void, *e.g.*: A bequeaths Rs. 500 to B on condition that he shall marry A's daughter. A's daughter was dead at the date of the will. The bequest is void. (2) A bequest upon a condition, the fulfilment of which would be **contrary to law or to morality**, is void, *e.g.*: A bequeaths Rs. 5,000 to his niece if she will desert her husband. The bequest is void. (3) Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, **the condition is considered to have been fulfilled if it has been substan-**

5) ib., ss. 109, 110, applies to Hindus, etc.
6) ib., ss. 111, 112, applies to Hindus, etc.

tially complied with, *e.g.*: (*a*) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B. C is present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition. (*b*) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies. A marries with the consent of B and C. A has fulfilled the condition. (*c*) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent *after* the marriage. A has not fulfilled the condition. (4) **A bequest may be made to any person with the condition superadded that in case a specified uncertain event shall happen the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen the thing bequeathed shall go over to another person**, *e.g.*: a sum of money is bequeathed to A, to be paid to him at the age of 18, and, if he shall die before he attains that age, to B. A takes a vested interest in the legacy, subject to be divested and to go to B in case A shall die under 18. An ulterior bequest of this kind cannot take effect, unless the condition is strictly filfulled, *e.g.*: (*a*) A legacy is bequeathed to A, with a proviso that, if he marries without the consent of B, C and D, the legacy shall go to E. D dies. Even if A marries without the consent of B and C, the gift to E does not take effect. If the ulterior bequest be not valid, the original bequest is not affected by it, *e.g.*: an estate is bequeathed to A for her life, and, if she do not desert her husband, to B. A is entitled to the estate during her life as if no condition has been inserted in the will. (5) **A bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen**, *e.g.*: (*a*) an estate is bequeathed to A, provided that, if he marries under the age of 25 without the consent of the executors named in the will, the estate shall cease to belong to him. A marries under 25 without the consent of the executors. The estate ceases to belong to him. (*b*) An estate is bequeathed to A, provided that, if he shall not go to England within three years after the testator's death, his interest in the estate shall cease. A does not go to England within the time prescribed. His interest in the estate ceases. (*c*) An estate is bequeathed to A, with a proviso that, if she becomes a nun, she shall cease to have any interest in the estate. A becomes a nun. She loses her interest under the will.

(6) Where a bequest is made with a condition superadded that, unless the legatee shall perform a certain act, the subject-matter of the bequest shall go to another person, or the bequest shall cease to have effect; but no time is specified for the performance of the act; if the legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy will go as if the legatee had died without performing such act, *e.g.*: (*a*) A bequest is made to A with a proviso that, unless he enters the army, the legacy shall go over to B. A takes holy orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy. (*b*) A bequest is made to A with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger, and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect. (12) **Where the will requires an act to be performed by the legatee within a specified time**, either as a condition to be fulfilled before the legacy is enjoyed, or as a condition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person, or the bequest is to cease to have effect; the act must be performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time will be allowed as is be requisite to make up for the delay caused by such fraud.[7]

Bequests with directions as to application or enjoyment.—(1) Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee will be entitled to receive the fund as if the will had contained no such direction, *e.g.*: A sum of money is bequeathed towards purchasing a country residence for A, or to purchase an annuity for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so The principle upon which this rule is based, is that a Court will not compel that to be done which the legatee may undo the next moment.[8]

Bequests to an executor -See "*Executor.*"

Pledges, liens and incumbrances.—Where property specifically bequeathed is subject at the death of the testator to any pledge, lien or incumbrance, created by the testator himself or by any person under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, must accept it subject to such pledge or incumbrance, and will (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance. A contrary inten-

7) ib., ss. 113—124, applies to Hindus, etc.
8) ib., s. 125. see ss. 126 127: applies to Hindus, etc.

tion will not be inferred from any direction which the will may contain for the payment of the testator's debts generally. A periodical payment in the nature of land-revenue or in the nature of rent is not such an incumbrance as is contemplated by the above rule, *e.g.*: (*a*) A bequeaths to B the diamond ring given him by C. At A's death the ring is held in pawn by D, to whom it has been pledged by A. It is the duty of A's executors, if the state of the testator's assets will allow them, to allow B to redeem the ring. (*b*) A bequeaths to B a zamindari, which at A's death is subject to a mortgage for Rs 10,000, and the whole of the principal sum, together with interest to the amount of Rs. 1,000, is due at A's death. B, if he accepts the bequest, accepts it subject to this charge, and is liable, as between himself and A's estate, to pay the sum of Rs. 11,000 thus due.[9]

Where anything is to be done to complete the testator's title to the thing bequeathed, it is to be done at the cost of the testator's estate—*e.g.*: (*a*) A, having contracted in general terms for the purchase of a piece of land at a certain price, bequeaths it to B, and dies before he has paid the purchase-money, the purchase-money must be made good out of A's assets.[1]

Land revenue and rent.—Where there is a bequest of any interest in immoveable property, in respect of which payment in the nature of land-revenue or in the nature of rent has to be made periodically, the estate of the testator must (as between such estate and the legatee) make good such payments or a proportion of them up to the day of his death, *e.g.*: A bequeaths to B a house, in respect of which Rs. 365 are payable annually by way of rent. A pays his rent at the usual time, and dies 25 days after. A's estate must make good Rs. 25 in respect of the rent.[2]

Shares and calls.—In the absence of any direction in the will, where there is a specific bequest of stock in a joint stock company, if any call or other payment is due from the testator at the time of his death in respect of such stock, such call or payment must, as between the testator's estate and the legatee, be borne by such estate; but, if any call or other payment shall, after the testator's death, become due in respect of such stock, the same must, as between the testator's estate and the legatee, be borne by the legatee if he accept the bequest, *e.g.*: (*a*) A bequeathed to B his shares in a certain railway. At A's death there was due from him the sum of £5 in respect of each share,

9) Ib., s. 154, applies to Hindus, etc.
1) Ib., s. 155, applies to Hindus, etc.
2) Ib., s. 156, applies to Hindus, etc.

being the amount of a call which had been duly made, and the sum of 5*s.* in respect of each share, being the amount of interest which had accrued due in respect of the call. These payments must be borne by A's estate. (*b*) A has agreed to take 50 shares in an intended joint stock company, and has contracted to pay up £5 in respect of each share, which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B. The estate of A must make good the payments which were necessary to complete A's title. (*c*) A bequeaths to B his shares in a certain railway.. B accepts the legacy. After A's death, a call is made in respect of the shares. B must pay the call. (*d*) A bequeaths to B his shares in a joint stock company. B accepts the bequest. Afterwards the affairs of the company are wound up, and each shareholder is called upon for contribution. The amount of the contribution must be borne by the legatee. (*e*) A is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of £3 per share, payable by three instalments. A bequeaths his shares to B, and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instalment, and without having paid the first instalment. A's estate must pay the first instalment, and B, if he accepts the legacy, must pay the remaining instalments.[3]

If there be a bequest of something described in general terms, the executor must purchase for the legatee what may reasonably be considered to answer the description, *e.g.* : (*a*) A bequeaths to B *a* pair of carriage-horses, or *a* diamond ring. The executor must provide the legatee with such articles if the state of the assets will allow it. (*b*) A bequeaths to B "*his* pair of carriage-horses." A had no carriage-horses at the time of his death. The legacy fails.[4]

Where the interest or produce of a fund is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal as well as the interest will belong to the legatee, *e.g.* : (*a*) A bequeaths to B the interest of his five per cent. promissory notes of the Government of India. There is no other clause in the will affecting those securities. B is entitled to A s five per cent. promissory notes of the Government of India. (*b*) A bequeaths the interest of his 5½ per cent. promissory notes of the Government of India to B for his life, and after his death to C. B is entitled to the interest of the notes during his life;

3) ib., s. 157, applies to Hindus, etc.
4) ib., s. 158, applies to Hindus, etc.

and C is entitled to the notes upon B's death. (*c*) A bequeaths to B the rents of his lands at X. B is entitled to the lands.[5]

Annuities.—Where an annuity is created by will, the legatee is entitled to receive it for his *life* only, unless a contrary intention appears by the will. And this rule will not be varied by the circumstance that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it, *e.g.*: (*a*) A bequeaths to B Rs. 500 a year, B is entitled during his life to receive the annual sum of Rs. 500. (2) Where the will directs that an annuity shall be provided for any person out of the proceeds of property, or out of property generally, or where money is bequeathed to be invested in the purchase of an annuity for any person, on the testator's death the legacy vests in interest in the legatee, and he is entitled at his option to have an annuity purchased for him, *or* to receive the money appropriated for that purpose by the will, *e.g.*: (*a*) A by his will directs that his executors shall out of his property purchase an annuity of Rs. 1,000 for B. B is entitled at his option to have an annuity of Rs. 1,000 for his life purchased for him, or to receive such a sum as will be sufficient for the purchase of such an annuity. (3) Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay all the legacies given by the will, the **annuity will abate** in the same proportion as the other pecuniary legacies given by the will. (4) **Where there is a gift of an annuity and a residuary gift**, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee, and, if necessary, the capital of the testator's estate must be applied for that purpose.[6] As to the payment and apportionment of annuities v. *post.*

Election.—(1) Where a man, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs must *elect either to confirm such disposition or to dissent from it*, and in the latter case he must give up any benefits which may have been provided for him by the will. (2) The interest so relinquished will devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will. (3) This rule applies whether the testator does or does not believe that which he professes to dispose of by his will to be his own, *e.g.*: the farm of Sultanpur was the property of C. A. bequeathed it to B, giving a legacy of Rs. 1,000 to C.

5) ib., s. 159, applies to Hindus, etc.
6) ib., ss. 160—163, applies to Hindus, etc.

C has elected to retain his farm of Sultanpur, which is worth Rs. 800. C forfeits his legacy of Rs. 1,000, of which Rs. 800 goes to B, and the remaining Rs. 200 falls into the residuary bequest, or devolves according to the rules of intestate succession, as the case may be.[7]

Void bequests.—The following bequests are void: (1) **where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description,** the bequest is void, *e.g.*: A bequeaths Rs. 1,000 to the eldest son of B. At the death of the testator, B has no son. The bequest is void. *Exception.*—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest, or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property will, at such later time, go to that person, or, if he be dead, to his representatives, *e.g.*: A bequeaths Rs. 1,000 to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death the legacy goes to C's son. (2) **Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest is void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed,** *e.g.*: property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator because a life estate only is given to A's eldest son. The bequest to A's eldest son for his life is void. (3) **No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong,** *e.g.*: A fund is bequeathed to A for his life; and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first

7) Ib., ss. 167—169. See ss. 170—177: applies to Hindus, etc.

attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest after B's death is void. (4) If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding clauses, or either of them, such bequest is wholly void. (5) Where a bequest is void by reason of any of the rules contained in the three last preceding clauses, any bequest contained in the same will, and intended to take effect after or upon failure of such prior bequest, is also void.[8] (6) **A direction to accumulate the income arising from any property is void; and the property will be disposed of as if no accumulation had been directed.** *Exception.*—Where the property is immoveable, or where accumulation is directed to be made from the death of the testator, the direction will be valid in respect only of the income arising from the property within *one year* next following the testator's death; and at the end of the year such property and income will be disposed of, respectively, as if the period during which the accumulation has been directed to be made had elapsed, *e.g.*: (*a*) The will directs that the sum of Rs. 10,000 shall be invested in Government securities, and the income accumulated for 20 years, and that the principal, together with the accumulation, shall then be divided between A, B and C. A, B and C are entitled to receive the sum of Rs. 10,000 at the end of the year from the testator's death. (*b*) A bequeaths a sum of money to B, to be paid to him when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death the legacy becomes vested in B; and so much of the interest as is not required for his maintenance and education is accumulated, not by reasons of the direction contained in the will, but in consequence of B's minority.[9]

Void bequests to religious or charitable uses—See "*Charities.*"

Construction of bequests—See "*Wills.*"

Payment and apportionment of annuities.—(1) Where an annuity is given by the will, and no time is fixed for its commencement, it will commence from the testator's death, and the first payment will be made at the expiration of a year next after that event. (2) Where there is a direction that the annuity shall be paid quarterly or monthly, the first payment will be due at

8) ib., ss. 99—103, applies to Hindus, etc. See "*Minority & Minors.*"
9) ib., s. 104, does not apply to Hindus, etc. See Act XXI of 1870, s. 2.

the end of the first quarter or first month, as the case may be, after the testator's death, and will, if the executor think fit, be paid when due; but the executor is not bound to pay it till the end of the year. (3) Where there is a direction that the first payment of an annuity shall be made within one month or any other division of time from the death of the testator, or on a day certain, the successive payments are to be made on the anniversary of the earliest day on which the will authorizes the first payment to be made; and if the annuitant should die in the interval between the times of payment, an apportioned share of the annuity will be paid to his representative.[1]

Of the investment of funds to provide for legacies.—(1) Where a legacy, not being a specific legacy, is **given for life**, the sum bequeathed must at the end of the year be invested in such securities as the High Court may authorize or direct, and the proceeds thereof paid to the legatee as the same accrues due. (2) Where a general legacy is given **to be paid at a future time**, the executor must invest a sum sufficient to meet it in securities of the kind mentioned in the last preceding clause. The intermediate interest will form part of the residue of the testator's estate. (3) Where an **annuity** is given, and no fund is charged with its payment or appropriated by the will to answer it, a Government annuity of the specified amount must be purchased, or, if no such annuity can be obtained, then a sum sufficient to produce the annuity must be invested for that purpose in such securities as the High Court may authorize or direct. (4) **Where a bequest is contingent** the executor is not bound to invest the amount of the legacy, but may transfer the whole residue of the estate to the residuary legatee on his giving sufficient security for the payment of the legacy if it shall become due.[2] (5) **Where the testator has bequeathed the residue** of his estate to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's decease invested in such securities as the High Court may regard as good securities must be converted into money and invested in such securities.[3] (6) Where the testator has bequeathed the residue of his estate to a person for life with a direction that it shall be invested in certain specified securities, so much of the estate as is not at the time of his death invested in securities of the specified kind must be converted into money and invested in such securities. (7) Such conversion and investment as are con-

1) ib., ss. 298—300, incorporated as ss. 118—120, Act V of 1881, and applicable to every Hindu, Mahommedan and Buddhist exempted under Act X of 1865.
2) ib., ss. 301—304, ss. 121—124, Act V of 1881.
3) s. 305, Act X of 1865, not incorporated in Act V of 1881.

templated by the two last preceding clauses must be made at such times and in such manner as the executor shall in his discretion think fit ; and, until such conversion and investment is completed, the person who would be for the time being entitled to the income of the fund when so invested will receive interest at the rate of four per cent. per annum upon the market-value (to be compured as of the date of the testator's death) of such part of the fund as shall not yet have been so invested.[4] (8) Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a **minor**, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator must pay or deliver the same into the Court of the District Judge, by whom or by whose District Delegate the probate was, or letters of administration with the will annexed were, granted, to the account of the legatee, unless the legatee be a ward of the Court of Wards ; and, if the legatee be a ward of the Court of Wards, the legacy must be paid into that Court to his account ; and such payment into the Court of the District Judge, or into the Court of Wards, as the case may be, is a sufficient discharge for the money so paid ; and such money when paid in must be invested in the purchase of Government securities, which, with the interest thereon, will be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge, or the Court of Wards, as the case may be, may direct."[5]

Of the produce and interest of legacies —The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death. *Exception.*—A specific bequest, contingent in its terms, does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy The clear produce of it forms part of the residue of the testator's estate, *e.g.* : (*a*) A bequeaths his flock of sheep to B. Between the death of A and delivery by his executor the sheep are shorn, or some of the ewes produce lambs. The wool and lambs are the property of B. (*b*) A bequeaths his Government securities to B, but postpones the delivery of them till the death of C. The interest which falls due between the death of A and the death of C belongs to B, and must, unless he is a minor, be paid to him as it is received. (*c*) The testator bequeaths all his four per cent. Government promissory notes to A when he shall complete the age of 18. A, if he complete that age, is entitled to receive the notes, but the interest which accrues in respect of them, between the testator's death

4) Act X of 1865, ss. 306-307 · Act V of 1881, ss. 125-126 : in the latter Act t rate is 6 per cent. instead of 4 per cent.
5) s. 308, ib. : s. 127, ib.

and A's completing 18, forms part of the residue. (2) **The legatee under a general residuary bequest is entitled to the produce of the residuary fund from the testator's death,** *e.g.*: (*a*) The testator bequeaths the residue of his property to A, a minor, *to be paid* to him when he shall complete the age of 18. The income from the testator's death belongs to A. *Exception.*—A general residuary bequest contingent in its terms does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy. Such income goes as undisposed of, *e.g.*: (*b*) The testator bequeaths the residue of his property to A *when* he shall complete the age of 18. A, if he complete that age, is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of. (3) **Where no time has been fixed for the payment of a general legacy, interest begins to run from the expiration of one year from the testator's death.** *Exceptions.*—(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator. (2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy will bear interest from the death of the testator. (3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator. (4) **Where a time has been fixed for the payment of a general legacy, interest begins to run from the time so fixed.** The interest up to such time forms part of the residue of the testator's estate. *Exception.*—Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, and the legatee is a minor, the legacy will bear interest from the death of the testator, unless a specific sum is given by the will for maintenance. (4) **The rate of interest is four per cent. per annum.**[6] (5) No interest is payable on the arrears of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity. (6) Where a sum of money is directed to be invested to produce an annuity, interest is payable on it from the death of the testator.[7]

See "*Executor*," "*Wills*," and *Index*.

6) ss. 309—313 ib., ss. 128—132 ib. The rate under Act V of 1881 is 6 per cent. instead of 4 per cent.

7) ss. 314-315 ib.: ss. 133-134 ib.

LEGAL AND MEDICAL PRACTITIONERS.

AUTHORITIES—Act XVIII of 1879 (extends in first instance only to the Lower Provinces Bengal, North-West Provinces, Punjab, Oudh, Central Provinces, and Assam[1]): Act IV of 1882: Act IX of 1872 (Contract): Civil Procedure Code: Evidence Act: Penal Code: Cases cited.

Certificates to pleaders and mukhtars —On the admission of a pleader or mukhtar the High Court issues a certificate authorizing him to practise up to the end of the current year in the Courts and in the case of a pleader, also the revenue offices, specified therein. The certificate must, if the holder wishes to continue to practise, be renewed at the end of the year. No person may practise as pleader or mukhtar without a certificate.[2]

Criminal offences and unprofessional conduct.—The High Court may suspend or dismiss any pleader or mukhtar who is convicted of a criminal offence implying a defect of character which unfits him to be a pleader or mukhtar as the case may be. It may also suspend or dismiss any pleader who takes instructions in any case except from the party on whose behalf he is retained, or a private servant of such party, or some person who is the recognised agent of such party within the meaning of the Code of Civil Procedure (see "*Agency*," p. 43), or any pleader or mukhtar, who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or for any other reasonable cause; provided that, where the party is—(*a*) a *pardánashin* woman; or (*b*) unable for any sufficient cause to instruct the pleader in person, the pleader will not be liable to suspension or dismissal merely by reason that he has taken instructions from a relative or friend authorized by the party to give such instructions and not receiving any remuneration in respect thereof.[3]

Remuneration of pleaders, mukhtars, and revenue agents.—The High Court and chief controlling revenue authority are empowered to fix fees on civil and revenue pro-

1) But any other Local Government may from time to time, by notification in the official Gazette, extend all or any of the provisions of this Act to the whole or any part of the territories under its administration. As to Madras Presidency, see *Fort St. George Gazette*, September 20, and December 7, 1881: Coorg, see *Mysore Gazette*, December 6, 1879: Scheduled Districts, see *Gazette of India*, October 22, 1881.

2) Act XVIII of 1879, ss. 6, 7, 10. The provisions of this Act, with the exception of a few sections, do not apply to advocates, vakils, and attorneys admitted or enrolled by any High Court or to mukhtars practising in such Court. The sections that do apply are marked with the letters "H. C."

3) ib. s. 13.

ceedings (except proceedings on the original side of High Courts established by Royal Charter). The table of fees is published in the local official Gazette (H. C.). No agreement entered into by any pleader, mukhtar or revenue agent with any person retaining or employing him, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements done or to be done by such pleader, &c., is valid, unless it is made in **writing,** signed by such person, and is, within 15 days from the day on which it is executed, **filed** in the District Court, or in some Court in which some portion of the business in respect of which it has been executed has been or is to be done. Where a suit is brought to enforce such an agreement, the Court may reduce the amount payable thereunder, or order the agreement to be cancelled if it is not proved to be **fair and reasonable.** Such agreements exclude all further claims, except such as are expressly excepted by the agreement. A provision in any such agreement that the pleader, &c., shall not be liable for **negligence,** or that he shall be relieved from any responsibility to which he would otherwise be subject as such pleader, &c., is wholly void.[4]

Giving or receiving commission.—Whoever commits any of the following offences :—(1) solicits or receives from any legal practitioner any gratification in consideration of procuring or having procured his employment in any legal business ; (2) retains any gratification out of remuneration paid or delivered, or agreed to be paid or delivered, to any legal practitioner for such employment ; (3) being a legal practitioner, tenders, gives, or consents to the retention of, any gratification for procuring or having procured the employment in any legal business of himself or any other legal practitioner, is punishable with simple imprisonment for a term which may extend to six months, or with fine which may extend to Rs. 500, or with both. "Legal Practitioner" means an advocate, vakil, or attorney of any High Court, a pleader, mukhtar, or revenue agent (H. C.).[5]

Incapacity to buy certain actionable claims.—No judge, pleader, mukhtar, clerk, bailiff, or other officer connected with Courts of Justice, can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.[9] See "*Action and Actionable Claims,*" pp. 18, 19.

Recognised agents of parties in legal proceedings—See "*Agency,*" pp. 43, 44.

Lien of attorneys of High Court on papers of client—See "*Bailment,*" p. 84.

4) ib. ss. 27—31. 5) ib. ss. 36, 3. 6) Act IV of 1882,, s. 136.

Representation in Court by : process served on : admissions by—See "*Agency*," pp. 43, 44.

The appointment of a pleader must be in writing—See p. 44.

Negligence of attorneys and others.—A professional adviser is not supposed to guarantee the soundness of his advice; he is expected to be honest and diligent; if there is no fault to be found with either his integrity or diligence, that is all for which he is answerable. Wrong advice might, however, in exceptional instances, show gross ignorance of the A B C of his profession, and crass negligence of his professional duty. An attorney or law agent is responsible in damages to his client for gross ignorance, or gross negligence in the performance of his professional services. All attorneys, pleaders, mukhtars, and law agents are bound to conduct their professional business with as much skill as is generally possessed by persons of their profession, unless their client has notice of their want of skill; they are bound to act with reasonable diligence, and to use such skill as they possess; they are liable in damages to their client for their neglect, misconduct, or want of skill.[7] An attorney is liable for negligently suffering judgment to go by default against his client[8]; for negligence in the preparation of the cause for trial, and for neglecting to deliver briefs to counsel: so if a cause which is meant to be defended is called on, and tried as an undefended cause, in consequence of the defendant's attorney's neglect to deliver his briefs, the Court will grant a new trial, compelling the defendant's attorney to pay the costs as between attorney and client out of his own pocket.[9] A solicitor is liable in damages for non-attendance with the witnesses at the trial.[1] "Instructing counsel" does not mean merely putting a piece of paper into his hands, professing to be instructions in the cause in which he is to appear; it means putting him into such a situation, both with respect to the information which is given him and the means of making that information available, as will enable him to conduct the cause properly, whether he appear for the plaintiff or defendant; the solicitor himself or his clerk should be present during the trial — the absence of both is a breach of duty towards his client.[2]—See "*Negligence.*"

Conflicting interests.—A solicitor will be restrained from acting for the antagonist of his former client, whether the solicitor was discharged by his former client or had discharged himself, whenever the transaction in reference to which the injunction is

7) Contract Act, s. 212: 12. Cl. & Fin., 91.
8) 7 Bing., 413.
9) 3 Taunt., 484.
1) 8 C. B. N. S., 289.
2) 4 Ex., 503.

sought so flows out of, or is connected with that in which the solicitor was formerly retained, that the same matter of dispute may probably arise.[3]

Investment of money.—A solicitor is liable for negligence in investing a client's money on insufficient security[4]; and for neglecting to make the necessary searches on putting out his client's money on mortgage.[5] All the members of a firm of solicitors are jointly liable for negligence, dishonesty, or misappropriation of client's money by any one member of the firm.[6]

Solicitor's lien.—Any agent may retain, out of any sums received on account of his principal in the business of the agency, all monies due to himself together with his remuneration. He has also a special lien on the principal's goods, papers and property moveable or immoveable. So an auctioneer has a lien on goods in his possession for the charges of the sale and his commission. An attorney has a lien on the proceeds of a judgment obtained by him for his client.[7] Attorneys of the High Court have also a *general* lien, which extends to all costs due from the client to the solicitor, on all papers of their clients which come into their hands in the course of their professional employment as solicitors. See "*Bailment*," p. 84.

Power to bind client.—An attorney like any other agent may bind his client, when he acts within the scope of his authority. But his power to bind his client ceases when judgment is recovered, at which time his retainer is at an end: but the authority may be renewed by any act on the part of the client showing an intention that the attorney shall continue to act as such.[8] Notice to the attorney is notice to the client.[9] An attorney has power before judgment **to compromise a suit.** A decree (embodying the terms of a compromise) made in open Court upon the consent of counsel duly instructed, is binding as between the parties to the suit, although the attorney of the defendant has no authority from his client to consent to such decree, or even though he is expressly directed not to compromise, provided such want of authority is not known to the other side.[1]

Dealings with legal advisers.—Dealings between persons one of whom stands towards the other in a relation of confidence and trust, are liable to be set aside if it be found that the latter

3) 20 Ch. Div., 733.
4) 2 Cl. & Fin., 762.
5) 21 L. J., Q. B., 292.
6) L. R., 7 Eq., 504: 38 L. J., 350: 36 L. J. Ch., 578; L. R., 3 Ch., 646.
7) Contract Act, ss. 217, 221: L. R., 4 Q. B., 156: 2 Q. B. D., 358.
8) Contract Act, s. 201: 4 Bing., 578: L. R., 2 Ex., 109.
9) Contract Act, s. 229.
1) 7 Bom H. C., O. C., 79. See 13 Cal., 115: s. 188, Contract Act. See "*Agency*."

party has made an unfair use of his advantages. Legal advisers stand towards their clients in such a position. So where a mukhtar claimed that certain property had been sold to him by his client, it was held that where any person, acting as an attorney or as a legal adviser, enters into a contract with his client in respect of the subject-matter of litigation or advice, undue influence is presumed to have been exercised until the contrary is proved, and the purchaser is bound to show that the terms and conditions of the contract are fair, adequate, and reasonable: a similar rule applies in the case of bargains with widowed or single *purda* women.[2] In order that a gift from a client to a solicitor may stand good, there must be not only a total absence of fraud and suspicion, but also a severance of the confidential relationship between them.[3] Transactions between solicitors and clients by which the former obtain gifts and an undue advantage, will be set aside, and the securities ordered to stand good only to the extent of what might be found justly due to the solicitor.[4] These principles apply in the case of all legal advisers, pleaders, mukhtars, or others.[5]—See "*Contract*," pp. 154, 155.

Professional communications. — No barrister, attorney, pleader, or vakil will, at any time be permitted, unless with his client's express consent, to disclose any communication made to him *in the course and for the purpose of his employment*, as such barrister, attorney, pleader, or vakil by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: the obligation above stated continues after the employment has ceased: this rule, however, does not protect from disclosure—(1) any such communication made in furtherance of any illegal purpose: (2) any fact observed by any barrister, pleader, attorney, or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of such barrister, &c., was or was not directed to such fact by or on behalf of his client.[6] If any party to a suit gives evidence therein at his own instance he will not be deemed to have consented thereby to such disclosure as is mentioned in s. 126; and if any party to a suit or proceeding calls any such barrister, &c., as a witness, he will be deemed to have consented

2) 1 B. L. R., A. C., 95: 9 W. R., 297.
3) 6 Ch. Div., 638.
4) 35 Beav., 549.
5) Contract Act, s. 16.
6) Evidence Act, s. 126. The provisions of this section apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils: ib., s. 127.

to such disclosure only if he questions such barrister, &c. on matters which, but for such question, he would not be at liberty to disclose.[7]

Confidential communications with legal advisers —No one can be compelled to disclose to the Court, any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.[8]

Negligence of medical practitioners.—A doctor, surgeon, or apothecary is liable in damages for gross negligence and ignorance.[9] Even though a patient neither employed nor engaged to pay him, a medical man is still liable to an action for damages for injury resulting to the patient, through negligence and unskilful treatment.[1] A chemist and druggist who sold to the plaintiff a blistering ointment to be applied to a mare with puffed legs, the ointment being unfit for the purpose, was held liable in damages for the injury which resulted to the mare from its application.[2] A medical practitioner or other person who causes the death of any person by a rash or negligent act is punishable with imprisonment (rigorous or simple) which may extend to two years, or with fine, or both.[3]—See "*Negligence.*"

Dealings with, and undue influence by, medical attendant.—The same principles apply to such dealings as to those between legal advisers and their clients (v. *ante*, and "*Contract.*") In all such cases the law throws on the person in whom confidence is placed, the burthen of showing that he acted *bonâ fide*.[4]—See "*Contract*," pp. 154, 155.

7) ib., s. 128.
8) ib., s. 129.
9) 12 Cl. & Fin., 98.
1) 6 Ex, 767: See also Bing. N. C., 733. 8 East, 348. 11 Price, 400: Indian Contract Act, s. 212.
2) 1 Nev. & M., 434.
3) Penal Code, s. 304A. See I. L. R., 14 Cal., 566.
4) Contract Act, s. 16: Evidence Act, s. 111: 8 Q. B. D., 587.

LIMITATION.

AUTHORITIES—Act XV of 1877 (as amended): Act IX of 1872 (Contract): H. T. *Rivaz's Limitation Act: Cases cited.*

Limitation means the time prescribed by law within which particular actions must be brought or proceedings taken. If a person neglects to avail himself of his right to sue within the prescribed time he loses his right to sue altogether. The limitation for the various forms of suit are given in the second schedule of the Act,* and subject to the following provisions every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor in the second schedule, will be dismissed, although limitation has not been set up as a defence.[1] If the period of limitation prescribed for any suit, appeal, or application expires on a day when the Court is closed, the suit, appeal, or application may be instituted, presented, or made on the day that the Court reopens.[2] An appeal or application for review of judgment may be admitted, however, after the prescribed period if the appellant or applicant satisfies the Court that he had sufficient cause for not appealing or applying within such period.[3] The Act saves special and local laws of limitation.[4]

Legal disability.—If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, **a minor, or insane, or an idiot,** he is under what is called "*legal disability*" and may institute the suit or make the application within the same period, after the disability, or (where double and successive disabilities) both disabilities to sue, or make the application, has or have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule of the Act; (the third column gives the time from which the period of *limitation begins to run*). *The following is an instance of* successive disability. A right to sue accrues to Z during his minority; after the accrual, but while Z is still a minor he becomes insane. Time runs against Z from the date when his insanity *and* minority cease. When his disability continues up to his death, his legal representative may institute the suit, or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed:

* *Note.*—The limitation in respect of suits and matters mentioned in this book will be found under the titles dealing with these suits and matters. See also *Index.*

1) Act XV of 1877, s. 4. 2) s. 5, ib. 3) ib. 4) s. 6, ib.

e.g., a right to sue accrues to X during his minority. X dies before attaining majority, and is succeeded by Y, his minor son. Time runs against Y from the date of his attaining majority. When such representative is at the date of the death affected by any such disability the same rules apply. The above-mentioned provisions, however, do not extend for more than three years from the cessation of the disability or the death of the person, affected thereby, the period within which any suit must be instituted or application made. If, however, the ordinary limitation gives a more favourable term to the person under disability within which to bring his suit, he need not bring it within three years: (see last of following **illustrations**): *e.g.* (*a*) The right to sue for the hire of a dog-cart (the limitation within which the suit must be brought is three years from the time when the hire becomes payable) accrues to A during his minority. He attains majority four years after such accruer (*i.e.*, four years after the hire became payable). He may institute his suit at any time within three years from the date of his attaining majority. (*b*) A, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accruer (*i.e.*, eleven years after the legacy was payable or deliverable to him): the limitation in cases of suits to recover legacies being twelve years from the date when they become payable or deliverable, A has, under the ordinary law, only one year remaining within which to sue. But under the above rule, an extension of two years will be allowed him, making in all three years from the date of his attaining majority, within which he may bring his suit. (*c*) Same case as last: but the right to sue accrued three years before majority. He has according to the ordinary law still nine years within which to sue, and can do so any time within that period. In other words, a person under "legal disability" may bring his suit either within three years from the time of the cessation of the disability, or within the period prescribed by the ordinary law, whichever ends last.[5] **When one of several joint creditors or claimants is under any legal disability,** and when a discharge can be given without his concurrence, time will run against them all; but when no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the other: *e.g.*, A incurs a debt to a firm, of which B, C and D are partners. B is insane, and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C, and D. But, on the other hand, suppose that A incurs a debt to a firm of which E, F, and G are partners. E and F are insane,

5) s. 7, ib.

and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.[6]

Continuous running of time.—When once time has begun to run, no subsequent disability, or inability to sue stops it: *e.g.*, A owed B Rs. 1,000 on a promissory note; B died two years after the money became payable, and B's son C attained majority two years after B had died, and on attaining majority filed a suit against A; C cannot recover, because the period of limitation had begun to run in B's life-time, and (being three years) had already elapsed when C filed his suit.. *Provided* that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt is suspended while the administration continues.[7]

Suits against express trustees and their representatives.—No suit against a person in whom property is vested in trust for any specific purpose, or against his legal representatives (who have received such property)[8] or assigns of such persons (not being assigns for valuable consideration) for the purpose of following in his or their hands such property is bound by any length of time.[9] For the purpose of following, &c., "means for the purpose of recovering the property for the trusts in question."[1] If the property have been sold by the trustee in his life-time, or has in any way disappeared, or can no longer be traced, and the suit is brought against the representatives to make good the loss out of the general estate, the suit must be brought within three years from the date of the trustee's death, or if the loss has not then resulted, the date of the loss.[2]

Suits on foreign contracts.—Suits instituted in British India on contracts entered into in a foreign country, are subject to the rules prescribed by the Indian Limitation Act.[3]

Computation of period of limitation.—In computing the period of limitation prescribed for any suit, appeal, or application the day from which such period is to be reckoned is excluded: so also in the case of appeals or applications for review, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence, or order appealed against, or sought to be reviewed is excluded; or in the case of an application to set aside an award the time requisite for obtaining a copy of the award is excluded. Where a decree is appealed against, or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is

6) s. 8, ib.
7) s. 9, ib.
8) 6 Mad. 455.
9) s. 10.

1) 13 Cal., L. R., 39.
2) Act XV of 1877. Art 98. Sched. II: 6 Mad. 455.
3) Act XV of 1877, s. 11.

founded is also excluded.[4] The day on which a contract is made should be excluded in computing the time allowed for its performance. The day on which a debt becomes payable is to be excluded in calculating the period of limitation; so in a suit on a bond, the day mentioned for the repayment of the money is excluded; the borrower in such a case has until the last moment of the day mentioned for the payment and the right to sue accrues not on, but from that day.[5] In computing the limitation prescribed for any suit the **following periods are excluded**:—(1) the time during which the *defendant* has been absent from British India. This section has been held not to apply where to the knowledge of the plaintiff, the defendant though not residing in, is yet represented by a duly constituted agent and mukhtar in British India;[6] (2) the time spent in the case either of a suit or application in proceeding *bonâ fide* in a Court without jurisdiction; (3) in the case of an order under the Civil Procedure Code[7] staying proceedings, the interval between the institution of the suit and the date of so staying proceedings, and the time requisite for going from the Court in which proceedings are stayed to the Court in which the suit is reinstituted;[8] (4) the time during which the commencement of suit is stayed by injunction or order;[9] (5) (in the case of a suit for possession by a purchaser at a sale in execution of a decree) the time during which the judgment-debtor has been prosecuting a proceeding to set aside the execution-sale.[1]

Effect of death.—When a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation is (except in the case of suits to enforce rights of pre-emption, or for the possession of immoveable property, or of an hereditary office) computed from the time when there is a legal representative of the deceased capable of instituting, or making such suit or application. When a person *against* whom, if he were living, a right to institute a suit or make an application would have accrued, dies before the right accrues, the period of limitation is computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.[2]

4) s. 12, ib.
5) 6 Bom., A. C., 57: 4 Mad. 330: Rivaz's Limitation Act, 45.
6) Act XV of 1877, s. 13: I. L. R., 10 Cal. 440.
7) Civ. Pr. Code, s. 20; order staying proceedings where all defendants do not reside within jurisdiction.
8) Act XV of 1877, s. 14.
9) ib., s 15.
1) ib., s. 16.
2) ib., s. 17.

Effect of fraud.—When any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application (*a*) against the person guilty of the fraud or accessory thereto; or (*b*) against any person claiming through him otherwise than in good faith and for valuable consideration, is computed from the time when the fraud first became known to the person injured, or in the case of a concealed document, when he first had the means of producing it or compelling its production. The fraud here spoken of must be committed by the person against whom a right is sought to be enforced.[3] See "*Fraud.*"

Effect of acknowledgment.—If *before* the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in *writing signed* (*i.e.*, signed either personally or by a duly authorized agent) *by the party against whom such property or right is claimed, or by some person through whom he derives title or liability*, a new period of limitation according to the nature of the original liability is computed from the time when the acknowledgment was so signed. When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents will not be received. An acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or states that the time for payment, delivery, performance, or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.[4]

The affixing of a seal or stamp on which the name of the signatory is impressed, is a sufficient signing: so also, the affixing of a mark so as to enable a creditor to avail himself of the new period of limitation brought about by an acknowledgment.[5] The acknowledgment must be one amounting to a distinct acknowledgment of liability: *e.g.*, when the acknowledgment relied on was: "If I have to stump up, the sooner it is done the better, though it would go against all my ideas of justice or right;" the demand being unjust in the opinion of the writer, the acknowledgment was held not to revive the period of limitation.[6] A written acknowledgment

3) ib., s. 18: I. L. R., 2 Cal. 1.
4) *Act XV of 1877*, s. 19.
5) 7 Mad. 358: Rivaz, p. 64.
6) 6 N.-W. P. 306; Rivaz, p. 67.

by one of several joint-contractors, partners, executors, or mortgagees, or his agent will not of itself avail to extend the period of limitation. It must be shown that the contractor, &c., who signed the acknowledgment was acting as the duly authorized agent of the other joint parties.[7]

A promise to pay a barred debt whether wholly or in part is a contract and enforceable at law if made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf.[8] See "*Contract.*"

Effect of part payment and payment of interest.—When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his duly authorized agent, or when part of the principal of a debt is before the expiration of the prescribed period paid by the debtor or his duly authorized agent, a new period of limitation, according to the nature of the original liability, is computed from the time when the payment was made. Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same. When mortgaged land is in the possession of the mortgagee, the receipt of the produce of such land is considered to be a payment within the meaning of the above provisions.[9] A payment made by one of several joint-contractors, partners, executors, or mortgagees, or by his agent will not of itself avail to extend the period of limitation. It must be shown that the contractor, &c., who made the payment was acting as the duly authorized agent of the other joint parties.[1]

Continuing breaches and wrongs.—In the case of a continuing breach of contract, and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time, during which the breach or the wrong, as the case may be, continues.[2] As a general rule, time begins to run in the defendant's favour from the date of his wrongdoing. In the case, however of a suit for compensation for an act which does not give rise to a cause of action, unless some *specific injury* actually results therefrom, the period of limitation is computed from the time when the injury results: *e.g*, A speaks and publishes of B slanderous words not actionable in themselves (see "*Defamation,*" p. 194) without special damage caused thereby: C in consequence refuses to employ B as his clerk. The period of limitation in the case of a suit by B against A for compensation for the slander does not commence until the refusal.[3]

7) s. 21, Act XV of 1877.
8) Contract Act, s. 25.
9) s. 20, Act XV of 1877.
1) s. 21, ib.
2) s. 23, ib.
3) s. 24, ib.

Effect of substituting or adding new plaintiff or defendant.—When after the institution of a suit a new plaintiff or defendant is substituted or added, the suit as regards him is deemed to have been instituted when he was so made a party. Provided that when an original plaintiff or defendant dies, and the suit is continued by or against his representative, the suit is deemed, as regards the representative, to have been instituted when it was instituted by the plaintiff or against the defendant, respectively.[4]

Gregorian calendar.—In computing the period of limitation, all documents are deemed to be made with reference to the Gregorian (British) calendar: *e.g.*, (*a*) A Hindu makes a promissory note, bearing a native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiry of four months after date computed according to the Gregorian (British) calendar.[5]

4) s. 22, ib.

5) s. 25, ib.

LUNACY.

AUTHORITIES—Acts XXXIV and XXXV of 1858 (Lunacy): IX of 1872 (Contract): Indian Penal Code: Criminal Procedure Code: Civil Procedure Code: 11 and 12 Vic., cap. 21: Acts cited in first paragraph.

Forms of mental unsoundness.—Unsoundness of mind is of three kinds:—(1) Idiocy or the case of those who have never had any reason or any lucid intervals from their birth. (2) Lunacy (which may be with, or without lucid intervals) or the case of those who were born sane and have since become insane. Lunacy may be general or only partial or confined to a single point (monomania). (3) Temporary and artificial unsoundness of mind caused by drunkenness, &c. Besides the Acts dealt with below, reference may be made to the following:—14 and 15 Vic., cap. 81 (removal from India of persons charged with offences and acquitted or not tried on the ground of insanity); Act XXXVI of 1858 (Lunatic Asylums); Act II of 1867 (High Court Convicts); Act X of 1886, s. 12 (removal of lunatic prisoners from jail to a lunatic asylum).

Suits by or against lunatics—See "*Minority and Minors*," and "*Limitation*."

Contracts by persons of unsound mind.—A person who is usually of sound mind but occasionally of unsound mind, may not make a contract when he is of unsound mind. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind: *e.g.*, a patient in a lunatic asylum, who is at intervals of sound mind may contract during those intervals. As to what constitutes soundness of mind for the purposes of contracting, see "*Contract*," p 153. There is a presumption in the first instance of sanity: but if insanity is once established, the burden lies on the party alleging a lucid interval, to prove that the lunatic was capable of understanding the contract and of forming a rational judgment as to its effect upon his interests. A contract entered into with a lunatic is avoidable contract[1]: as to the revocation of proposals by the insanity of the proposer, see "*Contract*," p. 152.

Dissolution of partnership in case of lunacy of partner—See "*Partnership*."

Revocation of authority of agent by lunacy of principal—See "*Agency*," p. 35, and "*Power of Attorney*."

1) *v.* p. 153, and Act IX of 1872, s. 12.

Claim for necessaries supplied to lunatic—See "*Contract*," p. 164. As to what are necessaries, see "*Minority and Minors*."

Testamentary capacity of lunatics—See "*Wills*."

Acts of lunatics and drunken persons.—Nothing is an offence which is done by a person who, at the time of doing it, by reason of **unsoundness of mind**, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of **intoxication**, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law, *provided* that the thing which intoxicated him was administered to him without his knowledge or against his will. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication is liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, *unless* the thing which intoxicated him was administered to him without his knowledge or against his will.[2] See "*Offences*."

Insolvent debtors becoming lunatics.—In case any prisoner for debt (in Calcutta, Madras or Bombay) is or becomes of unsound mind, the gaoler of the prison wherein such prisoner is must give information to the Court, which will thereupon make an enquiry: on the lunacy being established the Court may, after the publication of due notice, proceed to discharge the prisoner. The order of discharge has, as regards the lunatic's property, the same effect as a vesting order.[3] See "*Insolvency*."

Deposits in Savings Banks belonging to lunatics—See "*Bankers, Banking, and Cheques*."

Proceedings in lunacy.—The late Supreme Courts at Calcutta, Madras and Bombay were invested with powers over infants, lunatics, and idiots, similar to those exercised by the Court of Chancery in England. They were empowered by their respective charters to appoint guardians and keepers of lunatics and to inquire into, hear, and determine questions of alleged lunacy by inspection of the person or by such other ways and means by which the truth might best be discovered and known. According to the practice of the Supreme Courts questions of alleged lunacy were determined by inquisition taken before a jury. In 1858 two Lunacy Acts were passed, the first (Act XXXIV) with the object of lessening the cost and altering the

2) Indian Penal Code, ss. 84, 85, 86; as to proceedings in trial of lunatics, see Cr. Pr. Code, Chapter XXXIV.

3) 11 and 12 Vic., cap. 21, s. 64.

mode of enquiry into such questions in the Supreme Courts and of empowering the latter to make provision for the due management of the estates of lunatics; the second (Act XXXV) with the object of making better provision for the case of the estates of lunatics in the *mofussil*, not subject to the jurisdiction of the Supreme Courts, and of prescribing general rules by which the state of mind of persons not subject to such jurisdiction, who are alleged to be lunatic might be enquired into and ascertained.

Proceedings in Lunacy under Act XXXIV of 1858.

Application for enquiry may be made by any person related by blood or marriage to the alleged lunatic, or by the Advocate-General: on such application the High Court will make an order directing an enquiry whether any person subject to the jurisdiction of the Court, who is alleged to be a lunatic, is, or is not, of unsound mind, and incapable of managing himself and his affairs. The order may also contain directions for other enquiries concerning the nature of the property belonging to the alleged lunatic, the persons who are his relatives or next-of-kin, the time during which he has been of unsound mind, or such other matters as to the Court may seem proper.

Notice of such enquiry must be given to the lunatic, and the Court may also, if it think fit, direct a copy of such notice to be served upon any person related by blood or marriage to the alleged lunatic.

Powers of Court.—If the enquiry is ordered to be by a Judge in chambers the alleged lunatic may demand an enquiry by the full Court. The Court may require attendance of the lunatic for the purpose of being personally examined by the Court or by any person from whom the Court may desire to have a report of the mental capacity and condition of such alleged lunatic. The Court may likewise authorize persons to have access to the lunatic for the purpose of a personal examination. If the lunatic happens to be a *purdánishín* woman the rules in respect of examination of such persons in other cases must be followed.

The report.—After enquiry a report will be made stating whether the alleged lunatic is or is not of unsound mind. If there is no application for a new trial the Court will confirm the report, and such report will be conclusive evidence in respect of the appointment of committees of the person and estate of the lunatic.

Powers of committee.—When committees are so appointed the Court may invest them with full powers of management short of power to sell or mortgage any portion of the estate or to

let it for a period exceeding three years. The Registrar on the original side will receive any proposals and conduct any enquiry, without an order of reference by the Court, in respect of all matters of management, including questions as to sale or mortgage or the letting of the estate, and make a report after enquiry thereto to the Court. The Court upon receiving such report will make such order as it thinks fit subject to the provisions of the Act. The Committees are empowered to exercise under the order of the Court all powers whatsoever vested in a lunatic, whether the same are vested in him for his own benefit, or in the character of trustee or guardian.

Borrowing money.—The Court may, if it appears to be just or for the lunatic's benefit, order that any property, moveable or immoveable, of the lunatic, and whether in possession, reversion, remainder, contingency, or expectancy, be sold or charged by way of mortgage, or otherwise disposed of, as may seem most expedient, for the purpose of raising money to be applied for any of the following purposes:—(1) The payment of the lunatic's debts, including any debt incurred for his maintenance or otherwise for his benefit; (2) the discharge of any encumbrance on his estate; (3) the payment of, or provision for, the expenses of his future maintenance and the maintenance of his family, including the expenses of his removal to Europe, when he ought to be so removed, and all expenses incidental thereto; (4) the payment of the costs of any enquiry under the Act, and of any costs incurred by order or under the authority of the Court.

Miscellaneous provisions.—The Act further makes provision for the performance of contracts entered into by a person before he becomes a lunatic which have not been completed; for cases in which a member of a partnership is found to be a lunatic; for the transfer of stock or Government securities or any share in a company standing in the name of a lunatic; for the application of the lunatic's property towards his maintenance without appointing a committee; for cases of temporary lunacy; for the mode in which an order declaring a person a lunatic should be set aside, when there are grounds for believing that he has ceased to be insane. Under the Act the Court has full discretion to deal with the costs incurred in any proceeding before it.[4]

Proceedings in Lunacy under Act XXXV of 1858.

This Act substantially lays down the same law in respect of lunatics not subject to the jurisdiction of the

4) Act XXXIV of 1858, *passim*.

High Courts. The jurisdiction is vested in the Civil Court within whose jurisdiction a person alleged to be a lunatic is residing, and the application may be made by the relatives aforementioned (v. *ante*), by the Government Pleader, or in some cases by the Collector of the District or the Court of Wards. The enquiry is made by the Civil Court with the assistance of two or more assessors to be appointed by it. The Act further makes provision for the appointment of guardians and managers of the lunatic and his estate respectively, and for their remuneration, duties, and powers; the mode in which control over them is to be exercised, and for their removal when a proper case for removal is made out; the Act prescribes when they may be sued by a relative of the lunatic for an account. The Civil Court may impose a fine not exceeding Rs. 500 upon a manager for neglect or refusal to deliver accounts and for other acts. All orders made by a Civil Court or by any Subordinate Court under this Act are appealable.[5]

See "*Index.*"

5) Act XXXV of 1858, *passim*.

MALICIOUS PROSECUTION AND ABUSE OF PROCESS.

AUTHORITIES—Indian Penal Code: Draft Indian Civil Wrongs Bill: Sir F. Pollock's Law of Torts: Civil Procedure Code: Cases cited.

Malicious prosecution is both an offence and a civil wrong. It is punishable under the Penal Code as an offence and is also a wrong for which an action may be brought in a Civil Court for damages.

MALICIOUS PROSECUTION CONSIDERED AS AN OFFENCE.

False charge of offence made with intent to injure.—Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceedings against that person, *or* falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceedings or charge against that person, is liable to be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, is liable to be punished with imprisonment of either description for a term which may extend to seven years and is also liable to fine.[1]

What it is necessary to prove.—It is absolutely necessary to allege and prove that the case terminated in favour of the complainant. Where a charge was preferred before an Inspector of Police, who disbelieved and refused to act upon it, an indictment under the above section was sustained.[2] It is, however, necessary that the false charge should be made to a Court or to an officer who has powers to investigate and send up for trial.[3]

Where it is established that the charge made or proceeding initiated was known to be absolutely without foundation, the law will infer intent. Rashness in making a charge, which is in fact believed, is not of itself indictable. Speaking generally, the complainant has to shew that the accused had no reasonable and probable cause for preferring the charge. Where a charge is really well founded, the fact that it is preferred merely to gratify personal spite, will not make it indictable.[4] The charge which the prosecutor actually intended to bring, and not that which was

1) Indian Penal Code, s. 211.
2) 1 Mad. H. C., 30.
3) I. L. R., 6 Cal., 620.
4) 3 N. W. P., 327.

framed by the Magistrate upon his evidence, must form the basis of a prosecution under the section.[5]

Abuse of other process.—The Indian Penal Code further makes it indictable (1) to give false information respecting an offence committed;[6] (2) to falsely personate any person for the purpose of any act or proceeding in a suit;[7] (3) to fraudulently claim property to prevent it seizure for a forfeiture or in execution of a decree (the fraudulent concealment or removal of property for the same purpose is also an indictable offence); (4) to fraudulently suffer a decree for a sum not due;[8] (5) to dishonestly make a false claim in a Court of Justice, and to fraudulently obtain a decree for a sum not due.[9]

Malicious Prosecution Considered as a Civil Wrong.

Definition.—A person wrongs another who — (*a*) without reasonable and probable cause, and (*b*) acting from some indirect motive, and not in furtherance of justice, falsely accuses that other of an offence, of which offence that other is acquitted by the Court before which the accusation is made, or, having been convicted in the first instance, is ultimately acquitted on appeal by reason of the original conviction having proceeded on evidence known by the accuser to be false, or on the wilful suppression by him of material information.[1] The plaintiff must prove both the absence of reasonable and probable cause, and the existence of an indirect and improper motive for the prosecution,[2] and the plaintiff's case fails if his proof fails at any one of these points. It is no excuse for the defendant that he instituted the prosecution under the order of a Court, if the Court was moved by the defendant's false evidence (though not at his request) to give that order, and if the proceedings in the prosecution involved the repetition of the same falsehood. For otherwise the defendant would be allowed to take advantage of his own fraud upon the Court which ordered the prosecution.

Suits against corporations.—It has been doubted whether an action for malicious prosecution is maintainable against a corporation. It seems, on principle, that such an action will lie, if the wrongful act was done by a servant of the corporation in the course of his employment and in the corporation's supposed interest, and it has been so held.[3]

5) 3 Wym., Cr. 9.
6) Penal Code, s. 203.
7) ib., s. 205.
8) ib., ss. 206, 207, 208.
9) ib., ss. 209, 210.
1) Pollock's Law of Torts, p. 557, 2nd edn., 11 Q. B. D., 440. Same case affirmed, H. L., 11 App. Cas., 247: 11B. L. R., 328: Draft Indian Civil Wrongs Bill, s. 42.
2) ib.
3) 6 Q. B. D., 287.
4) Pollock op. cit., 558.

Abuse of process of Court.—A person wrongs another who causes harm to that other by wilful abuse of *any* process of law.[4] Malicious abuse of civil process may be actionable.[5]

Institution of civil proceedings without cause.—Generally speaking, it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even if malice be proved. For in contemplation of law the defendant who is unreasonably sued is sufficiently indemnified by a judgment in his favour which gives him his costs against the plaintiff. But there are proceedings which, though civil, are not ordinary actions, and fall within the reason of the law which allows an action to lie for the malicious prosecution of a criminal charge. That reason is that a charge "involving either scandal to reputation, or the possible loss of liberty to the person" necessarily and manifestly imports damage: *e.g.*, proceedings in bankruptcy against a trader, or the analogous process of a petition to wind up a company. Therefore such a proceeding, if instituted without reasonable and probable cause and with malice, is an actionable wrong.[6] So where an attachment before judgment, a temporary injunction, or an order for arrest on the ground of imminent departure from the jurisdiction of the Court to avoid its decree is wrongfully taken out by a person, a suit for damages will lie against such person if he had no reasonable and probable cause for taking such course, and if he did so with malice.[7] In this class of cases special damage must always be shewn.[8] In other respects the principles on which relief against abuse of process is granted are, *mutatis mutandis*, the same as those on which relief is granted in actions for malicious prosecution.

5) I. L. R., 4 Cal., 583.
6) *v.* 11 Q. B. D., 674.
7) *v.* s. 491, Civ. Pr. Code.
8) *v.* Pollock, p. 558.

MARRIAGE.

AUTHORITIES—Act XV of 1872 (as amended): Act III of 1872: Act X of 1865 (Succession): Act XV of 1865: Act IX of 1872 (Contract): Evidence Act: Act I of 1877 (Specific Relief): Indian Penal Code: Criminal Procedure Code: Cases cited.

Agreements in restraint of the marriage of any person other than that of a minor are void.[1]

Effect of marriage on domicile—See "*Domicile.*"

Rights of parties; how affected by marriage—See "*Husband and Wife*"

Marriage effected by force and fraud—See "*Divorce and Matrimonial Law.*"

Separation deeds.—A bond to provide for the future separation of husband and wife, or made in contemplation of a breach of conjugal fidelity, is illegal. Money advanced by plaintiff to defendant for the purpose of procuring the latter's divorce from her husband is irrecoverable, and the agreement to do so void.[2] When, however, the separation has actually occurred, the husband and wife may provide by deed for their rights and liabilities during the separation: and the Courts will enforce performance of an agreement to execute such a deed, or of the covenants contained in it[3]

Breach of promise.—An action will lie for damages for breach of promise of marriage. But the right of action is extinguished on the death of the promisor or promisee.[4] The contract becomes void on its becoming impossible or illegal: *e.g.* (1) A and B contract to marry each other. Before the time fixed for the marriage A goes mad. The contract becomes void. (2) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practice polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.[5]

Communications during marriage—See "*Husband and Wife.*"

Marriage settlements.—The children of a marriage contemplated in a marriage settlement may enforce any covenant for their benefit contained in the settlement.[6] See "*Contract.*" The

1) Contract Act, s. 26.
2) 10 Bom., 152: 11 B. L. R., 129.
3) Cunningham and Shephard's Contract Act, p. 98: 27 L. J. Q. B., 57: 22 L. J., Ch. 230: Contract Act, s. 23.
4) s. 37, Contract Act: 2 H. L. C., 622.
5) s. 56, ib. illust. (b) & (c).
6) Specific Relief Act, s. 23 (c).

property of a minor may be settled in contemplation of marriage, provided the settlement be made by the minor with the approbation of the minor's father, or "if he be dead or absent from British India" with the approbation of the High Court.[7] See "*Divorce and Matrimonial Law.*"

Family compromises—See "*Contract.*"

Birth during marriage.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, is conclusive proof that he is the legitimate son of that man, unless it can be shewn that the parties to the marriage had no access to each other at any time when he could have been begotten.[8]

Nullity of marriage—See "*Divorce and Matrimonial Law.*"

Offences relating to marriage.—The following offences are punishable under the Penal Code: (1) Kidnapping or abducting a woman to compel her marriage or seduction[9]; (2) forgery of a register of marriage[1]; (3) cohabitation caused by a man deceitfully inducing a belief of lawful marriage; (4) marrying again during the lifetime of husband or wife except where polygamy is permitted, and except where there has been a decree of divorce, and except in the case mentioned in the next paragraph[2]; (5) same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted; (6) going through marriage ceremony with fraudulent intent without lawful marriage[3]; (7) enticing or taking away or detaining with a criminal intent (*i.e.*, with a view to illicit intercourse) a married woman[4]: the offence of taking away is completed though the woman goes away voluntarily with the man and even if he goes with her by her solicitation;[5] (8) adultery.—v. *post.* See "*Offences*" and "*Prosecution.*"

Absence of husband or wife for seven years.—The section of the Code (v. *ante*) prohibiting marrying again during the lifetime of husband or wife does not extend to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of *seven years*, and shall not have been heard of by such person as being alive within that time, *provided*, the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marri-

7) Act X of 1865, s. 45.
8) Evidence Act, s. 112.
9) Penal Code, s. 366.
1) s. 466, ib.
2) ss. 493, 494, ib.
3) ss. 495, 496, ib.
4) s. 498, ib.
5) 2 Mad. H. C., 331.

age is contracted, of the real state of facts so far as the same are within his or her knowledge.[6]

Restitution of conjugal rights—See "*Divorce and Matrimonial Law.*"

A marriage celebrated out of India which is proved to be valid by the law of the country where it took place is valid all over the world.[7] The forms of marriage are regulated by the law of the country of celebration, the essentials by the law of the country of domicile.[8] In the case of any Christian it is necessary, however, to the validity of the marriage that it be of such a character as the Christian law recognises. An incestuous, temporary, or polygamous marriage is a nullity wherever celebrated.[9]

Every fair presumption will be made in favour of a marriage where both the parties have *bonâ fide* believed themselves to be married. So, where the marriage was celebrated between Catholics, who could not by reason of relationship have been lawfully married without a dispensation, it was held that it must be presumed that such a dispensation had been obtained.[1]

Adultery.—For the offence of adultery the male paramour is alone punishable. The wife is not punishable as an abettor. The offence is committed by a man by sexual intercourse with a person (1) who is; and (2) whom he knows or has reason to believe to be the wife of another man; (3) without the consent or connivance of such man; (4) such sexual intercourse not amounting to the offence of rape. The punishment is imprisonment (rigorous or simple) for a term which may extend to five years, or with fine, or with both.[2] To establish **connivance**, the Court must be satisfied from the facts that the husband so connived at the wife's adultery as to give a willing consent to it. Was he, or was he not, an accessory before the fact? Mere negligence, mere inattention, mere dulness of apprehension, mere indifference will not suffice; there must be an intention on his part that she should commit adultery. If such a state of things existed as would, in the apprehension of reasonable men, result in the wife's adultery—whether that state of things was produced by the connivance of the husband, or independent of it—and if the husband, intending that the result of adultery should take place, did not interfere when he might have done so to protect his own honour, he is guilty of connivance.[3] No Court will take cognisance of the offence of adultery except upon

6) Penal Code, s. 494.
7) L. R., 3 Eq. 343: 33 L. J., Matrim., 42: L. R., 1 P. & D., 85.
8) 9 H. L., 193.
9) 38 Ch. D., 220.
1) I. L. R., 12 Cal., 706.
2) Penal Code, s. 497.
3) 30 L. J., Matrim., 2.

a complaint made by the husband of the woman, or in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed.[4]

Divorce and judicial separation—See "*Divorce and Matrimonial Law.*"

v. *passim*, "*Husband and Wife*" and "*Divorce and Matrimonial Law.*"

CHRISTIAN MARRIAGE.

AUTHORITY—Act XV of 1872 (as amended).

The Act extends to the whole of British India, and so far only as regards Christian subjects of Her Majesty to the territories of Native Princes and States in alliance with Her Majesty. The Act has been declared in force in Upper Burma generally (except Shan States), Arakan, British Baluchistan, Sonthal Pergunnahs, Hazarebagh, Lohardugga, Manbhoom, Dhalbhoom and Kolhan in Singbhoom, and N.-W. Provinces Tarai.

Persons by whom marriages may be solemnized.—Every marriage between persons, one or both of whom is or are a Christian or Christians must be solemnized in accordance with the next following provisions of this paragraph; unless it is so solemnized it is *void;* marriages may be solemnized in India (1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the church of which he is a minister; (2) by any clergyman of the Church of Scotland provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland; (3) by any minister of religion licensed under this Act to solemnize marriages; (4) by, or in the presence of a marriage registrar appointed under this Act; (5) by any person licensed under this Act to grant certificates of marriage between Native Christians.[5]

Provisions as to marriage before a minister.—(1) Every marriage (except with special license) must be **solemnized** between 6 in the morning and 7 in the evening. (2) **Notice** of the intended marriage must be given by one of the parties in writing to the minister whom he or she desires to solemnize the marriage, and must state therein the name, surname, profession and condition of each of the persons intending marriage: the dwelling-place of each of them: the time during which each has dwelt there: and the church or private dwelling in which the marriage is to be solemnized.[6] (3) The minister consenting or intending to solemnize the marriage will, on the declaration next mentioned being made, give a **certificate** of notice being given and of such

4) Cr. Pr. Code, s. 199. 5) Act XV of 1872, ss. 4, 5. 6) s. 12, ib.

declaration being made. No certificate will be issued until four days after receipt of notice by the minister, nor if impediment be shown why certificate should not issue, nor if the issue of the certificate has been forbidden.[7] v. *post* (4) A **declaration** must be made by one of the parties in the presence of the minister and to the following effect: (*a*) that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the marriage; (*b*) when either or both of the parties is or are **minors** (minor being a person who has not completed the age of 21 years, and who is not a widower or widow) that the consent to the marriage of the undermentioned persons required by law has been obtained, or that there is no person resident in India having authority to give such consent, as the case may be. The father of a minor, if living, or if dead, the guardian, or if no guardian the mother, may give such consent. Such consent is necessary unless no person authorized to give consent is resident in India.[8] (5) Each of the above-mentioned persons may prohibit the issue of the certificate at any time before it is actually issued, on notice in writing to the minister signed by the person, and stating his or her place of abode and his or her position with respect to either of the persons intending marriage, by reason of which he or she is authorized to object.[9] (6) If the **prohibition** is not valid, marriage may be solemnized: it must be solemnized in the presence of at least two **witnesses** besides the minister:[1] if not solemnized within two months after the date of issue of the certificate, such certificate and all proceedings (if any) thereon are void, and no person can proceed to solemnize the marriage until a new notice has been given and certificate issued.[2]

Marriage before a registrar.—(1) One of the parties to the intended marriage must give **notice** in writing to any marriage registrar of the district in which the parties have dwelt, or if the parties dwell in different districts, notice must be given to a marriage registrar of each district.[3] (2) Four days after receipt of the notice, or when one of the parties is a minor, 14 days, a **certificate** will be given on an oath being taken by one of the parties to a similar effect as the declaration in the preceding paragraph mentioned, and provided that no lawful impediment has been shewn why a certificate should not issue, and that the issue has not been forbidden.[4] (3) One of the parties intending marriage must make **oath** in regard to the matters required to be declared before a minister (v. *ante*) and in addition thereto, that both the parties have (or where they have dwelt in the

7) s. 17, ib.
8) ss. 18, 19, ib.
9) s. 20, ib.
1) s. 25, ib.
2) s. 26, ib.
3) s. 38, ib.
4) s. 41, ib.

districts of different marriage registrars) that the party making such oath has had their, his or her usual place of abode within the district of such marriage registrar.[5] Consent is required in the case of the marriage of **minors**[6] (v. *ante*). (4) Any person whose consent to the marriage is required (v. *ante*) may enter a **protest** against the issue of a certificate by writing any time before the issue of the certificate "forbidden" opposite to the entry of the notice in the marriage notice book and subscribing his name and abode and position in regard to the parties intending marriage, by reason of which he or she is authorized to protest.[7] (5) If any person, whose consent to the marriage is necessary, is of unsound mind, or if any such person (other than the father) without just cause withholds his consent, the parties intending marriage may apply by petition, where the person whose consent is necessary is resident in Calcutta, Madras, or Bombay to a Judge of the High Court, or if not resident within any of these towns, to the District Judge.[8] If the registrar refuses to grant a certificate, the parties may apply, where the district of the registrar is within any of the above-mentioned towns, to the High Court, or if without, to the District Judge.[9] Any person entering a protest with the marriage registrar against the issue of a certificate on grounds that are frivolous will be liable for costs and for damages at the suit of the person against whose marriage the protest was entered.[1] (6) After certificate or certificates, as the case may be, has or have been issued, **marriage may** (if there be no lawful impediment or valid protest) **be solemnized according to any form of ceremony the parties think fit to adopt.** Marriage must take place in the presence of some registrar (to whom the certificate or certificates must be given) and of two or more credible **witnesses** besides the registrar. In some part of the ceremony each of the parties must declare as follows or to the like effect: "*I do solemnly declare that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D.*;" and each of the parties must also say to the other as follows, or to the like effect: "*I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife* (*or husband*)." When marriage is not had within two months after notice a new notice and certificate is required.[2]

Marriage of Native Christians.—Native Christians (not Roman Catholics) may, under Part VI of this Act apply for certificate without the preliminary notice required in the case of marriage before a minister (v. *ante*), (1) if the man is over 16, and the woman over 13 years old; (2) if neither of the persons

5) s. 42, ib.
6) s. 44, ib.
7) ib.
8) s. 45, ib.
9) s. 46, ib.
1) s. 49, ib.
2) ss. 51, 52, ib.

intending to be married has a wife or husband still living; (3) if they are married in the presence of a person especially licensed to give certificates of marriage to Native Christians, and of at least two credible witnesses.[3] No marriage can, however, be certified under this part when either of the parties has not completed his or her eighteenth year unless the consent of the father or guardian or mother has been given to the marriage, or unless it appears that there is no person living authorized to give such consent.[4] After the above conditions have been fulfilled, and a declaration of marriage has been made in the presence of the person licensed as above-mentioned, the latter will grant a certificate of marriage on payment of a fee of 4 annas.[5]

Dissolution of marriage and re-marriage of native converts—See *"Divorce and Matrimonial Law."*

MARRIAGE OF NON-CHRISTIANS (NOT BEING JEWS, HINDUS, MOHAMMEDANS, PARSEES, BUDDHISTS, SIKHS, OR JAINS.)

AUTHORITY—Act III of 1872.

Conditions of marriage under the Act.—Marriages may be celebrated under this Act between persons neither of whom professes the Christian, or Jewish, or Hindu, or Mohammedan, or Parsee, or Buddhist, or Sikh, or Jaina religions, upon the following conditions:—(1) neither party must, at the time of marriage, have a husband or wife living; (2) the man must have completed his age of 18 years, and the woman her age of 14 years; (3) each party must, if under 21, have obtained the consent of his or her father or guardian to the marriage; (4) the parties must not be related to one another in any degree of consanguinity and affinity, which would, according to any law to which either of them is subject, render a marriage between them illegal.[6]

Procedure.—When a marriage is solemnized under this Act one of the parties must give notice thereof to the registrar of marriages under Act III of 1872, who must be a registrar of a district in which one at least of the parties to the marriage has resided for 14 days before such notice is given. The notice is filed by the registrar, and a copy entered in the marriage notice book. The marriage may be solemnized (in the absence of objection) *14 days after notice of it has been given. Any person may* object to the marriage on the ground that it contravenes some one or more of the four conditions mentioned in the preceding paragraph.[7]

Procedure on objection.—When objection is entered the registrar cannot solemnize the marriage until 14 days after

3) s. 60, ib.
4) ib.
5) s. 61, ib.
6) Act III of 1872, s. 2.
7) ss. 4, 5, 6, ib.

receipt of objection if a Court of competent jurisdiction be open at the time, or if not, until 14 days from the opening of such Court. The objector may file a suit in order that it may be declared that the marriage contravenes one of the four conditions. Certificate of filing the suit is lodged with the registrar, and if filed within 14 days from notice of objection or from the opening of the Court (in case no Court of competent jurisdiction was open at the time of entering objection) the marriage cannot be solemnized until the decision of the Court has been given and the period allowed by law for appeal has elapsed: or if there be an appeal, until the decision of the Appellate Court has been given.[8]

Solemnization of marriage.—Before the marriage is solemnized the parties and three witnesses must sign a declaration in the presence of the registrar that the conditions prescribed by law are not contravened, and on such signing in the presence of the registrar and in the presence of the three witnesses the marriage may be solemnized in any form, provided that each party says to the other in the presence and hearing of the registrar and witnesses: "*I* [*A*] *take thee* [*B*] *to be my lawful wife* (*or husband*). The registrar then enters a certificate of marriage in a book kept for that purpose, and the certificate is signed by the parties to the marriage and the three witnesses.[9]

Divorce.—The Indian Divorce Act applies to all marriages solemnized under this Act, and any such marriage may be declared null or dissolved in the manner therein provided and for the causes therein mentioned, *or* on the ground that it contravenes one of the four above-mentioned conditions.[1] See "*Divorce and Matrimonial Law.*"

PARSEE MARRIAGE.

AUTHORITY—Act XV of 1865 (as partly repealed and amended).

Requisites of validity.—No marriage contracted after the commencement of this Act is valid if the contracting parties are related to each other in any of the degrees of consanguinity or affinity prohibited among Parsees, and unless the marriage is solemnized according to the Parsee form or ceremony called "*Aśirvád*" by a Parsee priest in the presence of two Parsee witnesses independently of such officiating priest: and unless in the case of any Parsee under the age of 21 years the consent of his or her father and guardian shall have been previously given to such

8) ss. 7, 8, ib.
9) ss. 10, 11, 13, ib.
1) s. 17, ib.: *Calcutta Gazette*, 22nd May 1872, p. 2322; *Bombay Government Gazette*, 26th September 1872, p. 1047; *Fort St. George Gazette*, 24th December 1872, p. 2064.

marriage.[2] No Parsee may marry in the lifetime of his or her wife or husband except after divorce from such wife or husband. If he or she does so, it is bigamy, and punishable accordingly. Every marriage must on solemnization be certified by the officiating priest. The certificate must be signed by the officiating priest, the contracting parties, or their fathers or guardians when they are under 21, and two witnesses present at the marriage: the priest must then send the certificate together with a fee of Rs. 2 (to be paid by the husband) to the registrar of the place at which such marriage is solemnized.[3] The marriage register is open for public inspection, and a certified extract therefrom will on application be given by the registrar on payment of Rs. 2.[4]

Divorce—See "*Divorce and Matrimonial Law.*"

2) Act XV of 1865, s. 3. 3) ss. 4, 5, 6, ib. 4) s. 8, ib.

MASTERS, SERVANTS, AND APPRENTICES.

AUTHORITIES—Act XV of 1882: Act IX of 1872 (Contract): Act I of 1877: Draft "Master and Servant" Bill, 1880: G. C. Sconce "The Master and his Domestic Servant" (1881): Macdonell's Law of Master and Servant (1883): 11 and 12 Vic., cap. 21 (Indian Insolvent Act): Indian Penal Code: Act XV of 1877: Pollock on Torts (1890): Act XIII of 1859: Act IX of 1890: Act IX of 1860: Act XIX of 1850: cases cited.

The law of master and servant, except where directly regulated by statute, is a portion of the ordinary Law of Contract (see "*Contract*"). The relation is constituted by a contract of hiring and service which, like every other contract, must possess the requisites of a valid and binding obligation. **A contract of service** is a contract binding one party to employ and remunerate, and the other to do personally any work, in such manner as the former party directs; and otherwise than in pursuit of an independent calling. The remuneration contracted for is called "**wages**," the person contracting to employ is called the "**master**," and the party contracting to do the work is called the "**servant.**"[1] Every person competent to contract may enter into a contract of service. **Minors** are able to enter into contracts of service for wages because it is for the benefit of minors, who are thereby enabled to earn their own living. By the undermentioned Act any minor may institute a suit for any sum of money, not exceeding Rs. 500, which may be due to him for wages or piecework, or for work as a servant, in the same manner as if he were of full age.[2] **There can be no specific performance of a contract of service.** The only relief lies in damages. Thus, if A contracts to employ B on personal service, and then refuses to employ B, B cannot specifically enforce the contract, and compel A to employ him, but he may sue A for damages for breach of contract.[3] The contract is terminated by the **death of either master or servant**, unless there is a stipulation express or implied to the contrary.[4] By the death of the master or one of a firm of masters[5] the servant is discharged. Therefore, in the absence of an express stipulation, the executors of a deceased person cannot sustain an action against a servant to enforce the continuance of service by the servant after the master's death.[6] **The term "servant" as used in the law of master and**

1) Draft "Master and Servant" Bill, 1880.
2) Act XV of 1882, s. 32 (Presidency Small Cause Courts): Act IX of 1872, s. 70: 3 Q. B., 229.
3) Act I of 1877, s. 21.
4) Act IX of 1872, s. 37: L. R. 4 C. P., 744.
5) 41 L. J., Ch. 476.
6) 3 B. and S. 826.

servant is not confined to domestic servants, but is applicable to all those who under a contract of service, engage personally to do any work in manner as the employer may direct and otherwise than in pursuit of an independent calling—*e.g.*, tutors, governesses, managers of tea gardens, banks, cotton mills, jute mills, &c., &c., agricultural servants, workmen, clerks, &c.

Term of service : notice.—In England a general or indefinite hiring for personal service is commonly understood to constitute a contract of service for one year; but that is a matter of fact, and it can be shown by evidence, if the case be so, that a given indefinite hiring is not really for a year but for a term, say, less than one year. In India, however, an indefinite hiring does not mean a hiring for one year. The mere payment of wages monthly is not enough to show that a hiring is a monthly hiring.[7] In the case of servants who fill important posts, the term of service and the notice to be given by either party is, as a rule, expressly fixed by the contract of service. When not so fixed, the presumption as to the term of service, the length of notice required and the amount of damages in lieu of notice, depend on custom, usage of trade,[8] profession, or business and the facts of each particular case. In the absence of custom and usage the Court is the judge of what is reasonable notice. As to domestic servants, see next paragraph.

Domestic servants.—In the case of domestic servants and the like, the rule is well fixed that in the absence of express contract the hiring is presumed to be a monthly one. An engagement of a domestic servant at, say, "7 rupees a month" means that for every full month's work the servant will receive a full month's pay. He is not entitled to anything for any work done during any part of any month—*e.g.*, a servant is dismissed for misconduct on the 20th of the month : he is not entitled to any wages for that month. If however, the contract becomes void—*e.g.*, by the death of the servant, the master must pay the servant's representatives for the work actually performed.[9] If the servant is wrongfully dismissed during a month he may sue his master on account of the wrongful dismissal by which he was prevented from earning his wages, and by which he was otherwise damnified. The wages are payable not for the bygone services, but for the wrongful dismissal.[1] If, on the other hand, the servant wrongfully and suddenly quits his master's service before the completion of the month's work, he not only has no claim for wages for the work during the broken month, but may also

7) 7 B. L. R., 788.
8) 27 L. J. C. P., 236 : 1 C. P. D., 591 : 4 C. B. N. S., 346 : 9 Ex., 518.
9) Act IX of 1872, s. 65.
1) 11 A. and E., 798 : 1 Ex. 298.

be called upon to compensate the master for any trouble, damage or inconvenience he may have sustained.[2] In the absence of an agreement limiting the period of service or that notice will not be required, reasonable notice must be given by either party of their intention to put an end to the contract or a reasonable sum must be paid in lieu of notice. No domestic servant who is hired by the month has a right to leave his employment without sufficient reason, and without any notice to his master of his intention to leave.[3] On the expiry of the notice the contract is ended and the servant must be paid up to date.[4] Unless it is expressly agreed that wages shall be paid in advance, the whole month's work must be done before payment of the wages can be claimed.[5] A master is not bound to accept the services of a *budlee;* but, if he does so, he cannot afterwards enforce the contract against the servant.[6] v. *post.*

Some incidents of the contract.—When one of the parties to the contract has refused to perform, or disabled himself from performing his promise in its entirety, the other party may put an end to the contract, unless he has signified by words or conduct his acquiescence in its continuance—*e.g.*, A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her Rs. 100 for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract. If, however, A, after absenting herself on the sixth night, sings with the assent of B on the seventh night, B has signified his acquiescence in the contract and cannot put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.[7] If a master or servant rightfully rescind a contract of service, the person rescinding is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract—*e.g.*, a servant whose personal services are engaged for a month wilfully and without excuse absents himself without leave for a day. He cannot therefore complete his month's work or perform his promise in its entirety (v. *ante.*) The master may rescind the contract, and in addition may claim compensation for any damages he has sustained.[8] If, however, the master does not exercise the right given to him, but permits the servant to return to work, the master has signified his acquiescence in the con-

2) Contract Act, ss. 39, 75 : 3 Esp., 235 : 6 C. and P., 15 : 11 Q. B., 742 : 5 B. and A., 789 : 8 Ex., 822. As to compensation for wrongful dismissal, see 7A. and E., 544 : 4 H. L. Ca., 645 : 15 Q. B., 576.

3) Per *Garth*, C. J., *Christophridi* v. *Gooljar*, 15 Sept. 1879.

4) 2 Agra H. C. Rep., Mis. 1.

5) Act IX of 1872, s. 52.

6) ib., ss. 40, 41 : Sconce *op. cit.*

7) Act IX of 1872, s. 39.

8) ib., s. 75.

tinuance of the contract, and cannot put an end to it unless and until something fresh takes place entitling him to rescind. Either the master or servant may dispense with, or remit wholly or in part the performance of the promise made to them, or may accept instead of it any satisfaction they think fit.[9] Contracts of hiring and service cannot be transferred or assigned without the consent of the parties thereto. The relation of master and servant, who contract with regard to the personal qualities of each other, is one of personal confidence, and the one cannot compel the other to accept a third person in substitution. The service must be performed by the servant himself, he cannot employ another person to perform it. If, however, the master accepts a substitute he cannot, of course, afterward enforce the contract against the servant.[1] The servant need not work, nor need the master employ the servant, unless the master is and continues to be ready and willing to employ the servant, and the servant is and continues to be ready and willing to work.[2] If a question arises as to whether the master or servant is to perform his part of the contract first, the rule, in the absence of express contract, is that the promises are to be performed in that order which the nature of the transaction requires.[3] If either master or servant prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract[4]; *e.g.*, a master wrongfully dismisses his servant before the expiration of the term of service, and so prevents the servant performing his promise; the latter is entitled to compensation. When a contract of service consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract: *e.g.*, in a contract of domestic service for one month in which there is no provision for payment in advance, payment cannot be claimed until the month's work, has been performed. If the servant fails to do his month's work he not only cannot claim pay, but must compensate his master for any loss he may have sustained.[5]

9) ib., s. 63.
1) ib., ss. 40, 41.
2) ib., s. 51.
3) ib., s. 52.
4) ib., s. 53. See "*Contract.*"
5) ib., s. 63. The author is indebted for the greater portion of this paragraph to Mr. Sconce's work, cited above.

Quantum meruit.—A contract of service may be either entire and indivisible, that is, the consideration may depend upon the entire fulfilment of the contract—the entire fulfilment of the promise given by one party being a condition precedent to the fulfilment of any part by the other: *e.g.*, the monthly contracts of domestic service above-mentioned; or the case of a watch given to a watch-maker to repair, in which case the latter cannot recover before he has completed the work. He cannot recover on a *quantum meruit* (*i.e.*, "so much as he has deserved" or the price of the work actually done): the whole work must be done or the servant will get nothing.[6] If, however, in the case given the contract becomes *void*; *e.g.*, if it becomes impossible of continuance by the death of the watch-maker, his representatives must be paid for the amount actually performed under the contract.[7] The contract may be several or divisible, that is, the consideration may be susceptible of apportionment according as the contract is more or less carried out; in such cases the person who has partially performed his contract may be entitled to recover *quantum meruit*.[8]

Damages for breach of contract of service.—If a master wrongfully refuses to receive his servant into his service, or wrongfully dismisses his servant, or if the servant wrongfully refuses or fails to enter his master's service, or wrongfully deserts his service, or if either in any other manner break the contract of service, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. A servant who is dismissed is bound to make reasonable exertions and show diligence in endeavouring to procure employment. The true measure of damages is, therefore, not the amount of wages which he was promised under the agreement, but his probable loss. This will be his wages less the value of any place which he has obtained or might have got by reasonable exertions. Compensation will not be given for any remote and indirect loss or damage sustained by reason of the breach of contract.[9] The measure of damages is obtained by considering what is the usual rate of wages for the employment contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a

6) Contract Act, s. 39: Smith's L. C., Vol. II, p. 1.
7) Contract Act, ss. 56, 65.
8) Macdonell, pp. 154—157.
9) Contract Act, s. 73. Macdonell, p. 191.

person competent for the place, and that the usual rate of wages for such employment can be proved, and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find other employment.[1] So also a master must use diligence to find a new servant. An injunction cannot be granted to restrain a breach of contract of service.[2] A suit for wrongful dismissal may be brought against Government.[3]

Grounds of dismissal.—A master is justified in dismissing his servant for various causes such as incompetence and want of reasonable skill to discharge the duties for which he was employed[4]; permanent disablement or serious and lengthy illness.[5] If the servant is not dismissed, sickness is no defence to an action for wages; habitual neglect of duty[6]; conduct likely to injure his master's business materially[7]; wilful disobedience of any lawful order; gross insolence or rudeness[8]; gross moral misconduct, whether pecuniary or otherwise, such as robbery, theft, drunkenness[9], or other misconduct or acts of gross immorality unfitting the servant for his position and inconsistent with his duties. Acts of immorality must have direct reference to the services to be performed, so as to render them worthless or less valuable than was to be reasonably anticipated.[1] A servant is bound to consult the interests of his master, and may be dismissed for acts seriously injurious thereto.[2] A master in dismissing a servant is not bound to state any specific act of misconduct or other precise ground of discharge; it is sufficient if such ground existed in fact at the time of the dismissal; even if the master be not aware of it at the time of dismissal.[3]

Insolvency of master.—Insolvency does not of itself dissolve the contract of service. If the wages or salary are not due at the date of the insolvency, the servant is entitled to wages for the time he has served. The Court may order wages or salary, not exceeding six months' wages or salary, due to servants or clerks of an insolvent to be paid out of his estate; the servant or clerk may further prove and receive dividends for any sum exceeding the six months' wages or salary so paid to him.[4]

1) 2 H. L. Ca., p. 606.
2) Act I of 1877, s. 56 (*f.*)
3) 7 B. L. R., 688.
4) See I. L. R., 2 Cal., 33.
5) 1 E. and E., 248: 28 L. J., Q. B., 25.
6) 10 Ex., 734.
7) 3 Esp., 235.
8) Macdonell, p. 213: 2 Stark, 256: 4 C. and P., 518: 9 A. and E., 548.
9) 5 M. and W., 279: 1 C. and K., 662.

1) Macdonell, p. 213.
2) 24 L. J., Ex. 80.
3) 3 A. and E., 171: 11 M. and W., 161: 5 Ex., 110: 4 Bing. N. C., 638. See generally "Master and Servant" Bill, s. 13.
4) 11 and 12 Vic., Cap. 21, s. 46.

Character of servants.—A master is not obliged to give his domestic servant a character. However much the servant may in fairness be entitled to it, no suit will lie against a master because he refuses to give it.[5] If a master in giving a servant a character makes, in good faith, statements which would be otherwise and *primâ facie* libellous or slanderous, no action for defamation (in the absence of malice) will lie. In the case of master and servant, convenience requires that what is said in fair communication between man and man, upon the subject of character, should be privileged if made *bonâ fide* and without malice.[6] See *Defamation*.

A master has a right of action against a third party for injury to his servant whereby he has been deprived of his or her services. A master may maintain an action against a man for the **seduction** of his servant; but the girl herself cannot maintain the action. A father may also maintain an action for the seduction of his daughter, in respect of the loss of such daughter's services occasioned by the seduction, and not in respect of his being compelled to maintain her by reason of such seduction.[7] A suit for compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter, must be brought within a year of the time when the loss occurs.[8]

Limitation in case of suits for wages.—A suit (1) by a workman engaged in a railway or other public works; (2) for the wages of a household servant, artisan or labourer not provided for by (1); (3) for a seaman's wages; (4) for wages not otherwise expressly provided for; *must be brought within* (1) six months of the time when the wages, hire or price of work claimed accrue or accrues due; (2) one year of the time when the wages accrue due; (3) three years of the end of the voyage during which the wages are earned; (4) three years of the time when the wages accrue due.[9]

Wrongfully procuring a person to break his contract with his employer.—An action will lie against a third party who wilfully, and with the design of harming the employer or gaining some advantage for himself, procures another to break his contract with his employer, whereby as a natural consequence damage is occasioned to the latter.[1] Such action is maintainable, notwithstanding that the relation of master and servant does not exist between the plaintiff and the person employed.[2]

5) 3 Esp., 201.
6) Penal Code, s. 499 : Exception 10, 1 B. and A. 240.
7) 7 M. and Gr., 1033.
8) Act XV of 1877, Sch. II, Art. 26.
9) ib., Arts. 4, 7, 101, 102.
1) 22 L. J., Q. B., 463.
2) 6 Q. B. D., 333.

Criminal acts of servant.—A master is not liable for the criminal acts of his servant unless he ordered the doing of them, or otherwise instigated and abetted him in their commission.

Liability for wrongs of servant.—A master is liable for the negligence or other civil wrongs of his servant whether authorized or ratified by him or not, if, and in so far as they are committed in the course of the servant's employment, and for the master's purposes; consequently, if a servant in exercise of the authority given him by his master and in performance of his duties as such servant, acts negligently, whereby he causes an injury to a third party, the master is responsible in damages to such third party for the injury sustained.[3] A master, however, is not liable for injuries caused by his servant's negligence if they might have been avoided by reasonable care on the part of the person injured. Nor is a master responsible, for the acts of servants which are unconnected with, and not incident to, their service; and which are not done in the course of their employment.[4] See "*Negligence.*"

Injury to fellow-servant.—When both the wrong-doer and the person injured are servants of the same master, and the wrong is done in the course of their employment as servants, the master is not liable unless (generally speaking) he has by his conduct shewn a gross disregard of the safety of the servant, or the wrong-doer is a person who does not possess and exercise ordinary skill and care, or the gear, implements, tackle, material, &c., are not fit and sound, and the master knew it, but the servant did not.[5] A servant when he engages to serve a master, undertakes as between himself and his master, to run all ordinary risks of the service, including the risk of negligence on the part of a fellow-servant when he is acting in discharge of his duty as servant of him, who is common master of both.

Independent contractors are not servants of the person who employs them; therefore, if a person employs a competent independent contractor to do a lawful act, and damage occurs, the employer is not liable.[6]

Liability for acts of coachmen.—When a master has his own carriage and employs his own servant to drive, the master is liable to a third party for any injury caused to him by the negligent driving of his servant. But if the servant, without the master's knowledge or permission takes out the carriage for his own purpose, or for a purpose unconnected with his master's business,

3) Pollock on Torts, p. 526: 2 Hyde, 79: I. L. R., 7 Bom., 119.
4) Macdonell, p. 285, and cases there cited.
5) 4 Jur., N. S., 767.
6) 8 B., L. R., 265: I. L. R., 11 Bom., 329: I. L. R., 10 Cal., 445.

and causes injury to others, the master will not be responsible.[7] When the master hires the horses and carriage, and the person who lets them provides the coachman, the person who lets them is liable for injuries arising from the negligent and careless driving of the coachman. If, however, the hirer drives himself, or provides his own coachman, the hirer is liable for his own negligence or that of the coachman, his servant.[8]

Criminal breach of contract of service.—The following are offences punishable under the Indian Penal Code:—(1) Breach of contract of service during a voyage or journey, *e.g.*, by a servant, palki-bearer, cooly, or proprietor of bullocks bound to convey goods. The only grounds on which the breach is excused are illness and ill-treatment. It is not necessary to this offence that the contract should be made with the person for whom the service is to be performed; it is sufficient if the contract is legally made with any person, either expressly or impliedly, by the person who is to perform the service. (2) Breach of contract to attend on and supply the wants of helpless persons. (3) Whoever, being bound by lawful contract in writing to work for another person as an artificer, workman, or labourer, for a period not more than three years at any place within British India, to which, by virtue of the contract, he has been, or is to be, conveyed at the expense of such other, voluntarily deserts the service of that other during the continuance of his contract, or without reasonable cause refuses to perform the service which he has contracted to perform, such service being reasonable and proper service, commits an offence punishable with imprisonment (rigorous or simple) not exceeding one month, or with fine not exceeding double the amount of such expense, or with both, unless the employer has ill-treated him, or neglected to perform the contract on his part.[9]

Priority of servants' wages on winding up of a company—See "*Companies.*"

Criminal breach of contract by artificers, workmen and labourers.—Masters and employers resident or carrying on business in any Presidency-town or any place to which the Act may be extended,[1] are given special remedies against artificers, workmen, or labourers when the latter have received from their employers or masters an advance of money on account of any work they may have contracted to perform or get performed, and

7) I. L. R., 7 Bom., 119: 1 East, 106: 10 C. B. N. S., 572: 6 C. and P., 501.

8) 5 B. and C., 547: 2 Man. and Ry., 1: 4 B. and Ald., 590.

9) Penal Code, ss. 490—492.

1) The Act has been extended to Bombay and Madras Mofussil, Mysore, Coorg, Sindh, Panjab, districts of Nimar, Silhat and Goalpara and elsewhere.

have without lawful or reasonable excuse neglected or refused to perform or get performed such work according to the terms of their contract. The Magistrate may on complaint of the master or employer summon the workman, &c., so refusing, &c., and may, at the option of the complainant, order the repayment of the advance, or the performance of the contract. If the workman, &c., fail to comply with the order, the Magistrate may sentence him to be imprisoned with hard labour for a term not exceeding three months, or if the order be for the repayment of a sum of money, for a term not exceeding three months, or until such sum of money may be sooner repaid. No order for the repayment of any money will, while the same remains unsatisfied, deprive the complainant of any civil remedy which he may have had but for this Act. The Magistrate may also, if, and when he orders the workman, &c., to complete his contract, compel him to enter into a recognisance with sufficient security for the due fulfilment of the contract. It matters not whether the contract be written or verbal, or whether it be for a term certain, or for specified work or otherwise.[2]

Compulsory service—See "*Negligence.*"

Railway servants—See Railway Act (Act IX of 1890).

Employers and workmen on railways and public works—See "Employers' and Workmen's Act" (Act IX of 1860).

Payment of wages by executor and administrator—See "*Executor*" and "*Administrator.*"

Domicile of certain servants—See "*Domicile.*"

Public servants—See "*Public Servants and Public Duties.*"

Offences committed by servants.—See "*Offences.*"

See "*Attachment,*" "*Bonds,*" "*Domicile,*" "*Executor,*" "*Military Men,*" "*Partnership,*" "*Possession,*" and *Index.*

APPRENTICES.

Binding of apprentices.—The Apprentices Act was passed for better enabling children, and especially orphans and poor children brought up by public charity, to learn trades, crafts and employments by which, when they come to full age, they may gain a livelihood. Any child above the age of 10 and under under the age of 18 may be bound apprentice by his or her father or guardian to learn any fit trade for such term as is set forth in the contract of apprenticeship, not exceeding seven years, so that it be not prolonged beyond the time when such child shall be of the full age of 21 years, or in the case of a female beyond her marriage. A Magistrate or Justice of the Peace may act as guardian on behalf of orphans or poor children abandoned by their parents or of

2) Act XIII of 1859, repealed partly by Act XVI of 1874.

children convicted of vagranoy or the commission of any petty offence. An orphan or poor child brought up by any public charity may be bound apprentice by the Governors, Directors, or Managers thereof.[3]

Sea service.—Any such boy may be bound apprentice in the sea service to any of Her Majesty's subjects being the owner of any registered ship belonging to and trading from any port in the territories under the Government of India, to be employed in any such ship, the property of such person, commanded by a British subject, and while so employed, to be taught the craft and duty of a seaman.[4]

Contract of apprenticeship.—Every contract of apprenticeship must be in writing and in the form prescribed by the Act or to the like effect, and must be deposited in the office of the chief Magistrate of the place or district where it has been executed, or in case of sea service, in the ship's registry office at the port where the apprentice is to begin his service. A certified copy will be given to each of the parties. The contract must be signed by the person to whom the apprentice is to be bound, and by the person by whom he is bound, and by the apprentice when he is of the age of 14 years or more at the time of binding.[5]

Alteration or cancellation of contract.—The terms of service may be changed at any time during the apprenticeship, or the contract may be put an end to, with the consent of both parties to the contract or their personal representatives, and with the consent of the apprentice if he is above the age of 14 years, provided that the changes agreed to, or the termination of the contract, must be expressed in writing on the original contract, with the signatures of the proper parties.[6]

Change of masters.—The master of any apprentice bound under this Act may, with the consent of the person by whom he was bound, and with the consent of the apprentice, if he is above the age of 14 years, assign such apprentice to any other person who is willing to take him for the residue of his apprenticeship and subject to the conditions thereof; such last mentioned person must, by endorsement under his own hand on the contract, declare his acceptance of such apprentice and acknowledge himself bound by the agreements and covenants therein mentioned to be performed on the part of the master: the consent of the other parties must be expressed in writing on the same and signed by them respectively.[7]

Neglect of master.—Upon complaint to any Magistrate by or on behalf of any apprentice bound under this act of refusal or

3) Act XIX of 1850, ss. 1, 3, 4, 9.
4) ib., s. 5.
5) ib., ss. 9 and 10.
6) ib., s. 11.
7) ib., s. 12.

neglect to provide for him, or to teach him according to the contract of apprenticeship, or of cruelty or other ill-treatment by his master, or the agent under whom he shall have been placed by his master, the Magistrate may summon the master or agent and cancel the contract and assess upon the offender a reasonable sum for behoof of the apprentice, not exceeding four times the amount of the premium paid, or if no premium or a less premium than Rs. 50 was paid, not exceeding Rs. 200.[8]

Chastisement of apprentice.—No contract of apprenticeship will be cancelled, nor will a master or his agent be liable to any criminal proceeding on account of such moderate chastisement for misbehaviour given to any apprentice as may lawfully be given by a father to his child.[9]

Ill-behaviour of apprentice.—A Magistrate may, upon complaint by the master or his agent of ill-behaviour of apprentice, bound to him under this Act, or of his having absconded, punish the offender by keeping him, if a boy, in a debtor's prison or other suitable place, not being a criminal jail, for any term not exceeding a month, of which one week may be in solitary confinement, during which time such allowance for his keep must be made by his master or agent as the Magistrate shall order; and if the boy be not more than 14 years of age, the Magistrate may order him to be privately whipped; or in the case of a girl or boy, pass an order empowering the master or agent to keep the offender in close confinement in his own house, or on board the vessel to which he belongs, upon bread and water, or such other plain food as may be given without injury to the health of the apprentice, for a period not exceeding one month. In case of wilful and repeated ill-behaviour on the part of an apprentice, the Magistrate may order the contract to be cancelled.[1] Complaints by masters against their apprentices must be brought within one month after the cause of complaint arose, or if it arose on board ship during a voyage within a month of arrival at port. Complaints of apprentices must be brought within three months after the same dates.

Death of master.—On the death of the master of an apprentice the contract is ended, and a proportionate part, corresponding to the unexpired portion of the term, of any premium which shall have been paid must be refunded by the executors or administrators of the deceased master. But if the executors or administrators continue the late master's business, and within three months of his death offer in writing to keep the apprentice on the former terms, the late master's estate will not be liable for any refund. Any apprentice whose master has died during the appren-

8) ib., s. 13. 9) ib., s. 14. 1) ib., ss. 15, 16, 18.

ticeship, is entitled to maintenance for three months after the master's death out of the assets left by him, provided he lives with and serves as an apprentice the executors or administrators, or such person as they may appoint.[2]

Insolvency of master.—When the master of an apprentice becomes insolvent during the apprenticeship, the apprentice is discharged from all obligation under the contract; and if any premium was paid, he or the person by whom he was bound is entitled to claim the amount thereof, as a debt against the estate of the insolvent.[3]

2) ib., ss. 19, 21.

3) ib., s. 22.

MILITARY MEN.

AUTHORITIES—Act X of 1865 (Succession). Civil Procedure Code: Act II of 1886 : 26 and 27 Vic., cap. 57 (Regimental Debts).

Wills of soldiers and sailors—See "*Wills.*"

May authorise person to sue or defend for them.—When any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending it in person, he may authorize any person to sue or defend in his stead. This person may himself appoint a pleader to conduct the suit on the behalf of the officer or soldier. The authority must be in writing and signed by the officer or soldier in the presence of (*a*) his commanding officer (*i.e.*, the officer in actual command for the time being), or the next subordinate officer, if the party be himself the commanding officer; or (*b*) when the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. The commanding or other officer must countersign the authority, which must be filed in Court.[1]

Service of process.—Processes served upon any person so authorised to conduct the suit, or upon any pleader appointed by the latter, are as effectual as if they had been served on the party in person or on his pleader. When an officer or a soldier is a defendant, the Court will send a copy of the summons to his commanding officer for the purpose of being served on him. The officer to whom the copy is sent, must, after serving it, if practicable, return it to the Court with the written acknowledgment of the defendant endorsed thereon. If from any cause the copy cannot be served, it must be returned to the Court by which it was sent, with information of the cause which has prevented the service.[2]

Warrant of arrest in cantonments, etc.—If, in the execution of a decree, a warrant of arrest or other process is to be executed within the limits of a cantonment, garrison, military station or military bazar, the officer charged with the execution of the warrant or other process must deliver it to the commanding officer. The latter must back the warrant or other process with his signature, and in the case of a warrant of arrest, if the person named therein is within the limits of his command, must arrest and deliver him to the officer charged with the execution of the decree.[3]

1) Civ. Pr. Code, ss. 465, 466. 2) ib., s. 468. 3) ib., s. 469.

Officer appointed to try suits in military bazars—See "*Action and Actionable Claim*," p. 5.

Military Courts of Request—*Ibid.*

The Regimental Debts Act contains provisions relating to the payment of regimental debts, and the distribution of the effects of officers (*i.e.*, commissioned officers of H. M.'s army or H. M.'s *Indian* army) and soldiers (*i.e.*, soldiers of H. M.'s army or *European* soldiers of H. M.'s *Indian* army, including a warrant and a non-commissioned officer) dying on service, and for the security and application of the effects of deserters and others, and of officers and soldiers becoming insane on service. When an officer or soldier dies on service, the following classes of expenses and debts are considered **preferential charges** on his personal property, and are payable thereout in preference to all other debts and liabilities, and, as among themselves, in the following order :—(1) expenses of last illness and funeral; (2) military debts, *viz.*, sums due in respect of quarters, mess, band, clothing, etc.; (3) servants' wages, not exceeding two months' wages to each servant; (4) household expenses incurred within a month before the death or after the last issue of pay to the deceased, whichever is the shorter period. The surplus only of personal property remaining over after payment of preferential charges is deemed personal estate with reference to the calculation of probate duty, or of any other tax or percentage, or for any of the purposes of administration or distribution. (See "*Administration.*") Immediately on the death of an officer or soldier on service, a committee of officers called the **Committee of Adjustment** secure his effects : provided that if the representative of the deceased, or his widow (if any), or any of his next-of-kin, pays in full the preferential charges, the Committee of Adjustment will not interfere in relation to the property. If such payment is not made the Committee have power to sell and convert effects and to get in credits, and, after payment of expenses, to secure surplus. In India the Committee have power in certain cases to deliver over the effects to the **Administrator-General.** The Act, except in the cases expressly provided for by it, places a restriction on the interposition of official administrators. The Act further provides for the disposal of the surplus and for the disposal of the residue by the Secretary of State.[4]

Offences relating to the Army—See Penal Code, ss. 131—140.

See "*Attachment*," p. 62; "*Domicile*," p. 214; "*Income-Tax*," p. 302; and *Index.*

4) 26 & 27 Vic., cap. 57, *passim.*

MINORITY AND MINORS.

AUTHORITIES—Acts IX of 1875; VIII of 1890: IX of 1872 (Contract): Penal Code: Acts X of 1865; XXI of 1870; Civil Procedure Code: Cases cited.

The age of majority of persons domiciled in India.—The age of majority for all persons domiciled in British India (see "*Domicile*") is the completion of the *eighteenth* year with two exceptions:—(1) Every minor of whose person or property, or both, a guardian, other than a guardian for a suit (v. *post*), has been or shall be appointed by any Court of Justice, before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age is, notwithstanding anything contained in the Indian Succession Act (X of 1865) or in any other enactment, deemed to have attained his majority when he shall have completed his age of *twenty-one* years and not before; (2) the above provisions do not affect (*a*) the capacity of any person to act in the following matters:—Marriage, Dower, Divorce, and Adoption (see "*Divorce and Matrimonial Law*" and "*Marriage*"; (*b*) the religion or religious rites and usages of any class of Her Majesty's subjects in India; or (*c*) the capacity of any person who, before 2nd March 1875, attained majority under the law applicable to him.[1]

In computing the age of any person, the day in which he was born is to be included as a whole day, and he will be deemed to have attained majority at the beginning of the twenty-first, or eighteenth anniversary of that day, as the case may be.[2]

European British subjects not domiciled in India attain their age of majority at twenty-one. The age of majority of Europeans not British subjects is governed by the personal law of their domicile (see "*Domicile*"). The age of majority in the cases mentioned in exception 2 in the first paragraph, is decided by the personal law of the individual and the special or local law applicable to the case.[3]

Contracts with minors are voidable at their option, *i.e.*, the minor may enforce the contract, but not the other party.[4] Subject to what is stated in the next paragraph, the plea of

1) Act IX of 1875, ss. 2, 3, (extends to the whole of British India, and so far as regards British subjects, to Allied States): Act VIII of 1890, s. 52.

2) Act IX of 1875, s. 4.

3) I. L. R., 7 All., 490.

4) I. L. R., 11 Cal., 552: I. L. R., 17 Cal., 223: I. L. R., 13 Bom., 50.

minority is a complete defence to an action founded on contract brought against a minor. A minor may, however, ratify a contract entered into by him while a minor, and on attaining his majority take up and carry on transactions commenced while he was a minor in such a way as to bind himself as to the whole.[5] See also "*Agency*," "*Partnership*."

A minor is liable for necessaries supplied to him.—A person who has supplied to a minor, or to any one whom he is legally bound to support, (*e.g.*, his wife and children,) *necessaries* suited to his condition in life, is entitled to be reimbursed on account of such supplies from the property of the minor. Things necessary are those without which an individual cannot reasonably exist: food, raiment, lodging and the like: instruction in art or trade, or intellectual, moral, and religious information. But the extent to which any of these are necessaries varies according to the state and condition of the minor himself. What is a necessary in the case of a rich minor, may not be so in the case of a poor one. The test is, are the things supplied appropriate to the minor's rank of life? Are they essential to the existence and reasonable advantage and comfort of the minor? Thus articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed. In all cases there must be personal advantage to the minor himself.[6] Where a suit has been brought against a minor, the effect of which, if successful, would be to deprive the minor of his property, the costs of successfully defending that suit on his behalf may be recovered as necessaries.[7] The burthen is on the plaintiff to show that the articles supplied were necessaries.[8]

Transfer of property by minor—See "*Transfer of Property*."

Onerous gift to minor—See "*Gifts*."

Marriage of minor—See "*Marriage*."

Agency.—A minor cannot employ an agent, but he may himself be one: but he cannot become an agent, so as to become responsible to his principal.[9] See "*Agency*."

Minor partner—See "*Partnership*."

A minor may enter into a contract of service—See "*Masters, Servants and Apprentices*."

Liability for torts.—A minor is liable in damages for all actionable wrongs, independent of contract, committed by him, such as assault, false imprisonment, libel, slander, seduction,

5) I. L. R., 17 Cal., 232.
6) 13 M. & W., 252.
7) I. L. R., 7 Cal., 140.
8) L. R., 4 Ex., 32: 11 M. & W., 671.
9) Act IX of 1872, s. 184.

detention of goods, trespass, conversion or detention of moveable property, negligence, fraud.[1] See "*Introduction.*"

Unconscionable bargains with persons who have recently attained their majority will be set aside by the Court. "It is sufficient for the application of the principle, if the parties meet under such circumstances as in the particular transaction, to give the stronger party a dominion over the weaker; and such power and influence are generally possessed in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience, and moral imbecility."[2]

Criminal liability of children.—Nothing is an offence which is done by a child under seven years of age. Nothing is an offence which is done by a child above that age, but under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.[3] After the age of twelve, a minor is liable to the penalties of the criminal law to the same extent as an adult.

Minor trustee—See "*Trusts and Trustees.*"

Evidence of child witness—See "*Oaths, Evidence, and Witnesses.*"

Domicile of minor—See "*Domicile.*"

Testamentary power of minors.—A minor cannot dispose of his property by will;[4] he may, however, make a will appointing a guardian for his child during minority.[5] See "*Wills.*"

Maintenance of legitimate and illegitimate children—See "*Husband and Wife.*"

Guardian of minor—See "*Guardian and Ward.*"

Minor plaintiff.—Every suit by a minor must be instituted in his name by an adult person, who in the suit is called the **next friend** of the minor, and who may be ordered to pay any costs in the suit as if he were the plaintiff.[6] If a minor has a guardian appointed or declared by an authority competent in this behalf, a suit cannot be instituted on behalf of the minor by any person other than such guardian except with the leave of the Court granted after notice to such guardian, and after hearing any objections which he may desire to make with respect to the institution of the suit; the Court will not grant such leave unless it is

1) 3 N. W., 191 : 1 Esp. N. P. C., 172.
2) I. L. R., 1. Cal., 120 : L. R., 8 Ch. App., 491.
3) Penal Code, ss. 82, 83 : 22 W. R., Cr. R., 27.
4) Act X of 1865, s. 46. This provision has been incorporated in the Hindu Wills Act, XXI of 1870, and applies to wills of Hindus, Jainas, &c., in the Lower Provinces of Bengal and in the towns of Madras and Bombay.
5) Act X of 1865, s. 47.
6) Civ. Pr. Code, s. 440.

of opinion that it is for the welfare of the minor that the person proposing to institute the suit in the name of the minor should be permitted to do so.[7] Every application to the Court on behalf of a minor (except an application to appoint a new next friend, (v. *post*) must be made by his next friend, or his guardian for the suit (*see next paragraph*). If a plaint be filed by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.[8] **Any person being of sound mind and full age may act as next friend of a minor,** provided his interest is not adverse to that of the minor, and he is not a defendant in the suit.[9] If the interest of the next friend of a minor is adverse, or if he is so connected with a defendant whose interest is adverse to that of the minor, as to make it unlikely that the minor's interest will be properly protected by him, or if he does not do his duty, or, pending the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal.[1] If the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared who desires to be himself appointed in the place of the next friend, the Court will remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor.[2]

Guardian ad litem of minor defendant. — Where the defendant to a suit is a minor, the Court will appoint a proper person to be guardian for the suit (called the "*guardian ad litem*") for the minor, to put in the defence for him, and generally to act on his behalf in the conduct of the case.[3] When an authority competent in this behalf has appointed or declared a guardian or guardians of the person or property or both, of the minor, the Court must appoint him or one of them, as the case may be, to be the guardian for the suit under this section unless it considers, for reasons to be recorded by it, that some other person ought to be so appointed.[4] An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor, or by the plaintiff, on affidavit shewing that the proposed guardian has no interest in the matters in question in the suit adverse to that of the minor, and that he is a fit person to be so appointed. Where there is no other person fit and will-

7) Act VIII of 1890, s. 53.
8) Civ. Pr. Code, s. 442.
9) ib., s. 445.
1) ib., s. 446.
2) Act VIII of 1890, s. 53. See "*Guardian and Ward.*"
3) Civ. Pr. Code, s. 443.
4) Act VIII of 1890, s. 53. See "*Guardian and Ward.*"

ing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian : provided that he has no interest adverse to that of the minor.[5] A co-defendant of sound mind and of full age may be appointed guardian for the suit, if he has no interest adverse to that of the minor ; but neither a plaintiff nor a married woman can be so appointed. If the guardian for the suit of a minor defendant does not do his duty, or if other sufficient ground be made to appear, the Court may remove him, and may order him to pay such costs as may have been occasioned to any party by his breach of duty. If the guardian dies pending the suit, or is removed by the Court, the Court will appoint a new guardian in his place. When the enforcement of a decree is applied for against the minor heir or representative of a deceased party, a guardian *ad litem* will be appointed by the Court. The decrée-holder must then serve on the guardian notice of the application.[6]

Retirement, removal, and death of next friend.—Unless otherwise ordered by the Court, a next friend cannot retire at his own request without first procuring a fit person to be put in his place, and giving security for the costs already incurred. The application for the appointment of a new next friend must be supported by affidavit showing the fitness of the person proposed, and also that he has no interest adverse to the minor. On the death or removal of a next friend of a minor, further proceedings are stayed until the appointment of a next friend in his place. If the pleader of such minor omits, within reasonable time, to take steps to get a new next friend appointed, any person interested in the minor, or the matter at issue, may apply to the Court for the appointment of one, and the Court will then appoint such person as it thinks fit.[7]

Effect of order obtained without next friend or guardian.—Every order made in a suit or on any application before the Court, in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, with costs to be paid by the pleader of the party at whose instance such order was obtained if the pleader knew, or might reasonably have known, the fact of such minority.[8]

Course to be followed by minor plaintiff on coming of age.—A minor plaintiff, or a minor not a party to a suit on whose behalf an application is pending, on coming of age must elect whether he will proceed with the suit or application. **If he elects to proceed with the suit or application**, he must

5) Civ. Pr. Code, s. 456.
6) ib., ss. 457—460.
7) ib., ss. 447—449.
8) ib., s. 444.

apply for an order discharging the next friend, and for leave to proceed in his own name. **If he elects to abandon the suit or application,** he must, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on payment of the costs incurred by the defendant or respondent, or which may have been paid by his next friend.[9] A minor co-plaintiff on coming of age must, **if he desires to repudiate the suit,** apply to have his name struck out as co-plaintiff; the Court will then, if it finds that he is not a necessary party, dismiss him from the suit on such terms as to costs or otherwise as it thinks fit. Notice of the application must be given to the next friend, as well as to the defendant. The Court may, if the late minor be a necessary party to the suit, direct him to be made a defendant.[1]

Unreasonable or improper suits.—If any minor on attaining majority can prove to the satisfaction of the Court that a suit instituted in his name by a next friend was unreasonable or improper, he may, if a sole plaintiff, apply to have the suit dismissed, on notice to all the parties concerned; if the Court grants the application it may order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit.[2]

Limitation of powers of next friend and guardian.—A next friend or guardian for the suit cannot, without the leave of the Court, **receive any money or other moveable property** on behalf of a minor, either—(*a*) by way of compromise before decree or order; or (*b*) under a decree or order in favour of the minor. Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court will, if it grants him leave to receive the property, require such security and give such directions as will in its opinion sufficiently protect the property from waste and ensure its proper application.[3] No next friend or guardian for the suit can, without leave of the Court, enter into any agreement or **compromise** on behalf of a minor with reference to the suit in which he acts as next friend or guardian. Any such agreement or compromise entered into without the leave of the Court is voidable against all parties other than the minor.[4] See "*Guardian and Ward.*"

Lunatics.—The above provisions apply, *mutatis mutandis*, in the case of persons of unsound mind, adjudged to be so under

9) ib., ss. 450—452.
1) ib., s. 454.
2) ib., s. 455.
3) Act VIII of 1890, s. 53.
4) Civ. Pr. Code, s. 462.

Act XXXV of 1858, or under any other law for the time being in force;[5] v. *post*. See "*Lunacy*."

Princes and Chiefs.—None of the above provisions relating to suits by minors applies to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued, by direction of the Governor-General in Council or a Local Government, in the name of an agent or in any other name.

Saving of local law.—None of the above-mentioned provisions will be construed to affect, or in any way derogate from, the provisions of any local law for the time being in force relating to suits by or against minors, or by or against lunatics, or other persons of unsound mind.[6]

Kidnapping minor from lawful guardianship—See "*Offences*."

Selling or buying of minor for purposes of prostitution—See "*Offences*."

See "*Guardian and Ward*," "*Husband and Wife*," "*Marriage*," "*Offences*," and *Index*.

5) Ib., s. 463.

6) Act VIII of 1890, s. 53.

MISCHIEF.

AUTHORITY—Indian Penal Code.

Nature of the offence.—Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property, or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously, commits "mischief," *e.g.*—A introduces water into an ice-house belonging to Z, and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief. The main element of the offence is the improper intention. Hence, "if a person deals injuriously with property in the *bonâ fide* belief that it is his own, he cannot be convicted of the offence of mischief, because his act was not committed with intent to cause wrongful loss or damage to any one." It is not essential to the offence that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not, *e.g.*—A having insured a ship, voluntarily causes the same to be cast away with the intention of causing damage to the underwriters. A has committed mischief. Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly, *e.g.*—A having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief. Mischief is punishable with imprisonment which may extend to three months, or with fine or with both. Certain forms of the offence are punishable more severely.[1]

Mischief to animals—See "*Animals.*"

Certain forms of the offence.—The following are punishable under the Code. Mischief (1) by injury to works of **irrigation,** or by causing diminution of the supply of **water** for food or drink of human beings, or for animals which are property, or for cleanliness, or for carrying on any manufacture; (2) by injury to public **road, bridge, or river**; (3) by causing **inundation** or **obstruction** to public **drainage** attended with damage; (4) by destroying or moving, or rendering less useful a **light-house** or **sea-mark,** or by exhibiting false lights; (5) by destroying or moving, etc., a **land-mark** fixed by public authority; (6) by **fire** or

1) Penal Code, ss. 425, 426.

explosive substance with intent to cause damage to the amount of Rs. 100, or to destroy a house; (7) with intent to destroy or make unsafe a decked **vessel**, or a vessel of 20 tons burden or upwards; (8) intentionally running vessels aground or ashore with intent to commit theft or misappropriation.[2]

Fraudulent cancellation, destruction, etc., of a will—See "*Wills.*"

See "*Offences*" and "*Prosecution.*"

2) ib., ss. 430—439.

MORTGAGE.

AUTHORITIES—Act IV of 1882 (Transfer of Property) extends to the whole of British India, except the territories administered by the Governor of Bombay, the Lieutenant-Governor of the Punjab, and the Chief Commissioner of British Burma; Shephard and Brown's Commentaries on Act IV of 1882, 2nd edition: Act XXVII of 1866 (Indian Trustee Act): Act XXVIII of 1866 (Trustees and Mortgagees Powers Act): Fisher on Mortgages, 4th edition.

A "mortgage" is the transfer of an interest in specific *immoveable* property for the purpose of securing: (*a*) the payment of money advanced or to be advanced by way of loan; (*b*) an existing or future debt; or (*c*) the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a **mortgagor**, the transferee a **mortgagee**; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.[1] Mortgages are of several forms: (*a*) simple; (*b*) by conditional sale; (*c*) usufructuary; (*d*) English; if they are in neither of these forms they are anomalous. In order that an instrument should operate as a mortgage no special form of words is required, but it must appear that an interest in *specific* immoveable property was transferred, and that a *security* was intended.[2]

Simple mortgage.—Where, *without* delivering possession of the mortgaged property, the mortgagor binds himself *personally* to pay the mortgage-money, *and agrees* (expressly or impliedly) *that*, in the event of his failing to pay according to his contract, *the mortgagee shall have a right to cause the mortgaged property to be sold*, and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage, and the mortgagee a simple mortgagee.[3]

Mortgage by a conditional sale.—Where the mortgagor ostensibly sells the mortgaged property *on condition* that: (1) on default of payment of the mortgage-money on a certain date the sale shall become absolute; or (2) on such payment being made the sale shall become void; or (3) on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale, and the mortgagee a mortgagee by conditional sale.[4] This form of mortgage is known in Bengal as *kat-kabala* or *bye-bil-wufa*, in Madras as *drishta-bundhaka*, and in Bombay as *Gahan Lahan*.[5]

1) Act IV of 1882, s. 58.
2) Shephard and Brown, p. 197.
3) Act IV of 1882, s. 58.
4) ib.
5) Shephard and Brown, p. 213.

Usufructuary mortgage.—Where the mortgagor *delivers possession* of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, *and to receive the rents and profits accruing from the property and to appropriate them* in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.[6]

English mortgage.—Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property *absolutely* to the mortgagee, but *subject to a proviso* that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.[7]

Anomalous mortgages.—In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties are determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.[8]

How effected.—Where the principal money secured is Rs. 100 or upwards, a mortgage can be effected only by a **registered instrument** signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than Rs. 100, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property. Mortgages, however, made in the towns of Calcutta, Madras, Bombay, Karáchí and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon, are valid. This form of mortgage is called "**equitable mortgage**" or "**by deposit of title-deeds.**[9] It is not necessary to constitute an equitable mortgage that there should be any writing; and if there is any writing which merely records the deposit and the purpose for which it was made, registration is not required.[1]

Rights and Liabilities of Mortgagor.

Right to redeem.—At any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the

6) Act IV of 1882, s. 58.
7) ib.
8) s. 98, ib.
9) s. 59, ib.; neither this section, nor ss. 107 and 123 (relating to the registration of leases and gifts) extends to any district excluded from the operation of the Registration Act, 1877: s. 1, ib.
1) Shephard and Brown, p, 228.

mortgagee (*a*) to deliver the mortgage-deed, if any, to the mortgagor ; (*b*) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (*c*) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished : Provided that the right above mentioned has not been extinguished by act of the parties or by order of a Court ; (as by a decree for foreclosure or sale). This right is called a right to redeem, and a suit to enforce it is called a **suit for redemption.** As to the parties in a suit for redemption, v. *post.* Any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money is valid. A person interested in a share only of the mortgaged property is not entitled to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor, *e.g.*—A and B mortgage certain property to C. C, the mortgagee, purchases B's share in the property. A is allowed to redeem his share on paying a proportionate amount. A mortgagor seeking to redeem any one mortgage is, in the absence of a contract to the contrary, entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem, *e.g.*—A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone. By this provision what is known as the "**consolidation**" of mortgages is disallowed : "The doctrine of consolidation has been defined as follows :—If the owner of different estates mortgage them to one person separately for distinct debts, or successively to secure the same debt, or the same debt with further advances, the mortgagee, so long as both securities exist, may insist that one security shall not be redeemed alone :"[2] v. *post.*

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property : (*a*) where the mortgagee is authorized to pay himself the mortgage

2) Act IV of 1882, ss. 60, 61 : Fisher on Mortgages, 4th edn., p. 597.

money from the rents and profits of the property,—when such money is paid; (*b*) where the mortgagee is authorised to pay himself from such rents and profits the interest of the principal money,—when the term (if any), prescribed for the payment of the mortgage-money has expired, and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court.[3]

Accession to mortgaged property.—Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, (*i.e.*, natural accessions and accessions other than those acquired at the mortgagee's cost,) the mortgagor, upon redemption, is, in the absence of a contract to the contrary, entitled as against the mortgagee to such accession.[4]

Where such accession has been acquired *at the expense of the mortgagee*, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest. In the case last mentioned the profits, if any, arising from the accession will be credited to the mortgagor. Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession will, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.[5]

Renewal of mortgaged lease.—Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, will, in the absence of a contract by him to the contrary, have the benefit of the new lease.[6]

Implied contracts by mortgagor.—*In the absence of a contract to the contrary*, the mortgagor is deemed to contract with the mortgagee: (*a*) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same; (*b*) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto; (*c*) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect

3) Act IV of 1882, s. 62.
4) v. *post*, s. 70.
5) ib., s. 63. See also s. 72, *post*.
6) ib., s. 64, v. *post*, s. 71.

of the property; (*d*) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts; (*e*) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance. Nothing in clause (*c*) or in clause (*d*), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage.

The benefit of the contracts above mentioned are annexed to and go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.[7]

Waste by mortgagor in possession.—A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act. A security is "insufficient" unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.[8]

Rights and Liabilities of Mortgagee.

Right to foreclosure or sale—*In the absence of a contract to the contrary*, the mortgagee has, at any time *after* the mortgage-money has become payable to him, and *before* a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited (v. *post*), a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold. A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called **a suit for foreclosure.**[9] Nothing in this section

7) Act IV of 1882, s. 65. 8) s. 66, ib. 9) s. 67, ib.

will be deemed—(*a*) to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale ; (as neither the simple nor usufructuary mortgagee has the whole property in the land transferred to him, neither can sue for foreclosure. To the usufructuary mortgagee sale is unnecessary, as he is able to realise his right by possession and enjoyment of the profits. The mortgagee by conditional sale does not require a suit for sale because the property has already been sold to him on a condition, and by the default of the mortgagor such sale has become absolute. The remedy of the simple mortgagee is a suit for sale, and the remedy of the mortgagee by conditional sale a suit for foreclosure, and if he is not in possession, an order for possession [1] ;) or (*b*) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure ; or (*c*) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale ; or (*d*) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage [2]

Right to sue for mortgage-money.—The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only :—(*a*) where the mortgagor binds himself to repay the same : (*b*) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor : (*c*) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section sixty-six (v. *ante*), the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.[3]

Power of sale : when valid.—A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-

1) Shephard and Brown, pp. 261—264, v. *post*, s. 87.

2) v. *ante*, s. 60, § 4 of which paragraph this is the converse.

3) Act IV of 1882, s. 68.

money, the mortgaged property, or any part thereof, *without the intervention of the Court*, is valid in the following cases, namely—(*a*) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindú, Muhammadan or Buddhist, or a member of any other race, sect, tribe or class specified in this behalf by the Local Government in the local official gazette;[4] (*b*) where the mortgagee is the Secretary of State for India in Council; (*c*) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi or Rangoon. *But no such power can be exercised unless and until*—(1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or (2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exercise of such a power, the title of the purchaser is not impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power has his remedy in damages against the person exercising the power. The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court (v. "*Transfer of Property*") of a sum to meet any prior incumbrance, must, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received must be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof. Nothing in the former part of this paragraph applies to powers conferred before this Act came into force. (1 July 1882.[5])

Accession to mortgaged property.—If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, is, for the purposes of the security, entitled to such accession: *e.g.*:—(*a*) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security,

4) Act III of 1885, s. 5.

5) Act IV of 1882, s. 69.

B is entitled to the increase. (*b*) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.[6]

Renewal of mortgaged lease.—When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, *in the absence of a contract to the contrary*, is, for the purposes of the security, entitled to the new lease.[7]

Right of mortgagee in possession.—When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, **he may spend such money as is necessary**—(*a*) for the due management of the property and the collection of the rents and profits thereof; (*b*) for its preservation from destruction, forfeiture or sale; (*c*) for supporting the mortgagor's title to the property; (*d*) for making his own title thereto good against the mortgagor; and (*e*) when the mortgaged property is a renewable leasehold, for the renewal of the lease; and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum. Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, **insure** and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance are a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate. But the amount of such insurance must not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured. The mortgagee, however, is not authorised to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is authorized to insure[8] (v. *post*, "Liabilities of mortgagee in possession").

Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part.[9]

Right of subsequent mortgagee to pay off prior mortgagee.—Any second or other subsequent mortgagee may, at any

6) Act IV of 1882, s. 70, ib. 7) s. 71, ib. 8) s. 72, ib. 9) s. 73, ib.

time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee will, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.[1]

Rights of mesne mortgagee against prior and subsequent mortgagees.—Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees, as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor:[2] *e.g.*: A mortgages Whiteacre successively to B, C and D: C and D have against B, and D has against C, the same rights as A has under the several mortgages against B, C and D., whilst C has against D the same rights as he has against A. That is to say, the later can redeem the prior mortgagee and exercise the right of foreclosure or sale against any mortgagee posterior to him.[3]

Liabilities of mortgagee in possession.—When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property—(*a*) he must manage the property as a person of ordinary prudence would manage it if it were his own; (*b*) he must use his best endeavours to collect the rents and profits thereof; (*c*) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government-revenue, all other charges of a public nature accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold; (*d*) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (*c*) and the interest on the principal money; (*e*) he must not commit any act which is destructive or permanently injurious to the property; (*f*) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money; (*g*) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee,

1) Act IV of 1882, s. 74. 2) s. 75, ib. 3) Shephard and Brown, pp. 288, 289.

and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported; (*h*) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, will, after deducting the expenses mentioned in clauses (*c*) and (*d*), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, will be paid to the mortgagor; (*i*) when the mortgagor tenders, or deposits (v. *post*) the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortggaed property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be. If the mortgagee fail to perform any of the abovementioned duties imposed upon him, he may, when accounts are taken in pursuance of a decree, be debited with the loss, if any, occasioned by such failure.[4]

Nothing in clauses (*b*), (*d*), (*g*) and (*h*), (v. *ante*) applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.[5]

Priority.

Postponement of prior mortgagee.—Where, through the fraud, misrepresentation, or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee will be postponed to the subsequent mortgagee.[6]

Mortgage to secure certain amount when maximum is expressed.—If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum, to be secured thereby, a subsequent mortgage of the same property will, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage: *e.g.*:— A mortgages Sultánpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A

4) Act IV of 1882, s. 76. 5) s. 77, ib. 6) s. 78, ib.

then mortgages Sultánpur to C, to secure Rs. 10,000, C having notice of the mortgage to B & Co., and C gives notice to B & Co. of the second mortgage. At the date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000. B & Co. subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co. are entitled, to the extent of Rs. 10,000, to priority over C.[7]

Tacking abolished.—The general rule of priority is "*prior tempore, prior jure*," but in English law this rule was modified by the doctrines of Consolidation and Tacking; neither Consolidation (*v. ante*) nor Tacking are allowed under the Act. Tacking was a device by which one mortgagee benefited at the expense of another mortgagee: *e.g.*:—The estate of Blackacre, worth £12,000, is mortgaged first to A for £6,000, secondly to B for £3,000, thirdly to C for £3,000. If C, at the time of taking security, *knew not* of B's charge, he might have purchased A's claim, and *tacked* on his own £3,000. He would then have squeezed out B and become entitled to have £9,000 paid to him before B was paid anything. Under the Indian Act, on the contrary, no mortgagee paying off a prior mortgage, whether with *or without* notice of an intermediate mortgage, thereby acquires any priority in respect of his original security. And, except in the case provided for by the last paragraph, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, thereby acquires any priority in respect of his security for such subsequent advance.[8]

Marshalling and Contribution.

Marshalling securities.—If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.[9]

Contribution to mortgage debt.—Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the

7) Act IV of 1882, s. 79. 8) s. 80, ib. 9) s. 81, ib.

date of the mortgage. Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid. Nothing in this paragraph applies to a property liable under section eighty-one (see the last paragraph) to the claim of the second mortgagee.[1]

Deposit in Court.

Deposit in Court of money due on mortgage.—At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage. The Court will thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a verified petition stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited will be delivered to the mortgagor or such other person as aforesaid.

When the mortgagor or such other person as aforesaid has tendered or deposited in Court the amount remaining due on the mortgage, interest on the principal money will cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

Nothing in these provisions deprives the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.[2]

Foreclosure and Sale.

Suits for foreclosure, sale, or redemption.—Subject to the provisions of the Code of Civil Procedure, section 437,[3] all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit relating to such mortgage: Provided that the plaintiff has notice of such interest.

Decree and procedure in foreclosure suit.—In a suit for foreclosure, if the plaintiff succeeds, the Court will make a decree,

1) Act IV of 1882, s. 82. 2) ss. 83, 84, ib. 3) See p. 30.

ordering (1) that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree, and (2) ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; *but* that (3), if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

If payment is made of such amount and of costs of mortgagee subsequent to decree (v. *post*), the defendant will (if necessary) be put into possession of the mortgaged property. If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court will then pass such order, and may, if necessary, deliver possession of the property to the plaintiff. On the passing of such order the debt secured by the mortgage will be deemed to be discharged: Provided that the Court may, upon good cause shewn, and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment.[4]

Decree and procedure in suit for sale.—In a suit for sale, if the plaintiff succeeds, the Court will pass a decree to the effect mentioned in the first and second clauses of the last paragraph, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same. In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks

4) Act IV of 1882, ss. 86, 87.

fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

If the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and the costs subsequent to decree, the defendant will (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court will then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in the previous part of this paragraph; and thereupon the defendant's right to redeem and the security will both be extinguished.

When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.[5]

REDEMPTION.

Who may sue for redemption.—Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property:—(*a*) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property; (*b*) any person having any interest in or charge upon the right to redeem the property; (*c*) any surety for the payment of the mortgage-debt or any part thereof; (*d*) the guardian of the property of a minor mortgagor on behalf of such minor; (*e*) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot; (*f*) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property; (*g*) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.[6]

Decree and procedure in redemption suit.—In a suit for redemption, if the plaintiff succeeds, the Court will pass a decree ordering—(1) that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree; (2) that, upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of

5) Act IV of 1882, ss. 88, 89, 90.

6) s. 91, ib.

declaring in Court the amount so due to be fixed by the Court, the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall re-transfer it to the plaintiff free from the mortgage and from all incumbiances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property; and (3) that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.[7] If payment is made of such amount and of the costs subsequent to decree (v. *post*) the plaintiff will, if necessary, be put into possession of the mortgaged property. If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold. If he applies for the former order, the Court will pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant. If he applies for the latter order, the Court will pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.[8] On the passing of any order under this section the plaintiff's right to redeem and the security will, as regards the property affected by the order, both be extinguished: Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day fixed under section ninety-two (v. *ante*) for payment to the defendant.[9]

Costs of mortgagee subsequent to decree.—In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court, the Court will, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.[1]

7) Act IV of 1882, s. 92. 8) s. 93, ib. 9) ib. 1) s. 94, ib.

Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.[2]

Sale of Property subject to prior Mortgage.

If any property, the sale of which is directed is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.[3]

Application of proceeds.—Such proceeds must be brought into Court and applied as follows:—(1) in payment of all expenses incident to the sale or properly incurred in any attempted sale; (2) if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage; (3) in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made; (4) in payment of the principal money due on account of that mortgage; and (5) lastly, the residue (if any) will be paid to the person proving himself to be interested in the property sold, or, if there be more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.[4]

Attachment of Mortgaged Property.

Attachment.—Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he is not entitled to bring such property to sale otherwise than by instituting a suit for foreclosure or sale under s. 67 (v. *ante*). This section is intended to prevent the mortgagee from suing his mortgagor personally and executing the money-decree so obtained against the mortgaged property, thereby depriving him of his right of redemption.[5]

Charges.

Charges.—Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, *and the transaction does not amount to a mortgage*, the latter person is said to have a charge on the property; and all the provisions abovementioned as to a mortgagor, (so far as may be), apply to the owner of such property and the

2) Act IV of 1882, s. 95. 4) s. 97, ib.
3) s. 96, ib. 5) s. 99, ib.: Shephard and Brown, p. 363.

provisions as to marshalling and contribution (v. *ante*) and all the provisions above mentioned as to a mortgagee instituting a suit for the sale of the mortgaged property (so far as may be) apply to the person having such charge.[6] Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.[7]

Extinguishment of charges.—Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance is extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.[8]

Notice and Tender.

Service or tender on or to agent.—Where the person on or to whom any notice or tender is to be served or made does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender will be deemed sufficient. Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property and such Court will direct in what manner such notice shall be served, and any notice served in compliance with such direction will be deemed sufficient. Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit will have the effect of a tender of such amount.

Miscellaneous.

Notice, etc., to or by person incompetent to contract.—Where a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served, or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of

6) Act IV of 1882, s. 100. 7) ib. 8) s. 101, ib.

serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Chapter XXXI of the Code of Civil Procedure will, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder. (v. "*Minority and Minors.*")[9]

Mortgaged debt.—When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor.[1]

Mortgagees' powers in cases to which English Law is applicable.—Mortgagees are given certain powers, commonly inserted in mortgages, by Act XXVIII of 1866,[2] in cases to which English Law is applicable, that is, generally speaking, in the case of all mortgages executed by persons, not being Hindus, Mahommedans or Buddhists. The object of the Act is to make certain powers and provisions usually inserted in settlements, mortgages, wills, and other instruments, incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument and to relieve trustees in cases to which English law is applicable. (See "*Trusts and Trustees.*") Sections 6—19 of the Act deal with the powers of mortgagees, relating to sale and appointment of receivers, powers of receivers, conveyance to purchaser, application of purchase money, etc. Notice must be given before sale, but the purchaser is relieved from inquiry as to the circumstances of the sale. Receipts for purchase money given by the person exercising the power of sale are sufficient discharges to the purchasers, who are not bound to see to the application of the purchase money.[3] The powers and provisions contained in the above-mentioned sections apply to English mortgages, wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Mahommedan, or Buddhist, or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government.[4] The Act further deals with the powers of trustees and executors, and contains provisions relating to leases, rent charges and powers. See "*Trusts and Trustees.*"

9) Act IV of 1882, ss. 102, 103.
1) s. 138, ib.
2) Applies to the whole of British India except the Scheduled Districts.
3) Act XXVIII of 1866, ss. 6—19, refer also to ss. 28—31, 44-45, ib.: cf. 22 & 23 Vic., cap. 35, and 23 and 24 Vic., cap. 145.
4) Act IV of 1882, s. 69.

Act XXVII of 1866, which consolidates and amends the law relating to the conveyance and transfer of property vested in Mortgagees and Trustees, in cases to which English law is applicable (v. *ante*), contains provisions relating to lunatic and minor mortgagees, and gives power to the High Court, in certain cases, to convey in place of a mortgagee. See "*Trusts and Trustees.*"[5]

See "*Lease*," "*Title*," "*Transfer of Property*," "*Trusts and Trustees*," and *Index*.

5) Act XXVII of 1866 (Indian Trustee Act) applies to the Lower Provinces, N.-W. Provinces, Presidencies of Madras, and Bombay, and the Punjab: cf. 13 and 14 Vic., cap. 60, and 15 and 16 Vic., cap. 55.

NEGLIGENCE.

AUTHORITIES—Pollock on Torts, 2nd edition: Underhill on Torts, 3rd edition: Alexander's Indian Case-Law on Torts: Addison on Torts, 5th ed.: Draft Indian Civil Wrong's Bill: Cases cited.

"**Negligence**" **is** the omission or failure to use due care and caution for the safety of person or property. It consists "in the omitting to do something a reasonable man would do, or doing something a reasonable man would not do, in either case unintentionally causing mischief to another."[1] "It is a public duty incumbent on every one to exercise due care in his daily life, and any damage resulting from his negligence is a tort."[2] A duty may further be imposed by statute. Failure to perform, or neglect in performing those duties is an actionable wrong. So where the Commissioners of Calcutta opened a hole in a road, but left it unfenced and insufficiently lighted at night, and the plaintiff driving along the road in the evening, drove into the hole and was injured, it was held that the defendants were liable to the plaintiff in damages.[3] It is a question of fact whether a person has or has not been negligent, and in determining whether one person has or has not been negligent towards another, regard will be had to that other's apparent means of taking care of himself. So if a person riding or driving sees, or with ordinary care would see, that a blind man, an infant, or cripple, is in the way, greater caution is required of him than if an able-bodied adult were in the same situation with regard to him.[4] A person is not liable for negligence where the facts are not less consistent with diligence than with negligence on that person's part. In all cases the burden of proving negligence lies upon the plaintiff.[5]

Contributory negligence.—A plaintiff must not, however, have so far contributed to the injury by his own neglect, that but for such neglect the injury would not have happened. "A man cannot complain of that which he has himself helped to bring about."[6] The rule of law upon this point is as follows. (1) If no fault can be attributed to the plaintiff, and there is negligence by the defendant, and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrong-doer. (2) If

1) *Per* Alderson, B., 25 L. J., Exch., 212.
2) Underhill on Torts, 3rd ed., p. 163. 3 Mad. H. C. R., 35: 2 Mad. H. C. R., 158.
3) I. L. R., 10 Cal., 445. See also I. L. R., 11 Bom., 329.
4) Pollock on Torts, pp. 570—572.
5) ib. See. 14 W. R., Q. C., 45.
6) Addison on Torts, 5th ed., p. 23.

in the same case the negligence is partly that of the defendant personally and partly that of his servants, the plaintiff can maintain an action either against the defendant or his servants. (3) If in the same case the negligence is that of the defendant's servants, though there be no personal negligence by the defendant, the plaintiff can maintain an action either against the defendant or his servants. (4) If in the same case the negligence, though not that of the defendant personally, or of a servant of the defendant, consists in an act or omission by another, done or omitted to be done in the way in which it is done or omitted to be done by the order or direction or authority of the defendant, the plaintiff can maintain an action either against the defendant, or the person personally guilty of the negligence. (5) If, although the plaintiff has himself or by his servants been guilty of negligence, such negligence did not directly partly cause the accident, as if, for example, the plaintiff or his servants having been negligent, the alleged wrong-doer might by reasonable care have avoided the accident, the plaintiff can maintain an action against the defendant. (6) If the plaintiff has been personally guilty of negligence which has partly directly caused the accident, he cannot maintain an action against any one. (7) If, although the plaintiff has not been personally guilty of negligence, his servants have been guilty of negligence which has partly directly caused the accident, the plaintiff cannot maintain an action against any one. (8) If, although the defendant or his servants has or have been guilty of negligence, the plaintiff or his servants could by reasonable care have avoided the accident, the plaintiff cannot maintain an action against any one.[7]

Negligence with respect to fire, combustible substance, explosives, and machinery—See "*Nuisance.*"

A master is liable for the negligence of his servant on the principle "*qui facit per alium facit per se.*" But neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned.[8] See "*Master, Servants and Apprentices,*" p. 432, and *ante.*

Negligent navigation—See "*Nuisance.*"

Compulsory pilotage.—Where the employment of a pilot is compulsory on board a vessel, and, such pilot being on board, an accident happens through negligence in the management of the vessel, it lies upon the owners, in order to exempt themselves from

7) *Per* Lord Esher, M. R., L. R., 12 P. D., 61. See 9 W. R., 73 (Railway Accident); 14 B. L. R., 1 O. C.
8) 4 Ex., 244: 6 M. & W., 499: L. R., 12 P. D., 62.

liability, to show that the negligence causing the accident was that of the pilot. If such negligence is partly that of the master or crew, and partly that of the pilot, the owners are not exempted from liability. If it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burthen of proof which the law casts upon them.[9]

Causing death by negligence.—Whoever causes the death of any person, by doing any rash or negligent act not amounting to culpable homicide, is punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[1] See "*Hurt*" and "*Offences.*"

Criminal negligence—See "*Nuisance.*"

Dangerous things and animals—See "*Dogs and Ferocious Animals;*" "*Nuisance.*"[2]

Liability of occupiers of property.—An occupier must keep the property occupied by him in reasonably safe condition and repair as regards (*a*) persons using that property as of right; (*b*) persons being or passing near that property as of right, and is liable as for negligence to any such person who is injured by want of such condition and repair.[3] See "*Nuisance.*"

Negligence with respect to pulling down or repairing buildings—See "*Nuisance.*"

Compensation for wrongful act, neglect or default of one person causing the death of another—See "*Executor,*" pp. 250, 251.

See "*Hurt,*" "*Nuisance,*" "*Offences,*" "*Prosecution,*" and *Index.*

9) 6 Bom. H. C. R., 98 O. C.
1) Penal Code, s. 304 A.
2) Cf. Pollock, pp. 575, 576: L. R., 1 Ind. App., 364: Penal Code, ss. 284, 285, 286, 289.
3) Pollock, p. 578: L. R., 1 C. P., 274.

NUISANCE.

AUTHORITIES—Pollock on Torts, 2nd ed. (1890): Indian Penal Code: Criminal Procedure Code: Draft Indian Civil Wrongs Bill: Cases cited.

Nuisances and their remedies.—Nuisances are of two kinds —(1) public or common, and (2) private. A person who is guilty of a private nuisance wrongs, and is liable in damages to any person thereby harmed. The remedy for a private nuisance is by an action for damages and by an injunction.[1] No criminal proceedings can be taken for a private nuisance; but a prosecution is the proper and only remedy for a public nuisance, proceedings against which should be taken under the Indian Penal Code. Where, however, a public nuisance causes *special* damage to a person beyond that which is common to others such person may bring a civil action for damages against the wrong-doer (v. *post*): *e.g.*, an action will not lie merely for placing an obstruction on a public highway; but if a person suffers damage by falling or driving against it, he may bring an action for damages.[2] Nuisances punishable under the Penal Code may still be made the subject of civil action, before or without prosecution.[3]

A private nuisance is one which affects individuals only and not the public at large, and is the using or authorizing the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property: (*a*) by diminishing the value of that property: *e.g.*, Z has chemical works near A's land, the fumes from which kill or stunt vegetation on A's land and reduce its selling value. Whether the land is or is not rendered less wholesome for human habitation, Z has wronged A[4] (*b*) by continuously interfering with his power of control or enjoyment of that property: *e.g.*, if Z has a house whose eaves overhang A's land and discharge water thereon, this is a nuisance; (*c*) by causing material disturbance or annoyance to him in his use or occupation of that property: *e.g.*, Z has a lime-kiln so near A's house that, when the kiln burns, the smoke enters A's house and prevents A and his household from dwelling there with ordinary comfort. This is a nuisance to A.[5] Or if Z, a neighbour of A's, causes bells to be rung on his land so loudly and frequently that A cannot dwell in his house in ordinary comfort. This is a nuisance to A. Where a man in the exercise of a trade or other

1) For the grounds on which an injunction will be granted, see I.L.R., 8 Bom., 35: 10 B. L. R., 241.
2) 38 L. J., Q. B., 21.
3) See I. L. R., 3 Cal., 20: 1 Bom. H. C., 2.
4) 11 H. L. C., 642.
5) 3 B. & S., 66.

operation does it in such a manner as to cause a nuisance, it is no defence that the trade or operation was carried on in a usual and proper manner, and was a reasonable use of the land.[6] What amounts to material disturbance or annoyance is a question of *fact* to be decided with regard to the character of the neighbourhood, the ordinary habits of life and reasonable expectations of persons there dwelling, and other relevant circumstances[7]: *e g.*, A, living in a street in Calcutta, complains of noises proceeding from the house of his neighbour Z, as being a nuisance to him. In deciding whether a nuisance exists or not, regard will be had to the general habits of life of persons dwelling in cities.[8] An owner of immoveable property not being in possession of it, can sue for a nuisance to that property only if the nuisance—(*a*) permanently affects the value of the property; (*b*) tends to establish an adverse claim of right.[9]

Personal comfort.—An action may be brought either on the ground that a nuisance is productive of a sensible personal discomfort, or is productive of material injury to property.[1] So an action may be brought against an occupier of house or land causing a nuisance by defective sewers, drains and watercourses,[2] or offensive and foul smelling and noisy trades and manufactures and occupations, etc., for noxious effluvia, smoke, etc.[3]

What persons are liable for a nuisance.—(*a*) Every one who actually creates or continues, or authorizes the creation or continuance of, a nuisance; (*b*) every one who knowingly suffers a nuisance to be created or continued on land in his possession;[4] (*c*) every one who lets or sells land with an existing nuisance on it;[5] but a lessor is not liable by reason only of the omission of repairs which, as between himself and the lessee, the lessee is bound to do.[6] Where a nuisance is caused by a tenant's use of property, the lessor is not liable for it, by reason only that the property is capable of being so used: *e.g.*, A lets to Z a house, with a chimney near B's windows. Z makes fires in this chimney, and the smoke thereof becomes a nuisance to B. Z only, and not A, has wronged B, unless A let the house to Z, with express

6) 31 L. J., Q. B., 286.
7) 4 De G. & Sm., 315: L. R., 9 Ch., 705.
8) Pollock on Torts, 2nd ed., pp. 565, 566: Draft Indian Civil Wrongs Bill, s. 55.
9) ib., s. 59.
1) 11 H. L. C., 642. See 10 B. L. R., 241.
2) 3 Q. B., 449: 1 Salk., 21: 26, L. J., Ex., 34: 3 E. & B., 128: 46 L. J., 438.
3) I. L. R. 8 Bom., 35 (noise, smoke and fluff of mill): 10 B. L. R., 241 (workshops, forges and furnaces): 31 L. J., Q. B., 286: 4 Ex. D., 302: 20 L. J., Ch. 433: 3 B. & Ad., 184: L. R., 5 Eq., 25: 14 Ch. D., 542 (building operations).
4) L. R., 18 Eq., 303.
5) 12 Mod., 635: 9 C. B. N. S. 377: 2 C. P. D., 311.
6) L. R., 8 C. P., 401: L. R., 10 C. P., 658: 3 Q. B., 449.

authority to use that chimney in the manner in which Z has used it.[7]

Public nuisance.—A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission which causes any common injury, danger or annoyance to *the public or to the people in general* who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right. The fact that a common nuisance may cause some convenience or advantage is no excuse.[8] Anything which seriously affects the health, safety, convenience or morals of the public is a public nuisance: *e.g.*, exercise of offensive trades, causing noises or noxious smells, or keeping common gambling houses, brothels, and the like (v. *ante*). There must be a sensible and real damage to the public in general or a portion of the public or to a particular class of people in the exercise of a public right. The fact that an act is lawful in itself and done upon the defendant's own lands, and in a convenient place for the purpose is no defence, if in fact it amounts to a nuisance:[9] every one must use his own rights and property so as not to injure others, or the property of others. It is no answer to a charge of committing a public nuisance, (1) that the nuisance has been going on for a long period of time without any objection from the public;[1] no length of enjoyment can legalize a public nuisance; or (2) that the Legislature has given authority to do the act out of which the nuisance arises, if the act might have been done without causing a nuisance. If the Legislature authorizes an act which would otherwise be a nuisance, no indictment will lie, in the absence of acts in excess of the power conferred, or negligent exercise of these powers.[2]

Other offences affecting the public health, safety, convenience, decency and morals.—The following specific acts are offences and punishable under the Indian Penal Code: (1) unlawful, negligent and malignant acts likely to spread infection of any disease dangerous to life: *e.g.*, bringing a glandered horse into a public place; (2) disobedience to a quarantine rule; (3) **adulteration of food or drink** intended for sale, rendering it injurious to *health;* (4) **sale of noxious food or drink** which has been rendered or has become noxious, or is in a state unfit for food or drink by a person knowing, or having reason to believe, it to be so noxious or unfit; (5) **adulteration of drugs** by which their

7) 4 C. B., 783: Pollock, p. 569: Draft Indian Civil Wrongs Bill, s. 60.
8) Indian Penal Code, s. 268.
9) 10 B. L. R., 241: 32 L. J., C. P., 104: 31 L. J., Q. B., 286.
1) 7 B. L. R., 499.
2) 34 L. J., Q. B., 191: L. R. 5, Ch., 583. See Introduction, p. XXIII, and cases there cited.

efficacy is lessened or operation changed, or by which they become noxious, and sales with knowledge of such adulteration; or **sale of any drug** or medical preparation knowing it to be a different drug or preparation; (6) fouling the **water** of public springs or reservoirs; (7) making the **atmosphere** noxious to health; if the smell is not noxious to health but otherwise offensive, it is a common nuisance, and punishable as such; (8) **rash riding or driving** on a public way so as to endanger life or to cause injury. A person is not criminally, though he is civilly, liable for the acts of his servants. Therefore, where the offence is committed, the driver and not the owner of a carriage is liable;[3] (9) **rash and negligent navigation of a vessel** endangering human life or likely to cause hurt or injury to any other person; (10) exhibition of false light, mark or buoy; (11) knowingly and negligently conveying persons by water for hire in a vessel over-loaded or unsafe; (12) the doing by any person of any act, or omitting to take order with any property in his possession or under his charge, causing danger, obstruction or injury to any person in any public way or line of navigation, *e.g.*, blasting stones in a quarry adjoining a highway, so that large pieces of stone fall in the highway to the danger of the passers-by; (13) rash or negligent conduct, endangering life, or likely to cause hurt to any person, with respect to any poisonous substance; (14) negligent conduct with respect to any **fire** or combustible matter or **explosive substance** or with respect to any **machinery** in the possession or under the charge of the offender; (15) negligence with respect to pulling down or repairing **buildings**; (16) negligence with respect to any animal (see "*Animals*"); (17) sale, distribution, importation, printing, or being in the possession of, for the purpose of sale, etc., of **obscene books**, prints, etc.; singing, reciting or uttering in or near any public place any obscene song or words to the annoyance of others; (18) keeping an unauthorized lottery office. See "*Gaming and Wagering.*"[4]

Conditional order for removal of public nuisance.—Whenever a District Magistrate, a Sub-Divisional Magistrate or, when empowered by the Local Government in this behalf, a Magistrate of the first-class, considers on receiving a report or other information, and on taking such evidence, if any, as he thinks fit—(1) that any unlawful **obstruction or nuisance** should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place; or (2) that any **trade or occupation**, or the keeping of any goods or merchandise, by reason of its being injurious to the health or physical comfort of the community, should be suppressed or removed, or prohibited; or (3) that the construction of any **building**, or the disposal of any

3) 14 Suth. Cr., 32.

4) Indian Penal Code, chap. xiv.

substance as likely to cause conflagration or explosion, should be prevented or stopped ; or (4) that any building is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence its removal, repair, or support is necessary ; or (5) that any **tank, well or excavation** adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public ;— such Magistrates may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, substance, tank, well, or excavation, within a time to be fixed in the order—(*a*) to remove such obstruction or nuisance ; or (*b*) to suppress or remove such trade or occupation ; or (*c*) to remove such goods or merchandise ; or (*d*) to prevent or stop the construction of such building, or to remove, repair, or support it ; or (*e*) to alter the disposal of such substance ; or (*f*) to fence such tank, well or excavation, as the case may be ; or (*g*) to appear before himself or some other Magistrate, at a certain time and place, to move to have the order set aside or modified. (v. *post.*) No order duly made by a Magistrate under this section can be called in question in any Civil Court. A "public place" includes also property belonging to the State, camping grounds, and grounds left open for sanitary and recreative purposes.[5] A Civil Court may make an order for removing a public nuisance at the suit of any person who suffers special damage by that nuisance, notwithstanding that an order for the like purpose might be made by a Magistrate.[6]

Service or notification of order.—The order must, if practicable, be served on the person against whom it is made in the manner provided by the Code of Criminal Procedure for service of summons. If such order cannot be so served, it will be notified by proclamation, and a copy thereof will be stuck up at such place or places as may be fittest for conveying the information to such person.[7]

What the person to whom the order is addressed must do.—He must (*a*) perform, within the time specified in the order, the act directed thereby ; or (*b*) appear in accordance with such order, and either[8] (i) show cause against the same, in which case the Magistrate will take evidence in the matter, and if he is satisfied that the order is not reasonable and proper, take no further proceedings in the case, or, if he is not so satisfied, make the order absolute ;[9] or (ii) apply to the Magistrate by whom it was made to

5) Cr. Pr. Code, s. 133.
6) I. L. R., 3 Cal., 20.
7) Cr. Pr. Code, s. 134.
8) ib., s. 135.
9) ib., s. 137.

appoint a jury to try whether the same is reasonable and proper (see "*Jury and Jurors*," p. 361). If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate will make the order absolute, subject to such modification (if any). In other cases, no further proceedings will be taken.[1] If the applicant by neglect or otherwise prevents the appointment of the jury, or if from any cause, the jury appointed do not return their verdict within the time fixed, or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and the order will be executed in the manner provided by s. 140 (v. *post*).[2] If the person against whom such conditional order is made does not perform such act, or appear and show cause, or apply for the appointment of a jury as required above, he will be liable to the penalty prescribed by s. 188 of the Indian Penal Code (v. *post*), and the order will be made absolute.[3] When an order has been made absolute under ss. 136, 137, 139 (v. *ante*), the Magistrate will give notice of the same to the person against whom the order was made, and may require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty prescribed in the Penal Code.[4]

Consequences of disobedience.—If such disobedience causes or tends to cause (1) obstruction, annoyance, or injury to any person lawfully employed, it is punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to Rs. 200, or with both; or (2) danger to human life, health or safety; or (3) a riot or affray; it is punishable with imprisonment of either description which may extend to six months, or with fine which may extend to Rs. 1,000 or with both. It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.[5] If the person against whom the order is made disobeys, and if such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the cost of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is without such limits, the order will authorize its attachment and sale

1) Cr. Pr. Code, s. 139.
2) ib., s. 141.
3) ib., s. 136.
4) ib., s. 140.
5) Indian Penal Code, s. 188.

when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found. No suit will lie in respect of anything done in good faith under this section.[6]

Injunction pending inquiry.—If a Magistrate making a conditional order under s. 133 (v. *ante*) considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be or has been appointed or not, issue such an injunction to the person against whom the order was made as is required to obviate or prevent such danger or injury. In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury. No suit will lie in respect of anything done in good faith by a Magistrate under this section.[7]

Prohibition of repetition or continuance of public nuisance.—A District Magistrate or Sub-divisional Magistrate or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code (v. *ante*), or any special or local law.[8] "Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction, not to repeat or continue such nuisance," is punishable with simple imprisonment for a term which may extend to six months, or with fine, or with both.[9]

Urgent cases of nuisance.—In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate, or of any other Magistrate specially empowered by the Local Government or the District Magistrate to act in this behalf *immediate prevention or speedy remedy is desirable*, such Magistrate may, by a written order stating the material facts of the case and served as in the case of notice of a conditional order (v. *ante*), direct any person to abstain from a certain act or to take certain order with certain property in his possession, or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any persons lawfully employed, or danger to human life, health or safety, or a riot or an affray. An order under this section may, in cases of emergency, or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*.[1] An order under this section may be directed

6) Cr. Pr. Code, s. 140.
7) ib., s. 142.
8) s. 143.
9) Penal Code, s. 291.
1) Cr. Pr. Code, s. 144.

to a particular individual or to the public generally when frequenting or visiting a particular place. Any Magistrate may rescind or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office. No orders under this section can remain in force for more than two months from being made; unless in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the Local Government, by notification in the official gazette, otherwise directs.[2]

See "*Negligence*," "*Offences*," "*Prosecution*," and *Index*.

2) Cr. Pr. Code, s. 144.

OATHS, EVIDENCE AND WITNESSES.

AUTHORITIES—Act X of 1873: Indian Penal Code: Act I of 1872 (Evidence): Cases cited.

Persons giving evidence are bound to state the truth.—Every person giving evidence on any subject before any Court or person authorised by the Act to administer oaths and affirmations is bound to state the truth on such subject: and is guilty of the offence of giving false evidence if he does not, even though an oath or affirmation may not have been administered to him. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, invalidates any proceeding or renders inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, *or affects the obligation of a witness to state the truth.*[1]

Affirmation instead of oath.—Where a witness, interpreter, or juror, is a Hindu or Mahommedan, or has an objection to making an oath, he must, instead of making the oath, make an affirmation. In every other case, a witness, interpreter or juror, must make an oath.[2]

Courts and authorities having power to administer oaths and affirmations.—(*a*) All Courts and persons having, by law or consent of parties, authority to receive evidence; (*b*) the Commanding Officer of any military station occupied by troops provided that the oath, etc., is administered within the limits of the station and that the oath, etc., be such as a Justice of the Peace is competent to administer in British India.[3]

Oaths or affirmations must be made by all witnesses, interpreters and jurors No oath or affirmation may be administered in a criminal proceeding to the accused person. Official oaths are abolished by the Act.[4]

Certain forms of oaths.—If any party or witness offers to give evidence on oath or affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may tender such oath or affirmation to him.[5]

1) Act X of 1873, ss. 13, 14: Penal Code, s. 191.
2) Act X of 1873, s. 6.
3) ib., s. 4.
4) ib., ss. 5, 16.
5) ib., s. 8.

Offence of giving false evidence.—Whoever, being legally bound on an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence.[6] A statement is within the meaning of the section, whether it is made verbally or otherwise. A false statement as to the belief of the person attesting is within the meaning of the section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.[7]

Other offences relating to evidence are (1) Fabricating false evidence; (2) giving or fabricating false evidence with intent to procure conviction of a capital offence or of an offence punishable with transportation or imprisonment; (3) using evidence known to be false; (4) false statement made in any declaration receivable as evidence; (5) using as true such declaration known to be false; (6) causing disappearance of evidence of an offence committed, or giving false information touching it, to screen an offender; (7) intentional omission to give information of an offence by a person bound to inform; (8) giving false information respecting an offence committed; (9) destruction of document to prevent its production as evidence.[8]

Other offences against public justice are (1) harbouring an offender; (2) taking or offering gift, etc., to screen an offender from punishment; (3) taking gift to help to recover stolen property, etc., and not using all means in one's power to cause the offender to be apprehended and convicted;[9] (4) certain offences committed by public servants;[1] (5) resistance or obstruction by a person to his lawful apprehension or the lawful apprehension of another;[2] (6) unlawful return from transportation; (7) violation of condition or remission of punishment; (8) intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding; (9) personation of a juror or assessor;[3] (10) certain abuse of process. See "*Malicious Prosecution and Abuse of Process*," p. 414.

Husband and wife as witnesses—See "*Husband and Wife*," p. 300.

Privilege of witnesses.—The statements of witnesses are privileged; it is not defamation therefore for a witness in a judicial

6) Penal Code, s. 191.
7) ib.
8) ib., ss. 192, 194—196, 199—204.
9) ib., ss. 212—216.
1) ib., ss. 217—223, 225 A. See "*Public Servants and Public Duties*."
2) ib., ss. 224, 225, 225 B.
3) ib., ss. 226—229.

proceeding to make an imputation in good faith on the character of another. If the statement is false, the remedy is by indictment for giving false evidence, and not for defamation.[4] See "*Defamation*," pp. 191, 193.

Incriminating answers.—A witness is not excused from answering any question as to any relevant matter in any suit or civil or criminal proceeding, upon the ground that the answer to such question will criminate, or tend to criminate, him, or will expose, or tend to expose, him to a penalty or forfeiture of any kind. But no answer which a witness is compelled to give, shall subject him to an arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.[5]

Number of witnesses.—No particular number of witnesses is required for the proof of any fact.[6]

Communications during marriage—See "*Husband and Wife*," p. 300.

Who may testify.—All persons are competent to testify, unless prevented from understanding the questions put to them, or from giving rational answers, by tender years, extreme old age, disease of body or mind, or any other cause of the same kind. A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him, and giving rational answers to them. Dumb witnesses may testify.[7]

Production of title-deeds of witness not a party—See "*Title.*"

Witness refusing to answer or produce document—See "*Contempt of Court and of Authority of Public Servants.*"[8]

An accomplice is a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.[9]

Matrimonial suits.—On a petition presented by a wife for dissolution of marriage on the ground of the husband's adultery and cruelty or desertion, the husband and wife are competent and *compellable* to give evidence of, or relating to such cruelty or desertion. In all other proceedings any party may *offer* himself or herself as a witness, but the offer is a condition precedent to their examination. In a suit by a husband on the ground of adultery of his wife, the co-respondent was summoned as a witness by the petitioner; the Court did not explain to him, before he was sworn, that it was not compulsory upon, but optional with

4) Penal Code, s. 499, 9th exception: I. L. R., 11 Mad., 477. 17 W. R., 283: I. L. R., 14 Bom., 79.
5) Evidence Act, s. 132.
6) ib., s. 134.
7) ib., ss. 118, 119.
8) See also s. 87 Act XV of 1882 (Presidency Small Cause Courts).
9) Evidence Act s. 133.

him to give evidence or not; the witness answered without objection until he was asked whether he had had sexual intercourse with the respondent, when he objected: the Court told him he was bound to answer; he then answered in the affirmative. It was held under such circumstances that the co-respondent had not offered himself, and that therefore his evidence was not admissible.[r]

Communications made to, and with legal advisers—See "*Legal and Medical Practitioners.*"

See "*Action and Actionable Claim,*" "*Contempt of Court and of Authority of Public Servants,*" and *Index.*

r) I. L. R., 4 All., 491.

OFFENCES.

AUTHORITIES—Act XLV of 1860 (Indian Penal Code) : Act VI of 1864 : Mayne's Commentaries on the Penal Code, 14th edition : Act XXVII of 1870, s. 4 : Cases cited.

Criminal Law in British India — See *"Introduction;"* p. xxiv.

Civil action in case of criminal offence.—It has been ruled by the High Courts of Bengal and Madras that the doctrine of English law by which the right of a civil action is suspended until criminal proceedings have been taken, where an act which causes a civil injury is also a felony, has no application in India.[1]

Punishments for offences are death ; transportation ; penal servitude ; imprisonment, which is of two descriptions, namely, rigorous, that is with hard labour, and simple ; forfeiture of property ; and fine.[2] Europeans and Americans are sentenced to penal servitude instead of transportation.[3] Certain crimes, such as waging war against the Queen, carry with them forfeiture of property : but where a crime does not specifically carry with it a forfeiture the Court may expressly declare a forfeiture in respect of offenders punishable with death, or transportation or imprisonment for a term of seven years or upwards.[4] Where no sum is expressed to which a fine may extend, the amount of fine to which an offender is liable is unlimited, but must not be excessive.[5] Whipping is now added as a punishment in certain cases.[6]

Good faith.—Nothing is said to be done or believed in "good faith," which is done or believed without due care and attention.[7]

"Fraudulently."—A person is said to do a thing "fraudulently" if he does that thing with intent to defraud, but not otherwise.[8]

"Dishonestly."—Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing dishonestly.[9]

Nothing is an offence which (1) **is done by a person who is**, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be, **bound by law to do it :** *e.g.*, A, a soldier, fires on a mob by order of his superior officer in conformity with the commands of the law. A has committed no offence ; or A, an officer of a Court of Justice, being

1) 2 Wym. S. C., 12 : 3 Mad., 6 : Mayne, p. 210.
2) Penal Code, s. 53.
3) ib., s. 56.
4) ib., ss. 62, 121.
5) ib., s. 63.
6) Act VI of 1864.
7) Penal Code, s. 52: see 12 Bom., 377.
8) ib., s. 25.
9) ib., s. 24.

ordered by that Court to arrest Y, and, after due enquiry believing Z to be Y, arrests Z. A has committed no offence. Neither the orders of a parent nor a master will furnish any defence for an illegal act; (2) **is done by a Judge** acting judicially, see "*Public Servants and Public Duties*;" (3) is done **pursuant to the judgment or order of a Court of Justice,** notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided that the person doing the act in good faith believes that the Court had such jurisdiction; (4) **is done by a person justified or, by mistake of fact, believing himself justified by law**: *e.g.*, A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence; (5) **is done by accident or misfortune,** and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution: *e.g.*, A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence; (6) is done with knowledge that it is likely to cause harm, but **done without a criminal intent and to prevent other harm**: *e.g.*, A, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence; (7) **is done by a child under seven years of age,** see "*Minority and Minors*," p. 442; (8) **or by a person of unsound mind,** see '*Lunacy*," p. 409; (9) is done by a person incapable of judgment by reason of **intoxication** caused against his will, see "*Lunacy*," p. 409; (10) (except murder and offences against the State punishable with death) **is done by a person compelled to it by threats,** which, at the time of doing it, reasonably cause the apprehension that instant *death* to that person will be the consequence; (11) **causes harm so slight that no person of ordinary sense and temper would complain of such harm**; (12) is done by **consent** and not intended, and not known to be likely to cause death or grievous hurt: *e.g.*, A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence;

(13) is done by consent in good faith for the benefit of a person, and not intended to cause death: *e.g.*, A, a **surgeon**, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z with Z's consent. A has committed no offence; (14) **which is done in good faith for the benefit of a child or person of unsound mind**, by, or by consent of the guardian or other person having lawful charge of that person: *e.g.*, A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A has committed no offence inasmuch as his object was the cure of the child;[1] (15) which is done in good faith for the benefit of a person without consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him, from whom it is possible to obtain consent in time for the thing to be done with benefit: *e.g.*, Z is carried off by a tiger. H fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed no offence; or, again, A, a **surgeon**, sees a child suffer an accident which is likely to prove fatal, unless an operation be immediately performed. There is not time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence;[2] (16) **which is a communication made in good faith.** No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person: *e.g.*, a **surgeon**, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.[3]

The right of private defence.—Nothing is an offence which is done in the exercise of the right of private defence.[4] Every person has a right, subject to the following restrictions, to defend—*First*—His own *body* and the body of any *other* person, against *any* offence affecting the human body. So where a husband severely beat a man who trespassed by night into his house, for the purpose of committing adultery with his wife, he was held

1) Penal Code, s. 89, see the proviso to this section and the following ss. 90, 91, 92.

2) Penal Code, s. 92, see proviso to this section.

3) ib., ss. 76—95.

4) ib., s. 96.

justified, in the exercise of his right of private defence, in causing any harm, short of death.[5] *Secondly*—The *property*, moveable or immoveable, of himself, or of any *other* person against *theft*, *robbery*, *mischief* (see "*Mischief*"), *or criminal trespass* (see "*Trespass*"), or an attempt to commit these offences.[6] When an act which would otherwise be a certain offence is not that offence by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence: *e.g.*:—(*a*) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane. (*b*) A enters by night a house which he is legally entitled to enter. Z, in good faith, taking A for a house-breaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.[7]

Restrictions on right.—The restrictions on the right of private defence above-mentioned are as follows—(1) there is no right of defence in the case of certain acts done by, or by the direction of a public servant (see "*Public Servants and Public Duties*"); (2) there is no right in cases in which there is time to have recourse to the protection of the public authorities; (3) the right in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.[8]

The right of private defence of the body extends under the above-mentioned restrictions to the causing of *death* or of any other harm to the assailant in the case of (1) such an assault (see "*Assault*") as may reasonably cause the apprehension that death will otherwise be the consequence of such assault; (2) such an assault as may reasonably cause the apprehension that grievous hurt (see "*Hurt*") will otherwise be the consequence of such assault; (3) an assault with intention of committing rape; (4) an assault with the intention of gratifying unnatural lust; (5) an assault with the intention of kidnapping or abducting; (6) an assault with the intention of wrongfully confining (see "*Wrongful Confinement and Restraint*") a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release. Even in these cases the infliction of death is unlawful if the crime can be prevented by milder means (*v. ante*). Death caused by the

5) Penal Code, s. 104: 20 Suth. Cr., 36.
6) Penal Code, s. 97.
7) ib., s. 98.
8) ib., s. 99.

exercise of the right of private defence of person *or* property *in good faith*, but to an extent not warranted by the law, is not murder, but culpable homicide: *e.g.*, Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A, believing in good faith, that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.[9] If the offence be not of any of the above-mentioned descriptions, the right of private defence of the body does not extend to the causing of death to the assailant, but does extend to the causing to the assailant of *any harm other than death.*

The right commences as soon as a reasonable apprehension of danger to the body arises from an attempt of threat to commit the offence, though the offence may not have been committed. "The right of defence begins when a reasonable apprehension of danger commences; that is, when there is a reasonable apprehension of such danger as would justify the particular species of defence employed. A man who is attacked by another who wears a sword is not justified in killing him on the chance that he may use the weapon; but if he sees him about to draw it, it is not necessary to wait until he draws it. So, a man who hears a burglar busy opening the lock of the house-door may fire at him before he gets in. But he would not be justified in firing at a man he saw prowling about his compound at night, unless he had reasonable grounds to suppose that party was about to force his way into the house" (v. *post*).[1]

The right continues as long as such apprehension of danger to the body continues. "The right of defence ends with the necessity for it. Where the injury is to the person, the right ceases with the apprehension of danger; that is, with the apprehension of such danger as would justify the particular form of violence employed in self-defence. Where a man is attacked by another with a sword, he is justified in killing him. But if the sword is broken, or the assailant is disarmed, so that all apprehension of serious harm is over, the party attacked would be committing murder, or culpable homicide at the least, if he were still to proceed to the death of his opponent. But a man who is assaulted is not bound to modulate his defence, step by step, according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat; but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is

9) Penal Code, s. 300, Exception, 2.

1) Mayne, pp. 100, 101.

justifiable. And, of course where the assault has once assumed a dangerous form, every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little farther than to a perfectly cool bystander would seem absolutely necessary. The question in such cases will be not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."[2] If, in the exercise of the right of defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without **risk of harm to an innocent person,** his right of defence extends to the running of that risk: *e.g.*, A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if, by so firing, he harms any of the children.[3]

The right of private defence of property extends, under the above-mentioned restrictions, to the causing of *death* or of any other harm to the wrong-doer in the case of the commission or attempt to commit the following offences:—(1) Robbery (*i.e.*, generally speaking, theft with violence or putting in fear); (2) House-breaking by night (see "*Trespass*"); (3) Mischief by fire committed on any building, tent, or vessel, used as a human dwelling, or as a place for the custody of property (see "*Mischief*"); (4) Theft, mischief, or house trespass (see "*Trespass*"), under such circumstances as may reasonably cause apprehension that death or grievous hurt (see "*Hurt*") will be the consequence, if such right of private defence is not exercised. If the offence be theft, mischief, or criminal trespass, not of any of the descriptions above-mentioned, the right does not extend to the causing of death, but does extend to the causing to the wrong-doer of any harm other than death. **The right commences** when a reasonable apprehension of danger to the property commences. **The right continues** against (1) *theft* till the offender has effected his retreat with the property, or the assistance of the public authorities is obtained, or the property has been recovered: *e.g.*, a robber while actually committing the offence may be killed (v. *post*); if he effects his escape he cannot be killed, nor if he be met with on a subsequent day: if, however, the property is found in his possession the right of defence revives for the purpose of its recovery, but not to the same extent as it formerly existed at the commission of the original offence because the robbery has

2) Penal Code, ss. 100—102: Mayne, p. 101: 1 Russ., 849.
3) Penal Code, s. 106.

come to an end. Only such violence is lawful as would be justifiable against a person who has stolen property without intimidation; and if he resists by means which create no apprehension of death or grievous hurt he cannot be killed;[4] (2) *robbery* as long as the offender causes or attempts to cause to any person death, or hurt, or wrongful restraint, or as long as the fear of instant death, or of instant hurt, or of instant personal restraint continues; (3) *criminal trespass* or *mischief* as long as the offender continues in the commission of criminal trespass or mischief; (4) *house-breaking by night* as long as the house-trespass which has been begun by such house-breaking continues, that is, so long as the criminal is within the building. "It would appear that if he died of a shot fired at him after he had effected his escape from the house, this would be an unlawful killing, though if he did not die but was maimed for life, it would be all right." *See the preceding paragraph.*[5]

Right of private persons to arrest offenders—See "*Arrest*," p. 67.

Offences against the State are as follows:—(1) waging or attempting to wage war, or abetting the waging of war against the Queen, and conspiracy to commit these offences; (2) collecting arms, etc., with the intention of waging war, etc.; (3) concealing (with intent to facilitate) a design to wage war; (4) assaulting the Governor-General or a Governor or Lieutenant-Governor or a Member of Council; (5) waging war against any Asiatic Power in alliance with the Queen, and receiving property taken by war; (6) committing depredation on the territories of any Power at peace with the Queen, and receiving property taken by depredation; (7) public servant (see "*Public Servants and Public Duties*") voluntarily allowing or negligently suffering a prisoner of State or war in his custody to escape; (8) aiding escape, or rescuing, or harbouring such prisoner; (9) the offence mentioned in the following paragraph.[6]

Exciting disaffection.—Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites or attempts to excite, feelings of disaffection to the Government established by law in British India, is punishable with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine. Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful

4) See Mayne, p. 101.
5) Penal Code, ss. 103—105: ss. 442, 104: Mayne, p. 102.
6) Penal Code, ss 121—130: Act XXVII of 1870, s. 4.

authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence. No charge of this offence can be entertained by any Court unless the prosecution be entertained by order of, or under authority from, the Local Government.[7]

Offences relating to the army and navy—See '*Military Men.*"

Offences against the public tranquillity—See "*Rioting, Unlawful Assembly and Affray.*"

Offences by or relating to public servants—See "*Public Servants and Public Duties.*"

Contempt of authority of public servants—See "*Contempt of Court and Contempt of Authority of Public Servants.*"

False evidence and offences against public justice—See "*Oaths, Evidence, and Witnesses*" and "*Malicious Prosecution and Abuse of Legal Process.*"

Weights and measures.—It is an offence to fraudulently use, make or sell a false instrument for weighing, or a false weight or measure: or to be in possession of such false instrument, knowing the same to be false and intending that the same may be fraudulently used.[8]

Offences affecting the public health, safety, convenience, decency, and morals—See "*Nuisance,*" "*Negligence,*" "*Dogs and Ferocious Animals,*" "*Gaming and Wagering.*"

Relating to religion.—It is an offence (1) to destroy, damage, or defile a place of worship, or any sacred object, with intent to insult the religion of any class, or with knowledge that any class is likely to be insulted; (2) to disturb a religious assembly; (3) to trespass (with intent to insult or with knowledge that the religion of any person is likely to be insulted thereby) in any place of worship, or on burial places, or to offer indignity to any human corpse, or to cause disturbance to any persons assembled for the performance of funeral ceremonies; (4) to utter words or make any sounds in the hearing of any person or to make gestures or to place any object in the sight of that person with the deliberate intention of wounding the religious feelings of any person.[9] The intention to wound must be *deliberate.* The original framers of the Code say in reference to (4):—"In framing this clause we had two objects in view; we wish to allow all fair latitude to religious discussion, and at the same time to prevent the professors of any

7) Penal Code, s. 124 A: Act XXVII of 1870, ss. 5, 13, 14.

8) Penal Code, ss. 264—267.

9) ib., ss. 295—298.

religion from offering, under the pretext of such discussion, intentional insults to what is held sacred by others. We do not conceive that any person can be justified in wounding with deliberate intention the religious feelings of his neighbour by words, gesture, or exhibition. A warm expression dropped in the heat of controversy, or an argument urged by a person not for the purpose of insulting and annoying the professors of a different creed, but in good faith for the purpose of vindicating his own, will not fall under the definition contained in this clause."[1]

Distinction between murder and culpable homicide.—Every murder is a culpable homicide; but an offence may amount to culpable homicide without amounting to murder. Culpable homicide falls short of murder if the case comes within any of the following exceptions: (1) homicide on provocation (v. *post*); (2) homicide caused by the exercise of the right of private defence to an extent not warranted by law (v. *ante*, "Right of private defence of the body"); (3) homicide when the offender, being a public servant or aiding a public servant, for the advancement of public justice, exceeds the powers given to him by law and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused; (4) homicide without premeditation in a sudden fight (v. *post*); (5) homicide by consent (*e.g.*, suttee) when the age of the consenting person, whose death is caused, is above 18 years. So it was held, that where death supervenes upon emasculation voluntarily submitted to by an adult, the operator is not guilty of murder, but only of culpable homicide.[2] Further, it is culpable homicide—not murder—to cause death by doing an act, with the knowledge that such act is likely to cause death (even if it does not fall within any of the above-mentioned exceptions), *unless* the act by which death is caused is done *with the intention of causing* (1) such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (2) bodily injury to any person, and the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or (3) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury aforesaid: *e.g.*, firing a loaded cannon without any excuse into a crowd of persons. If the act falls within (1), (2), (3), it is murder. "In short, where the positive intention to cause death is negatived, the difference

1) See Mayne, p. 272.

2) 1 Wym. Cr., 12.

between murder and culpable homicide is a mere question as to different degrees of probability that death would ensue. Where death must have been known to be *a* probable result, it is culpable homicide. Where it must have been known to be *the most* probable result, then it is murder."[3]

Homicide on provocation.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by *grave and sudden* provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident. Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. "It is not to be supposed that any amount of provocation will reduce the offence of murder to culpable homicide. There must be some proportion between the provocation and the resentment."[4] The violence used must not be in a cruel or unusual manner. The provocation may be (in this unlike the English law) by words or gestures alone (v. *post*). This rule, however, is subject to the following proviso:—(1) that the provocation is not sought or voluntarily provoked, by the offender, as an excuse for killing or doing harm to any person. (2) That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant: *e.g.* (i) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers; (ii) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder. (3) That the provocation is not given by anything done in the lawful exercise of the right of private defence: *e.g.*, A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

Homicide without premeditation—Culpable homicide is not murder, if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage, or acted in a cruel or unusual manner. It is immaterial in such cases which party offers the provocation or commits the first assault.[5]

Causing death by negligence—See "*Negligence.*"

3) Penal Code, ss. 299, 300: B.L.R. Sup. Vol. 443: Mayne, p. 282.
4) Penal Code, s. 300: Mayne, p. 284.
5) Penal Code, s. 300.

Causing miscarriage, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman is an offence punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both: and if the woman is quick with child, is punishable with imprisonment of either description for a term which may extend to seven years and also with fine. If *death* be caused by an act done with an intent to cause miscarriage, the imprisonment may be of either description for a term which may extend to ten years and with fine Causing miscarriage without the woman's consent, whether the woman is quick with child or not, is punishable with transportation for life, or with imprisonment of either description for a term which may extend to ten years and with fine. If death be caused by an act done without the woman's consent with intent to cause miscarriage, the offender is liable to transportation for life, or to imprisonment of either description for a term which may extend to ten years and with fine.[6]

Injury to unborn child.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child if any part of that child has been brought forth; though the child may not have breathed or been completely born.[7] But causing the death of a child in the womb is a punishable offence. Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent the child from being born alive, or causes it to die after its birth is (if such act be not caused in good faith for the purpose of saving the life of the mother), punishable with imprisonment of either description for a term which may extend to ten years or with fine, or with both. Causing the death of a quick unborn child by an act amounting (if death be caused thereby) to culpable homicide is an offence punishable with a similar term of imprisonment and with fine: *e.g.*, A, knowing *that he is likely to cause the death of a pregnant woman*, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die; but the death of an unborn quick child with which she is pregnant, is thereby caused. A is guilty of the above-mentioned offence.[8]

Exposure and abandonment of a child under twelve years of age is a punishable offence. If the child die in consequence of the exposure, the offender is guilty of murder or culpable homicide.[9]

6) Penal Code, ss. 312–314.
7) ib., s. 299.
8) ib., ss. 315, 316.
9) ib., s. 317.

Concealment of birth by secret disposal of a dead body is an offence.[1]

Hurt—See "*Hurt.*"

Wrongful restraint and wrongful confinement—See "*Wrongful Confinement and Restraint.*"

Assault and Criminal Force—See "*Assault*"

Protection of parental rights.—Kidnapping (that is taking or enticing) any male minor under 14 years of age, or female minor under 16 years of age, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian is an offence punishable with imprisonment (of either description; maximum seven years) and with fine "Lawful guardian" includes any person lawfully entrusted with the care or custody of such minor or other person.[2] The consent of the minor is immaterial. A minor, if under the above-mentioned age, will be compelled to return to the father's house even against his or her consent, unless the father is an unfit person. The mother of an illegitimate child is its natural guardian. In the case of Hindus and Europeans the mother of a legitimate child has no right to its custody adverse to the father.[3] According to Mahommedan Law, on the contrary, the mother is entitled, even as against the father, to the custody of her sons up to seven years, and of her daughters, according to the *Sunni* school of law, up to puberty, but according to the *Shiah* school only until seven years.[4]

Prostitution of minors.—Selling or buying, letting to hire or hiring, or otherwise disposing of or obtaining possession of, any minor under the age of 16 years, with intent that such minor shall be employed, or used, for the purpose of prostitution, or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, is an offence punishable with imprisonment of either description for a term which may extend to ten years, and with fine.[5]

Extortion is the intentionally putting any person in fear of any injury to that person *or* to any other, and thereby dishonestly inducing the person so put in fear to deliver to *any* person any property or valuable security, or anything signed or sealed which may be converted into a valuable security (*e.g.*, a blank piece of paper with seal or signature on it): *e.g.*, A threatens to publish a defamatory libel concerning Z, unless Z gives him money. He thus induces Z to give him money. A has committed extortion.[6]

1) Penal Code, s. 318
2) ib., ss. 361, 363. See 8 Cal., 971.
3) 8 Cal., 969. 4 A. & E., 624: Mayne, p. 325.
4) Macnaghten's Mahommedan Law, 1860, pp. 267—269: Mayne, p. 325.
5) Penal Code, ss. 372, 373.
6) ib., s. 383.

Where money is extorted by a threat of bringing a criminal charge, the offence is equally committed whether the charge is true or false.[7]

Distinction between theft and criminal misappropriation.—These two offences differ in respect (1) of the manner in which the property is obtained; and (2) of the time when the fraudulent intention was formed. To constitute theft, property must be taken out of the possession of any person without that person's consent; the taking must also be with a dishonest intention, that is "there must be a fraudulent intention at the time the posession of the property is changed:" possession is therefore come by criminally. Criminal misappropriation, on the contrary, takes place "when the possession has been *innocently* come by, but where by a *subsequent* change of intention or from the knowlege of some new facts, with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent"[8]: *e g*, A takes property belonging to Z out of Z's possession, in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake dishonestly appropriates the property to his own use, he is guilty of misappropriation: or again A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But if A afterwards sells the book for his own benefit he is guilty of criminal misappropriation.[9] When property is in the possession of a person's wife, clerk, or servant, on account of that person, it is in that person's possession within the meaning of the Penal Code: *e.g.*, A being Z's servant and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate without Z's consent. A has committed theft.[1] As to the distinction between misappropriation and criminal breach of trust see "*Trusts and Trustees.*"

Misappropriation by finder of property—See "*Bailment.*"

Criminal breach of trust—See "*Trusts and Trustees.*"

Commission or reduction of price obtained by servants—See "*Trusts and Trustees.*"

Cheating.—A person is said to "cheat," who, by deceiving any person, *fraudulently or dishonestly* induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, *or* intentionally induces the

7) 3 Wym. Cr. 19.
8) Mayne, p., 363.
9) Penal Code, ss. 378, 403.
1) ib., ss. 27, 378, illust. (*d.*)

person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes, or is likely to cause, damage or harm to that person in body, mind, reputation or property :[2] *e.g.*, A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats. The pretence may be that the party will do something which he did not mean to do : *e.g.*, A intentionally deceives Z into a belief that A means to repay any money that Z may lend him, and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats. A dishonest concealment of facts is a deception within the meaning of the above-mentioned section : *e.g.*, A sells and conveys an estate to B. A knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.[3] A pretence made by act and conduct without verbal representation is sufficient : *e.g.*, A obtains goods from B upon giving B in payment a cheque upon X, a banker, with whom in fact A has no account, or A in a similar manner obtains goods knowing that his account is overdrawn, and that it will not be honoured. In either case A makes a false pretence and cheats.[4] See "*Fraud*," p. 266.

Mischief—See "*Mischief*."

Fraudulent deeds and dispositions of property.—It is a criminal offence (1) to dishonestly or fraudulently remove, conceal, or transfer property, without adequate consideration, with intent to prevent (in insolvency proceedings) the distribution of that property according to law among creditors ; or (2) to dishonestly or fraudulently prevent a debt or demand due to the offender from being made available for his creditors ; (see "*Insolvency*," "Undue Preference," p. 319, "Void and Fraudulent Conveyances," p. 321 ; "Dishonest Applicants," p. 325 ; see also "*Oaths, Evidence and Witnesses*"); (3) to dishonestly or fraudulently execute a deed of transfer containing a false statement relating to the consideration for such transfer, or relating to the person or persons for whose use or benefit it is really intended to operate : *e.g.*, a purchase of an estate *benami*, *i.e.*, in the name of another, for the purpose of shielding it from creditors ; (4) to dishonestly or fraudulently remove or conceal or assist in removal or concealment of any property or to dishonestly release any demand or claim : *e.g.*, the removal by a tenant of his furniture to avoid a

2) Penal Code, s. 415. 3) ib. 4) L. R., 2 C. C., 134.

distress for rent, or a release of a debt by one of several executors, partners or joint creditors, to the injury of the others.[5]

Criminal trespass—See "*Trespass.*"

House-breaking—See "*Trespass.*"

Fraudulent destruction, etc., of will, etc.—Whoever fraudulently, or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys, or defaces, or attempts to cancel, etc., or secretes or attempts to secrete, any **will** or **authority to adopt** a son, or any **valuable security**, or commits mischief (see "*Mischief*") in respect to such document, is punishable with transportation for life, or with imprisonment of either description for a term which may extend to seven years and with fine.[6]

Trade, property, and other marks—See "*Trade and Trade Marks.*"

Criminal breach of contracts of service—See "*Masters, Servants and Apprentices.*"

Adultery and other offences relating to marriage—See "*Marriage.*"

Defamation—See "*Defamation.*"

Intimidation, insult and annoyance—See "*Intimidation, Insult and Annoyance.*"

See "*Prosecution*" and *Index.*

5) Penal Code, ss. 421—424: Mayne, pp. 387—389.

6) Penal Code, s. 477.

PARTNERSHIP.

AUTHORITIES—Act IX of 1872 (Contract Act): I of 1872 (Evidence): II of 1882 (Trusts): VI of 1882 (Companies): Lindley on Partnership, 4th edition: Cases cited.

The law of partnership is simply a branch of the law of agency (see "*Agency*"), and is dealt with, and mainly contained, in the tenth and eleventh chapters of the Indian Contract Act. Every member of an ordinary firm is, to a certain extent, both a principal and an agent. He is liable as a principal for the debts and engagements of the firm, and in respect of them he is entitled to contribution from his co-partners. Each member as an agent of the firm is entitled to be indemnified by the firm against losses and expenses incurred *bonâ fide* by him (and not through negligence, want of skill, or in disregard of the authority reposed in him) for the benefit of the firm whilst pursuing the authority conferred upon him by the agreement entered into between himself and his co-partners.[1]

'Partnership' is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them. Persons who have entered into partnership with one another are called collectively a 'firm:' *e.g.*:—(*a*) A and B buy 100 bales of cotton, which they agree to sell for their joint account; A and B are partners in respect of such cotton. (*b*) A agrees with B, a goldsmith, to buy and furnish gold to B, to be worked up by him and sold, and that they shall share in the resulting profit or loss. A and B are partners. Mere co-ownership or combination of property without carrying on of a business in common and without an agreement to share profits does not make a partnership: *e.g.*:—(*c*) A and B buy 100 bales of cotton, agreeing to share it between them. A and B are not partners. (*d*) A and B are joint owners of a ship. This circumstance does not make them partners. (*e*) A and B agree to work together as carpenters, but that A shall receive all profits and shall pay wages to B. A and B are not partners. The agreement for a partnership must be between two or more persons, not exceeding ten in the case of a banking business, and not exceeding twenty in any other business. If the partnership consists of more than ten and twenty persons respectively, it must be registered as a company.[2] Extraordinary partnerships, such as partnerships with limited liability, incorporated partnerships, and joint-stock companies, are regulated by the law

1) Lindley, p. 759.

2) Act VI of 1882, s. 4.

for the time being in force relating thereto.[3] See Act VI of 1882, (Indian Companies Act). See "*Companies.*"

Participation in profits is not conclusive evidence of the existence of a partnership. It is very cogent, and, if it stands alone, may be conclusive evidence that the trade in which the profits have been made was carried on, in part, for, or on behalf of, the person participating. But the effect of participation may be outweighed by other circumstances. The test in all such cases resolves itself into a question of agency. The law of partnership being a branch of the law of agency, the test of partnership is not simply whether the alleged partner was to receive a share of profits, but whether he constituted his alleged partners his agents for carrying on business. If that is so, the person participating is liable to the trade obligations and entitled to profits or a share of them; v. *post.*[4]

Lender distinguished from partner.—A loan to a person engaged, or about to engage, in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits, does not, *of itself*, constitute the lender a partner, or render him responsible as such.[5] This and the four succeeding sections of the Contract Act are taken from Bovill's Act (28 and 29 Vic., c. 86,) which had previously been extended to India by Act XV of 1866. In the absence of any contract to the contrary, property left by a retiring partner, or the representative of a deceased partner, to be used in the business, will be considered a loan within the meaning of the last preceding section.[6] In all cases the Court will look to the intention of the parties. Where the real relation of the parties is that of partners, a person who has advanced capital will not be allowed to escape liability under the guise of a mere lender. Though an agreement is expressed to be an agreement for a loan to the partnership, and contains a declaration that the lender shall not be a partner, he will nevertheless be a partner, if the result of the agreement construed as a whole is to give him the rights and impose on him the obligations of a partner.[7]

Servant or agent remunerated by share of profits.—No contract for the remuneration of a servant or agent of any person, engaged in any trade or undertaking, by a share of the profits of such trade or undertaking will, of itself, render such servant or agent responsible as a partner therein, nor give him the

3) Act IX of 1872, ss. 239, 266.
4) 8 H. L. C., 268 : 7 Ch. D., 529 : 1 H. and M., 85 : 6 Ch. D., 303.
5) Act IX of 1872, s. 240 : *v.* 10 B. L. R., 312.
6) Act IX of 1872, s. 241.
7) L. R., 7 Ch. Div., 511.

rights of a partner :[8] *e.g.*, an agreement to pay a gomastah by a share of the profits (v. *ante*).[9]

Widow or child of deceased partner receiving annuity out of profits.—No person, being a widow or child of a deceased partner of a trader, and receiving, by way of annuity, a proportion of the profits made by such trader in his business, will, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him.[1]

Person receiving portion of profits for sale of good-will.—No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, will, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities.[2]

Ostensible partners.—A person who has, by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm. Any one consenting to allow himself to be represented as a partner, is liable, as such, to third persons who, on the faith thereof, give credit to the partnership.[3] A nominal partner is one having no real interest in a firm, but who allows his name to be held out as a partner : *e.g.*, a retired partner who still allows his name to be used by the firm and gives no proper notice of the change in the partnership (v. *post*) ; in all such cases the law imposes on a nominal partner the responsibility of a real partner to persons who have had dealings with the firm of which he has held himself out as a member. Upon principles of general policy, he who lends his name as a partner becomes as against all the rest of the world a partner.[4] In such a case the nominal partner is said to be estopped from denying that he is a real partner.[5]

Minor partners.—A person who is under the age of majority according to the law to which he is subject (see "*Minority and Minors*") may be admitted to the *benefits* of partnership, but cannot be made *personally* liable for any obligation of the firm ; but the *share* of such minor in the property of the firm is liable for the obligations of the firm. A person who has been admitted to the benefits of partnership under the age of majority, becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public

8) Act IX of 1872, s. 244.
9) See 14 Cal., 791.
1) Act IX of 1872, s. 243.
2) ib., s. 244. Cf. 28 and 29 Vic., cap. 86, ss. 1—4.
3) Act IX of 1872, ss. 245, 246.
4) 1 Sm. L. C., 922.
5) Evidence Act, s. 115; v. *post*, s. 106 ib.

notice, within a reasonable time, of his repudiation of the partnership.[6]

Partner's liability.—Every partner is liable for all **debts and obligations** incurred while he is a partner in the *usual* course of business by, or on behalf of, the partnership; but a person who is admitted as a partner into an existing firm does not *thereby* become liable to the creditors of such firm for anything done *before* he became a partner.[7] The estate of a partner who has died is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm *after* his death. See "*Agency.*" Every partner is liable to make compensation to third persons in respect of loss or damage arising from the **neglect or fraud** of any partner in the management of the business of the firm.[8] See "*Negligence*," "*Fraud*," and "*Agency*," p. 42.

Wrongful employment by partner-trustee of trust property for partnership purposes—See "*Trusts and Trustees.*"

Partner's power to bind co-partners.—Each partner who does any act *necessary* for, or *usually* done in, carrying on the business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose. In determining the question of the liability of a principal for the act of his agent, the test is—was the agent acting within the limits of his authority, or in excess of his authority, or in some matter beyond the proper scope of the agency. The same test applies when the person sought to be rendered liable is a partner. Each partner is an agent only in and for the business of the firm, to do such acts as are above-mentioned, and therefore his acts beyond that business will not bind the firm.[9] See "*Agency.*" If, however, it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement will bind the firm with respect to persons having notice of such agreement, *e.g.*: (*a*) A and B trade in partnership, A residing in England, and B in India. A draws a bill of exchange in the name of the firm. B has no notice of the bill, nor is he at all interested in the transaction. The firm is liable on the bill, provided the holder did not know of the circumstances under which the bill was drawn. (*b*) A, being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority. The other partners are not liable on the bill. (*c*) A and B carry on business in partnership as bankers. A sum of money is received by A on behalf of the firm. A does not

6) Act IX of 1872, ss. 247, 248.
7) See 9 C. L. R., 21.
8) Act IX of 1872, ss. 249, 261, 250.
9) 5 A. and E., 883.

inform B of such receipt, and afterwards A appropriates the money to his own use. The partnership is liable to make good the money. (*d*) A and B are partners. A, with the intention of cheating B, goes to a shop and purchases articles on behalf of the firm, such as might be used in the ordinary course of the partnership business, and converts them to his own separate use, there being no collusion between him and the seller. The firm is liable for the price of the goods.[1]

Annulment of articles of partnership.—Where partners have by contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of *all* of them, which consent must either be expressed or be implied from a uniform course of dealing, *e.g.:* A, B and C, intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the nett profits arising from the partnership business shall be equally divided between them. Afterwards they carry on the partnership business for many years, A receiving one-half of the nett profits, and the other half being divided equally between B and C. All parties know of and acquiesce in this arrangement. This course of dealing supersedes the provision in the articles as to the division of profits.[2] With regard to ordinary matters connected with the business the decision of a majority is binding. *See next paragraph.*

Rules determining partner's mutual relations.—*In the absence of any contract to the contrary* the relations of partners to each other are determined by the following rules:—(1) All partners are joint owners of all property originally brought into the partnership stock, or bought with money belonging to the partnership, or acquired for purposes of the partnership business. All such property is called **partnership property**. The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss; (2) all partners are entitled to share equally in the **profits** of the partnership business, and must contribute equally towards the **losses** sustained by the partnership;[3] (3) each partner has a right to take part in the **management** of the partnership business; (4) each partner is bound to attend diligently to the **business** of the partnership, and is not entitled to any remuneration for acting in such business; (5) **when differences arise** as to *ordinary* matters connected with the partnership business, the decision must be according to the opinion of the majority of the partners; but no change in the nature of the business of the partnership can be made, except with the consent of *all* the partners

1) Act IX of 1872, s. 251. 2) ib., s. 252. 3 See 2 H. Bl., 235.

(v. *ante*); (6) no person can introduce a **new partner** into a firm without the consent of all the partners;[4] (7) **Dissolution and retirement.** If, from any cause whatsoever (as by death, retirement, or expulsion) any member of a partnership ceases to be so, the partnership is dissolved as between *all* the other members; (8) unless the partnership has been entered into for a fixed term, any partner may retire from it at any time. On the giving of notice of retirement, the partnership is dissolved to this extent that the Court will compel the parties to act as partners in a partnership existing only for the purpose of winding up the affairs.[5] As a partnership of no fixed duration may be dissolved at any time, no specific performance will be granted of an agreement to enter into such a partnership. See "*Contract*," p. 168;[6] (9) where a partnership has been entered into for a fixed term, no partner can, during such term, retire, except with the consent of all the partners, nor can he be **expelled** by his partners for any cause whatever, except by order of Court: as to the principles which apply in expelling a partner when a power of expulsion is conferred by the partnership contract, see "*By-Laws*," pp. 117, 118, and note to p. 118; (10) partnerships, whether entered into for a fixed term or not, are dissolved by the **death** of any partner.[7] In the absence of an agreement to that effect the representatives of a deceased partner have no right to succeed him in the firm. As a general rule, however, the executors of a deceased partner are entitled to have the existing contracts of the firm carried out to completion in order to ascertain their testator's share of the profits resulting therefrom, his estate being liable to contribute rateably to the resulting loss, if any.[8] Where the partners have an account at a banker's, upon the death of one partner the survivor has a right to draw cheques upon the partnership account.[9] The death of a partner dissolves the partnership not only as regards the deceased, but also (unless there is some agreement to the contrary) as regards all the other partners. A partnership is in all cases dissolved by its business being prohibited by law.[1]

If a partnership entered into for a fixed term be continued after such term has expired, the rights and obligations of the partners will, in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far as such rights and obligations can be applied to a partnership dissolvable at the will of any partner.[2]

4) See 9 Bing. 68.
5) 1 Swanst., p. 508.
6) Act I of 1877, s. 21 (*d*).
7) Act IX of 1872, s. 253.
8) L. R., 9 Ch., 336.
9) 8 Ch. Div.,, 444.
1) Act IX of 1872, s. 255.
2) ib., s. 256.

Duties of partners.—(1) Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives. (2) A partner must account to the firm for any benefit derived from a transaction affecting the partnership. See "*Trusts and Trustees*:[3] *e.g.*, (*a*) A, B and C are partners in trade. C, without the knowledge of A and B, obtains for his own sole benefit a lease of the house in which the partnership business is carried on. A and B are entitled to participate, if they please, in the benefit of the lease.[4] (*b*) A, B and C carry on business together in partnership as merchants trading between Bombay and London. D, a merchant in London, to whom they make their consignments, secretly allows C a share of the commission which he receives upon such consignments, in consideration of C's using his influence to obtain the consignments for him. C is liable to account to the firm for the money so received by him. (3) If a partner, without the knowledge and consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.[5]

Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.[6]

When the Court may dissolve partnership.—At the suit of a partner the Court may dissolve the partnership in the following cases:—(1) When a partner becomes of **unsound mind**; (2) when a partner, other than the partner suing, has been adjudicated an **insolvent** under any law relating to insolvent debtors; (3) when a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person: *e.g.*, assigning (*v. post*) or suffering his share to be taken in execution of a decree; (4) when any partner becomes incapable of performing his part of the partnership contract; (5) when a partner, other than the partner suing, is guilty of **gross misconduct** in the affairs of the partnership or

3) See Act II of 1882, s. 88.
4) 17 Ves., 298.
5) Act IX of 1872, ss. 257, 258, 259.
6) ib., s. 262.

towards his partners; (6) when the business of the partnership can only be carried on at a **loss.**[7]

Winding up.—After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership. Where necessary, as in cases of mismanagement or misconduct of a partner, the Court will appoint a receiver (see "*Receivers*"). Such an appointment prevents the partners from taking any part in the winding up. The dissolution of a partnership may be brought about either by a suit for that purpose or by consent. Where a partnership is thus already dissolved a suit may yet be brought for the purpose of winding up the dissolved partnership. Where a partner is entitled to claim a dissolution of partnership, or where a partnership has terminated, the Court may, *in the absence of any contract to the contrary*, wind up the business of the partnership, provide for the payment of its debts and distribute the surplus according to the shares of the parties respectively.[8]

Revocation of continuing guarantee by change in firm.—A continuing guarantee, given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to *future* transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guarantee was given.[9] See "*Indemnity and Guarantee*," p. 309.

Notice of dissolution.—Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given unless they themselves had notice of such dissolution.[1] As regards the general public a public notice is sufficient. But to old customers of the firm an express or specific notice by circular or otherwise must be given.[2]

Adjustment of accounts after dissolution.—Losses must be paid, first out of profits, next out of capital, and lastly by having recourse to the partners individually. The assets should be applied in paying (1) the debts and liabilities of the firm to non-partners; (2) to each partner rateably what is due from the firm to him for advances as distinguished from capital; and (3) to each partner rateably what is due from the firm to him in respect of capital. (4) The ultimate residue, if any, will then be divisible as profit between the partners in equal shares, unless the contrary can be shown.[3]

7) Act IX of 1872, s. 254.
8) ib., s. 265, substituted for the original by Act IV of 1886.
9) ib., s.260: cf. 19 & 20 Vic., cap. 97, s. 4: (Mercantile Law Amendment Act.)
1) Act IX of 1872, s. 264: 3 Esp., 248.
2) I. L. R., 8 Cal., 678.
3) Lind., 806.

The Good-will of a business is part of the assets of the firm, and therefore under a provision in the partnership articles for valuation of the partnership property, the good-will is matter for valuation.[4] On the death of a partner in a firm the good-will does not *survive* to the remaining partners.[5] The sale of the good-will of a business does not, in the absence of express covenant, prevent the vendor from dealing with the former customers.[6]

Assignment of share.—An assignment of a share in a partnership concern is not illegal or void as between the parties to the assignment, but only so far void as between those parties and the other partners as to cause an immediate dissolution of the partnership. In other words one partner cannot by assigning his share make any one else a partner in his stead with his co-partners; therefore upon his assigning his share the partnership ceases to exist unless the other partners consent to accept the assignee as a partner in his place. If they do consent the partnership may continue to be carried on as before. If no assent is given by the other partners to the assignment, the assignee is upon dissolution at liberty to sue for an account and for distribution, not as a partner, but as assignee of the right of his assignor in the partnership property.[7]

Burden of proof as to relationship in cases of partners, etc.—When the question is whether persons are *partners*, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.[8]

4) 13 Ch. D., 863 : 47 L. J. Ch., 773.
5) 27 Beav., 446.
6) 51 L. J. Ch. App., 90. But see L. R., 13. Eq., 322 : 14 Ch. Div., 596.
7) I. L. R., 10 Cal., 672. Act IX of 1872, s. 253, cl. 6.
8) Evidence Act, s. 109.

PENSIONS AND SALARIES.

AUTHORITIES—Act XXIII of 1871 : Civil Procedure Code : Act XXI of 1886 ; Act IV of 1882 (Transfer of Property) : Cases cited.

Claims for : to whom made.—Any person having a claim relating to any pension, or grant of money, or land revenue conferred or made by the British or any former Government, should prefer such claim to the Collector of the District, or Deputy Commissioner, or other officer authorized in this behalf by the Local Government, who will dispose of such claim in accordance with the rules prescribed from time to time by the Chief Revenue authority.[1]

Civil suit for pension.—No Civil Court can entertain any claim relating to any such pension or grant except upon receiving a certificate from the Collector, &c., that the case may be tried. It cannot, however, make any order or decree in any suit by which the liability of Government to pay any such pension or grant is affected directly or indirectly.[2] Thus suits under the Pensions Act require sanction ; but if the requisite sanction is obtained before decree, the original defect is cured.[3]

Pensions for lands held under grants in perpetuity.—The provisions in the preceding paragraph do not apply to any *inám* of the class referred to in section 1, Madras Act No. IV of 1862 ; or pensions granted by Government previous to 1871 in the territories respectively subject to the Lieutenant-Governors of Bengal and the North-West Provinces, either wholly or in part, as an indemnity for loss sustained by the resumption by a Native Government of lands held under sanads purporting to convey a right in perpetuity. These pensions are not liable to resumption on the death of the recipient, are capable of alienation and descent, and may be sued for and recovered in the same manner as any other property.[4]

Mode of payment of.—All pensions or grants by Government of money or land revenue are payable by the Collector, Deputy Commissioner, or other duly authorized officer subject to the rules in force, prescribed by the Chief Revenue authority.[5]

Commutation.—The Local Government may, with the consent of the holder, order the whole or any part of his pension, or grant of money, or land revenue to be commuted for a lump sum on such terms as may seem fit.[6]

1) Act XXIII of 1871, s. 5.
2) ib., ss. 4, 6. See s. 9, ib.
3) I. L. R., 8 Cal., 422.
4) Act XXIII of 1871, s. 7.
5) ib., s. 8. See s. 9, ib.
6) ib., s. 10.

Pension cannot be attached.—No pension granted or continued by Government on political considerations, or on account of past services, or present infirmities, or as a compassionate allowance, and no money due or to become due on account of any such pension or allowance is liable to seizure, attachment, or sequestration by process of any Court in British India, at the instance of any creditor, for any demand against the pensioner, or in s atisaction of a decree or order of any such Court.[7] Stipends and gratuities allowed to Civil and Military pensioners of Government and political pensions are not liable to attachment or sale whether before or after they are actually payable: nor can such stipends and political pensions be transferred.[8] The above-mentioned provisions apply to Government pensions only: private pensions can be attached as debts; but the sums attached must not be inchoate, but arrears existing and definite (v. *post*).[9]

Assignments in anticipation of pension are void.—All assignments, agreements, orders, sales and securities of every kind made by the person entitled to any such pension, pay, or allowance in respect of any money not payable *at or before the making thereof*, on account of any such pension, pay, or allowance, or for giving or assigning any future interest therein are null and void.[1]

Rewards to informers.—Whoever proves to the satisfaction of the Local Government that any pension is fraudulently or unduly received by the person enjoying the benefit thereof, is entitled to a reward equivalent to the amount of such pension for the period of six months.[2]

Oudh Wasikas.—The allowances known as the *Amanat Wasikas*, the *Zamanat Wasikas* and the Loan *Wasikas* are pensions within the meaning of the Pensions Act.[3]

Attachment and transfer of salaries.—The principle upon which Courts have held pensions and salaries of public officers inalienable, is, either that they are given to keep up the dignity of the office, or to ensure a discharge of its duties. And it has been held in either case, that it is against public policy to assign such a salary.[4] A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.[5] The following is not liable to attachment or sale, *viz.*: (*a*) The salary of a public officer or of any servant of a Railway Company, or local authority to the extent of—(i) the whole of the salary where the salary does not exceed Rs. 20 monthly;

7) Act XXIII of 1871, s. 11.
8) Civ. Pr. Code, s. 266 (*g*)—(see "*Attachment*," p. 72): Act IV of 1882 (Transfer of Property), s. 6 (*g*.)
9) 8 B. L. R., 195, 196: 6 C. L. R., 19.
1) Act XXIII of 1871, s. 12.
2) Ib., s. 13.
3) Act XXI of 1886
4) See 3 M. I. A., 443.
5) Act IV of 1882, s. 6 (*f*).

(ii) Rs. 20 monthly where the salary exceeds Rs. 20, and does not exceed Rs. 40 monthly; and (iii) one moiety of the salary in any other case. (*b*) Any allowance declared by a Governor or Lieutenant-Governor to be exempt from liability to attachment or sale in execution of a decree. The particulars mentioned in clause (*a*) are exempt from attachment or sale whether before or after they are actually payable.[6]

6) Civ. Pr. Code, s. 266, (*h*), (*m*). See "*Attachment*," p. 72.

POSSESSION.

AUTHORITIES—Act I of 1877 (Specific Relief): Act XV of 1877 (Limitation): Commentaries on the same by H. T. Rivaz: Act IX of 1872 (Contract): Criminal Procedure Code: Commentaries on the Limitation Act by M. H. Starling, 1886: Act XV of 1882 (Presidency Small Cause Courts): Cases cited.

Protection given to possession.—Mere possession of property (moveable or immoveable) is protected by law, quite apart from any question of right of ownership. So where (as in a leading case) a sweep had found a jewel which he took to a jeweller to examine, and the jeweller took the jewel, returning the socket only to the sweep, it was held that the latter might maintain an action for wrongful detention, and was entitled to the jewel, as the finder and possessor thereof, against all the world, except the true owner.[1] So also mere possession of immoveable property is protected both in the Civil and Criminal Courts. The relief given by the latter is mainly granted to prevent breaches of the peace and to secure public tranquillity by obliging owners of property to seek the aid of the Courts in establishing their rights instead of themselves endeavouring, by private efforts, to enforce them. The relief given by both the Criminal and Civil Courts is only of a temporary nature, that is, the Courts will only uphold mere possession pending the determination of the question of title and ownership in a competent Court. If the person who seeks to recover the property against the possessor, does not within a certain time (fixed by the law of limitation) take steps to obtain a decision of the question of title from a competent Court, the right of the possessor becomes indefeasible by effluxion of time (v. *post*).

Chose in possession—See "*Action and Actionable Claim*," p. 18.

Suits for the possession of immoveable property.—If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he, or any person claiming through him, may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.[2] No suit of this kind can be brought against the Government. There is no appeal from any order or decree passed in such suit, nor any revision thereof.[3] The suit must be brought within six months of the time when the dispossession occurs.[4] This provision of the law does not abridge in any way any rights possessed by a plaintiff, but is intended to give him the right, if illegally dispossessed, to have his possession restored *without*

1) See Act I of 1877, s. 10, and *post*.
2) Act I of 1877, s. 9.
3) ib.
4) Act XV of 1877, Art. 3.

reference to the title on which he holds, or to that which his dispossessor asserts (*i.e.*, all the plaintiff is required to do is to prove possession). The plaintiff may, if he likes, institute a suit in the ordinary course to establish his title to the property and to recover possession.[5] But land to which the plaintiff fails to make out a title cannot be recovered on the ground of previous possession merely, except under this section,[6] the object of which is to discourage proceedings calculated to lead to serious breaches of the peace, and to provide against the party who has taken the law into his own hand deriving any benefit thereby.[7]

Suits for the possession of moveable property.—A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Civil Procedure Code.[8] A special or temporary right to the present possession of property is sufficient to support a suit under this section: *e.g.*, A deposits books and papers for safe custody with B. B loses them, and C finds them, but refuses to deliver them to B when demanded. B may recover them from C; subject to C's right, if any, to be compensated for the trouble and expense incurred by him to preserve the goods and to find out the owner.[9] See "*Bailment.*" The following is an instance of a mere temporary right of possession: A, a warehouse keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.[1] A trustee may sue for the possession of property to the beneficial enjoyment of which the person for whom he is trustee is entitled.[2]

Rights as to letters.—A person who sends a letter to another gives that other a qualified property in the letter for the purposes of reading and keeping it. But the gift is so restrained that beyond the purposes for which the letter was sent, the property is still in the sender. Thus, if the receiver threatens to publish a letter, the writer (in whom the copyright is vested) may obtain an injunction to restrain him. The receiver of a letter may bring an action against the writer to recover it if he has got it back into his possession, and withholds it: *e.g.*, A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B, and of course from any third person.[3]

5) Act I of 1877, ss. 8, 9.
6) ib., s. 9, v. *ante*.
7) Rivaz's Limitation Act, p. 98: 2 Mad., 313: 9 W. R., 602: 2 W. R., 250: 6 Cal. L. R., 249: S. C. L. R., 7 I. A., 73: Act I of 1877, s. 9.
8) Act I of 1877, s. 10.
9) ib.: s. 168, Act IX of 1872.
1) Act I of 1877, s. 10.
2) ib.
3) ib., s. 10, illust. (*c*): 32 Beav., 462: 2 Ves. and B., 19: 2 Swanston, 402: 54 L. J. Ch., 293: 11 C. B. N. S., 139: 54 L. J. Ch., 293.

When possessor may be compelled to specifically deliver.—Any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—(*a*) When the thing claimed is held by the defendant as the agent or trustee of the claimant; (*b*) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed: *e.g.*, Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A; (*c*) when it would be extremely difficult to ascertain the actual damage caused by its loss: *e.g.*, A is entitled to a picture by a dead painter and a pair of rare china vases. B has possession of them. The articles are of too special a character to bear an ascertainable market value. B may be compelled to deliver them to A; (*d*) when the possession of the thing claimed has been wrongfully transferred from the claimant.[4]

Claim to possession of property attached or taken in execution—See "*Attachment*," p. 75, and "*Execution*."

Ejectment suits.—In such suits the defendant may have nothing but possession on which to rely, and yet will succeed if the plaintiff fails to establish his title. The burden of proof lies on the plaintiff, who must stand or fall by the strength of his own and not by the weakness of the defendant's title.

Acquisition of ownership by possession.—Possession is evidence of title. Possession without title, if held for the period of time and under the conditions prescribed by the law of limitation, creates title. At the determination of the period limited to any person for instituting a suit for possession of any property, his right to such property is extinguished.[5] (1) A suit for possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed, or has discontinued the possession, must be brought within twelve years of the date of the dispossession or discontinuance. The plaintiff must prove that he was possessed and dispossessed of immoveable property within *twelve years* before the time when he filed his suit.[6] "Dispossession" occurs when a person comes in and drives another out of possession. "Discontinuance" means an abandonment of possession by one person followed by the actual possession of another person.[7] (2) Like suit, when the

4) Act I of 1877, s. 11.
5) Act XV of 1877, s. 28.
6) Art. 142, Act XV of 1877 (Limitation); I. L. R., 9 Cal. 744 (F. B.
7) 14 Ch. D., 537: Starling, p. 196: 10 Ir. L. R., 514: 6 Bom. H. C. Rep., 129.

plaintiff has become entitled by reason of any forfeiture or breach of condition, must be brought within *twelve years* of the time when the forfeiture is incurred or the condition is broken.[8] (3) A suit for possession of immoveable property or any interest therein not otherwise specially provided for by the Limitation Act, must be brought within *twelve years* of the date when the possession of the defendant becomes adverse to the plaintiff.[9] Under this article the plaintiff need not (as in the case of suits under Art. 142 (v. *ante*) prove possession within twelve years, but as soon as title is shewn in the plaintiff the defendant must prove twelve years' adverse possession in order to establish his defence.[1] **Adverse possession** is possession by a person holding the land, on his own behalf, or on behalf of some person other than the true owner, the true owner having a right to immediate possession. If by this adverse possession the Statute of Limitation is set running, and it continues to run for twelve years, then the title of the true owner is extinguished and the person in possession becomes the owner.[2] See "*Easements and Licenses.*"

Procedure where dispute concerning land, etc., is likely to cause breach of the peace.—Whenever a District Magistrate, a Sub-divisional Magistrate, or Magistrate of the first class is satisfied from a Police report or other information that a dispute likely to cause a breach of the peace exists concerning any tangible immoveable property, or the boundaries thereof, within the local limits of his jurisdiction, he may make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court, in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of *actual possession* of the subject in dispute. The Magistrate must then, without reference to the merits of the claims of any such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties *is then* in such *possession* of the said subject. If he decides that one of the parties is then in such possession of the said subject, he will issue an order declaring such party to be entitled to retain possession thereof *until evicted therefrom in due course of law*, and forbidding all disturbances of such possession until such eviction.

8) Act XV of 1877, Art. 143.
9) ib., Art. 144 : as to suits for possession, by mortgagees and purchasers see Arts. 135—138.
1) Starling, p. 196. I. L. R., 10 Cal., 374.
2) Per Markby, J. I. L. R., 4 Cal., 329.

It is always open to a party so required to attend to show that no such dispute as alleged exists or has existed, and the Magistrate may thereupon stay all further proceedings.[3]

Attachment of property.—If the Magistrate decides that neither party is in such possession, or is unable to decide which of them is in possession, he may attach the property until a competent Civil Court has decided who is the person rightfully entitled to possession.[4]

Recovery of possession of immoveable property in the Small Cause Court.—When any person has had possession of any immoveable property within the local limits of the jurisdiction of a Presidency Small Cause Court, and of which the annual value at a rack rent does not exceed Rs. 1,000, as the tenant, or by permission of another person, or of some person through whom such other claims, and such tenancy or permission has determined or been withdrawn, and such tenant or occupier, or any person holding under or by assignment from him (hereinafter called the occupant), refuses to deliver up such property in compliance with a request made to him in this behalf by such other person, such other person (hereinafter called the applicant) may apply to the Small Cause Court for a summons against the occupant, calling upon him to show cause why he should not be compelled to deliver up the property.[5] If the occupant does not appear at the time appointed, and show cause to the contrary, the applicant, if the Court is satisfied that he is entitled to apply under the preceding section, is entitled to an order addressed to a bailiff of the Court directing him to give possession of the property to the applicant on such day as the Court thinks fit to name in the order. Such an order justifies the bailiff in entering on the property and giving possession. The applicant, if entitled to possession, will not be deemed a trespasser for any error in the proceedings: but the occupant may sue for compensation.[6] An application for an order by an applicant not entitled is deemed to be an act of trespass, even though no possession is taken under the order.[7] Recovery of the possession of any immoveable property under the above-mentioned provisions is no bar to the institution of a suit in the High Court for trying the title thereto.[8]

See *Index*.

3) Cr. Pr. Code, s. 145.
4) ib., s. 146.
5) Act XV of 1882, ss. 41, 42.
6) ib., ss. 43—45.
7) ib., ss. 46, 47.
8) ib., s. 49.

POWER-OF-ATTORNEY.

AUTHORITIES—Act VII of 1882 : Act IX of 1872.

A power-of-attorney is a writing authorizing another person who, in such case, is called the attorney of the person (or donee of the power) appointing him to do any lawful act in the stead of another, as to receive rents, debts, to make appearance and applications in Court, etc. (*v.* p. 43). It may be either general or special—to do all acts, or to do some particular act. The nature of this instrument is to give the attorney the full power and authority of the maker to accomplish the act intended to be performed : sometimes it is revocable, sometimes not ; if it is an authority coupled with an interest, *e.g.*, if the attorney is authorized to collect debts and to pay thereout a debt due to himself, the power cannot be revoked to the prejudice of such interest. Revocable powers may be dissolved either by act of party or by operation of law : see "*Agency*," p. 35.[1]

Acts done under power.—The donee of a power-of-attorney may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature, and his own seal, when sealing is required, by the authority of the donor of the power ; and every assurance, instrument and thing so executed and done, is as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof.[2]

Payment by attorney without notice of death, etc.—Any person making or doing any payment or act in good faith, in pursuance of a power-of-attorney, will not be liable in respect of the payment or act by reason that, before the payment or act, the donor of the power had died, or become lunatic, of unsound mind, or bankrupt or insolvent, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, insolvency or revocation was not, at the time of the payment or act, known to the person making or doing the same.[3] This section does not affect any right against the payee of any person interested in any money so paid ; and that person has the like remedy against the payee as he would have had against the payer, if the payment had not been made by him.

1) Act IX of 1872, s. 202 : Wharton's Law Lexicon.

2) Act VII of 1882, s. 2. This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force (24th Feb. 1882).

3) ib., s. 3. This section applies only to payments and acts made or done after this Act comes into

Power-of-attorney of married women.—A married woman, whether a minor or not, has power as if she were unmarried and of full age, by a non-testamentary instrument, to appoint an attorney on her behalf for the purpose of executing any non-testamentary instrument or doing any other act which she might herself execute or do; and the provisions of the Act relating to instruments creating powers-of-attorney apply thereto.[4]

Deposit of original instruments in Court.—(*a*) An instrument creating a power-of-attorney, its execution being verified by affidavit, statutory declaration or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the High Court within the local limits of whose jurisdiction the instrument may be. (*b*) A separate file of such instruments is kept, and any person may search that file and inspect every instrument so deposited and obtain a certified copy of it. (*c*) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as a certified copy, and when so stamped or marked becomes and is a certified copy. (*d*) A certified copy of an instrument so deposited, is considered, without further proof, sufficient evidence of the contents of the instrument and of the deposit thereof in the High Court. (*e*) The fees chargeable for depositing powers-of-attorney, searching the file and obtaining copies are regulated by the High Courts. Throughout British Burmah the Court of the Recorder of Rangoon is for the purposes abovementioned deemed to be a High Court.[5]

Form of power—See *Appendix*.

4) Act VII of 1882, s. 5. This section applies only to instruments executed after this Act comes into force.

5) ib., s. 4. This section applies to instruments creating powers-of-attorney either before or after this Act comes into force.

PROBATE.

AUTHORITIES—Act X of 1865 (Succession): Act V of 1881 (Probate and Administration): Evidence Act: Act XXI of 1870 (Hindu Wills): Cases cited.

Nature of.—On the death of a person leaving a will appointing an executor, the latter should take steps to prove before a competent Court of Justice that the will has been executed by the testator. When the will has been duly established, that is shown to be the genuine will of the testator, and to have been executed by him in a sound mind and with the formalities prescribed by law (see "*Wills*"), "probate" will be given to the executor propounding the will. "**Probate**" **means** the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator.[1] **A grant of probate when made is conclusive prpof of a will against all the world.** It may be shown that the grant was revoked (v. *post*), for that is the further act of the same Court; or that it was forged, for that shows it was not the act of the Court at all; or that it was granted by a Court that had no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad, or the *will* was forged, for those facts might have been alleged in opposition to the grant of administration.[2] Probate is also conclusive proof of the legal character of the person appointed executor thereof:[3] it is a judicial recognition of his executorship, authorizing and empowering him to perform all the acts of his office in respect of the estate of the deceased.[4] **Probate simply establishes the fact of the will.** Where an application for probate of a will is made *bonâ fide* the Court will not go into questions of title with reference to the property of which the will purports to dispose. The grant of probate does not prejudice the rights of any person who claims the property.[5] Since the will and not probate is the foundation of the executor's title, the executor may before probate act as effectually in almost all matters relating to his office, as if probate had been granted. Yet **probate is the confirmation and authenticated evidence of the executor's title,** and the investment of the executor with the character which it declares to belong to him and with the full and complete powers which attach to his office: for the executor as such, before

1) Act X of 1865, s. 3: Act V of 1881, s. 3.
2) 2 Smith, L. C., 827. See 8 B. L. R., 208.
3) Evidence Act, s. 41. See "*Judgments and Decrees*," p. 357.
4) See "*Executor*," p. 245.
5) I. L. R., 4 Cal. 1: 2 C. L. R., 577: 8 C. L. R., 287.

obtaining probate, cannot maintain an action. In the case of the wills of persons governed by the Indian Succession Act and Hindu Wills Act,[6] no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction shall have granted probate of the will under which the right is claimed or letters of administration with copy annexed of authenticated copy of will proved abroad.[7] In the case of the wills of persons not so governed (*viz.*, Hindus, Mahommedans and Buddhists not subject to the Hindu Wills Act), it is necessary to obtain either probate or administration or a succession certificate before recovery can be had through the Courts of debts due from debtors of a deceased person, by any person claiming to be entitled to the effects of a deceased person or to any part thereof.[8] The grantee of probate has alone power to sue, or otherwise act as representative of the deceased, throughout the province in which the same may have been granted, until such probate shall have been recalled or revoked.[9] The **effect of probate** when granted is to establish the will from the death of the testator and to render valid all intermediate acts of the executor as such.[1] Probate like administration may be granted subject to exception, and whenever a grant with exception of probate has been made, the person entitled to probate of the remainder of the deceased's estate may take a grant of probate of the rest of the deceased's estate :[2] *e.g.*, a testator appoints one executor for a special purpose, or a specific fund only, and another executor for all other purposes; the latter may take probate save and except that purpose or fund.[3]

To whom granted.—Probate can be granted only to an executor appointed by the will.[4] It cannot be granted to any person who is a minor or is of unsound mind ;[5] nor to a married woman without the previous consent of her husband.[6] When several executors are appointed, probate may be granted to them all simultaneously or at different times : *e.g.*, A is an executor of B's will by express appointment, and C an executor of it by implication. Probate may be granted to A and C at the same time, or to A first and then to C, or to C first and then to A. When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the

6) Act XXI of 1870 (applies to the wills of Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and the towns of Madras and Bombay).
7) Act X of 1865, ss. 187, 180 : Act XXI of 1870, s. 2 : Act V of 1881 : s. 5. See "*Executor*," p. 246.
8) See "*Administration*," pp. 21, 26, 29 : and "*Executor*," p 246.
9) Act X of 1865, s. 260 : Act V of 1881, s. 82.
1) ib., s. 188 : ib., s. 12.
2) ib., ss. 226, 228 : ib., ss. 42, 44.
3) See "*Administration*," p. 27.
4) See "*Executor*," pp. 246, 247.
5) Act X of 1865, ss. 181, 183 : Act V of 1881, ss. 6, 8.
6) Act X of 1865, s. 183 : this provision is not incorporated in Act V of 1881.

surviving executor or executors.[7] If an executor be appointed for any limited purpose specified in the will, the probate will be limited to that purpose, and if he should appoint an attorney to take administration on his behalf, the letters of administration, with the will annexed, will accordingly be limited. If an executor appointed generally give an authority to an attorney to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration, with the will annexed, will be limited accordingly. The grant follows the terms of the power.[8] If the executor to whom probate has been granted has died leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.[9] Grants of effects unadministered are technically called "grants *de bonis non*" or "*de bonis non administratis.*" See "*Administration*" and "*Executor.*"

Jurisdiction to grant.—The High Court has concurrent jurisdiction with the District Judge in the exercise of all the powers conferred upon the District Judge.[1] The latter has jurisdiction to grant and revoke probate and letters of administration in all cases within his district: it must appear that the testator or intestate, as the case may be, had a fixed place of abode, or some property within the jurisdiction of the Judge. The High Court has power to appoint judicial officers to act for the District Judge as delegates in *non-contentious* cases. Grants may be made by delegates if it appear that the testator or intestate, as the case may be, at the time of his death resided within the jurisdiction of such delegate.[2]

Procedure.—The Code of Civil Procedure (except where otherwise specially provided) regulates all proceedings of the District Judge's Court in relation to probate and administration. In contentious cases the proceedings take, as nearly as may be, the form of a regular suit, in which the petitioner for probate or letters of administration, as the case may be, is the plaintiff, and the person who appears to oppose the grant, the defendant. Every order made by a District Judge is subject to **appeal** to the High Court under the rules contained in the Civil Procedure Code, applicable to appeals.[3]

Protection of property until probate or administration and otherwise.—Until probate is granted or an administrator is

7) Act X of 1865, ss. 184, 186: Act V of 1881, ss. 9, 11.
8) ib., ss. 219, 220: ib., ss. 35, 36.
9) ib., s. 229: ib., s. 45.
1) ib., s. 264: ib., s. 87.
2) ib., ss. 235, 240, 241, 235A, 241A, 253A: ib., ss. 51, 56, 57, 52, 58, 73. Sections 235A, 241A, 253A, have been added by the District Delegates Act (VI of 1881).
3) ib., ss. 238, 261, 263: ib., ss. 55, 83, 86. See "*Appeal, Revision, Review and Reference.*"

constituted the District Judge within whose jurisdiction any part of the property of the deceased person is situate is authorized and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he shall see fit, to appoint an officer to take and keep possession of the property.[4] See "*Intestacy*," p. 347.

Order to produce testamentary papers.—The District Judge may order any person to produce and bring into Court any paper or writing, being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person: and if it be not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined respecting the same.[5]

No probate will be granted until after the expiration of seven clear days from the day of the testator's death.[6]

Application for probate must be made by written petition with the will annexed, stating (1) the time of the testator's death; (2) that the writing annexed is his last will and testament; (3) that it was duly executed (see "*Wills*"); (4) the amount of the assets which are likely to come to the petitioner's hands; (5) that the petitioner is the executor named in the will; (6) (when the application is to the District Judge) that the deceased at the time of his death, had his fixed place of abode, or had some property situate within the jurisdiction of the Judge, or (when the application is to a delegate) that the deceased, at the time of his death, resided within the jurisdiction of such delegate; (7) (when the application is to a High Court for probate intended to have effect throughout British India) that to the best of the petitioner's belief no such similar application has been made to any other High Court, or where such application has been made, the High Court to which it was made, the persons by whom it was made, and the proceedings (if any) had thereon. The petition must be signed and verified in the following form:—"I (A.B.), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief." The petition must also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following:—"I (C.D.), one of the witnesses to the last will and testament of the

4) Act X of 1865, s. 239: this provision is not incorporated in Act V of 1881.
5) ib., s. 237: Act V of 1881, s. 54.
6) ib., s. 258: ib., s. 80.

testator mentioned in the above petition, declare that I was present, and saw the said testator affix his signature (*or* mark) thereto (*as the case may be*), (*or* that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence)." A person making a false averment in any petition or declaration is punishable for giving or fabricating false evidence.[7] In cases wherein the will is written in any language other than English, or the language of the Court, a translation of the will must be annexed to the petition. An application for probate or letters of administration, (see "*Administration*,") if duly made and verified, is conclusive for the purpose of authorizing the grant of probate or administration, and no such grant can be impeached by reason that the testator had no fixed place of abode, or no property within the district at the time of his death unless by a proceeding to revoke the grant if obtained by a fraud upon the Court.[8]

Issue of citations.—The Judge or Delegate may examine the petitioner in person and require further evidence of the due execution of the will or the right of the petitioner to the letters of administration as the case may be, and may issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.[9]

Caveat on opposition to grant of probate or administration.—Any person intending to *oppose* the grant of probate or letters of administration must lodge a caveat with the Judge or Delegate. The caveat must be to the following effect :— "*Let nothing be done in the matter of the estate of A. B., late of ....., deceased, who died on the .....day of..... at....., without notice to C. D., of.....*" After entry of the caveat no proceeding can be taken on a petition for probate or administration until after notice given to the person entering the caveat, called the caveator.[1] No person is entitled to oppose the grant of probate or dispute the validity of the will who has not got an interest in the estate of the deceased.[2] The opposition must be on grounds denying the right of the petitioner to a grant, or denying the making or validity of the will (see "*Wills*"), but not on grounds denying the title of the testator to the property of which the will purports to dispose, because the grant of probate does not prejudice the rights of any person who claims the property (v. *ante*).[3]

7) See Penal Code, chap. xi, and "*Oaths, Evidence and Witnesses.*"
8) Act X of 1865, ss. 244, 246A, 247, 248, 249, 245, 243 : Act V of 1881, ss. 62, 65, 66, 67, 68, 63, 61.
9) ib., s. 250 : ib., s. 69.
1) ib., ss. 251—253 : ib., ss. 70—72.
2) 15 W. R., 351.
3) I. L. R., 4 Cal., 1.

Form of grant.—The grant of probate is under the seal of the Court and in the following form:—"I....., Judge of the District of..... , *or* Delegate appointed for granting probate or letters of administration in [*here is inserted the limits of the Delegate's jurisdiction*] hereby make known that on the.....day of....., in the year..... the last will of....., late of....., a copy whereof is hereunto annexed, was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning his will, was granted to ....., the executor in the said will named, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits, and exhibit the same in this Court, within six months from the date of this grant, or within such further time as the Court may from time to time appoint, and also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may from time to time appoint.[4]

Conclusiveness of probate or letters of administration.—Probate or letters of administration have effect, over all the property and estate of the deceased, throughout the province in which the same is or are granted, and are conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration have been granted: *provided* that probates and letters of administration granted by a High Court, the Chief Court of the Panjab, or the Court of the Recorder of Rangoon after the 1st April 1875, have, unless otherwise directed by the grant, like effect throughout the whole of British India.[5]

Separate probate of codicil discovered after grant of probate.—If a codicil be discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will. If different executors are appointed by the codicil, the probate of the will must be revoked, and a new probate granted of the will and the codicil together.[6]

Copy or draft of lost will.—When the will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident, and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted

4) Act X of 1865, s. 254; Act V of 1881, s. 76.

5) ib., s. 242: ib., s. 59.

6) ib., s. 185: ib., s. 10.

of such copy, or draft, limited until the original or a properly authenticated copy of it be produced.[7]

Contents of lost or destroyed will.—When the will has been lost or destroyed, and no copy has been made, nor the draft preserved, probate may be granted of its contents, if they can be established by evidence.[8] The contents of a lost will like those of any other instrument may be proved by secondary evidence: where the contents are not completely proved, probate will be granted to the extent to which they are proved.[9] But in all cases the validity of the execution must be shown as well as the substance or contents of the will.[1]

Probate of copy where original exists.—When the will is in the possession of a person residing out of the province in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it be produced.[2]

Administration until will produced.—Where no will of the deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it be produced.[3]

Revocation of grants of probate or administration.—The Court possesses and exercises, when it becomes necessary, the power of revoking or annulling for just cause any grants of probate or letters of administration which it has made.[4] "Just cause" is (1)—That the proceedings to obtain the grant were defective in substance: *e.g.* (*a*) the Court by which the grant was made had no jurisdiction; (*b*) the grant was made without citing parties who ought to have been cited. (2)—That the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case: *e.g.* (*a*) the will of which probate was obtained was forged or revoked; (*b*) A obtained letters of administration to the estate of B as his widow, but it has since transpired that she was never married to him. (3) That the grant was obtained by means of an untrue allegation of a fact, essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently: *e.g.* (*a*) A has taken administration to the estate of B as if he

7) Act X of 1865, s. 208: Act V of 1881, s. 24.
8) ib., s. 209: ib., s. 25.
9) L. R., 1 P. Div., 154.
1) 1 Sw. and Tr., 68, 109. See 7 C. L. R., 387.
2) Act X of 1865, s. 210: Act V of 1881, s. 26.
3) ib., s. 211: ib., s. 27.
4) See "*Administration*," p. 27.

had died intestate, but a will has since been discovered; (*b*) since probate was granted a later will has been discovered. (4) That the grant has become useless and inoperative through circumstances: *e.g.* (*a*) since probate was granted, a codicil has been discovered, which revokes, or adds to, the appointment of executors under the will; (*b*) the person to whom probate was, or letters of administration were, granted, has subsequently become of unsound mind.[5] (5) That the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account, or has exhibited an inventory or account which is untrue in a material respect.[6] Administration may be granted *pending any suit* for obtaining or revoking probate, or any grant of letters of administration.[7] Persons who seek to contest a will must prove an interest (*e.g.*, as legatee) sufficient to entitle them to a *locus standi* in the Court.[8] Where any probate is, or letters of administration are, revoked, all payments *bonâ fide* made to any executor or administrator under such probate or administration before the revocation thereof are, notwithstanding such revocation, a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him, which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made.[9]

Filing of original wills—See "*Wills.*"

See "*Administration*," "*Executor*," "*Wills*," "*Intestacy*," and *Index.*

5) Act X of 1865, s. 234: Act V of 1881, s. 50.
6) ib., s. 234: ib., s. 50, added by Act VI of 1889, s. 2. See "Duties of an executor or administrator," pp. 21 2nd 248.
7) ib., s. 218: ib., s. 34.
8) I. L. R., 17 Cal., 48: 2 All. H. C. R., 268.
9) Act X of 1865, s. 262: Act V of 1881, s. 84.

PROSECUTION.

AUTHORITIES—Criminal Procedure Code (Act X of 1882: as amended by Acts III of 1884, X of 1886, V and XIV of 1887, I and XIII of 1889, III, IV, X and XII of 1891): Indian Penal Code: Cases cited.

History of the Criminal Courts—See *Introduction.*

Law of Criminal Procedure in British India.—All offences under the Indian Penal Code must be inquired into and tried according to the provisions contained in the Criminal Procedure Code: and all offences under any other law must be enquired into and tried according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of enquiring into or trying such offences.[1] See *Introduction* and "*Offences.*"

Classes of Criminal Courts.—Besides the High Court and the Courts constituted under any law other than the Criminal Procedure Code, there are five classes of Criminal Courts in British India, *viz.*, the Courts of (1) Session; (2) Presidency Magistrates; (3) Magistrates of the first class; (4) Magistrates of the second class; (5) Magistrates of the third class.[2] The following table shows the relation of the territorial divisions and the distribution of Courts and officers outside the Presidency-towns (Calcutta, Madras and Bombay):—

(*For Table* see *next page.*)

1) Criminal Procedure Code, s. 5. 2) ib., s. 6.

TABLE

Showing the relation of the territorial divisions and the distribution of Criminal Courts. See p. 525.

Province.—High Court. A High Court may pass any sentence.[3] Every province (excluding the Presidency-towns) is a Sessions Division or consists of[4]—

Sessions Divisions.—Court of Session. SESSIONS JUDGE and Additional, Joint, and Assistant Sessions Judges.[5] The last are subordinate to the Sessions Judge. These Judges, excepting Assistant Sessions Judges, may pass any sentence; but a death sentence is subject to confirmation by the High Court.[6]

Sessions Divisions.—Every Sessions Division is a District* or consists of[7]—

Districts.—Court of District Magistrate. DISTRICT MAGISTRATE (1st class). Besides the District Magistrate, SUBORDINATE MAGISTRATES (1st, 2nd or 3rd class), exercising jurisdiction either throughout the whole district, or in defined local areas only, and subordinate to the District Magistrate.[8] As to the sentences which may be passed by 1st, 2nd and 3rd class Magistrates, see p. 527.

Districts.—The Local Government may make any portion of any district (outside the Presidency-towns) a sub-division, or may divide any such district into[9]—

Sub-divisions—Court of Sub-divisional Magistrate. SUB-DIVISIONAL MAGISTRATES† in charge of a sub-division and subordinate to the District Magistrate.[1] Every Magistrate (other than a Sub-divisional Magistrate) and every Bench (v. *infra*) exercising powers in a sub-division is subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate ‡[2]

Sub-divisions.—

* Every Presidency-town is, for the purposes of the Code, deemed to be a district.(*a*)

† In addition to the above-mentioned Magistrates the Local Government has power to appoint "Special Magistrates" (1st, 2nd or 3rd class) in respect to particular cases, or to a particular class or classes of cases, or in regard to cases generally, in any local area outside the Presidency-towns.(*b*) It may also direct any two or more Magistrates in any place outside the Presidency-towns to sit together as a Bench, and may invest such Bench with any of the powers of a Magistrate of the 1st, 2nd or 3rd class (*c*) The Special Magistrates and Benches are subordinate to the District Magistrate.(*d*)

‡ Neither the District Magistrate, nor the Subordinate, Sub-divisional, or Special Magistrates, nor the Benches, are subordinate to the Sessions Judge, except to the extent and in the manner expressly provided by the Code.(*e*)

3) Cr. Pr. Code, s. 31.
4) ib., s. 7.
5) ib., s. 9.
6) ib., ss. 31, 374.
7) ib., s. 7.
8) ib., ss. 10, 12, 17.
9) ib., s. 8.
1) ib., ss. 13, 17.
2) ib., s. 17.

(*a*) ib., s. 7.
(*b*) ib., s. 14.
(*c*) ib., s. 15.
(*d*) ib., s. 17.
(*e*) ib., s. 17.

Courts of Presidency Magistrates.—A certain number of Magistrates (called Presidency Magistrates) are appointed to be Magistrates for each of the Presidency-towns, and one of such persons is appointed to be Chief Magistrate for each such town. Every Presidency Magistrate exercises jurisdiction in all places within the Presidency-town for which he is appointed, and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law for the time being in force for the regulation of ports and port dues. In Bombay the Presidency Magistrate exercises all jurisdiction which was, prior to 1st April 1877, exercised in that town by the Court of Petty Sessions: provided that appeals under the law for the time being regulating the municipality of Bombay lie to the Chief Magistrate only.[3] The following Courts may pass the following sentences:—(1) Courts of Presidency Magistrates and Magistrates of the 1st Class—imprisonment up to two years; fine up to Rs. 1,000; whipping; (2) Courts of Magistrates of the 2nd Class—imprisonment up to six months; fine up to Rs. 200; (if specially empowered,) whipping; (3) Courts of Magistrates of the 3rd Class—imprisonment up to one month; fine up to Rs. 50.[4] District Magistrates in certain local areas are given more extended powers.[5]

Justices of the Peace—See "*Justices of the Peace.*"

Aid and information to the Magistrates and Police, and persons making arrests—See "*Arrest,*" pp. 67, 68.

Arrest, escape and re-taking—See "*Arrest,*" pp. 67, 68.

Service of summons.—Every summons is issued in duplicate. Every person on whom one of the duplicates of the summons is served personally must, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate. When the person summoned cannot be found, and the summons is left with an adult male member of his family or (in a Presidency-town) with his servant, the person with whom the summons is left must, if so required, sign a receipt on the back of the other duplicate.[6]

Proclamation and attachment.—If a person against whom a warrant has been issued, absconds or conceals himself so that such warrant cannot be executed, the Court may, after publication of a proclamation requiring him to appear, order the attachment of any property belonging to the proclaimed person.[7]

Search-warrants may be issued for the search of a document or other thing whose production has been ordered, or of a house suspected to contain stolen property, forged documents, etc., or

3) Cr. Pr. Code, ss. 18—20.
4) ib., s. 32.
5) ib., ss. 30—34.
6) ib., ss. 69, 70.
7) ib., ss. 87, 88.

for the search for persons wrongfully confined—see "*Wrongful Confinement and Restraint.*" Persons in charge of closed places must allow free ingress thereto, and afford all reasonable facilities for search therein. The search must be made in the presence of at least two witnesses; the occupant of the place searched may attend.[8]

Security to keep the peace and for good behaviour—See "*Assault,*" p. 70, and "*Rioting, Unlawful Assembly, and Affray.*"

Unlawful assemblies—See "*Rioting, Unlawful Assembly, and Affray.*"

Public nuisances—See "*Nuisance.*"

Disputes concerning land likely to cause breach of the peace—See "*Possession.*"

Disputes concerning easements, etc.—See "*Easements and Licenses.*"

Injury to public property.—A Police-officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, or the removal or injury of any public land-mark, or buoy or other mark used for navigation. If such injury or removal be done in opposition to the Police-officer he is empowered to arrest the offender.[9] See "*Mischief.*"

Complainants and witnesses.—No complainant or witness on his way to the Court of the Magistrate is required to accompany a Police-officer: and must not be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond, but recusant complainants and witnesses may be forwarded in custody.[1]

Inquest by Magistrates—See "*Coroner and Inquests,*" pp. 183—185.

Ordinary place of enquiry or trial.—Every offence will ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.[2] When a Native Indian subject of Her Majesty commits an offence at any place beyond the limits of British India he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found, provided that the Political Agent certify the fitness of inquiry into the charge.[3] As to offences committed out of British India by European British subjects, see "*Europeans and European British Subjects,*" p. 233.

8) Cr. Pr. Code, ss. 96, 98, 100—103.
9) ib., ss. 152, 154.
1) ib., s. 171.
2) ib., s. 177. See ss. 178—187.
3) ib., s. 188. See ss. 189, 190. See p. 233.

Initiation of proceedings.—Except when otherwise specially provided, any Presidency, District, and Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognisance of any offence—(*a*) upon receiving a complaint of facts which constitute such offence; (*b*) upon a Police-report of such facts; (*c*) upon information received from any person other than a Police-officer, or upon his own knowledge or suspicion that such offence has been committed.[4] Except as otherwise specially provided no Court of Session can take cognisance of any offence as a Court of original jurisdiction, unless the accused has been committed to it by a Magistrate.[5] The High Court may take cognisance of any offence upon a commitment made to it.[6] The Courts are forbidden to take cognisance *without previous sanction* of certain offences, *viz.*, contempt,[7] certain offences against the State and against public justice,[8] and offences relating to documents given in evidence: sanction is also necessary for the prosecution of a Judge and public servant for offences of which they are accused as such Judge or public servant.[9] Further, no Court may take cognisance of criminal breaches of contract,[1] or of defamation,[2] or of the offences of bigamy, fraudulently going through a mock marriage, or of deceitfully causing a woman to cohabit with a man in the belief that she is lawfully married to him, except upon a complaint made by some person aggrieved by such offence;[3] nor of the offence of enticing away a married woman, or of adultery, except upon a complaint made by the husband of the woman, or, in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed.[4] These two last-mentioned offences and the offence of defamation may be compounded (v. *post*) by the person entitled to complain.[5]

Complaint and issue of summons or warrant.—Generally speaking, the order of proceedings in a prosecution under the Code is as follows. The Magistrate, upon **complaint** being made, examines the complainant.[6] If, after such examination and after considering the results of any investigation which may have been made, the Magistrate is of opinion that there is no sufficient ground for proceeding he may dismiss the complaint;[7] otherwise he will proceed with the trial.[8] Cases are of two kinds—warrant

4) Criminal Procedure Code, s. 191.
5) ib., s. 193.
6) ib., s. 194.
7) See "*Public Servants and Public Duties.*"
8) See "*Oaths, Evidence and Witnesses.*"
9) See "*Public Servants and Public Duties.*"

1) See "*Masters, Servants and Apprentices.*"
2) See "*Defamation.*"
3) See "*Marriage,*" p. 417.
4) See "*Marriage,*" pp. 417—419.
5) Cr. Pr. Code, ss. 195—199 and s. 345.
6) ib., s. 200.
7) ib., s. 203.
8) ib., s. 204.

cases and summons cases: A "**warrant case**" means a case relating to an offence punishable with death, transportation, or imprisonment for a term exceeding *six months*; a "**summons case**" means a case relating to an offence not so punishable.[9] If the case appears to be one in which a **summons** should issue in the first instance, the Magistrate will issue a summons for the attendance of the accused. If the case appears to be a warrant case he may issue a **warrant**, or, if he think fit, a summons for causing the accused to be brought or to appear at a certain time before him or before some other Magistrate having jurisdiction.[1] The Court has also power to issue a warrant in lieu of, or in addition to, a summons: (*a*) if either before the issue of the summons, or after the issue of the same, but before the time fixed for the appearance of the person summoned, the Court sees reason to believe that he has absconded or will not obey the summons; or (*b*) if at such time he fails to appear, and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith, and no reasonable excuse is offered for such failure.[2] Whenever a Magistrate issues a summons, he may, if he sees reason to do so, dispense with the personal attendance of the accused, and permit him to appear by his pleader. But the Magistrate may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance.[3] The procedure of the trial differs according as the case is a warrant case or a summons case. Where charges are of two offences—one a summons case, and the other a warrant case—the procedure will be that prescribed for the trial of warrant cases.[4]

Trial of summons cases by Magistrates.—The following is the procedure observed in the trial of summons cases (*v. ante*), or cases relating to lesser offences. When the accused appears the particulars of the offence of which he is accused is stated to him, and he is asked if he has any cause to show why he should not be convicted; it is not necessary to frame a formal charge. If the accused admits that he has committed the offence, his admission is recorded; and if he shows no sufficient cause why he should not be convicted, the Magistrate will convict him accordingly. If the accused does not make such admission, the Magistrate proceeds to hear the complainant (if any), take the evidence of the prosecution, hear the accused, and take all such evidence as he produces in his defence. The Magistrate may, on the application of the complainant or accused, issue process to

9) Criminal Procedure Code, s. 4.
1) ib., s. 204.
2) ib., s. 90.
3) ib., s. 205.
4) I. L. R., 11 Cal., 91.

compel the attendance of any witness or the production of any document or other thing. The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court. As to the trial of European British subjects, see "*Europeans and European British Subjects*," p. 231.[5] If the Magistrate, upon taking evidence and (if he thinks fit) examining the accused, find the accused not guilty, he will record an order of acquittal: if he finds the accused guilty, he will pass sentence upon him.[6]

A Magistrate may convict the accused of any offence (triable as a summons case) which, from the facts admitted or proved, he appears to have committed, whatever may be the nature of the complaint or summons. If the summons has been issued on complaint, and the complainant does not appear, the Magistrate may acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day. If a complainant, at any time before a final order is passed, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw the complaint, the Magistrate may permit him to withdraw the same, and will thereupon acquit the accused. In any case instituted otherwise than on complaint, a Presidency Magistrate or Magistrate of the first class, or any other Magistrate so empowered, may stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.[7] As to frivolous or vexatious accusations (v *post.*)

Trial of warrant cases by Magistrates.—The following is the procedure observed in the trial of warrant cases (v. *ante*) or cases relating to graver offences. When the accused appears the Magistrate proceeds to hear the complainant (if any) and takes all such evidence as may be produced in support of the prosecution. The Magistrate ascertains from the complainant, or otherwise, the names of any persons likely to be acquainted with the facts of the case, and to be able to give evidence for the prosecution, and summons to give evidence such of them as he thinks necessary. If upon taking evidence and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate must discharge him: the Magistrate may also discharge the accused at any previous stage of the case if for reasons to be recorded by such Magistrate, he considers the

5) Cr. Pr. Code, ss. 241—244, 451A. 6) ib., s. 245. 7) ib., ss. 246—249.

charge to be groundless. If where evidence and examination have been taken and made, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him (v. *ante*, p. 527,) he will frame in writing a charge against the accused.[8] The charge is then read and explained to the accused, and he is asked whether he is guilty or has any defence to make. If the accused pleads guilty, the Magistrate records the plea, and may, in his discretion, convict him thereon. If the accused refuses to plead or does not plead, or claims to be tried, he is called upon to enter upon his defence and to produce his evidence. The accused is allowed, at any time while he is making his defence, to recall and cross-examine any witness for the prosecution present in the Court or its precincts. As to the trials of European British subjects, see "*Europeans and European British Subjects*," p. 231. If the accused puts in any written statement the Magistrate will file it with the record.[9] If the accused applies to the Magistrate to issue any process for compelling the attendance of any witness (whether he has or has not been previously examined in the case) for the purposes of examination or cross-examination, or the production of any document or other thing, the Magistrate must issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay, or for defeating the ends of justice. The Magistrate may, however, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.[1] If in any case in which a charge has been framed, the Magistrate finds the accused not guilty he will record an order of acquittal: if he finds the accused guilty he will pass sentence upon him. When the proceedings have been instituted upon complaint and the complainant is absent, and the offence may be lawfully compounded (v. *post*), the Magistrate may, in his discretion, at any time before the charge has been framed, discharge the accused.[2]

Summary trials.—The District Magistrate and any Magistrate of the First Class so empowered, and any Bench of Magistrates invested with the powers of a Magistrate of the First Class and so empowered, may try, in a summary way, certain specified offences.[3] Benches of Magistrates with second or third-class powers may also be empowered to try summarily certain specified

8) Criminal Procedure Code, ss. 252—254.
9) ib., ss. 255, 256.
1) ib., s. 257.
2) ib., ss. 258, 259.
3) See s. 260, ib.

offences, amongst others offences against Municipal Acts, and the conservancy-clauses of Police Acts, punishable only with fine, or with an imprisonment for a term not exceeding one month.[4] In summary trials the procedure prescribed for summons cases is followed in summons cases, and the procedure prescribed for warrant cases is followed in warrant cases, except as is otherwise specially provided. No sentence, however, of imprisonment for a term exceeding three months can be passed in the case of any conviction in a summary trial. Moreover, in cases where no appeal lies, the evidence of the witnesses need not be recorded, nor a formal charge framed. In appealable cases the only record is the judgment embodying the substance of the evidence and certain particulars which are required to be entered in both appealable and non-appealable cases.[5]

Commitment for trial to High Court or Sessions Court. —Certain classes of Magistrates are empowered in cases triable exclusively by the High Court or Sessions Court, or which in their opinion ought to be tried by such Court, to make a preliminary inquiry, and then to commit the offender for trial to the High Court or Court of Session, as the case may be. The following is the procedure in such inquiries. When the accused appears, the Magistrate proceeds to hear the complainant (if any), and takes the evidence in support of the prosecution or on behalf of the accused: He may also issue process for the production of further evidence.[6] When the evidence has been taken, and he has examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, the Magistrate must, if he finds that there are not sufficient grounds for committing the accused person for trial, discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he will proceed accordingly. A Magistrate may, however, discharge the accused at any previous stage of the case, if he considers the charge to be groundless. When upon such evidence being taken and such examination (if any) being made, the Magistrate finds that there are sufficient grounds for committing the accused for trial, he will frame a charge declaring with what offence the accused is charged. As soon as the charge has been framed, it is read and explained to the accused, and a copy thereof must, if he so requires, be given to him free of cost. The accused is required to give in a list of his witnesses: if the commitment is to the High Court the accused may give, at any time before his trial, a further list to the Clerk of the Crown. The Magistrate may, in his discretion, summon and examine any witness named in the list of the accused. The Magistrate may then

4) Cr. Pr. Code, s. 261. 5) ib., ss. 262—264. 6) ib., ss. 206—208.

make an order committing the accused for trial by the High Court or Sessions Court, as the case may be.[7] A commitment once made by a competent Magistrate can be quashed by the High Court only, and only on a point of law.[8] Complainants and witnesses for the prosecution and defence, whose attendance before the Court of Session or High Court is necessary, and who appear before the Magistrate, must execute bonds binding themselves to be in attendance when called upon by the Sessions Court or High Court, to prosecute or give evidence as the case may be. If any complainant or witness refuses to attend to execute the bond he may be detained in custody until he executes such bond, or until his attendance is required at the High Court or Sessions Court, when the Magistrate must send him in custody to the High Court or Sessions Court, as the case may be.[9] Subject to the provisions regarding the taking of bail, the Magistrate must, until and during the trial, commit the accused to custody. If the offence is bailable the Magistrate must admit the accused to bail, unless he thinks fit, instead of taking bail, to discharge him on executing a bond without sureties for his appearance. The High Court or Sessions Court may, however, in any case, direct that any person be admitted to bail.[1] See "*Bail.*"

Trials before High Courts and Sessions Courts.—All trials before a High Court (including the Chief Court of the Punjab and the Court of the Recorder of Rangoon) are by Jury, and all trials before a Court of Session are either by Jury, or with the aid of assessors.[2] When the Court is ready to commence the trial, the accused is brought in and the charge is read out in Court and explained to him, and he is asked whether he is guilty of the offence charged, or claims to be tried. If the accused pleads guilty, the plea is recorded, and he may be convicted thereon. If the accused refuses to plead or claims to be tried, the Court proceeds to choose jurors or assessors, and to try the case.[3] See "*Jury and Jurors.*" When the jurors or assessors have been chosen, the prosecutor opens the case, reading the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused. The examination of the accused recorded before the committing Magistrate is then tendered by the prosecutor and read as evidence.[4] When the examination of the witnesses for the prosecution is concluded, the accused is asked whether he means to adduce evidence. If he says he does not, the prosecutor sums up the case; and if the Court considers that there is no evidence that the accused committed the offence, it

7) Cr. Pr. Code, ss. 209—213.
8) ib., s. 215.
9) ib., s. 217.
1) ib., ss. 220, 496, 498.
2) ib., ss. 266—268.
3) ib., ss. 271, 272.
4) ib., ss. 286, 287.

may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by jury, direct the jury to return a verdict of not guilty. If the accused says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case, and the Court considers that there is evidence that the accused committed the offence, the Court will call upon the accused to enter on his defence.[5] The accused or his pleader then opens his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He then examines his witnesses (if any), and after their cross-examination and re-examination (if any) sums up his case.[6] If the accused has stated, when asked, that he means to adduce evidence, the prosecutor is entitled to reply.[7] In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court will proceed to charge the Jury, summing up the evidence for the prosecution and defence, and laying down the law by which the Jury are to be guided. The Jury then return their verdict or the verdict of the majority through the mouth of their foreman.[8] Whenever the Jury disagrees, and is discharged, the accused is detained in custody or on bail, and will be tried by another Jury, unless the Judge considers that he should not be re-tried. An entry made by the Judge to such effect operates as an acquittal.[9] When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court sums up the evidence for the prosecution and defence, and then requires each of the assessors to state his opinion orally, and records such opinion. The Judge then gives judgment, but, in doing so, is not bound to conform to the opinions of the assessors.[1] See "*Jury and Jurors.*"

Right of accused to be defended.—Every person accused before any Criminal Court may of right be defended by a pleader.[2] "Pleader" with reference to any proceeding in Court means a pleader authorized by Act XVIII of 1879 (see "*Legal and Medical Practitioners*") to practise in such Court and includes (1) an advocate, a vakil and an attorney of the High Court so authorized; and (2) any mukhtar or other person appointed with the permission of the Court to act in such proceeding.[3]

Compounding offences.—Certain offences may by certain persons be compounded (see *Appendix*). The composition of an offence has the effect of an acquittal of the accused. When any offence is compoundable, the abetment of such offence, or an

5) Cr. Pr. Code, s. 289. 6) ib., s. 290. 7) ib., s. 292. 8) ib., ss. 297, 301. 9) ib., s. 308. 1) ib., s. 309. 2) ib., s. 340. 3) ib., s. 4.

attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner. When the person who would otherwise be competent to compound is a minor, an idiot or a lunatic, any person competent to contract on his behalf may compound such offence. No offence not mentioned in the table may be compounded.[4] If the offence is compoundable, a Magistrate has no discretion to refuse to allow a complaint to be withdrawn.[5]

Judgment of Criminal Court—See "*Judgments and Decrees.*"

Suspension, remission, and commutation of sentences.—When any person has been sentenced to punishment for an offence, the Governor-General in Council or the Local Government may, at any time, suspend the execution of the sentence, or remit the whole or any part of the punishment to which he has been sentenced, and may also commute the punishment.[6]

A person once convicted or acquitted may not be tried again for the same offence.—But the dismissal of a complaint, the stopping of proceedings when there is no complainant,[7] or the discharge of the accused is not an acquittal. Nor is an entry made on a charge by a Judge of the High Court before the commencement of a trial that the charge or any portion of it is clearly unsustainable, an acquittal.[8]

Appeal.—Unless otherwise specially provided, no appeal lies from any judgment or order of a Criminal Court (v. *post*).[9] An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by Jury, in which case the appeal lies on a matter of law only. The alleged severity of a sentence is deemed a matter of law.[1] Except in the case of an appeal by Government against a judgment of acquittal passed by an Appellate Court, and in the cases subject to reference and revision,[2] judgments and orders passed by an Appellate Court upon appeal are final.[3] An appeal from the sentence of a Magistrate of the Second or Third Class or Sub-divisional Magistrate of the Second Class lies to the **District Magistrate.** The District Magistrate may transfer the appeal to a First Class Subordinate Magistrate.[4] An appeal from the sentence of an Assistant Sessions Judge, a District Magistrate, or other Magistrate of the First Class lies to the **Court of Session:** provided that (*a*) when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the

4) Cr. Pr. Code, s. 345
5) W. N., 1886, p. 167.
6) Cr. Pr. Code, ss. 401, 402.
7) v., s. 249, *ante*.
8) Cr. Pr. Code, s. 403. See s. 273.
9) b., s. 404.
1) ib., s. 418.
2) See Cr. Pr. Code, Chap. XXXII.
3) ib., s. 430.
4) ib., s. 407.

confirmation of the Court of Session, every appeal in such case lies to the High Court, but must not be presented until the case has been disposed of by the Court of Session; (*b*) any European British subject so convicted may, at his option, appeal either to the High Court or the Court of Session.[5] Any person convicted on a trial held by a Sessions Judge, or an Additional, or a Joint Sessions Judge, may appeal to the **High Court.**[6] Any person convicted on a trial held by a **Presidency Magistrate** may appeal to the High Court if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding Rs. 200.[7] Nothwithstanding anything hereinbefore mentioned no appeal lies in **petty cases**, that is cases in which a Court of Session, or the District Magistrate or other Magistrate of the First Class passes a sentence of imprisonment not exceeding one month, or of fine not exceeding Rs. 50 only, or of whipping only; nor from **summary convictions** (v. *ante*) in which a Magistrate passes a sentence of imprisonment not exceeding three months only, or of fine not exceeding Rs. 200 only, or of whipping only.[8] The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of *acquittal* passed by any Court other than a High Court.[9]

Petition of appeal.—Every appeal must be made in the form of a petition in writing presented by the appellant or his pleader and must (unless the Court otherwise directs) be accompanied by a copy or judgment of the order appealed against, and, in cases tried by a Jury, a copy of the heads of the charge recorded.[1] As to the period of limitation within which appeals must be brought, see *Appendix* and "*Limitation.*"

Suspension of sentence pending appeal—See "*Bail,*" p. 79.

Release of appellant on bail—See "*Bail,*" p. 79.

Abatement of appeals. — Every appeal by Government against a judgment of acquittal (v. *ante*) finally abates on the death of the accused, and every other appeal abates on the death of the appellant:[2] but the death of the offender does not discharge from the liability to pay a fine imposed on him any

5) Cr. Pr. Code, s. 408. See p. 233.
6) ib., s. 410. See s. 412, ib.
7) ib., s. 411. See s. 412, ib.
8) ib., ss. 413, 414. An appeal may be brought when any two or more punishments are combined. Nothing in these sections applies to European British subjects. *Every* sentence passed on an European British subject by a Sessions Judge, or a Magistrate (not being a Presidency Magistrate) is appealable either to the High Court or Court of Session, at the option of the person sentenced (ib., ss. 416, 408). See p. 233.
9) ib., s. 417. See s. 427, ib.
1) ib., s. 419.
2) ib., s. 431.

property which would after his death be legally liable for his debts.[3]

Criminal proceedings against Europeans and Americans—See "*Europeans and European British Subjects.*"

Trial of lunatics—See Chapter XXXIV of the Criminal Procedure Code.

Procedure in certain cases of contempt—See "*Contempt of Court and Contempt of Authority of Public Servants,*" p. 148.

Witness refusing to answer, etc.—See pp. 148, 149.

Maintenance of wives and children—See "*Husband and Wife,*" pp. 299, 300.

Directions in the nature of a habeas corpus—See "*Habeas Corpus.*"

Bail—See "*Bail.*"

Destruction of libellous and other matter.—On a conviction for selling, or having in possession for sale, obscene books, etc.; printing or engraving matter knowing it to be defamatory; or selling or offering for sale such printed or engraved matter with such knowledge, the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court, or remain in the possession or power of the person convicted. The Court may, in like manner, on a conviction for—(1) adulteration of food or drink intended for sale so as to make it noxious; (2) selling or offering or exposing for sale such food or drink with knowledge of its state; (3) adulteration of drugs; (4) selling, or offering or exposing for sale such adulterated drugs:—order the food, drink, drug or medical preparation, in respect of which the conviction was had, to be destroyed.[4]

Transfer of criminal cases.—The High Court may transfer a case, or itself try it, whenever it appears to it—(*a*) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate to it; or (*b*) that some question of law of unusual difficulty, is likely to arise; or (*c*) that a view of the place, in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same; or (*d*) that an order of transfer will tend to the general convenience of the parties or witnesses; or (*e*) that such an order is expedient for the ends of justice.[5]

Expenses of complainants and witnesses.—Subject to any rules made by the Local Government, any Criminal Court may order payment, on the part of Government, of the reasonable expenses of any complainant or witness, attending for the purpose

3) Penal Code, s. 70.
4) Cr. Pr. Code, s. 521.
5) ib, s. 526. See Chap. XLIV, ib.

of any inquiry, trial or other proceeding before such Court under the Criminal Procedure Code.[6]

Powers to compel restoration of abducted females—See "*Habeas Corpus*," p. 281.

Power of Court to pay expenses or compensation out of fine.—Whenever a Criminal Court imposes a fine, or confirms in appeal, revision or otherwise, a sentence of fine, or a sentence of which fine forms a part, the Court may when passing judgment order the whole or any part of the fine recovered to be applied—(*a*) in defraying expenses properly incurred in the prosecution; (*b*) in compensation for the injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil suit. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court will take into account any such sum paid or recovered as compensation.[7]

Copies of proceedings.—If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the Jury, or of any order or deposition or other part of the record, he must, on applying for such copy, be furnished therewith: provided that he pay for the same, unless the Court for some special reason thinks fit to furnish it free of cost.[8]

Compensation to person groundlessly given in charge in Presidency-town.—The person causing arrest may be ordered to pay to the person so arrested a sum (not exceeding Rs. 50) as compensation for his loss of time and expenses in the matter.

Cases in which Judge or Magistrate is personally interested.—No Judge or Magistrate can, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party or personally interested, and no Judge or Magistrate can hear an appeal from any judgment or order passed or made by himself. A Judge or Magistrate is not deemed to be a party or personally interested to, or in any case, merely because he is a Municipal Commissioner.[9]

Officers concerned in sales—See "*Public Servants and Public Duties.*"

Frivolous or vexatious accusations.—If in any case instituted by complaint, or upon information given to a Police-officer, or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is tried discharges or acquits the accused, and is satisfied that the accusation against him was frivolous or vexatious, the Magis-

6) Cr. Pr. Code, s. 544.
7) ib., ss. 545, 546.
8) ib., s. 548.
9) ib., s. 555.

trate may direct the person upon whose complaint or information the accusation was made to pay to the accused, or to each of the accused where there are more than one, such compensation, not exceeding Rs. 50, as the Magistrate thinks fit. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court will take into account any such compensation paid or recovered.[1]

See "*Offences*" and *Index*.

1) Cr. Pr. Code, s. 560 : added by Act IV of 1891. See s. 2, ib.

PUBLIC SERVANTS AND PUBLIC DUTIES.

AUTHORITIES—Act XVIII of 1850: Act V of 1861: 21, 22 Vic., cap. 106: Civil Procedure Code: Act I of 1877 (Specific Relief): Indian Penal Code: Act XV of 1889: Criminal Procedure Code: 33 Geo. III, cap. 52: 3 and 4 Will. IV, cap. 85: Reg. I of 1803: Reg. II of 1803: Act XV of 1848: Mayne's Penal Code: Act XXXVII of 1850: Act XV of 1882: Cases cited.

"**Public Servant**" **means** any of the following persons, namely: (1) Every Covenanted Servant of the Queen; (2) Every Commissioned Officer in the Military and Naval Forces of the Queen while serving under the Government of India, or any Government; (3) Every Judge; (4) Every Officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorised by a Court of Justice to perform any of such duties; [(5) Every Juryman, Assessor, or Member of a Punchayet assisting a Court of Justice or public servant]; [(6) Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority]; (7) Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement; (8) Every Officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety, or convenience; (9) Every Officer whose duty it is, as such officer, to take, receive, keep, or expend any property on behalf of Government, or to make any survey, assessment, or contract on behalf of Government or to execute any revenue process, or to investigate, or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty; [(10) Every Officer whose duty it is, as such officer, to take, receive, keep, or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town, or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town, or district. A

Municipal Commissioner is thus a public servant.] Persons falling under any of the above descriptions are public servants, whether appointed by Government, or not; wherever the words "public servants" occur, they will be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be, in his right to hold that situation.[1]

Public officer.—The definition of a "public officer," as given by the Civil Procedure Code, is the same as that given by the Penal Code (v. *ante*) of a "public servant," with the exception of those portions which have been included in brackets (v. *ante*) and which form no part of the definition of a "public officer."[2]

Protection of judicial officers.—No Judge, Magistrate, or Justice of the Peace, Collector, or other person acting judicially, is liable to be sued in any Court for any act done or ordered to be done by him in the discharge of his *judicial* functions, *whether or not within the limits of his jurisdiction*, provided that he, at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of.[3] The mere fact of his being a Judge, &c., is not sufficient: he must be acting judicially to be entitled to the protection of the Act.[4] If the officer acted judicially within his jurisdiction no action lies:[5] if he acted without jurisdiction, no action lies unless he did not in good faith believe himself to have jurisdiction. A Judge, &c., is not only liable when he knows he has not jurisdiction, but also where he has the means of such knowledge at his disposal.[6] There is no such general protection in favour of **executive officers**,[7] except that no officer of any Court or other person bound to execute the lawful warrants or orders of any Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially is liable to be sued in any Civil Court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.[8] **Police-officers** are also protected for acts done under the authority of a warrant issued to them by a Magistrate. **Nothing is an offence** which is done by a Judge, when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law. The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person who is empowered to give in any legal proceeding, civil or criminal, a definitive judgment, or a

1) Indian Penal Code, s. 21.
2) Civ. Pr. Code, s. 2.
3) Act XVIII of 1850.
4) 14 B. L. R., 254: L. R., 9 I. A., 152.
5) I. L. R., 1 All., 280: I. L. R., 12 All., 115.
6) 2 Moo., I. A., 293: I. L. R., 1 Mad., 89: 4 Moo. I. A., 353: 6 Mad. H. C. Rep., 423.
7) L. R., 9 I. A., 152: 2 Q. B. D., 35.
8) Act XVIII of 1850.

judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons which body is empowered by law to give such a judgment: *e.g.*, a member of a Panchayet which has power, under Regulation VII of 1816 (Madras Code), to try and determine suits is a Judge.[9]

Suits against public officers.—Subject to the aforegoing provisions, and to the fulfilment of the conditions required by law in respect of the bringing of such suits, a public officer may be sued on account of acts causing damage purporting to be done by him in his official capacity.

Suits against the Government of India.—By the Act passed in the year 1858 [1] which brought to an end the East India Company, and which transferred all its property to the Crown in trust for the Government of India, all persons were given the same remedies against the Secretary of State for India in Council as they had or might have had against the Company. The latter was not only a trading company, but a company invested with sovereign powers. The acts done by it were therefore of a two-fold character: [1] acts done in the exercise of sovereign powers, *i.e.*, powers which cannot be lawfully exercised except by the sovereign, or by a private person delegated by the sovereign to exercise them: *e.g.*, an act assuming the government of a country, or acts of its naval and military officers carrying on hostilities. No action would lie in any Court with regard to acts of this nature;[2] [2] acts done by it in its character of a company in the conduct of undertakings which might be carried on by private individuals without sovereign powers being delegated to them, *e.g.*, entering into contracts and so forth. These might be the subject of suit in a Civil Court. In 1858 the sovereign jurisdiction of India was directly assumed by the Crown, and the Company ceased to exist. Much of its business was, however, continued by the Government of India and carried on by its officers, not as the Company had done for profit, but for the benefit of the Indian Exchequer (*e.g.*, opium). Suits against the Government of India must be instituted against the Secretary of State for India in Council.[3] The latter, it has been held, is not a real person, or a body corporate, but merely a nominal defendant, under whose name the Government of India may sue, or be sued. Suing him is the means prescribed for suing the Government of India, that is, the mode in which the Indian Exchequer may itself be made the subject of proceedings, for the purpose of determining

9) Act V of 1861. See also 4 M. I. A., 353. Penal Code, ss. 77, 19.

1 21, 22 Vic., cap. 106. See the Introduction.

2) 7 Moo. I. A., 477: ib., 555 Bourke, 167: 2 L. R., I. A., 38.

3) Civ. Pr. Code, ss. 416, 418.

the rights between Her Majesty's subjects and the Indian Government, which may be said to be the governing agent of the Crown, and as such liable to be sued for wrongful acts of a private nature not done in the exercise of its sovereign powers. The Crown itself cannot be made either civilly or criminally liable. The only form of redress is by petition called "Petition of Right." Although the Crown is not itself liable for wrongful acts, its officers are, even if the acts be done by its authority.

Notice of suit necessary.—No suit can be instituted against the **Secretary of State** or against a **public officer** in respect of an act purporting to be done by him in his official capacity until the expiration of *two months* next after notice in writing has been, in the case of the Secretary of State, delivered to, or left at the office of, a Secretary to the Local Government, or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action and the name and place of abode of the intending plaintiff, and the relief which he claims; further, the plaint must contain a statement that such notice has been so delivered or left. The Government Pleader in any Court, or other person appointed in this behalf by the Local Government, is the agent of Government for the purpose of receiving processes against the Secretary of State in Council arising out of such Court.[4]

Procedure in suit.—If the Government undertakes the defence of a suit against a public officer, the Government Pleader, upon being furnished with authority to appear and answer to the plaint, will apply to the Court, and upon such application the Court will cause note of the authority to be entered in the register. If no such application is made the suit will proceed as one against a private party, except that the defendant cannot be arrested, nor his property attached, otherwise than in execution of a decree.[5] See "*Arrest*," pp. 65, 66.

Decree against Government or public officer.—When a decree is given against the Secretary of State, or against a public officer in respect of such afore-mentioned act, a time is specified in the decree within which it must be satisfied, and, if the decree is not satisfied within the time specified, the Court will report the case for the orders of the Local Government. Execution cannot issue on any such decree unless it remains unsatisfied for three months computed from the date of the report.[6]

When salary of public officer may be attached—See "*Attachment*," p. 72, and "*Pensions and Salaries.*"

Enforcement of public duties.—Any of the High Courts at Calcutta, Madras, and Bombay may make an order requiring

4) Civ. Pr. Code, ss. 419, 424. 5) ss. 426, 427, ib. 6) s. 429, ib.

any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a **public office**, whether of a permanent or temporary nature, or by any **corporation**, or **inferior Court** of Judicature: provided—(*a*) that an application for such order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act; (*b*) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person, or Court, in his or its public character, or on such corporation in its corporate character; (*c*) that, in the opinion of the High Court, such doing or forbearing is consonant to right and justice; (*d*) that the applicant has no other specific and adequate legal remedy; and (*e*) that the remedy given by the order applied for will be complete. The High Court is not, however, authorized (1) to make any order binding on the Secretary of State for India in Council, on the Governor-General in Council, on the Governors of Madras and Bombay in Council, or on the Lieutenant-Governor of Bengal; (2) to make any other order on any other servant of the Crown as such, merely to enforce the satisfaction of a claim upon the Crown; or (3) to make any order which is otherwise expressly excluded by any law for the time being in force.[7] Every such application must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice, and denial thereof. The High Court may thereupon make an order at once or refuse it, or grant a rule to show cause why the order applied for should not be made. If in the last case no sufficient cause is shewn, the High Court may make an order in the alternative either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer by an appointed day. If the person, Court, or Corporation to whom such order is directed makes no answer, or makes an insufficient or false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely. Every such order will be executed, and may be appealed from, as if it were a decree made in the exercise of the ordinary original civil jurisdiction of the High Court. The costs of all applications and orders are in the discretion of the Court.[8]

Offences by or relating to public servants.—These are dealt with in the ninth and portions of other chapters of the Penal Code. The Code makes it punishable for a public servant to voluntarily allow a prisoner of State or war in his custody to escape;[9] or to *negligently* allow him to escape.[1] A public

7) Act I of 1877, s. 45.
8) ss. 46, 49, ib.
9) Indian Penal Code, s. 128.
1) s. 129, ib

servant is also punishable for abetting an offence ;[2] for concealing a design to commit an offence which it is his duty to prevent ;[3] for taking a gratification improperly in respect of an official act ;[4] for abetting the taking of bribes or other improper gratification ;[5] for obtaining valuable things without, or for inadequate consideration from a person concerned in any proceeding or business transacted by such public servant ;[6] for disobeying a direction of the law with a view to injure any one ;[7] for framing an incorrect document with intent to cause injury ;[8] for unlawfully engaging in trade ;[9] for unlawfully buying or bidding for property ;[1] for disobeying a direction of law, in order to save an offender from punishment, or to save property from forfeiture ;[2] for framing an incorrect record or writing with intent to save a person from punishment, or property from forfeiture ;[3] for corruptly making an order, report, &c., which he knows to be contrary to law in a judicial proceeding ;[4] a public servant is punishable for committing any person to confinement, or for trial, if he knows that in doing so he is acting contrary to law ;[5] for intentionally omitting to apprehend a person accused, or suffering him to escape ;[6] for intentionally omitting to apprehend a person sentenced, or for *voluntarily suffering him to escape* ;[7] for *negligently suffering* the escape of a person lawfully in confinement ;[8] criminal breach of trust by public servant. See "*Trusts and Trustees.*"

Disclosure of official secrets—*See* Act XV of 1889.

Offences against or relating to public servants.—A person is liable to punishment under the Code for assaulting or obstructing a public servant while suppressing a riot, &c. ;[9] for taking a gratification in order by corrupt or illegal means, to influence a public servant ;[1] for taking a gratification for the exercise of personal influence with a public servant ;[2] for personating a public servant ;[3] for wearing the garb or token of a public servant with a fraudulent object ;[4] for various contempts of the authority of a public servant, see "*Contempt of Court and Contempt of Authority of Public Servants*" ;[5] for causing hurt to a public servant to deter him from doing his duty ;[6] for causing grievous

2) Indian Penal Code, s. 116.
3) s. 119, ib.
4) s. 161, ib.
5) s. 164, ib.
6) s. 165, ib.
7) s. 166, ib.
8) s. 167, ib.
9) s. 168, ib.
1) s. 169, ib.
2) s. 217, ib.
3) s. 218, ib.
4) s. 219, ib.
5) s. 220, ib.
6) s. 221, ib.
7) s. 222, ib.
8) s. 223, ib.
9) s. 152, ib.
1) s. 162, ib.
2) s. 163, ib.
3) s. 170, ib.
4) s. 171, ib.
5) ss. 172—190, and s. 228, ib.
6) s. 332, ib.

hurt with the like object;[7] for using criminal force towards a public servant, see "*Assault*";[8] for destroying or moving landmark fixed by the authority of a public servant;[9] for counterfeiting a property mark used by a public servant;[1] for making false marks upon goods or on a receptacle for goods with intent to deceive a public servant, or any other person;[2] for making use of such a false mark.[3]

Private defence against act of public servant.—There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, (*e.g.*, a threatened flogging) if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law; nor against a similar act done or attempted to be done by the direction of a public servant, acting in good faith under the colour of his office, though that direction may not be strictly justifiable by law: provided the person in question knows, or has reason to believe, that the person doing the act is either such public servant, or is acting under such direction.[4] See "*Offences.*"

Sanction necessary to prosecution of public servant.—A Judge or public servant cannot be prosecuted for acts done by him in his official capacity without the previous sanction of the Government of India or the Local Government.[5]

Unlawfully engaging in trade.—It is unlawful for any Governor-General or Governor, or any Member of Council of any of the presidencies of India, or for any Collector, Supervisor, or other person employed or concerned in the collection of revenues or the administration of justice in the provinces of Bengal, Behar, or Orissa, or for their agents or servants, or anyone in trust for them, or for any of the Judges of the Supreme Court of Judicature to be concerned in any trade or traffic whatever whether within or without India.[6] Members of the Board of Revenue are forbidden to be concerned in trade, commerce, or houses of agency, or in direction or management of banks, or in transactions for borrowing or lending money with native officers under the Revenue Department, or with zemindars, proprietors of land, renters, or other persons responsible for the revenue.[7] Collectors and assistants to Collectors are forbidden to exercise or carry on trade or commerce directly or indirectly, or to be engaged in any bank or house of agency, or to be concerned in the farming of the

7) Indian Penal Code, s. 333.
8) s. 353, ib.
9) s. 434, ib.
1) s. 484, ib.
2) s. 487, ib.
3) s. 488, ib.
4) s. 99, ib.
5) s. 197, Cr. Pr. Code.
6) 33 Geo. III, c. 52, s. 137. See also 3 and 4 Will. IV, c. 85, s. 76.
7) Reg, I of 1803, s. 40.

public revenue, or in the lending of money to proprietors of land, renters, or persons responsible for the public revenue, or in any way connected with its management.[8] Officers of the Supreme Courts in India (such as the Registrar and others) or of the Courts for the Relief of Insolvent Debtors are forbidden to carry on any dealing as banker, trader, agent, factor, or broker, either for their own advantage or for the advantage of any other person, except such dealings as it may be part of their duty to carry on. No Judge or other officer appointed under the Presidency Small Cause Courts Act may either by himself or as a partner of any other person, practise or act as an advocate or other legal practitioner, or be concerned either on his own account or for any other person or as the partner of any other person in any trade or profession.[9] A public servant who unlawfully engages in trade is punishable with simple imprisonment for a term which may extend to one year, or with fine, or with both.[1]

Enquiry into behaviour of public servants. — Act XXXVII of 1850 (repealed partly by Acts XIV of 1870, XVI of 1874, XVI of 1868, XII of 1876) provides for regulating enquiries into the behaviour of public servants, not removeable without the sanction of Government, and makes the law uniform throughout India.

Officers concerned in sales.—A public servant having any duty to perform in connection with the sale of any property under the Criminal Procedure Code, cannot purchase or bid for the property.[2] As to officers concerned in execution-sales, see "*Execution*," p. 241.

See "*Contempt of Court and of authority of Public Servants*," and *Index*.

8) Reg. II of 1803, ss. 60, 61, 64.
9) Act XV of 1848, Mayne's Penal Code, p. 149. Act XV of 1882, s. 15.
1) Penal Code, s. 168.
2) Cr. Pr. Code, s. 559.

RECEIVERS.

AUTHORITIES—Act I of 1877 (Specific Relief): Code of Civil Procedure, Chapter XXXVI.

Appointment of receivers discretionary.—The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The mode and effect of his appointment, and his rights, powers, duties and liabilities, are regulated by the Code of Civil Procedure (v. *post*).[1]

Receivers in suits.—Whenever it appears to be necessary for the realisation, preservation or better custody or management of any property, moveable or immoveable, the subject of a suit, or under attachment, the Court may by order—(*a*) appoint a receiver of such property, and, if need be, (*b*) remove the person in whose possession or custody it is; (*c*) commit the same to the custody or management of such receiver; and (*d*) grant to such receiver such fee or commission on the rents and profits of the property by way of remuneration as it thinks fit, and all such powers as to bringing and defending suits, and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits, the application and disposal of such rents and profits, and the execution of instruments in writing as the owner himself has, or such of those powers as the Court thinks fit. Where the property is land paying revenue to Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.[2]

These powers can be exercised only by High Courts and District Courts; provided that, whenever the Judge of a Court subordinate to a District Court considers it expedient that a receiver should be appointed in any suit before him, he must nominate such person as he considers fit for such appointment, and submit such person's name, with the grounds for the nomination, to the District Court, which will then either authorize such Judge to appoint the person so nominated, or pass such other order as it thinks fit.[3]

Every receiver so appointed is bound to—(*e*) give such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property; (*f*) pass his accounts

1) Act I of 1877, s. 44. 2) Civ. Pr. Code, ss. 503, 504. 3) ib., s. 505.

at such periods and in such form as the Court directs ; (*g*) pay the balance due from him thereon as the Court directs ; and is (*h*) responsible for any loss occasioned to the property by his wilful default or gross negligence. The Court cannot under these powers remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove.[4]

Receivers in insolvency—See "*Insolvency*," pp. 323, 324.

4) Civ. Pr. Code, s. 504.

REGISTRATION.

AUTHORITIES—Act III of 1877 (extends to the whole of British India except such districts or tracts of country as the Local Government may from time to time with the previous sanction of the Governor-General in Council exclude from its operation) : Commentaries on the same by H. T. Rivaz, 1890 : Cases cited.

Documents which must be registered.—All documents either *must* or *may* be registered under this Act. The following documents *must* be registered if the property to which they relate is situate in a district in which, and if they were executed on or after the date on which, Act XVI of 1864, or Act XX of 1866, or Act VIII of 1871, or this Act came or comes into force (1st of April 1877). (1) **Instruments of gift of immoveable property** (whatever be the value of the property[1]). (2) **Other non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of Rs. 100 or upwards, to or in immoveable property.** "Immoveable property," for the purpose of this Act, includes land, buildings, hereditary allowances, rights to way, lights, ferries, fisheries, or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to any thing which is attached to the earth, but not standing timber, growing crops nor grass.[2] The necessity for registration must be determined by the value of the consideration stated in the deed, and not by the actual or market value of the property.[3] (3) **Non-testamentary instruments which acknowledge the receipt or payment of any consideration for the creation, etc., of any such right, title, or interest.** (4) **Leases of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent.** The Local Government may, by order published in the official Gazette, exempt any leases executed in any district or part of a district, the terms granted by which do not exceed 5 years, and the annual rents reserved by which do not exceed Rs. 50.[4] A **lease** for one year certain, containing an expression on the tenant's part, of readiness to hold the land longer at the same rent, if the landlord should desire it, need not be registered ;[5] nor a lease under which the tenant may claim possession of the land for one year, but is to pay rent to the landlord, so long as the landlord

1) 13 W. R., 334.
2) Act III of 1877, s. 3.
3) 15 W. R., 558.
4) Act III of 1877, s. 17.
5) I. L. R., 3 Bom., 21.

leaves the land with the tenant;[6] nor a lease under which the tenant may live in the house so long as the landlord permits him to do so, and so long as he pays the rent, even where an annual rent is reserved.[7] But a lease for no definite time but fixing an annual rent must be registered.[8] A lease for one year, containing an option for renewal for a further period of one year, need not be registered.[9] A lease for so long as the tenant continues to pay the stipulated rent must be registered.[1] "Lease" includes a counterpart, *kabuliyat*, an undertaking to cultivate or occupy, and an agreement to lease. (5) **Authorities to adopt a son, executed after the 1st January 1872, and not conferred by a will, must also be registered.**[2]

Documents which need not be registered.—Nothing in clauses (2) and (3) in the preceding paragraph applies to (1) Any **composition deed.** (2) Any instrument relating to **shares** in a joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immoveable property. (3) Any **debenture** issued by any such Company and not creating, etc., any right, etc., (*v.* preceding paragraph, clause 2) to or in immoveable property, except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the Company has mortgaged, conveyed or transferred the whole or part of its immoveable property or any interest therein upon trust for the benefit of the holders of such debentures. (4) Any **endorsement upon or transfer of any debenture** issued by any such Company. (5) Any **document** not itself creating, etc., any right, etc., of the value of Rs. 100, to or in immoveable property, but merely **creating a right to obtain another document** which will, when executed, do so. So where by an *ikrarnama* tenants conjointly promised that they would sign and have registered *kabuliyats* for rents at rates mentioned, it was held that the document did not operate to create or declare an interest in immoveable property, but merely a right to obtain another document which would, when executed, create or declare an interest.[3] (6) **Decrees** and orders of Courts and **awards.** (7) Grants of immoveable property by Government. (8) Instruments of partition made by Revenue Officers. (9) Orders granting loans and instruments of collateral security granted and instruments for securing repayment of loans made under the Land Improvement Loans Act, 1883, and the Agriculturists' Loans Act, 1884. (10) Any **endorsement on a mortgage deed,** acknowledging the payment of the whole or any part of the

6) I. L. R., 8 Bom., 493.
7) I. L. R., 14 Bom., 319. In this case the tenant was, however, to vacate when asked to do so.
8) 10 W. R., 410.
9) I. L. R., 17 Cal., 548.
1) 4 N.-W. P. 36; Rivaz, pp. 29—32.
2) Act III of 1877, ss. 17, 3.
3) I. L. R., 17 Cal., 291; Rivaz, p. 32.

mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage. (11) A certificate of sale granted to the purchaser of any property sold by public auction by a civil or revenue officer. Any of these instruments, however, may, if it is so desired, be registered under this Act.[4]

Documents which may be registered.—Registration of the following documents is optional: (1) Instruments (other than instruments of gift and wills) which purport or operate to create, etc., any right, etc., whether vested or contingent of a value *less than Rs. 100*, to or in immoveable property. (2) Instruments acknowledging the receipt or payment of any consideration on account of the creation, etc., of any such right, etc. (3) **Leases** of immoveable property for any term not exceeding one year and leases exempted by the Local Government (v. *ante*). (4) Instruments (other than wills) which purport or operate to create, etc., any right, etc., to or in **moveable property.** "Moveable property" for the purposes of this Act includes standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description except immoveable property (v. *ante*). (5) **Wills.** (6) All other documents not required to be registered (v. *ante*).[5]

Time of presentation.—No document (other than a will) will be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution, or in case of a copy of a decree or order from the day on which the decree or order was made, or, when appealable, from the day on which it becomes final; provided that where there are several persons executing a document at different times, the document may be presented for registration and re-registration within four months from the date of each execution. If delay in presentation is unavoidable the Registrar may, where the delay does not exceed four months, on payment of a fine not exceeding ten times the amount of the proper registration fee, register the document even though presented out of time. When a document purporting to have been executed out of British India by all or any of the parties to it is not presented for registration until after four months, the registering officer may, if satisfied that the instrument was so executed, and that it has been presented for registration within four months after its arrival in British India, register the document on payment of the proper registration fee. A will may at any time be presented for registration or deposited in manner hereinafter mentioned.[6]

Place of registration.—All documents the registration of which is compulsory, and the first three classes of documents the

4) Act III of 1877, s. 17. 5) ib., s. 18. 6) ib., ss. 23—25, 27.

registration of which is optional (v. *ante*, "Documents which may be registered") must be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate.[7] The Registrar of a district including a Presidency-town, and the Registrar of the Lahore district, may receive and register any of the above-mentioned documents without regard to the situation in any part of British India of the property to which the documents relate.[8] Every other kind of document may be presented for registration either in the office of the Sub-Registrar, in whose sub-district the document was executed, or in the office of any other Sub-Registrar under the Local Government, at which all the persons executing and claiming under the document desire it to be registered. A copy of a decree or order may be presented for registration either in the office of the Sub-Registrar, in whose sub-district the original decree or order was made, or where the decree or order does not affect immoveable property, in the office of any other Sub-Registrar under the Local Government, at which all the persons claiming under the decree or order desire the copy to be registered. In ordinary cases registration or deposit of documents under this Act must be made at the office of the officer authorized to accept the same for registration or deposit, but such officer may, on special cause being shown, attend at the private residence of the person desiring to register a document or to deposit a will, and accept for registration or deposit such document or will.[9]

Who must present the documents.—Whether registration is optional or compulsory documents must be presented either (1) by the person executing or claiming under it, or in the case of a copy of a decree or order claiming under the decree or order; or (2) the representative or assign of such person; or (3) the agent of such person, representative or assign, duly authorized by power of attorney executed and authenticated in manner in the next paragraph mentioned.[1]

Powers-of-attorney.—The following powers-of-attorney are alone recognised:—(1) A power-of-attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides (if the principal at the time of executing the power resides in any part of British India where this Act is in force); (2) a power-of-attorney executed before and authenticated by any Magistrate (if the principal at the time aforesaid resides in any other part of British India); (3) a power-of-attorney executed before and authenticated by a Notary Public or any Court, Judge, Magistrate, British Consul or Vice-Consul

7) Act III of 1877, s. 28.
8) ib., s. 30.
9) ib., ss. 28—31.
1) ib., s. 32.

or representative of Her Majesty or of the Government of India (if the principal at the time aforesaid does not reside in British India).

The following persons are not required to attend at any registration office or Court for the purpose of executing any such power-of-attorney as is mentioned in clauses (1) and (2):—Persons who by reason of bodily infirmity are unable without risk or serious inconvenience so to attend; persons in jail; and persons exempt by law from personal appearance in Court.[2]

Presenting authorities to adopt, and wills.—The testator or, after his death, any person claiming as executor or otherwise under a will, may present it to any Registrar or Sub-Registrar for registration, and the donor or, after his death, the donee, of any authority to adopt, may present it to any Registrar or Sub-Registrar for registration.[3]

Deposit of wills.—A testator may either personally or by his agent deposit with any Registrar his will in a sealed cover superscribed with the name of the testator, and that of his agent (if any), and with a statement of the nature of the document. The Registrar will then transcribe in his register-book the superscription, and will note in the book, and on the cover, the year, month, day and hour of the presentation and receipt and the names of any persons who may testify to the identity of the testator or his agent, and will then place the sealed cover in his fire-proof box. If the testator wishes to withdraw it he may apply personally or by his agent. If on the death of a testator who has deposited a sealed cover containing a will, application be made to the Registrar who holds it in deposit to open the same, the Registrar will open the cover, and at the applicant's expense copy the contents into a register-book and re-deposit the original will.[4]

Effects of registration and non-registration.—(1) A registered document operates from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. (2) All non-testamentary documents duly registered under this Act, and relating to any property, whether moveable or immoveable, **will take effect against any oral agreement** or declaration relating to such property unless where the agreement or declaration has been accompanied or followed by delivery of possession. Registration will not, however, confer validity upon an instrument which is illegal or fraudulent.[5] An instrument got up by fraud

2) Act III of 1877, s. 33.
3) ib., s. 40.
4) ib., ss. 42—45.
5) I. L. R., 4 Bom., 126.

cannot prevail against a *bonâ fide* instrument which is not registered.[6] The reason why the Act excepts oral agreements accompanied by possession is that by such possession the parties who rely upon a subsequent registered deed had or might have had, if reasonably vigilant, notice by the fact of such possession that there was a prior claim to the property. Therefore where there is actual notice of a prior oral agreement though unaccompanied by possession, any subsequently registered deed will not take priority over such agreement.[7] (3) **No document of which the registration is compulsory will affect any immoveable property comprised therein, or confer any power to adopt or be received as evidence of any transaction affecting such property or conferring such power unless it has been registered** in accordance with the provisions of this Act (v. *ante*). (4) Again every document of which the registration is compulsory and the class of documents (1) and (2) of which registration is optional (v. *ante*, "Documents which may be registered") if duly registered, **will take effect** as regards the property comprised therein, **against every unregistered document** (not being a decree or order) relating to the same property whether such unregistered document be of the same nature as the registered document or not. This provision does not affect exempted leases or the various documents exempted under section 17 (v. *ante*, "Documents which need not be registered)." (5) Lastly copies of entries in the Register Books signed and sealed by the registering officer are admissible in Court in evidence for the purpose of proving the contents of the original documents.[8]

Sales, mortgages, leases.—By section 4 of the Transfer of Property Act,[9] sections 54, §§ 2, 3, ss. 59, 107 and 123 of that Act shall be read as supplemental to the Indian Registration Act. See "*Sale*," "*Mortgage*," "*Lease*," "*Gift*," and *Index*.

Destruction of unclaimed documents. — Documents (other than wills) remaining unclaimed in any registration office, for a period exceeding two years, may be destroyed.[1]

No registering officer is liable to any suit, claim, or demand by reason of anything in good faith done or refused in his official capacity.[2]

6) 20 W. R., 110. See Rivaz, p. 69, and cases there cited.
7) I. L. R., 4 Bom., 126 : I. L. R., 6 Cal., 534 : Rivaz, p. 56.
8) Act III of 1877, ss. 47—50, 57.
9) Act IV of 1882 as amended by Act III of 1885.
1) Act III of 1877, s. 85.
2) ib., s. 86.

RIVERS AND WATERS.

AUTHORITIES—Cases cited: Act V of 1882: Act XV of 1877.

Navigable rivers.—The Indian Government has a freehold in the **beds** of navigable rivers in India.[1] There is no distinction as regards the proprietorship of the bed of the river between a tidal river and a navigable river which has ceased to be tidal.[2] The **foreshore** of a tidal navigable river belongs to the Government.[3] When the river ceases to be navigable the foreshore is the property of the riparian proprietors. The **banks** are generally the property of the adjoining land-owners. The public have a right of passage over them for the purpose of navigation.[4]

Non-navigable rivers.—The **beds** of small and shallow streams and of rivers above the point where they cease to be navigable, *primâ facie* belong to the riparian proprietors *ad medium filum aquæ, i.e.*, as far as the middle thread of the stream.[5] This presumption may be rebutted by showing that the bed belongs to some third person.[6] If the lands on both banks of the stream belong to one proprietor, the presumption is that he is the person entitled to the entire bed. The **foreshore** and **banks** of a non-navigable river belong to the riparian proprietors.

Riparian rights.—It is necessary for the existence of a riparian right, that the land should be in contact (either constant, as in the case of non-tidal, or intermittent in the case of tidal, rivers) with the flow of the stream. Private riparian rights may and do exist in a tidal navigable river subject to, and controlled by, the public right of navigation; they are the same as riparian rights in non-navigable streams.[7] These rights are natural rights inherent in the riparian soil, whether the owner of such soil exercises them or not, and he may begin to exercise them whenever he will.[8] The ordinary rights are those of access to the river, erection of private wharves, piers, landing-places, &c., which do not encroach on the property of the Crown, or interfere with the public rights of navigation and fishery; and defences against the encroachment of the river (which do not impede navigation or injure other riparian proprietors); the right to accretion by alluvion, and the right to the use, flow and purity of water.

Right to use of water.—Each riparian proprietor has a right to the use of the water. Consequently all the proprietors have

1) 6 Moo. Ind. App., 267.
2) 10 B. L. R., 406.
3) 6 Moo. Ind. App., 267: 9 B. L. R., 128.
4) 22 Suth. W. R., 276.
5) L. R., 17 Ind. App., 62.
6) ib.
7) 1 App. Cas., 662.
8) 1 C. B. N. S., 590.

an equal right; and, therefore, no one of them can make such use of it as will prevent any of the others from having an equal use of the stream when it reaches them. Every proprietor may divert the water for the purpose, for example, of turning a mill; but, then, he must carry the water back into the stream so that the other proprietors may in their turn have the benefit of it. He must not injure those whose lands lie below him on the banks of the river by diminishing the quantity of water which descends to them or those whose lands lie above him, by returning water upon them so as to overflow their lands, or to disturb any of the operations in which they have occasion to use the water—as, for example, by diminishing the extent of its fall.[9] As to the **pollution** of streams every owner of land has a right that "within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.[1]" Unreasonable pollution of water is therefore an actionable wrong.

Surface water.—Every owner of land has a right to collect and dispose within his own limits of all water on its surface which does not pass in a defined channel.[2] Every proprietor of land on a higher level has a right that the surface drainage of his land shall be received by the proprietor of the land below.[3] Though a land-holder has a right to dispose of the surface water, yet he has no right to corrupt or pollute it so as to cause injury to his neighbour.[4]

Easements.—The natural rights of a riparian proprietor may be curtailed, modified, or enlarged by the acquisition of easements "in respect of any watercourse or the use of any water,"[5] v. "*Easements and Licenses*" and "*Fishery*."

Alluvion—See "*Mortgage*" and "*Lease*."

Territorial waters.—The Government is the owner of the soil of the sea within a distance of three miles around the coasts of British India[6] The soil of the beds of bays, gulfs and estuaries, *primâ facie*, belongs to Government.[7]

Right of fishery—See "*Fishery*."

Jalkur is the profit or rent derived from the water, lakes, ponds or the like, upon a tract of country or an estate, with the right of fishing, and of cultivating the beds if dry.[8]

9) 1 L. J. Ch., 94: Cal. S. D., 1857, p. 1324.
1) Ind. Easement Act, V of 1882, s. 7, ill. (*f*). See "*Easements and Licenses.*"
2) ib., s. 7, ill. (*g*). Cal. S. D., 1857, p. 1324.
3) Act V of 1882, illust. (*i*) I. L. R., 12 Cal., 323.
4) See Act V of 1882 and "*Easements and Licenses.*"
5) Act XV of 1877, s. 26: Act V of 1882, s. 15.
6) 8 Bom. H. C. (Cr. C.) 63. I. L. R., 2 Bom., 19.
7) ib.
8) Wilson's Glossary.

SALE.

AUTHORITIES—Act IV of 1882 (Transfer of Property): Act IX of 1872 (Contract): Cases cited.

SALE OF IMMOVEABLE PROPERTY.

AUTHORITIES—Act IV of 1882 (Transfer of Property): Shephard and Brown's Commentaries on the Transfer of Property Act, 2nd ed.: Act II of 1882 (Trusts).

"Sale" is a transfer of ownership in exchange for a price paid or promised, or part paid and part promised.[1] It is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer.[2]

How made.—Such transfer, in the case of tangible immoveable property, *e.g.*, lands, buildings, etc., of the value of 100 rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a **registered instrument.**

In the case of tangible immoveable property of a value less than 100 rupees, such transfer may be made either by a registered instrument or by delivery of the property.[3] See "*Registration.*" Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property. A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. The contract of sale *quâ* contract does not require registration. As to specific performance of contract to transfer: see "*Contract*," p. 167. It does not, of itself, create any interest in or charge on such property. Though the mere contract to sell does not of itself create any interest in the property, yet the purchaser is entitled to the benefit of the obligation arising out of the contract, and may enforce such right or obligation against a gratuitous transferee, or a transferee with notice: *e.g.*, A contracts to sell Sultanpur to B. While the contract is still in force, he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.[4]

Rights and liabilities of seller.—*In the absence of a contract to the contrary*, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold: **(1) The seller is bound**—(*a*) to

1) Act IV of 1882, s. 54.
2) Act IX of 1872, s. 77.
3) These provisions as to registration do not extend to any district excluded from the operation of the Registration Act, 1877: Act IV of 1882, s. 1.
4) Act IV of 1882, ss. 54, 40, cf., Act II of 1882 (Trusts), s. 91.

disclose to the buyer any **material defect** in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover; the omission to make such disclosure is fraudulent: the contract induced by it is voidable: see "*Contract*," pp. 153, 155; (*b*) to produce to the buyer on his request for examination all **documents of title** relating to the property which are in the seller's possession or power; (*c*) **to answer** to the best of his information all relevant **questions** put to him by the buyer in respect to the property or the title thereto; (*d*) on payment or tender of the amount due in respect of the price, to **execute a proper conveyance** of the property when the buyer tenders it to him for execution at a proper time and place; (*e*) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents;[5] (*f*) to give, on being so required, the buyer, or such person as he directs, such **possession** of the property as its nature admits; (*g*) **to pay all public charges and rent** accrued due in respect of the property up to the date of the sale, the interest on all **incumbrances** on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing. (2) **The seller is deemed to contract** with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same (this is known in English conveyances as the "**covenant for title**"): provided that, where the sale is made by a person in a fiduciary character, he is deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it. The benefit of the contract above-mentioned is annexed to and goes with the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. (3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all **documents of title** relating to the property which are in the seller's possession or power: provided that (*a*), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (*b*), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (*a*) the seller, and in case (*b*) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case

5) cf., Act II of 1882, s. 15.

may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and, in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, must keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident. **(4) The seller is entitled**—(*a*) to the **rents and profits** of the property till the ownership thereof passes to the buyer (*i.e.*, until the date of the conveyance); (*b*) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a **charge upon the property** (known also as "the vendor's lien for unpaid purchase-money") in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.[6]

Rights and liabilities of buyer.—(1) The buyer is bound—(*a*) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest, *e.g.*, the purchaser of an estate knows and the vendor does not know that a prior tenant for life has died: the former is bound to disclose the fact to the vendor. The purchaser, however, need not mention latent advantages, *e.g.*, the existence of a mine on the property unknown to the vendor. The omission to make such a disclosure is fraudulent, and a contract induced by it is voidable. See "*Contract*," pp. 153, 155; (*b*) to pay or tender, at the time and place of completing the sale, the **purchase-money** to the seller or such person as he directs: provided that, where the property is **sold free from incumbrances**, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and must pay the amount so retained to the persons entitled thereto; (*c*) where the ownership of the property has passed to the buyer (*i.e.*, from the date of the registered conveyance or delivery of possession), **to bear any loss arising from the destruction, injury or decrease in value of the property** not caused by the seller; (*d*) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all **public charges and rent** which may become payable in respect of the property, the principal moneys due on any **incumbrances** subject to which the property is sold, and the interest thereon afterwards accruing due. **(2) The buyer is entitled**—(*a*) where the ownership of the property has passed to him, to the benefit of

6) Act IV of 1882, s. 55.

any improvement in, or **increase in value** of, the property, and to the rents and profits thereof; (*b*) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.[7] See "*Contract.*"

Sale of one of two properties subject to a common charge.—Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.[8]

Discharge of incumbrances on sale.—(*a*) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court, or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court—(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property, —of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge; and (2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon. But in either case there must also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons thinks fit to require a larger additional amount. (*b*) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court. (*c*) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge

7) Act IV of 1882, s. 55.

8) ib., s. 56.

for the same, and generally may give directions respecting the application or distribution of the capital or income thereof. (*d*) An appeal lies from any declaration, order or direction under this section as if the same were a decree.[9]

Sale of moveable and immoveable property combined —v. *post*, p. 565.

Sale of Goods.

AUTHORITIES—Act IX of 1872, Ch. VII (Contract) : Cunningham and Shephard's Contract Act, 6th Ed. ; Sugden's Vendors and Purchasers, 14th Ed. ; Bateman's Auctions, 6th Ed. ; Cases cited.

Definition of "Sale"—v. *ante*.

"Goods" mean and include every kind of moveable property.[1] "Moveable property" means property of every description except immoveable property, which latter includes "land, benefits to arise out of land, and things attached to the earth, or permanently fastened to any thing attached to the earth."[2]

Sale is effected by offer and acceptance of *ascertained* goods for a price, or of a price for ascertained goods, together with payment of the price or delivery of the goods ; or with tender, part-payment, earnest or part-delivery ; or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed. Where there is a contract for the sale of *ascertained* goods, **the property in the goods sold** passes to the buyer when the whole or part of the price, or when the earnest, is paid, or when the whole or part of the goods is delivered. If the parties agree, expressly or by implication, that the payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted : *e.g.* : (*a*) B offers to buy A's horse for Rs. 500. A accepts B's offer, and delivers the horse to B. The horse becomes B's property on delivery. (*b*) A sends goods to B, with the request that he will buy them at a stated price if he approves of them, or return them if he does not approve of them. B retains the goods, and informs A that he approves of them. The goods become B's when B retains them. (*c*) B offers A for his horse, Rs. 1,000, the horse to be delivered to B on a stated day, and the price to be paid on another stated day. A accepts the offer. The horse becomes B's as soon as the proposal is

9) Act IV of 1882, s. 57. In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction : (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate : (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section. Cf. 44 and 45 Vic., cap. 41, s. 5 (Conveyancing Act).

1) Act IX of 1872, s. 76.

2) Act I of 1868, s. 2 : as to things which are not transferable, see "*Transfer of Property*."

accepted. (*d*) B offers A, for his horse, Rs. 1,000, on a month's credit. A accepts the offer. The horse becomes B's as soon as the offer is accepted. (*e*) B, on the 1st January, offers to A, for a quantity of rice, Rs. 2,000, to be paid on the 1st March following, the rice not to be taken away till paid for. A accepts the offer. The rice becomes B's as soon as the offer is accepted.[3]

Transfer of ownership: completion of sale.—The following rules as to the passing of the property in goods sold apply in cases which do not fall completely within the terms of the preceding paragraph which relates to ascertained goods only:—(1) Where there is a contract for the sale of a thing which has *yet* to be ascertained, made, or finished, the ownership of the thing is not transferred to the buyer until it is ascertained, made, or finished;[4] *e.g.*: B orders A, a barge-builder, to make him a barge. The price is not made payable by instalments.[5] While the barge is building, B pays to A money from time to time on account of the price. The ownership of the barge does not pass to B until it is finished.[6] (2) Where, by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done: *e.g.*: A, a ship-builder, contracts to sell to B, for a stated price, a vessel which is lying in A's yard; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the contract, the property in the vessel does not pass to B until the vessel has been rigged, fitted up and delivered.[7] (3) Where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done: *e.g.*: (*a*) A, the owner of a stack of bark, contracts to sell it to B, weigh and deliver it, at Rs. 100 per ton. B agrees to take and pay for it on a certain day. Part is weighed and delivered to B; the ownership of the residue is not transferred to B until it has been weighed pursuant to the contract.[8] (*b*) A contracts to sell a heap of clay to B at a certain price per ton. B is, by the contract, to load the clay in his own carts, and to weigh each load at a certain weighing machine, which his carts must pass on their way from A's ground to B's place of deposit. Here, nothing more remains to be done by the seller; the sale is complete, and the ownership of the heap of clay is transferred at

3) Act IX of 1872, s. 78: 11 Moo. P.C.C., 566: 32 L. J. Q. B., 322: 5 B. and A., 340: 7 Q. B., 850.
4) ib., s. 79: 1 Taunt., 318. See 5 Bing., 270: 4 M. and W., 687.
5) L. R., 10 Ch., 405.
6) Act IX of 1872, s. 79: 5 B. and A., 942: L. R., 10 Ch., 40.
7) ib., s. 80: 5 B. and C., 862: 11 Jur., 1091.
8) 5 B. and C., 857.

once.[9] (4) Where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained: *e.g.*: A agrees to sell to B, 20 tons of oil in A's cisterns. A's cisterns contain more than 20 tons of oil. No portion of the oil has become the property of B.[1] (5) When there is a contract for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts done, after the goods are produced in pursuance of the contract, by the seller, or by the buyer with the seller's assent: *e.g.*:—(*a*) A contracts to sell to B, for a stated price, all the indigo which shall be produced at A's factory during the ensuing year. A, when the indigo has been manufactured, gives B an acknowledgment that he holds the indigo at his disposal. The ownership of the indigo vests in B from the date of the acknowledgment. (*b*) A, for a stated price, contracts that B may take and sell any crops that shall be grown on A's land in succession to the crops then standing. Under this contract, B, with the assent of A, takes possession of some crops grown in succession to the crops standing at the time of the contract. The ownership of the crops, when taken possession of, vests in B. (*c*) A, for a stated price, contracts that B may take and sell any crops that shall be grown on his land in succession to the crops then standing. Under this contract, B applies to A for possession of some crops grown in succession to the crops which were standing at the time of the contract. A refuses to give possession. The ownership of the crops has not passed to B, though A may commit a breach of contract in refusing to give possession.[2] (6) Where an agreement is made for the sale of immoveable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immoveable property: *e.g.*: A agrees with B for the sale of a house and furniture. The ownership of the furniture does not pass to B until the house is conveyed to B[3] (v. *ante*).

Ascertainment of goods.—A sale is not complete until the goods are ascertained[4] (v. *ante*). (1) Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party, for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete: *e.g.*: A, having a quantity of sugar in bulk, more than sufficient to fill 20 hogsheads, contracts to sell B 20 hogsheads of it. After the contract, A fills 20 hogsheads with the sugar, and gives notice to B that

9) Act IX of 1872, s. 81: 2 H. and C., 200.
1) ib., s. 82: 2 C. and M., 530.
2) ib., s. 87.
3) ib., s. 85: 13 M. and W., 29.
4) ib., s. 85.

the hogsheads are ready, and requires him to take them away. B says he will take them as soon as he can. By this appropriation by A, and assent by B, the sugar becomes the property of B.[5] (2) Where the goods are not ascertained at the time of making the contract of sale, and, by the terms of the contract, the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has a right to select any goods answering to the contract, and by his doing so, the goods are ascertained: *e.g.*: B agrees with A to purchase of him, at a stated price, to be paid on a fixed day, 50 maunds of rice out of a larger quantity in A's granary. It is agreed that B shall send sacks for the rice, and that A shall put the rice into them. B does so, and A puts 50 maunds of rice into the sacks. The goods have been ascertained.[6]

When goods have become the property of the buyer, he must bear any loss arising from their destruction or injury,—*e.g.*: (*a*) B offers, and A accepts, Rs. 100 for a stack of firewood standing on A's premises, the firewood to be allowed to remain on A's premises till a certain day, and not to be taken away till paid for. Before payment, and while the firewood is on A's premises, it is accidentally destroyed by fire. B must bear the loss. (*b*) A bids Rs. 1,000 for a picture at a sale by auction. After the bid, it is injured by an accident. If the accident happens before the hammer falls, the loss falls on the seller; if afterwards, on A.[7] So also, according to English law, "where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of property follow; one of which is, that if it be destroyed, the loss falls upon the vendee."[8] The buyer of *specific* goods bears any loss from the date of the contract; and of other goods as soon as the property has passed to him (v. *ante*).

A contract for the sale of goods to be delivered at a future day is binding, though the goods are not in the possession of the seller at the time of making the contract, and though, at that time, he has no reasonable expectation of acquiring them otherwise than by purchase: *e.g.*: A contracts, on the 1st January, to sell B 50 shares in the East Indian Railway Company, to be delivered and paid for on the 1st March of the same year. A, at the time of making the contract, is not in possession of any shares. The contract is valid.[9]

5) Act IX of 1872, s. 83: 6 B. & C., 388: 14 C. B. N. S., 412.
6) ib., s. 84.
7) ib., s. 86.
8) 6 B. & C., 360.
9) Act IX of 1872, s. 88: 5 M. & W., 462.

The price.—Where the price of goods sold is not fixed by the contract of sale, the buyer is bound to pay the seller such a price as the Court considers reasonable: *e.g.*: B, living at Patna, orders of A, a coach-builder at Calcutta, a carriage of a particular description. Nothing is said by either as to the price. The order having been executed, and the price being in dispute between the buyer and the seller, the Court must decide what price it considers reasonable.[1]

Delivery.—(1) Delivery of goods sold **may be made** by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorized to hold them on his behalf: *e.g.*: (*a*) A sells to B a horse, and causes or permits it to be removed from A's stables to B's. The removal to B's stable is a delivery. (*b*) B, in England, orders 100 bales of cotton from A, a merchant of Bombay, and sends his own ship to Bombay for the cotton. The putting the cotton on board the ship is a delivery to B. (*c*) A sells to B certain specific goods which are locked up in a godown. A gives B the key of the godown, in order that he may get the goods. This is a delivery. (*d*) A sells to B five specific casks of oil. The oil is in the warehouse of A. B sells the five casks to C. A receives warehouse rent for them from C. This amounts to a delivery of the oil to C, as it shows an assent on the part of A to hold the goods as warehouseman of C. (*e*) A sells to B 50 maunds of rice in the possession of C, a warehouseman. A gives B an order to C to transfer the rice to B, and C assents to such order, and transfers the rice in his books to B. This is a delivery. (*f*) A agrees to sell B five tons of oil, at Rs. 1,000 per ton, to be paid for at the time of delivery. A gives to C, a wharfinger, at whose wharf he had 20 tons of the oil, an order to transfer five of them into the name of B. C makes the transfer in his books, and gives A's clerk a notice of the transfer for B. A's clerk takes the transfer notice to B, and offers to give it him on payment of the price of the oil. B refuses to pay. There has been no delivery to B, as B never assented to make C his agent to hold for him the five tons selected by A. (2) A delivery **of part of goods,** in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder: *e.g.*: (*a*) A ship arrives in a harbour laden with a cargo consigned to A, the buyer of the cargo. The captain begins to discharge it, and delivers over part of the goods to A in progress of the delivery of the whole. This is a delivery of the cargo to A for the purpose of passing the property

1) Act IX of 1872, s. 89: 10 Bing., 376: ib., 482.

in the cargo. (*b*) A sells to B a stack of firewood, to be paid for by B on delivery. After the sale, B applies for and obtains from A leave to take away some of the firewood. This has not the legal effect of delivery of the whole. (*c*) A sells 50 maunds of rice to B. The rice remains in A's warehouse. After the sale, B sells to C 10 maunds of the rice, and A, at B's desire, sends the 10 maunds to C. This has not the legal effect of a delivery of the whole. (3) In the absence of any special promise, the seller of goods is not bound to deliver them until **application for** delivery by the buyer. In the absence of any special promise as to **the place of delivery,** goods sold are to be delivered at the place at which they are at the time of the *sale ;* and goods contracted to be sold are to be delivered at the place at which they are at the time of the *contract* for sale, or, if not then in existence, at the place at which they are *produced.*[2]

Effect of delivery to wharfinger or carrier—See "*Carriers.*"

Nature of a lien.—"Lien" has been defined to be "a right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied."[3] Thus agents, bailees, workmen and others have a right of lien: *e.g.:* a horse-breaker by whose skill a horse is made manageable has a lien upon the horse for his charges in keeping and training it (but in the case of a racehorse it is doubtful if the trainer's lien attaches).[4] So also a tailor to whom cloth is sent to make a suit of clothes has a lien for the price upon them.[5] Lien carries no right of sale even though the retention be attended with expense: as to the vendor's right of re-sale; v. *post.*[6] A lien may be either specific or general: that is a lien in respect of some particular demand, or a lien in respect of all outstanding claims. Thus a bailee has a particular or specific lien, whereas the lien of a banker is general.[7] A lien being founded on possession, the lien is lost with the parting with possession.

Seller's lien.—(1) Unless a contrary intention appears by the contract, a seller has a lien on sold goods as long as (*a*) *they remain in his possession ;* and (*b*) the price or any part of it remains unpaid. The lien being founded on possession is lost with delivery. A vendor has, however, in certain cases, a further right, *viz.*, the right of stoppage *in transitu* (*see next paragraph*). The seller's lien may be negatived by the terms of the contract, as for instance in the case of a contract for which security is given: in such a case "the express stipulation and agreement of the parties

2) Act IX of 1872, ss. 90—94.
3) 2 East., 235.
4) 13 Q. B., 680 : 5 M. & W., 350.
5) 3 M. & S. 169. See pp. 83, 84.
6) 29 L. J., Ch. 714.
7) See pp. 83, 84.

for security exclude lien and limit their rights by the extent of the express contract that they have made."[8] (2) Where, by the contract, the payment is to be made at a future day, but no time is fixed for the delivery of the goods, the seller has no lien, and the buyer is entitled to a present delivery of the goods without payment. But if the buyer (*a*) becomes insolvent (*i.e.*, if he has ceased to pay his debts in the usual course of business, or is incapable of paying them) before delivery of the goods; or (*b*) if the time appointed for payment arrives before the delivery of the goods, the seller may retain the goods for the price: *e.g.*: A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse. Before the expiry of the three months, B becomes insolvent. A may retain the goods for the price. (*z*) Where, by the contract, the payment is to be made at a future day, and the buyer allows the goods to remain in the possession of the seller until that day, and does not then pay for them, the seller may retain the goods for the price: *e.g.*: A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse till the expiry of the three months, and then does not pay for them. A may retain the goods for the price. (3) A seller, in possession of goods sold, may retain them for the price against any subsequent buyer, unless the seller has recognized the title of the subsequent buyer[9]

Stoppage in transit.—A seller who (1) *has parted with the possession* of the goods; and (2) has not received the whole price, may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer.[1] Stoppage in transit **entitles the seller** to hold the goods stopped until the price of the whole of the goods sold is paid: *e.g.*: A sells to B 100 bales of cotton; 60 bales having come into B's possession, and 40 being still in transit, B becomes insolvent, and A, being still unpaid, stops the 40 bales in transit A is entitled to hold the 40 bales until the price of the 100 bales is paid.[2] **The seller may effect** stoppage in transit, either (1) by taking actual possession of the goods; or (2) by giving notice of his claim to the carrier or other depositary in whose possession they are.[3] Such notice may be given, either to the person who has the immediate possession of the goods, or to the principal whose servant has possession. In the latter case, the notice must be given at such a time, and under

8) 23 Ch. Div.. 330.
9) Act IX of 1872, ss. 95–98.
1) ib., s. 99: Sm. L. C.: *Lackbarrow v. Mason.*
2) ib., s. 106.
3) ib., s. 104.

such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.[4] **Goods are deemed to be in transit** while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged: *e.g.*: (*a*) B, living at Madras, orders goods of A, at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to C, a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of C, are in transit. (*b*) B, at Delhi, orders goods of A, at Calcutta. A consigns and forwards the goods to B at Delhi. On arrival there, they are taken to the warehouse of B, and left there. B refuses to receive them, and immediately afterwards stops payment. The goods are in transit. (*c*) B, who lives at Púná, orders goods of A at Bombay. A sends them to Púná by C, a carrier appointed by B. The goods arrive at Púná, and are placed by C, at B's request, in C's warehouse for B. The goods are no longer in transit. (*d*) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship. (*e*) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. A delivers the cotton on board the ship, and takes bills of lading from the master, making the cotton deliverable to A's order or assigns. The cotton arrives at London, but, before coming into B's possession, B becomes insolvent. The cotton has not been paid for. A may stop the cotton.[5]

Continuance of right of stoppage.—The seller's right of stoppage does not, except in the cases hereinafter mentioned (v. *post*), cease on the buyer's re-selling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf.[6]

Cessation of right.—The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing title to the goods, assigns it, while the goods are in transit, to a second buyer, who is acting in good faith, and who gives valuable consideration for them: *e.g.*: (*a*) A sells and consigns certain goods to B, and sends him the bill of lading. A being still unpaid, B becomes insolvent, and while the goods are in

4) Act IX of 1872, s. 105.
5) ib., s. 106: Sm. L. C.: *Lickbarrow* v. *Mason*.
6) ib., s. 101.

transit, assigns the bill of lading for cash to C, who is not aware of his insolvency. A cannot stop the goods in transit. (*b*) A sells and consigns certain goods to B. A being still unpaid, B becomes insolvent, and, while the goods are still in transit, assigns the bill of lading for cash to C, who knows that B is insolvent. The assignment not being in good faith, A may still stop the goods in transit.[7]

Stoppage where bill of lading is pledged—v. "*Carriers*," p. 124.

Re-sale.—Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may, after giving notice to the buyer of his intention to do so, re-sell them, after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit, which may occur on such re-sale.[8] But this is not the vendor's only remedy. This is one remedy, but it is only a partial remedy, for the purchaser might be insolvent and the market depressed, in which case it would be small satisfaction for the vendor to re-sell. The vendor may rescind the contract and refuse to deliver the goods.[9]

Title conveyed by seller of goods to buyer—See "*Title.*"

Warranty—See "*Warranty.*"

When the seller sends to the buyer goods not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered: *e.g.*: A orders of B specific articles of china. B sends these articles to A in a hamper, with other articles of china which had not been ordered. A may refuse to accept any of the goods sent.[1]

Wrongful refusal to accept.—If a buyer wrongfully refuses to accept the goods sold to him, this amounts to a breach of the contract of sale.[2] The ordinary measure of damages for not accepting goods sold is the difference between the contract price and the market price of similar goods at the time when they ought to have been accepted.[3] See "*Contract*," pp. 165, 166. So also the ordinary measure of damages for not delivering goods sold is the difference between the contract price and the market price at the time appointed for delivery.[4]

When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer's

7) Act IX of 1872, s. 102: L. R., 2 Q. B. D., 376.
8) ib., s. 107.
9) I. L. R., 6 Cal., 64, 68, 69: s. 55, Act IX of 1872. See p. 163.

1) Act IX of 1872, s. 119.
2) ib., s. 120.
3) 9 B. & C., 145.
4) I.L.R., 1 Cal. 264: 8 Q. B., 609.

failing to pay the price at the time fixed, unless it was stipulated by the contract that he should be so entitled.[5]

Sale by auction.—Until the moment of sale an auctioneer is primarily the agent of the seller: but for some purposes he is also the agent of both parties.[6] The offer is made by the bidder and accepted by the auctioneer by the falling of the hammer. Before the fall of the hammer, either party may revoke the auctioneer's authority. Every bidding is but an offer on one side, which is binding on neither until it receives assent: the general rule being that an offer may always be retracted before acceptance. A bidding may therefore be countermanded before the lot is actually knocked down: but the retraction must be made loud enough to be heard by the auctioneer.[7] Where goods are sold by auction, there is a distinct and separate sale of the goods in each lot, by which the ownership thereof is transferred as each lot is knocked down.[8] If, at a sale by auction, the seller makes use of pretended biddings (called "puffing") to raise the price, the sale is voidable at the option of the buyer.[9] An auctioneer has a lien on the goods sold by auction and the proceeds thereof for his commission, and may sue the purchaser either in the name of his principal, or in his own name.[1]

See "*Agency*," "*Contract*," "*Title*," "*Warranty*" and *Index*.

5) Act IX of 1872, s. 121.
6) 5 B & Ald., 333; 7 Ves., 276.
7) 3 T. R., 148. Sugden's Vendors and Purchasers, pp. 11, 13, 14, 14th Ed.: Bateman's Auctions, 6th Ed., p. 30: and cases there cited.
8) Act IX of 1872, s. 122: 4 B & Ad., 77.
9) ib., s. 123: Bateman, pp. 120, 136, Cf. 30 & 31 Vic., cap. 48: Sugden, p. 9.
1) 4 E. & B., 954.

SMALL CAUSE COURTS.

AUTHORITIES—Act XV of 1882 (Presidency Small Cause Courts): Act IX of 1887 (Provincial Small Cause Courts).

Small Cause Courts are Courts, with a limited jurisdiction, for the trial of civil suits, where the subject-matter of the suit does not exceed a certain sum. They are of two kinds: Presidency (*i.e.*, the Courts in the towns of Calcutta, Madras and Bombay) and Provincial or Mofussil. The former date from 1850, and are historically connected with the Courts of Requests established by Charter in 1753; the latter were established subsequently to the Presidency Small Cause Courts, and are governed by a separate Act (IX of 1887). See *Introduction*, pp xiv, xv. The previous Act dealing with Presidency Small Cause Courts (Act IX of 1850) was mainly an adaptation of the earlier English County Courts statutes to the Presidency-towns. The present Act (XV of 1882) has, especially in matters of procedure and practice, brought the Presidency Small Cause Courts much more under the operation of the general law which governs the procedure in the Civil Courts of the country than had hitherto been the case.[1]

PRESIDENCY COURTS.

AUTHORITY—Act XV of 1882.

Constitution and officers—In each of the towns of Calcutta, Madras and Bombay there is a Court of Small Causes. These Courts are deemed to be under the superintendence of the High Courts. Subject to the control of the Governor-General the Local Government may appoint, suspend, or remove the Judges. Not less than one-third of the persons appointed, including the Chief Judge, must be advocates of one of the High Courts. The Chief Judge is the first in rank and precedence, and has the distribution of the business of the Court, and a casting voice in case the Court is equally divided in opinion. With the sanction of the High Court, the Small Cause Court may make rules to provide for all matters not specially provided for by the Act. The Local Government may appoint the officer who is called the Registrar of the Court, and who is the chief ministerial officer. The Chief Judge may, subject to the control of the Local Government, appoint clerks, bailiffs and other ministerial officers. The Registrar may be invested with the powers of a Judge for the trial of suits in which the amount or value of the

1) See MacEwen's (R. S. T.) "Practice of the Presidency Court of Small Causes of Calcutta," 1883, p. iv.

subject-matter does not exceed Rs. 20. No Judge or other officer appointed under the Act may, during the continuance of his office practise or act as a legal practitioner, or be concerned either on his own account or for any other person, or as the partner of any other person, in any trade or profession.[2]

Law administered by the Court.—All questions other than questions relating to procedure or practice, which arise in suits or other proceedings, must be dealt with and determined according to the law for the time being administered by the High Court in the exercise of its *ordinary original civil jurisdiction*.[3]

The local limits of the jurisdiction of each of the Small Cause Courts is the local limits for the time being of the ordinary civil jurisdiction of the High Court.[4]

Suits in which Court has no jurisdiction are suits—(*a*) concerning the assessment or collection of the revenue; (*b*) concerning any act ordered or done by the Governor-General in Council or the Local Government, or by the Governor-General or a Governor, or by any member of the Council of the Governor-General or of the Governor of Madras or Bombay, in his official capacity, or by any person by order of the Governor-General in Council or the Local Government; (*c*) concerning any act ordered or done by any Judge or judicial officer in the execution of his office, or by any person in pursuance of any judgment or order of any Court or any such Judge or judicial officer; (*d*) for the recovery or partition of immoveable property; (*e*) for the foreclosure or redemption of a mortgage of immoveable property; (*f*) for the determination of any other right to, or interest in, immoveable property; (*g*) for the specific performance or rescission of contracts; (*h*) to obtain an injunction; (*i*) for the cancellation or rectification of instruments; (*j*) to enforce a trust; (*k*) for a general average loss and suits on policies of insurance on sea-going vessels; (*l*) for compensation in respect of collisions on the high seas; (*m*) for compensation for the infringement of a patent, copyright, or trade-mark; (*n*) for a dissolution of partnership, or for an account of partnership transactions; (*o*) for an account of property and its due administration under the decree of the Court; (*p*) for compensation for libel, slander, malicious prosecution, adultery, or breach of promise of marriage; (*q*) for the restitution of conjugal rights, for the recovery of a wife, or for a divorce; (*r*) for declaratory decrees; (*s*) for possession of an hereditary office; (*t*) against Sovereign Princes or Ruling Chiefs, or against Ambassadors or Envoys of Foreign States; (*u*) on any judgment of a High Court; (*v*) the cognizance whereof by the

2) Act XV of 1882, ss. 5—15. 3) ib., s. 16. 4) ib., s. 17.

Small Cause Court is barred by any law for the time being in force.[5]

Suits in which Court has jurisdiction.—Subject to the above-mentioned exceptions the Small Cause Court has jurisdiction to try all suits of a civil nature when the amount or value of the subject-matter does not exceed Rs. 2,000; and (*a*) the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court and the leave of the Court has been given before the institution of the suit; or (*b*) all the defendants, at the time of the institution of the suit, actually and voluntarily reside or carry on business, or personally work for gain, within such local limits; or (*c*) any of the defendants, at the time of the institution of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, within such local limits, and either the leave of the Court has been given before the institution of the suit, or the defendants who do not reside, etc., acquiesce in such institution. Where a person has a permanent dwelling at one place and also a lodging at another place for a temporary purpose only, he is deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging. The Court may by *consent* try suits beyond the pecuniary limits of its jurisdiction. When in any suit the sum claimed is, by a set-off admitted by both parties, reduced to a balance not exceeding Rs. 2,000 the Small Cause Court has jurisdiction to try such suit.[6] If any suit cognizable by the Small Cause Court (other than suits by and against officers of the Court) is instituted in the High Court, and if, in such suit the plaintiff obtains in the case of a suit founded on contract a decree for any matter of an amount or value less than Rs. 2,000, and in the case of any other suit a decree for any matter of an amount or value of less than Rs. 300, no costs will be allowed to the plaintiff: and if in any such suit the plaintiff does not obtain a decree, the defendant will be entitled to his costs as between attorney and client. The foregoing rules do not apply to any suit in which the Judge who tries the same certifies that it was one fit to be brought in the High Court.[7]

Procedure.—Certain portions of the Code of Civil Procedure[8] extend to the Small Cause Court, provided that the Court may declare that any of the said portions of the said Code shall not extend to the Small Cause Court, or shall extend with such modifications as the Court may think fit. Except in cases of

5) Act XV of 1882, s. 19.
6) ib., ss. 18, 20.
7) ib., s. 22.
8) Specified in the second schedule annexed to the Act.

set-off,[9] no written statement will be received unless required by the Court.[1]

Compensation payable to defendant.—In any suit in which the defendant appears and does not admit the claim, and the plaintiff does not obtain a decree for the full amount of his claim, the Small Cause Court may order the plaintiff to pay to the defendant, by way of satisfaction for his trouble and attendance, such sum as it thinks fit.[2]

Discharge of judgment-debtor on sufficient security.—Whenever any judgment-debtor, who has been arrested, or whose property has been seized in execution of a decree of the Small Cause Court, offers security to the satisfaction of such Court for payment of the amount which he has been ordered to pay and the costs, the Court may order him to be discharged, or the property to be released.[3]

Suspension of execution.—Whenever it appears to the Small Cause Court that any judgment-debtor under its decree is unable, from **sickness, poverty, or other sufficient cause**, to pay the amount of the decree, or, if such Court has ordered the same to be paid in instalments, the amount of any instalment thereof, it may from time to time, for such time and upon such terms as it thinks fit, suspend the execution of such decree and discharge the debtor, or make such order as it thinks fit.[4]

Suits by minors—See "*Masters, Servants and Apprentices*," p. 425.

New trials and re-hearing.—Saving the provisions for a new trial, for reference to the High Court, and for a re-hearing (v. *post*) every decree and order of the Small Cause Court in a suit is final and conclusive; but the Court may, on application of either party, made within *eight* days from the date of the decree or order in any suit,[5] order a **new trial** to be held, or alter, set aside, or reverse the decree or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings. Any party may also, within *eight* days after the judgment in any suit in the Small Cause Court in which the amount or value of the subject-matter *exceeds* Rs. 1,000, apply to the High Court for an order that such **suit may be re-heard** in the High Court.[6] No suit lies on any decree of the Small Cause Court.[7]

Recovery of possession of immoveable property—See "*Possession.*"

9) See pp. 9, 10, "*Action and Actionable Claim.*"
1) Act XV of 1882, ss. 23, 24.
2) ib., s. 26.
3) ib., s. 29.
4) ib., s. 30.
5) Not being a decree following upon a judgment according to award under s. 522, Civ. Pr. Code: see "*Arbitration*," p. 59.
6) Act XV of 1882, ss. 37, 38.
7) ib., s 94.

References to High Court.—If two or more Judges of the Small Cause Court sit together in any suit or in any proceeding for the recovery of possession of immoveable property (see "*Possession*") and differ in their opinion as to any question of law or usage having the force of law, or the construction of a document, which construction may affect the merits, or, if in any suit or any such proceeding in which the amount or value of the subject-matter exceeds Rs. 500, any such question arises, and either party so requires, the Small Cause Court must draw up a statement of the facts of the case, and refer such statement for the opinion of the High Court, and must either reserve judgment or give judgment contingent upon such opinion.[8]

Distresses.—Chapter VIII of the Act deals with the subject of distresses and extends to every place within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay. But nothing contained in this chapter applies (*a*) to any rent due to Government; (*b*) to any rent which has been due for more than 12 months before the application for a distress-warrant. Any person claiming to be entitled to arrears of rent of any house or premises may apply for a distress-warrant. The Judge or Registrar will thereupon issue a warrant directing the bailiff to distrain the moveable property of the person in arrear for the sum in arrear and the costs of the distress. Every distress must be made after sunrise and before sunset, and not at any other time. The bailiff may force open any stable, outhouse, or other building, and may also enter any dwelling-house the outer door of which may be open, and may break open the door of any room in such dwelling-house for the purpose of seizing property liable to be seized under this chapter: but he must not enter or break open the door of any room appropriated for the *zanánd*, which, by the usage of the country, is considered private. On seizing any property the bailiff must make an inventory and give notice to the debtor that unless the arrear rent and costs of distress be paid within five days, the property mentioned in the inventory will be appraised and sold.[9] At the expiration of five days, the bailiff may appraise the property seized and must give the debtor notice that such property will be sold two clear days at least after the date of the notice. In default of any order to the contrary the distrained property will be sold and the proceeds handed over to the Registrar to be applied first in payment of the costs of the distress, and then in satisfaction of the debt; the surplus, if any, will be returned to the debtor.[1] No distress may be levied for rent except under the provisions of the above-mentioned chapter.[2]

8) Act XV of 1882, s. 69.
9) ib., ss. 50, 53—56, 59.
1) ib., ss. 64, 65.
2) ib., s. 68.

Property which may be seized.—In pursaunce of a distress-warrant, the bailiff must seize the moveable property found in or upon the house or premises mentioned in the warrant and belonging to the person from whom the rent is claimed, or such part thereof as may, in the bailiff's judgment, be sufficient to cover the amount of the rent, together with the costs of the distress. **But the bailiff must not seize**—(*a*) things in actual use; or (*b*) tools and implements not in use, where there is other moveable property in or upon the house or premises sufficient to cover such amount and costs; or (*c*) the debtor's necessary wearing apparel; or (*d*) goods in the custody of the law.[3]

Application to discharge or suspend warrant.—The debtor, or any other person alleging himself to be the owner of any property seized, may, at any time within *five* days from such seizure, apply to any Judge to discharge or suspend the warrant, or to release a distrained article: the Judge may give reasonable time to the debtor to pay the rent due from him.[4] If the value of the subject-matter in dispute exceeds Rs. 1,000, the applicant may apply to the High Court to transfer the case to itself.[5]

Claim to goods distrained made by stranger.—If any claim is made to, or in respect of, any property seized, or in respect of the proceeds or value thereof, by any person not being the debtor, the Registrar of the Small Cause Court may issue a summons calling before the Court the claimant and the person who obtained the warrant. A Judge of the Small Cause Court will adjudicate upon such claim, and make such order between the parties in respect thereof and of the costs of the proceedings as he thinks fit.[6] If the value of the subject-matter in dispute exceed Rs. 1,000, the claimant may apply to the High Court to transfer the case to itself.[7]

Contempt of Court—See Ch. XII of the Act.

Fees and costs.—An **institution-fee** not exceeding (*a*) when the amount or value of the subject-matter does not exceed Rs. 500—the sum of Annas 2 in the rupee on such amount or value; (*b*) when the amount or value of the subject-matter exceeds Rs. 500—the sum of Rs. 62-8, and Anna 1 in the rupee on the excess of such amount or value, over Rs. 500, must be paid on the plaint in every suit and every application for re-hearing (v. *ante*), or for delivery of possession of immoveable property. (See "*Possession.*") No such plaint or application will be received until such fee has been paid. The fees payable for issue of process will be found in the appendix to the Act. **Whenever such suit or proceeding is settled by agreement** of the parties before

3) Act XV of 1882, s. 57.* 5) ib., s. 63. 7) ib., s. 63.
4) ib., s. 60. 6) ib., ss. 61

the hearing, half the amount of all fees paid up to that time will be re-paid by the Small Cause Court to the parties by whom the same have been respectively paid. The Small Cause Court may receive and register suits instituted, and applications for recovery of possession (v. "*Possession*") made by **poor persons**, and may issue processes on behalf of such persons, without payment, or on a part payment of the fees for institution and issue of process. **The expense of employing an advocate, vakil, attorney, or other legal practitioner** incurred by any party, will not be allowed as costs in any suit, or in any proceeding for recovery of possession (see "*Possession*"), in the Small Cause Court, in which suit or proceeding the amount or value of the subject-matter *does not exceed* Rs. 20, unless the Court is of opinion that the employment of such practitioner was, under the circumstances, reasonable.[8]

Imprisonment or committal of person refusing to answer or to produce a document—See s. 87 of the Act.

PROVINCIAL COURTS.

AUTHORITY—Act IX of 1887.

Object of the Act.—The above-mentioned Act, which extends to the whole of British India, consolidates and amends the law relating to Small Cause Courts established *beyond* the local limits of the ordinary original civil jurisdiction of the Calcutta, Madras and Bombay High Courts. Certain portions of the Act apply to Courts invested with the jurisdiction of Courts of Small Causes.[9]

Constitution of Courts. — The Local Government may establish a Small Cause Court at any place within the territories under its administration beyond the local limits above-mentioned. The local limits of the jurisdiction of the Small Cause Court is such as the Local Government may define, and the Court may be held at such place or places within those limits as the Local Government may appoint. The Local Government may appoint a Judge and additional Judge, and may direct two Judges to sit as a bench. It may also appoint a Registrar to be the chief ministerial officer.[1] A Small Cause Court is subject to the administrative control of the District Court and to the superintendence of the High Court.[2]

Jurisdiction.—A Small Cause Court cannot take cognizance of certain suits specified in the schedule annexed to the Act. Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits

8) Act XV of 1882, ss. 71—74, 76.
9) Act IX of 1887, s. 32.
1) ib., ch. 2.
2) ib., s. 28.

of a civil nature, of which the value *does not exceed* Rs. 500, are cognizable by a Small Cause Court. Subject as aforesaid, the Local Government may direct that all suits of a civil nature, of which the value *does not exceed* Rs. 1,000, shall be cognizable by a Court of Small Causes mentioned in the order. Save as expressly provided by this Act, or by any other enactment, a suit cognizable by a Small Cause Court cannot be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Small Cause Court by which the suit is triable.[3]

Procedure.—The procedure followed in a Small Cause Court is the procedure prescribed in the chapters and sections of the Civil Procedure Code specified in the second schedule to that Code in so far as those chapters and sections are applicable.[4] Where an order imposing fine, or for the arrest or imprisonment of any person (except when such imprisonment is in execution of a decree) is made by a Small Cause Court, an appeal therefrom lies to the District Court. The High Court has power to revise the decrees and orders of a Small Cause Court. Save as provided by the Act, a decree or order made by a Small Cause Court is final.[5] See "*Action and Actionable Claim.*"

Suits involving questions of title.—When the right of a plaintiff and the relief claimed by him in a Small Cause Court depend upon the proof or disproof of a title to immoveable property or other title which such a Court cannot finally determine, the Court may return the plaint to be presented to a Court having jurisdiction to determine the title.[6]

3) Act IX of 1887, ss. 15, 16.
4) Ib., s. 17. As to order to set aside *ex-parte* decree or, for a review of judgment, see the section.
5) Ib., ss. 24, 25, 27.
6) Ib., s. 23.

SOCIETIES.

AUTHORITIES—*Acts I of 1880 : XX of 1863 : XXI of 1860.*

Religious societies.—The Religious Societies Act (I of 1880) simplifies the manner in which certain bodies of persons associated for the purpose of maintaining religious worship may hold property acquired for such purpose, and provides for the dissolution of such bodies and the adjustment of their affairs, the appointment of trustees and for the decision of certain questions relating to such bodies. When any question arises, either in connection with the matters referred to in the Act, or otherwise, as to whether any person is a member of any such body, or as to the validity of any appointment under the Act, any person interested in such question may apply by petition to the High Court for its opinion on such question. A copy of such petition will be served upon, and the hearing thereof may be attended by, such other persons interested in the question as the Court thinks fit. *Any opinion given by the Court has the force of a declaratory decree.* The costs of the application are in the discretion of the Court. The Act extends to the whole of British India, but does not apply to Hindus, Mahommedans, or Buddhists.[1]

Religious endowments and trustees of mosques, Hindu temples, and colleges—See Act XX of 1863.

Literary, scientific, and charitable societies.—Act XXI of 1860 makes provision for improving the legal condition of societies established for the promotion of literature, science, or the fine arts, or for the diffusion of useful knowledge, or for charitable purposes. Any seven or more persons associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in s. 20 of the Act, may, by subscribing their names to a Memorandum of Association, and filing the same with the Registrar of Joint Stock Companies, form themselves into a society under this Act. Upon the memorandum and certified copy of the rules and regulations being filed, the society will be registered. *The property of such a society, if not vested in trustees, is deemed* to be vested for the time being in the governing body of such society. The Act makes provision for the manner in which suits by and against such a society are to be brought, and judgment is to be enforced. The society is empowered to make by-laws and to enforce them by pecuniary penalties. Members are liable to be sued as strangers, and are punishable as strangers if guilty of

1) *Act I of 1880.*

offences. The Act further enables such societies to alter, extend, or abridge their purposes, and makes provision for their dissolution. Any person may inspect all documents filed with the Registrar under this Act on payment of a fee of one rupee for each inspection.[2]

Associations not for profit—See "*Companies*," p. 135.

2) Act XXI of 1860, *passim*.

TITLE.

AUTHORITIES—Act IX of 1872 (Contract): Act IV of 1882 (Transfer of Property): Act I of 1877 (Specific Relief): Act I of 1872 (Evidence).

Suit for declaratory decree in case of denial of title—See "*Judgments and Decrees*," p. 358.

Title to negotiable instruments—See "*Bills of Exchange and Promissory Notes*," p. 101.

Title of literary work—See "*Copyright*," p. 177.

Slander of title—See *Introduction*, p. xxiii, note.

Donatio mortis causa of title-deeds—See "*Donatio Mortis Causa*," p. 217.

Adjudication of title in interpleader suits—See "*Interpleader*," p. 336.

Denial by lessor of landlord's title—See "*Lease*," p. 374.

Possession without title—See "*Possession*," pp. 510, 511, 512.

Title in ejectment suits—See "*Possession*," p. 512.

Title of executors—See "*Probate*," p. 517.

TITLE TO MOVEABLE PROPERTY.

Title conveyed by seller of goods to buyer.—No seller can give to the buyer of goods a better title to those goods than he has himself, *except* in the following cases:—(1) When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary: *Provided* that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods. (2) If one of several joint-owners of goods has the sole possession of them by the permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint-owner in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them. (3) When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred

to a third person who, before the contract is rescinded, buys them in good faith of the person in possession; unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents. In this case the original seller is entitled to compensation from the original purchaser for any loss which the seller may have sustained by being prevented from rescinding the contract: *e.g.*, (*a*) A buys from B, in good faith, a cow which B had stolen from C. The property in the cow is not transferred to A. (*b*) A, a merchant, entrusts B, his agent, with a bill of lading relating to certain goods, and instructs B not to sell the goods for less than a certain price, and not to give credit to D. B sells the goods to D for less than that price, and gives D three months' credit. The property in the goods passes to D. (*c*) A sells to B goods of which he has the bill of lading, but the bill of lading is made out for delivery of the goods to C, and it has not been endorsed by C. The property is not transferred to B. (*d*) A, B and C are joint Hindu brothers, who own certain cattle in common. A is left by B and C in possession of a cow, which he sells to D. D purchases *bonâ fide*. The property in the cow is transferred to D. (*e*) A, by a misrepresentation not amounting to cheating, induces B to sell and deliver to him a horse. A sells the horse to C before B has rescinded the contract. The property in the horse is transferred to C; and B is entitled to compensation from A for any loss which B has sustained by being prevented from rescinding the contract. (*f*) A compels B by wrongful intimidation, or induces him by cheating or forgery, to sell him a horse, and, before B rescinds the contract, sells the horse to C. The property is not transferred to C.[1]

Seller's responsibility for badness of title.—If the buyer, or any person claiming under him, is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract.[2]

No specific relief in favour of vendor or lessor without title, or voluntary settlor—v *post*.

Purchaser's and lessee's rights against vendor and lessor with imperfect title—v. *post*.

Title to Immoveable Property.

Operation of transfer of property by owner — See "*Transfer of Property*."

1) Act IX of 1872, s. 108.

2) ib., s. 109.

Transfer by ostensible owner—See "*Transfer of Property.*"

Sale.—The seller of immoveable property is deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same. See "*Sale*,"[3] p. 560.

Mortgage.—In the absence of a contract to the contrary the mortgagor is deemed to contract with the mortgagee that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same.[4] See "*Mortgage*," pp. 452, 456.

Right of party by reason of defect of title in exchange—See "*Exchange.*"

Title-deeds.—No witness who is not a party to a suit can be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds, or some person through whom he claims.[5]

Vendors and lessors without titleand voluntary settlors.—A contract for the sale or letting of property, whether moveable or immoveable, cannot be specifically enforced in favour of a vendor or lessor—(*a*) who, knowing himself not to have any title to the property, has contracted to sell or let the same; (*b*) who, though he entered into the contract, believing that he had a good title to the property, cannot, at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt; (*c*) who, previous to entering into the contract, has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract[6]: *e.g.*, A, out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a stranger. A cannot enforce specific performance of this contract so as to override the settlement.

Purchaser's and lessee's rights against vendor and lessor with imperfect title.—Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee has the following rights:—(*a*) if the vendor or lessor has, subsequently to the sale or lease, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest; (*b*) where the con-

3) Act IV of 1882, s. 55.
4) s. 65, ib.
5) Act I of 1872, s. 130.
6) Act I of 1877, s. 25.

currence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence ; (*c*) when the vendor professes to sell unincumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has, in fact, only a right to redeem it, the purchaser may compel him to redeem the mortgage, and to obtain a conveyance from the mortgagee ; (*d*) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let.[7]

Rent bona fide paid to holder under defective title.—No person is chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits : *e.g.*, A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.[8]

Improvements made by bona fide holders under defective title.—When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement. The amount to be paid or secured in respect of such improvement is the estimated value thereof at the time of the eviction. When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.[9]

See "*Possession*," "*Trespass*," "*Registration*," "*Small Cause Courts*," and "*Index*."

7) Act I of 1877, s. 18. 8) Act IV of 1882, s. 50. 9) s. 51, ib.

TRADE AND TRADE-MARKS.

AUTHORITIES—Act IX of 1872 (Contract): Lindley on Partnership, 5th Ed.: Cunningham and Shephard's Contract Act, 6th Ed.: Story's Equity Jurisprudence, 12th Ed.: Act I of 1877 (Specific Relief): Act IV of 1889 (Merchandise Marks) amended by Act IX of 1891: Indian Penal Code: Act VIII, of 1878 (Sea Customs): The Merchandise Marks Act, 1889, by Reginald Gilbert, 2nd Ed., 1892: Sebastian's Law of Trade-Marks, 3rd Ed., 1890: Cases cited.

Usage of trade—See "*Agency*," p. 32; "*Custom and Usage*," pp. 187, 188.

Requisites and proof of mercantile usage—See "*Custom and Usage*," p. 188.

Agreement in restraint of trade, void.—"Public policy" requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labour, skill, or talent, by any contract that he enters into.[1] Every agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.[2] Thus it was held that a covenant by a person employed by a company in a tea garden not to engage in similar business within 40 miles of the Company's premises during the time of his engagement and for five years after its termination, was void so far as it restrained him for the five years, although the restriction was a qualified one. The restriction, so far as it operated during the period of the engagement, was probably good.[3] So also an agreement whereby a dentist was restrained from practising over a district 200 miles in diameter, in consideration of receiving instruction and a salary from the plaintiff determinable at three months' notice, was held to be unreasonable and void.[4] The words of the section (v. *ante*) "restrained from exercising a lawful profession, trade, or business" do not mean an absolute restriction, and are intended to apply to a *partial* restriction—a restriction limited to some particular place.[5] The rule of English law, which is wider than that of the Contract Act, is that agreements in restraint of trade are against public policy and void, unless the restraint they impose is *partial* only and reasonable in relation to the objects of the contract, and also unless they are made upon a real and *bonâ fide* consideration.[6] But in India such an agreement may still be void even though the restriction created be partial only.[7] "Trade

1) L. R., 9 Eq., 345
2) Act IX of 1872, s. 27.
3) I. L. R., 11 Cal., 545: Cunningham and Shephard, pp. 116, 117.
4) 7 Bing., 735.
5) 22 W. R. 370: 14 B. L. R., 86: I. L. R., 1 Mad., 134.
6) 4 App. Cas., 674: 48 L. J. P. C., 68.
7) 22 W. R., 370: 14 B. L. R., 86, *ubi supra*.

in India is in its infancy; and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained."[8] These exceptions are three in number, and are as follows:—

Saving of agreement not to carry on business of which the good-will is sold.—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court *reasonable*, regard being had to the nature of the business.[9]

Saving of agreements between partners.—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some, or all of them, will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding paragraph. Partners may also agree that some one or all of them will not carry on any business other than that of the partnership, during the continuance of the partnership.[1] As to the position of a partner who has carried on any business competing or interfering with the partnership business, see "*Partnership*," p. 504, "Duties of Partners." In the absence of any agreement on the subject, a retiring partner is at liberty to set up for himself, in opposition to the firm he has quitted: and, on a general dissolution, all the partners are at liberty to commence business in opposition to each other.[2]

Trade secrets may be sold with a stipulation against dealing with them so as to interfere with the purchaser, and with a stipulation, unlimited as to time and place, against the communication of such secrets. So in the case of a suit relating to a manufacture partly carried on by a process known only to the vendors, it was held that "it is settled by authority that a man may bind himself not to communicate that process to anybody else, anywhere, under any circumstances, in any part of the world." Public policy requires that a man having a commodity to sell "should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser."[3] A person will be restrained by the Court from making a disclosure of secrets, communicated to him in the course of a confidential employment, whether the secrets be secrets of trade, or secrets of title, or any

8) *Per* Kindersley, J., 1 Mad., 145.
9) Act IX of 1872, s. 27. Exception (1): 28 L. J., 841: Lind., 437.
1) Act IX of 1872, s. 27. Exceptions (1) and (2), Lind., 436, 437.
2) Lind. on Partn., pp. 436, 437.
3) L. R., 9 Eq., 345: 39 L. J., Ch., 86: 47 L. J., Ch., 567: Cunningham and Shephard, p. 121 Sebastian, p. 313, *et seq.*

other secrets of the party important to his interests;[4] *e.g.*, A carries on a manufactory, and B is his assistant. In the course of his business A imparts to B a secret process of value. B afterwards demands money of A threatening in case of refusal to disclose the process to C, a rival manufacturer. A may sue for an injunction to restrain B from disclosing the process.[5]

Restriction on liberty of selling goods.—A stipulation in a contract, prohibiting any sales of goods (of a similar description to those bought under the contract) to others during a particular period was held not to be a stipulation in restraint of trade and therefore not void.[6]

Wages and earnings of a woman gained in trade—See "*Husband and Wife*," p. 295.

Contracts of married women with tradesmen—See "*Husband and Wife*," pp. 297, 298.

Shop books—See "*Action and Actionable Claim*," p. 7.

Insolvent traders—See "*Insolvency*."

Offensive and foul-smelling trades.—The fitness of the locality for the carrying on of an offensive, though lawful, trade, is no answer if it be an actionable nuisance.[7] See "*Nuisance*," pp. 471—473, 474, *et seq.* As to the suppression and removal by a Magistrate of a noxious trade, see p. 474.

Public servants unlawfully engaging in trade—See "*Public Servants and Public Duties*," pp. 547, 548.

Libel on the goods of tradesmen.—An action for libel cannot be brought by a tradesman against a person who imputes that the goods of that tradesman are bad, if such imputation is made *bonâ fide* and in truth. But if the imputation is against the plaintiff as a manufacturer or tradesman to the effect that he is in the habit of manufacturing or selling goods which he knows to be bad or worthless, it is a libel upon him personally;[8] and if a person falsely and maliciously publish a statement disparaging an article a tradesman sells or manufactures, and special damage results from such publication, an action will lie, although the statement contains no imputation on the character of the seller or manufacturer.[9] See "*Defamation*."

Slander spoken of a person in the way of his profession or trade—See "*Defamation*," p. 194.

Partnership in trade—See "*Partnership*."

Trade name.—The right of an individual or firm to the sole use of a trade name, as distinguished from a trade-mark, is this,

4) Story's Eq. Jur., § 952: Sebastian, p. 313: 21 L. J., Ch., 248.
5) Act I of 1877, s. 54, illust. 2.
6) I. L. R., 8 Cal., 809.
7) 31 L. J. Q. B., 286: 32 L. J., C. P. 104.
8) 5 Q. B., 624.
9) 32 L. J. Q. B., 6: 49 L. J., 605.

that when a name has become identified by adoption and use with a particular trade, or manufacture, or business, the person who has so used or adopted it can obtain the aid of the Court to restrain the use of it by others in such a way as to lead customers or the public to think that the trade or business of the person using it is his trade or business.[1] "Whether there is, or is not, property in a trade name, it is a fraud on the part of one person to attract to himself the custom intended for another, by a false representation, direct or indirect, that the business carried on by himself is identical with that of the other person by whose ability and exertions the name has acquired the reputation it possesses."[2]

Telegraphic address.—There is no right to a telegraphic address.[3]

Mode of packing.—"The imitation of a peculiar manner of making up and packing goods may, in combination with other circumstances, be held to prove a fraudulent intention; and it seems that, even in the absence of other circumstances of fraud, if the imitation is very significant, and the evidence very conclusive, an injunction will be awarded."[4]

Good-will means "every positive advantage (as contrasted with the negative advantage of the late partner not carrying on the business himself) that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."[5] The good-will is a subject of value and price It may be sold, bequeathed, or become assets in the hands of the personal representatives of the trader. See "*Partnership*," p. 506. "The purchaser of a business and good-will is entitled to all the advantages of the reputation and connection of the business as previously conducted, except such benefit as the vendor, on setting up a *bonâ fide* new business, as he is at liberty to do if there is no covenant to the contrary, may derive from the fact of his being known to have belonged to the former business: and the purchaser is entitled to restrain the vendor by injunction from interfering with what he has sold."[6]

Inventions—See "*Inventions and Patents.*"

Designs—See "*Copyright*," p. 179.

See "*Agency*," "*Bailment*," "*Bankers, Banking and Cheques*," "*Bills of Exchange and Promissory Notes*," "*Bond*," "*Contract*," "*Custom and Usage*," "*Defamation*," "*Husband and Wife*," "*Insolvency*," "*Nuisance*," "*Partnership*," "*Warranty*," and "*Index.*"

1) 23 L. R., Ir., 371.
2) Sebastian, p. 275, L. R., 5 Ch., 155.
3) 30 Ch. D., 156.
4) Sebastian, p. 311, and cases there cited.
5) *Per* Wood, V. C.: Johns, 174.
6) Sebastian, p. 344.

TRADE, PROPERTY, AND OTHER MARKS.

AUTHORITIES—Indian Penal Code: Act IV of 1889 (Merchandise Marks) amended by Act IX of 1891: Act VIII of 1878 (Sea Customs): The Merchandise Marks Act, 1889, by Reginald Gilbert, 2nd Ed., 1892: Sebastian's Law of Trade-Marks, 3rd Ed., 1890: Act I of 1877 (Specific Relief): Cases cited.

Meaning of "trade-mark"—v. *post.*

General principle of trade-mark law. — Protection is given to trade-mark because a trade-mark is property. The general principle upon which the Courts exercise jurisdiction in the case of trade-marks is that "a manufacturer who produces an article of merchandise which he announces as one of public utility, and who places upon it a mark by which it is distinguished from all other articles of a similar kind, with the intention that it may be known to be of his manufacture, becomes the exclusive owner of that which is henceforth called his trade-mark. By the law of this country — and the like law prevails in most other civilized countries— he obtains a property in the mark which he so affixes to his goods. The property thus acquired by the manufacturer, like all other property, is under the protection of the law, and for the invasion of the right of the owner of such property, the law affords a remedy similar in all respects to that by which the possession and enjoyment of all property is secured to the owners."[7] "A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception, nor to use the means, which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."[8] In order to constitute property in a trade-mark, the mark must not have been copied from another person's mark, nor involve any false representation.[9]

The function of the trade-mark is "to give the purchaser a satisfactory assurance of the mark and quality of the article he is buying."[1]

What may be a trade-mark.—Any symbol or emblem, however unmeaning in itself, any name, number, or combination of names, marks, numbers, &c., may be used as a trade-mark.

Colourable imitations.—But the trade-mark adopted must not be a colourable imitation of a trade-mark previously used by somebody else and of such a nature that it is likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs.[2]

7) *Per* Bacon, V.C.: 51 L. J., Ch., 897
8) *Per* Lord Langdale, M.R., 6 Beav. 66: 44 L. J., Ch., 90.
9) 33 L. J., Ch., 567.
1) Sebastian, p. 2.
2) *Per* Lord Chelmsford, L. R., 5 H. L., 508.

Thus it has been held that "Cacaotine" was a colourable imitation of "Cocoatina," "Steel Pens" of "Stephens," "Tung's" of "Tonges" and the like.[3] To constitute a colourable imitation "there must be some general resemblance of the forms, words, symbols, get up, and accompaniments so as to mislead the public. If the public, or the innocent and ignorant buyer, could be probably misled by the similarity of the marks, this is sufficient. It is not necessary to show that a manufacturer would not be deceived. The imitation may be colourable, although, if the two marks are compared together, the difference would be detected at once."[4] No trader can adopt a trade-mark so resembling that of a rival as that *ordinary purchasers, purchasing with ordinary caution*, are likely to be misled.[5]

Registration.—In England acquisition of a trade-mark may be made by registration. By the English Patent Acts, 1883—88, no infringement of a registrable trade-mark can be restrained, nor can damages be recovered therefor, unless the mark has been registered.[6] **There is no registration of trade-marks in India.** "As a rule the person who has first used the trade-mark would be considered the proper person entitled to use it, except under special circumstances. The registration in England of a trade-mark used in India is useful, as it affords some proof of user and ownership."[7]

Requisites of infringement.—The plaintiff must establish the existence of the trade-mark, his exclusive right therein, the fact of an imitation, and the absence of license or acquiescence on the part of the plaintiff.[8] "A man may by his own delay and acquiescence lose his right to that protection which he would have obtained at once had he come to the Court with reasonable promptitude."[9]

Remedies in case of infringement.—A person whose trade-mark has been infringed has two remedies, *viz.*, (1) in the *Criminal* Courts by a prosecution under the provisions of the Penal Code and Indian Merchandise Marks Act[1] (v. *post*); (2) in the *Civil* Courts by a suit for damages and an account of profits, and by injunction under the Specific Relief Act[2] to restrain the wrongful user of the imitation trade-mark. An injunction will be granted to restrain an imitation of a trade-mark if it is calculated to deceive a purchaser of goods.[3] If A improperly uses the trade-mark of B, B may obtain an injunction to restrain the user,

3) 37 L. J., Ch., 847 : 16 L.T. N. S., 145 : 21 L.T. N. S., 480 : Sebastian, pp. 149, 150, *et seq.*
4) Gilbert, p. 4 : see Sebastian, Ch. IV.
5) L. R., 1 Ch., 192.
6) 46 & 47 Vic., c. 57, s. 77.
7) Gilbert, p. 2.
8) Sebastian, p. 127.
9) Ib., p. 222, and cases there cited.
1) Act IV of 1889.
2) Act I of 1877.
3) 7 App. Cas., 219.

provided that B's use of the trade-mark is honest.[4] It is also open to the owner of a trade-mark to claim the assistance of the customs authorities, to prevent the import of goods bearing a counterfeit trade-mark or a false trade description. An innocent use of an imitation trade-mark is no defence to a civil action. "A man may take the trade-mark of another ignorantly, not knowing it was the trade-mark of the other; or he may take it in the belief, mistaken but sincerely entertained, that in the manner in which he is taking it he is within the law, and doing nothing which the law forbids; or he may take it knowing it is the trade-mark of his neighbour, and intending and desiring to injure his neighbour by so doing. But in all these cases it is the same act that is done, and in all these cases the injury to the plaintiff is just the same."[5] As to the plea of unintentional contravention of the law in the case of a criminal prosecution; v. *post*.

Transfer of trade-mark.—A trade-mark is capable of being assigned during the life of its proprietor and of being transmitted at his death, but it can be assigned and transmitted only in connection with the good-will of the business concerned in the particular goods or classes of goods for which it is the mark, and an assignee has no exclusive right to a trade-mark unless the assignment is of a business co-extensive with the trade-mark. The trade-mark cannot be severed from, and used independently of, the good-will.[6] On the sale of the good-will of a business the trade-mark will pass, whether specially mentioned or not.[7]

Object of the Indian Merchandise Marks Act.—The object of this Act is to bring the law of India relating to fraudulent marks on merchandise into accord, as far as local circumstances admit, with the law of England as enacted in the Merchandise Marks Act, 1887.[8] The Indian Act adopts the provisions of the English Act with respect to false trade descriptions and re-casts on the lines of that Act that part of the Indian Penal Code which relates to trade-marks and property marks, and that part of the Sea Customs Act, 1878, which relates to the prohibition of the importation into British India of goods bearing false descriptions or marks.[9] The Acts extends to the whole of British India, and came into force on the 1st April 1889.[1]

Meaning of "trade-mark."—A mark used for denoting that goods are the manufacture or merchandise of a particular person

4) Act I of 1877, s. 54, illust. *w*: 3 B. L. R., App. 4: Coryton, 150.
5) 3 App. Cas., 391.
6) 4 De G., J. and S., 137: 30 Ch. D., 454: Sebastian, p. 108.
7) 19 W. R. (Eng.), 599
8) 50 and 51, Vic., c. 28.
9) Statement of objects and reasons of Bill, No. 19 of 1888: *Gazette of India*, October 20, 1888.
1) New rules were promulgated under s. 16 of the Act on the 13th November 1891.

is called a trade-mark, and for the purposes of the Indian Penal Code, the expression "trade-mark" includes any trade-mark which is registered in the register of trade-marks kept under the Patents, Designs and Trade-Marks Act, 1883,[2] and any trade-mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of section 103 of the Patents, Designs and Trade-Marks Act, 1883, are, under Order in Council, for the time being applicable.[3]

Meaning of "property mark."—A mark used for denoting that moveable property belongs to a particular person is called a property mark.[4]

"**Trade description**" means any description, statement, or other indication, direct or indirect—(*a*) as to the number, quantity, measure, gauge, or weight of any goods; or (*b*) as to the place or country in which, or the time at which, any goods were made or produced; or (*c*) as to the mode of manufacturing or producing any goods; or (*d*) as to the material of which any goods are composed; or (*e*) as to any goods being the subject of an existing patent, privilege, or copyright;—and the use of any numeral, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, is deemed to be a trade description within the meaning of this Act.

"**False trade description**" means a trade description which is untrue in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description untrue in a material respect, and the fact that a trade description is a trade-mark or part of a trade-mark does not prevent such trade description being a false trade description within the meaning of this Act.[5]

"**Goods**" means anything which is the subject of trade or manufacture: and "**name**" includes any abbreviation of a name.[6]

Using a false trade-mark or property mark.—Whoever marks any goods or any case, package, or other receptacle containing goods, or uses any case, package, or other receptacle with any mark thereon, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade-mark. Whoever uses any false trade-mark or any false property mark (v. *post*) is, *unless he proves that he acted*

2) 46 and 47 Vic., c. 57.
3) Act IV of 1889, s. 2: Indian Penal Code, s. 478.
4) Indian Penal Code, s. 479.
5) Act IV of 1889, s. 2.
6) ib.

without intent to defraud, punishable with imprisonment of either description for a term which may extend to one year, or with fine, or with both.[7]

Using a false property mark.—Whoever marks any moveable property or goods or any case, package, or other receptacle containing moveable property or goods, or uses any case, package, or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark. As to the punishment for the offence, see the preceding paragraph.[8]

Counterfeiting a trade-mark or property mark used by another.—Whoever counterfeits any trade-mark or property mark used by any other person is punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.[9] A person is said to counterfeit who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

Counterfeiting a mark used by a public servant.—Whoever counterfeits any property mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, is punishable with imprisonment of either description for a term which may extend to three years, and is also liable to fine.[1]

Making or possession of any instrument for counterfeiting a trade-mark or property mark.—Whoever makes, or has in his possession, any die, plate, or other instrument for the purpose of counterfeiting a trade-mark or property mark, or has in his possession a trade-mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, is punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both.[2]

Selling goods marked with a counterfeit trade-mark or property mark.—Whoever sells, or exposes, or has in possession

7) Indian Penal Code, ss. 480, 482.
8) ib., ss. 481, 482.
9) ib., s. 483.
1) ib., s. 484.
2) ib., s. 485.

for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade-mark or property mark affixed to or impressed upon the same or to or upon any case, package, or other receptacle in which such goods are contained, is, unless he proves—(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark; and (*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or (*c*) that otherwise he had acted innocently,—punishable with imprisonment of either description for a term which may extend to one year, or with fine, or with both.[3]

Making a false mark upon any receptacle containing goods.—Whoever makes any false mark upon any case, package, or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain, or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof is, unless he proves that he acted without intent to defraud, punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both.[4]

Punishment for making use of any such false mark.—Whoever makes use of any such false mark in any manner prohibited by the last foregoing section is, unless he proves that he acted without intent to defraud, punishable as if he had committed an offence against that section.[5]

Tampering with property mark with intent to cause injury.—Whoever removes, destroys, defaces, or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, is punishable with imprisonment of either description for a term which may extend to one year, or with fine, or with both.[6]

Provisions supplemental to the definition of false trade description.—(1) The provisions of the Merchandise Marks Act respecting the application of a false trade description to goods or respecting goods to which a false trade description is applied, extend to the application to goods of any such numerals, words, or marks, or arrangement or combination thereof, whether including a trade-mark or not, as are or is reasonably calculated to lead persons to believe that the goods are the manufacture or

3) Indian Penal Code, s 486. 4) ib., s. 487. 5) ib., s. 488. 6) ib., s. 489.

merchandise of some person other than the person whose manufacture or merchandise they really are, and to goods having such numerals, words, or marks, or arrangement or combination, applied thereto. (2) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means as applied to any goods any name or initials—(*a*) not being a trade-mark, or part of a trade-mark; and (*b*) being identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description and not having authorized the use of such name or initials. (3) A trade description which denotes or implies that there are contained in any goods to which it is applied more yards, feet, or inches than there are contained therein standard yards, standard feet, or standard inches is a false trade description.[7]

Application of trade descriptions.—(1) A person is deemed to apply a trade description to goods who—(*a*) applies it to the goods themselves; or (*b*) applies it to any covering label, reel, or other thing in or with which the goods are sold or are exposed or had in possession for sale or any purpose of trade or manufacture; or (*c*) places, encloses, or annexes any goods which are sold, or are exposed or had in possesssion for sale or any purpose of trade or manufacture, in, with or to any covering, label, reel, or other thing to which a trade description has been applied; or (*d*) uses a trade description in any manner reasonably calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade description. (2) A trade description is deemed to be applied whether it is woven, impressed, or otherwise worked into or annexed or affixed to the goods or any covering, label, reel, or other thing (3) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper, and the expression "label" includes any band or ticket.[8]

Penalty for applying a false trade description.—If a person applies a false trade description to goods, he is, subject to the provisions of this Act, and *unless he proves that he acted without intent to defraud*, punishable with imprisonment for a term which may extend to three months or with fine which may extend to Rs. 200, and in the case of a second or subsequent conviction

7) Act IV of 1889, s. 4.

8) ib., s. 5.

with imprisonment which may extend to one year, or with fine, or with both.[9]

Penalty for selling goods to which a false trade description is applied.—If a person sells, or exposes, or has in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, he is, unless he proves—(*a*) that, having taken all reasonable precautions against committing an offence against this section he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade description; and (*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or (*c*) that otherwise he had acted innocently,—punishable with imprisonment for a term which may extend to three months, or with fine which may extend to Rs. 200, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.[1]

Unintentional contravention of the law relating to marks and descriptions.—Where a person is accused under section 482 of the Indian Penal Code (v. *ante*) of using a false trade-mark or property mark by reason of his having applied a mark to any goods, property, or receptacle in the manner mentioned in section 480 or section 481 of that Code (v. *ante*) as the case may be, or under section 6 (v. *ante*) of the Merchandise Marks Act of applying to goods any false trade description, or under section 485 (v. *ante*) of the Indian Penal Code of making any die, plate, or other instrument for the purpose of counterfeiting a trade-mark or property mark, and proves—(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to apply trade-marks or property marks, or trade descriptions, or, as the case may be, to make dies, plates, or other instruments for making, or being used in making, trade-marks or property marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other thing by way of profit or commission dependent on the sale thereof; and (*b*) that he took reasonable precautions against committing the offence charged; and (*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description; and (*d*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied, he shall be acquitted.[2]

9) Act IV of 1889, s. 6. 1) ib., s. 7. 2) ib., s. 8.

Forfeiture of goods.—(1) When a person is convicted under section 482 of the Indian Penal Code of using a false trade-mark, or under section 486 of that Code of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade-mark applied thereto, or under section 487 or section 488 of that Code of making, or making use of, a false mark, or under section 6 or section 7 of the Merchandise Marks Act of applying a false trade description to goods, or of selling, or exposing, or having in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, or is acquitted on proof of the matter or matters specified in section 486 of the above-mentioned Indian Penal Code or section 7 or section 8 of this Act (v. *ante*), the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and things by means of, or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed. (2) When a forfeiture is directed on a conviction, and an appeal lies against the conviction, an appeal lies against the forfeiture also. (3) When a forfeiture is directed on an acquittal, and the goods or things to which the direction relates are of value exceeding Rs. 50, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentences of the Court which directed the forfeiture.[3]

Implied warranty on sale of marked goods—See "*Warranty*."

3) Act IV of 1889, s. 9.

TRANSFER OF PROPERTY.

AUTHORITIES—Act IV of 1882 (Transfer of Property : extends in the first instance to the whole of British India, *except* the territories administered by the Governor of Bombay in Council, the Lieutenant-Governor of the Punjab, and the Chief Commissioner of Burmah. But any of these Governments may, by notification in the local Gazette, extend the Act to the whole or any part of the territories under its administration.) Cases cited.

Law relating to.—Under this title the general principles of all transfers are alone dealt with. The law as to specific forms of transfer such as sale, mortgage, lease, exchange, and gift will be found under their respective titles. For transfer of actionable claims, v. "*Action and Actionable Claim.*" None of the provisions in this title affect any transfer by operation of *law*, or by, or in execution of, a decree or order of Court, or any rule of Hindu, Muhammadan, or Buddhist law: nor (*a*) the provisions of any enactment not expressly repealed by the Act; or (*b*) any terms or incidents of any contract or constitution of property which are consistent with the provisions of the Act and are allowed by law; or (*c*) any right or liability arising out of a legal relation constituted before this Act comes into force (1st July 1882), or any relief in respect of such right or liability.[1]

(A)—TRANSFER OF PROPERTY, WHETHER MOVEABLE OR IMMOVEABLE.

"Transfer of property" means (in the following sections) an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons, and "to transfer property" is to perform such act.[2]

What may be transferred.—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force: (*a*) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other **mere possibility** of a like nature, cannot be transferred; (*b*) a mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby; (*c*) an **easement** cannot be transferred apart from the dominant

1) Act IV of 1882, s. 2. "The object of this Act is to regulate the transfer of property from one living hand to another; as the Indian Succession Act regulates its transmission after the owner's death." Brown and Shephard's Commentaries on the Act, p. 28, 2nd Ed.

2) ib., s. 5.

heritage; (*d*) an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him; (*e*) a **mere right to sue for compensation for a fraud or for harm** illegally caused cannot be transferred; (*f*) a **public office** cannot be transferred, nor can the **salary** of a public officer, whether before or after it has become payable; (*g*) stipends allowed to military and civil pensioners of Government and political **pensions** cannot be transferred; (*h*) no transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an illegal purpose, or (3) to a person legally disqualified to be transferee.[3]

Persons competent to transfer.—Every person competent to contract (see "*Contract*") and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent, and in the manner, allowed and prescribed by any law for the time being in force.

Operation of transfer.—Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. Such incidents include, where the property is land, the **easements** annexed thereto, the **rents and profits** thereof accruing after the transfer, and all things "attached to the earth"; (*i.e.*, (*a*) rooted in the earth, as in the case of **trees** and **shrubs**; (*b*) imbedded in the earth, as in the case of **walls or buildings**; or (*c*) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;)and, where the property is **machinery** attached to the earth, the moveable parts thereof; and, where the property is a **house**, the easements annexed thereto, the **rent** thereof accruing after the transfer, and the **locks, keys, bars, doors, windows** and all other things provided for permanent use therewith; and, where the property is a debt or other actionable claim, the **securities** therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer; and, where the property is money or other property yielding income, the **interest** or income thereof accruing after the transfer takes effect.[4]

3) Act IV of 1882, s. 6, Nothing in this section will be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer, or lessee; (added by Act III of 1885, s. 4.)

4) ib., ss. 7, 3, 8, cf. 44 & 45 Vic. c., 41.

Oral transfer.—A transfer of property may be made without writing in every case in which a writing is not expressly required by law.[5] (v. *infra*, note.)

Conditions restraining alienation, or making interest determinable on attempted alienation or insolvency are void.—Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void *except* in the case of a **lease** where the condition is for the benefit of the lessor or those claiming under him: provided that **property may be transferred to or for the benefit of a woman** (not being a Hindu, Muhammadan, or Buddhist), **so that she shall not have power during her marriage to transfer** or charge the same or her beneficial interest therein.[6] Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming **insolvent** or endeavouring to transfer or dispose of the same, such condition or limitation is void. This section does not apply to a condition in a **lease** for the benefit of the lessor or those claiming under him.[7]

Repugnant restrictions.—Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction. This section does not affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.[8]

Vested interest.—Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect *forthwith* or on the happening of an event which *must* happen, such interest is "vested," unless a contrary intention appears from the terms of the transfer. A vested interest is not defeated by the death of the transferee before he obtains possession. An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising

5) Act IV of 1882, s. 9. See "*Sale*," p. 559; "*Mortgage*," p. 450; "*Lease*," p. 371; "*Exchange*," p. 235; "*Action and Actionable claim*," p. 18; "*Gifts*," p. 270: See also "*Trusts and Trustees*."

6) ib., s. 10. 7) ib., s. 12. 8) ib., s. 11.

from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen, the interest shall pass to another person.[9]

Contingent interest.—Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified *uncertain* event, or if a specified *uncertain* event shall not happen, such person thereby acquires a "contingent" interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible. Where, however, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is *not* contingent.[1]

Unborn persons : perpetuity.—(1) Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property : *e.g.*, A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.[2] (2) Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.[3] (3) No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.[4] (4) If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in clauses (1) and (3), such interest fails as regards the whole

9) Act IV, 1882, s. 19. cf. Act X, 1865 (Succession), s. 106; "*Legacy & Bequest*," p. 382.
1) ib., s. 21, cf. Act X of 1865, s. 107 ; "*Legacy and Bequest*," p. 383.
2) ib., s. 13, cf. Act X of 1865, s. 100 ; "*Legacy and Bequest*," pp. 390, 391.
3) ib., s. 20.
4) ib., s. 14, cf. Act X of 1865, s. 101 ; "*Legacy and Bequest*," pp. 390, 391.

class.[5] (5) Where an interest fails by reason of any of the rules contained in clauses (1), (3) and (4), any interest created in the same transaction, and intended to take effect after or upon failure of such prior interest also fails.[6] The restrictions in clauses (3), (4) and (5) do not apply to property transferred for the benefit of the public in the **advancement of religion, knowledge, commerce, health, safety,** or any other object beneficial to mankind.[7]

Direction for accumulation.—Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction is void, and the property will be disposed of as if no accumulation had been directed. Where, however, the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction will be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income will be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.[8]

Transfer to survivors at unspecified period.—Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer:[9] *e.g.*, A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

Conditional transfers.—(1) An interest created on a transfer of property, and dependent upon a condition, fails if the fulfilment of the condition is **impossible**, or is **forbidden by law,** or is of such a nature that, if permitted, it would defeat the provisions of any law, or is **fraudulent**, or involves or implies injury to the person or property of another, or the Court regards it as **immoral or opposed to public policy:** *e.g.*:—(*a*) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void. (*b*) A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.[1] (2) Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an

5) Act IV of 1882, s 15, cf. Act X of 1865, s. 102; "*Legacy & Bequest*," pp. 390, 391.
6) ib., s. 16, cf. Act X of 1865, s. 103; "*Legacy and Bequest*," pp. 390, 391.
7) ib., s. 17.
8) ib., s. 18, cf. Act X of 1865, s. 104; "*Legacy and Bequest*," p. 391; 39 & 40 Geo. III, c. 98; 44 & 45 Vic., c. 41.
9) ib., s. 24, cf. Act X of 1865, s. 112; "*Legacy and Bequest*," p. 384.
1) ib., s. 25, cf. Act X of 1865, ss. 113, 114; "*Legacy & Bequest*," pp. 384—386.

interest in the property, the condition will be deemed to have been fulfilled if it has been substantially complied with: *e.g.*: (*a*) A transfers Rs. 5,000 to B on condition that he shall **marry with the consent** of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition. (*b*) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.[2] (3) On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that, in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. On a transfer of property an interest therein may also be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen: *e.g.*:—(*a*) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm. (*b*) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.[3]

Election.—(1) Where a person professes to transfer property which he has *no* right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he must relinquish the benefit so conferred, and the benefit so relinquished will revert to the transferor or his representative as if it had not been disposed of, (2) *subject nevertheless*, where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer, and in all cases where the transfer is for consideration, *to the charge* of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him:[4] *e.g.*:—The farm of Sultánpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000. In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.[5]

2) Act IV of 1882, s. 26, cf. Act X of 1865, s. 115; "*Legacy & Bequest*," pp. 384, 385.
3) ib., ss. 28, 31, cf. Act X of 1865, ss. 118, 121; "*Legacy & Bequest*," pp. 384—386.
4) ib., s. 35.
5) See s. 35, ib., cf. Act X of 1865, ss. 167—177; "*Legacy & Bequest*," pp. 389, 390.

Apportionment.—(1) In the absence of a contract or local usage to the contrary, all **rents, annuities, pensions, dividends and other periodical payments in the nature of income** shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.[6] (2) When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty must, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed, and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty must be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose: Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance:[7] *e.g.*:—(*a*) A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase-money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7½ to C, and Rs. 7½ to D, and must deliver the sheep according to the joint direction of B, C and D. (*b*) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

(B)—Transfer of Immoveable Property.

Transfer by person authorized only under certain circumstances to transfer.—Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, (which does not include standing timber, growing

6) Act IV of 1882, s. 36; cf. 33 & 34 Vic. c. 35.
7) s, 37, ib. Nothing in this section applies to leases for agricultural purposes, unless and until the Local Government, by notification in the official Gazette, so directs.

crops, or grass,[8]) transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith : *e.g.*:—A, a **Hindu widow**, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale will be deemed to have existed.[9]

Transfer where third person is entitled to maintenance.—Where a third person has a right to receive maintenance or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention, or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands: *e.g.*:—A, a Hindu, transfers Sultánpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultánpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultánpur. She has no claim on the villages transferred to C.[1]

Burden of obligation on property.—Where, (*a*) for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property, or to compel its enjoyment in a particular manner, or (*b*) where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or

8) Act IV of 1882, s. 3. 9) ib., s. 38. 1) ib., s. 39.

obligation, nor against such property in his hands : *e.g.* :—A contracts to sell Sultánpur to B.[1] While the contract is still in force he sells Sultánpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.[2]

Transfer by ostensible owner. — Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer will not be voidable on the ground that the transferor was not authorized to make it : provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.[3]

Transfer by person having authority to revoke former transfer.—Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power :[4] *e.g.* :—A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

Transfer by unauthorized person who subsequently acquires interest.—Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer will, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists. Nothing however in this section impairs the right of transferees in good faith for consideration without notice of the existence of the said option : *e.g.* :—A, a Hindu who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition ; but on B's dying A, as heir, obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.[5]

Transfer by co-owners.—Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the

2) Act IV of 1882, s. 40.
3) ib., s. 41.
4) ib., s. 42; cf. s. 5, 27 Eliz., c. 4.
5) ib., s. 43.

transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred. Where the transferee of a share of a **dwelling-house belonging to an undivided family** is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.[6] Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares : *e.g.*:—A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultánpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half an anna share from each of the shares of B and C.[7]

Joint transfer for consideration. — Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund ; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced. In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons will be presumed to be equally interested in the property.[8]

Transfer for consideration by persons having distinct interests.—Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests : *e.g.*:—(*a*) A, owning a moiety, and B and C, each a quarter share,

6) Act IV of 1882, s. 44. 7) ib., s. 47. 8) ib., s. 45.

of mauza Sultánpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mauza. (*b*) A, being entitled to a life-interest in mauza Atrali and B and C to the reversion, sell the mauza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600 ; the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money ; B and C to receive Rs. 400.[9]

Priority of rights created by transfer.—Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right will, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.[1] This section is a statement of the rule expressed in the legal maxim "*Qui prior est tempore, potior est jure.*"

Transferee's right under policy of insurance—v. "*Insurance*," p. 333.

Rent bona fide paid to holder under defective title—See "*Title*," p 586.

Improvements made by bona fide holders under defective title—See "*Title*," p. 586.

Transfer of property pending suit relating thereto.—During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.[2] This section deals with what is known as the doctrine of "*lis pendens*."

Fraudulent transfer.—Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to **defeat or delay the creditors** of the transferor, is voidable at the option of any person so defrauded, defeated or delayed. Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid. Nothing however contained in this

9) Act, IV of 1882, s. 46. 1) ib., s. 48. 2) ib., s. 52.

section impairs the rights of any transferee in good faith and for consideration.[3] A transfer of property with intent to delay, hinder, or defraud creditors is void as against them under the Statute 13 Eliz., c. 5, which is still in force in the Town of Bombay: it has been held that this Statute is applicable to persons other than European British subjects[4]; and that the principles applied in the English cases may fully be made applicable to voluntary transactions between Natives in the Mofussil.[5] A deed though founded on valuable consideration, even in consideration of marriage[6] may, if it was executed for the purpose of defrauding creditors, be declared to be void.[7]

Specific performance of contract to transfer — See "*Contract*," p. 167.

3) Act IV of 1882, s. 53, cf. 13 Eliz., c. 5, and 27 Eliz., c. 4, repealed by Act IV of 1882 in those territories to which it extends. (v. *ante*, p. 600.)
4) 2 Ind. Jur. O. S., 7.
5) 4 Mad. H. C., 84: see also 1 W. R., 41: 22 W. R., 60; but see 6 Mad. H. C., 474.
6) 8 L. R., Eq. 46; 1 Sm. & G., 228.
7) Lewin on Trusts, 9th Ed., 78.

TRESPASS.

AUTHORITIES—*Indian Penal Code: Draft Indian Civil Wrongs Bill*, 1886: Pollock on Torts, 2nd Ed.: Alexander's Indian Case Law on Torts, 3rd Ed., Revised by R. F. Rampini: Collett's Comments on the Indian Penal Code, 1889: Criminal Procedure Code: Act I of 1877 (Specific Relief): Act I of 1871 (Cattle-Trespass): Act IX of 1890 (Railways): Cases cited.

Nature of civil and criminal trespass.—Trespass is either civil or criminal. It may be either (1) to the person: *e.g.*, an assault, which is both a civil wrong and an offence: see "*Assault*;" (2) to the goods, as by the civil wrong of "conversion" (v. *post*), or by the commission of the offence of "mischief:" see "*Mischief*;" (3) to land, as by trespass, civil or criminal, commonly so-called. Criminal, is distinguishable from civil trespass in this, that to constitute the former the act of trespass must have been done with a certain unlawful intention, whereas the existence of such an intention forms no ingredient in the definition of civil or actionable trespass. Thus, in the case of civil trespass to land, the strict rule being that a man meddles with another's property absolutely at his peril, a trespasser is liable to an action whatever may have been his intention, even if his intention had been to act for the true owner's benefit: whereas to constitute criminal trespass it must be shown that the trespass was with criminal intent, that is, "with an intent to commit an offence, or to intimidate, insult, or annoy" any person in possession of the land.[1] When this intent is shown the trespasser may be prosecuted under the provisions of the Penal Code. "The action of trespass lies where a trespass has been committed either to the plaintiff's person or property. A trespass is an injury committed with violence, and this violence may be either actual or implied; and the law will imply violence, though none is actually used, where the injury is of a direct and immediate kind, and committed on the person or on tangible and corporeal property of the plaintiff. Of actual violence an assault and battery is an instance; of implied violence, a peaceable but wrongful entry upon the plaintiff's lands.[2]" Every invasion, whatever be its extent, of private property, is a trespass. The gist of the wrong is the breach in the continuity of the plaintiff's or prosecutor's right of possession. There must be a possession to be interrupted: property apart from possession cannot be subject of trespass:[3] v. *post* "Criminal Trespass."

Relief against trespass.—The criminal law affords the following relief:—(1) Prosecution and punishment under the

1) Penal Code, s. 441, v. *post*.
2) Wharton's Law Lexicon, 9th Ed., p. 746.
3) Collett, p. 126.

Penal Code; (2) preventive relief under Chapter XII of the Criminal Procedure Code: (see "*Possession*," pp. 513, 514, and "*Easements and Licenses*," p. 228.) In the case of civil trespass (1) an action for damages may be brought; (2) in certain cases an injunction will be granted under Act I of 1877 (Specific Relief): see "*Injunctions*." In cases of pure trespass to land an injunction may be granted to protect the possession thereof against repeated acts of invasion: "for though for each instance of trespass there may be a right to recover damages, the defendant may be a pauper out of whom no satisfaction is to be got: or the acts of trespass, though severally insignificant, may by their repetition work a serious damage to the plaintiff, and anyhow he is entitled to have his possession quieted and protected from constant disturbance, and an injunction is the most effective form of relief for this purpose."[4]

Civil trespass.—A person commits trespass, who, without the consent of the owner of such property as is next mentioned, or other lawful justification or excuse (as, *e.g.*, where in the case of an entry on the land of another, such entry is done in exercise of a right of way, to execute in a legal manner the process of the law, or to demand or pay money there payable and the like)—(1) enters on any *immoveable* property, or causes any animal to go upon such property, or permits any animal in his possession or custody, being to his knowledge or by its kind accustomed to stray, to go upon such property,[5] or puts, casts, or impels any thing in, upon, or over such property. Entry on immoveable property with intent to commit an offence, or to intimidate, insult and annoy constitutes the offence of "Criminal Trespass" (v. *post*); (2) assumes to exercise ownership over any *moveable* property, or does any act which deprives the owner of its use permanently or for an indefinite time.[6] An act of this kind is technically known as "**conversion.**" For the remedies in the case of conversion, see "*Possession*;" (3) destroys or damages any property. Destruction or damage to property (moveable or immoveable) with a criminal intent constitutes the offence of "mischief": see "*Mischief*;"[7] (4) does any other act which directly interferes with the lawful possession of any property, moveable or immoveable.[8] For the purposes of this section every one who is in lawful possession of any property, or who peaceably and as of right is in actual occupation, or has the actual custody or control[9]

4) Collett, p. 139.
5) 9 W. R., 156.
6) *Per* Bramwell, B. L. R., 9 Ex., 86, 89.
7) Cf. 24 and 25 Vic., c. 97 (malicious injuries to property).
8) Pollock on Torts, p. 559: Draft Indian Civil Wrongs Bill, s. 44. As to Mischief: see I. L. R., 12 Cal., 55.
9) See Pollock, p. 559 Note, and 2 B. & Ad., 817.

of any property, is deemed to be the owner thereof as against every one not having a better title.[1] Mere apprehension of trespass gives no ground for an action.[2] Every person who directs, orders, or procures the commission of a trespass is liable as a wrong-doer or a trespasser.[3] Co-sharers can commit tresspass *inter se* on the joint estate.[4] Any one of several joint tenants of land may sue to eject a trespasser. The consent of one joint tenant as to possession does not make him the less a trespasser with regard to the other joint tenants.[5] If any mesne profits have been enjoyed by the trespasser they will be recoverable from him. As to the meaning of "Mesne Profit," see "*Action and Actionable Claim*," p. 12. It is no answer to an action for trespass, that the trespass was done by mistake, even in good faith, as to the ownership or right of possession of property. Where, however, the trespass is malicious, substantial damages will be given.[6] The mere assertion of a right to deal with property, or to prevent another from dealing with it, is not a trespass.[7]

Trespass by possessor for limited purpose exceeding his right.—A person in possession for a limited purpose commits a trespass by exceeding his right, and the rule of law, as laid down by the undermentioned bill, is as follows:—A person who has lawful possession, custody or control of property under a contract with the owner of that property or otherwise may become a trespasser by dealing with the property in a manner inconsistent with the title by which he has that possession, custody, or control, or in excess of his rights under that title; *e.g.*: If a pledgee with power of sale sells the pledge without the conditions being satisfied on which the power of sale is exerciseable, or a hirer of goods pledges them for his own debt, or a bailee, without the bailor's consent, lends the goods in his custody to a third person, these and the like acts are trespasses.[8]

Mistake does not generally excuse trespass.—Interference with the property of another is not excused by mistake, even in good faith, as to the ownership or the right of possession, or by an intention to act for the true owner's benefit.[9] (v. *post.*)

Immunity of certain ministerial actions.—Provided that a **carrier** or other person using the carriage or custody of goods as a public employment does not commit a trespass by dealing

1) Draft Indian Civil Wrongs Bill, s. 45.
2) 3 B. L. R., A. C., 411 : 12 W. R., 82: All. H. C. Rep., 119.
3) 12 W. R., 329.
4) All. H.C.R., 1874, p. 259 : I. L. R., 5 Cal., 188 : Alexander, pp. 116, 117 and cases there cited.
5) Alexander, p. 121 : All. H. C. Rep. 1873, p. 182 : I.L.R., 7 Cal., 414.
6) 9 W. R., 156.
7) Draft Indian Civil Wrongs Bill, s. 48.
8) Pollock, p. 560 : Draft Indian Civil Wrongs Bill, s. 46 : L. R., 1 Q. B., 585.
9) Draft Indian Civil Wrongs Bill, s. 47 : Pollock, p. 560 : 9 W. R., 156. See illustrations to next paragraph.

with goods in the ordinary way of that employment and solely by the direction and on behalf of a person who delivers those goods to him for that purpose and whom he in good faith believes to be entitled to deal with those goods.[1] Provided also that a **workman or servant** does not commit a trespass by dealing with any property in the ordinary way of his employment and in a manner authorised as between himself and his employer and which he in good faith believes his employer to be entitled to authorise;[2] *e.g.*: (1) M obtains goods from Z by fraud and false pretences, and, being apparent owner of the goods, purports to sell them to A who, in good faith, accepts them and pays M for them. A is, in fact, dealing on behalf of P, and forthwith delivers the goods to P. M absconds with the price. A has wronged Z, and is liable to Z for the value of the goods.[3] (2) A is a tenant of land belonging to B. A without authority, but intending to act for B's as well as A's benefit, converts part of this land into a tank. A has wronged B and B need not prove that the value of the land is diminished.[4] (3) A obtains goods by fraud and false pretences from Z at Bombay, and sends them by Railway to B at Allahabad. The Railway Company's servants deliver the goods at Allahabad to B's order according to the usual course of business. If the Railway Company had not before this delivery received any notice of an adverse claim on the part of Z, the Railway Company has not wronged Z. (4) Z is the owner of 100 maunds of wheat. A obtains this wheat from him by fraud and false pretences, and offers it for sale to B, a miller, who accepts it in good faith. B causes the wheat to be ground in his mill together with other wheat bought by B from the true owners. The men employed in the mill do not know from whom the wheat was bought. Here B may have wronged Z, but the men employed in the mill have not.[5]

Nature of license.—The consent of an owner to entry upon, or interference with, his property is called a license, and a person to whom such consent is given is called a licensee. A license does not create an interest in property but merely excuses what would otherwise be a trespass. A license, and the revocation of a license, may be either express or tacit.[6]

1) As to the immunity of, and compulsory character of the employment of, a carrier, see Judgment of Willes, J., 4 C. B. N. S., pp. 649, 650.
2) Draft Indian Civil Wrongs Bill, s. 47 : Pollock, p. 560.
3) L. R., 7 H. L., 757.
4) 8 B. L. R., App. 69.
5) Draft Indian Civil Wrongs Bill, s. 47, illust.: Pollock, pp. 560, 561 : L. R., 7 H. L., 766—768.
6) Draft Indian Civil Wrongs Bill, s. 49 : Pollock, pp. 561-562; Ch. VI of the Easements Act deals with licenses as regards immoveable property only. See "*Easements and Licenses.*"

Effect of license.—(1) A license does not bind the successors in title of the licensor; (2) is not assignable by the licensee; (3) is limited to the purposes for which and subject to the conditions, if any, on which it is given; (4) is revocable at the will of the licensor, unless coupled with an interest: *e.g.*: A sells to B trees growing on A's land. This implies a license to B to enter on A's land to cut the trees, and A cannot revoke the license while the contract of sale is in force [7]

Time of grace after revocation.—Notwithstanding the revocation of a license, the licensee is entitled to the benefit of the license for a reasonable time thereafter so far as may be necessary to enable him to restore the former state of things: *e.g.*: B has timber lying on A's wharf under a revocable license. A revokes the license. A must allow B access to the wharf for a reasonable time for the purpose of removing his timber.[8]

True owner's right of re-capture.—A person entitled to the possession of any moveable property who has been wrongfully deprived thereof may, within a reasonable time, re-take the same if he can peaceably do so, and, so far as necessary for that purpose, may peaceably enter on the wrong-doer's land.[9]

Criminal trespass.—Whoever enters into or upon property in the possession of another *with intent to commit an offence, or to intimidate, insult, or annoy* any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there (a lawful entry may thus by relation become a trespass *ab initio*) *with intent* thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass," and is punishable with imprisonment (rigorous or simple) for a term which may extend to three months, or with fine which may extend to Rs. 500, or with both.[1] This section (s. 441) seems intended to be limited to trespass upon real or immoveable property. "Wrongful acts done to personal property within the scope of criminal law, though they frequently involve the elements of trespass, are seldom, if ever, pure trespasses, but involve other ingredients which will bring the acts within the category of some specific offence, as robbery or theft. The cases of mischief (see "*Mischief*") are probably the only exceptions to this."[2] Other forms of criminal trespass are house-trespass, lurking house-trespass, house-breaking, and trespass to goods by dishonestly breaking open any closed receptacle containing or supposed to contain property (v. *post*).[3]

7) Draft Indian Civil Wrongs Bill, s. 50.
8) ib., s. 51 : L. R., 5 C. P., 334, 339.
9) ib., s. 52 : 3 M. & W., 483 : Pollock, pp. 561—563.

1) Indian Penal Code, ss. 441—447.
2) Collett, p. 126.
3) Penal Code, ss. 442—462.

House-trespass is criminal trespass by entering into, or remaining in, any building, tent, or vessel used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property. "Lurking house-trespass" is house-trespass after having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, etc. "Lurking house-trespass by night" is lurking house-trespass committed after sunset and before sunrise.[4]

House-breaking.—A person is said to commit "house-breaking" who commits house-trespass, if he effects his entrance into the house, or any part of it, in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence, or having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say:—(1) If he enters, or quits, through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass. (2) If he enters, or quits, through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling, or climbing over, any wall or building. (3) If he enters, or quits, through any passage which he, or any abettor of the house-trespass, has opened, in order to the committing of the house-trespass, by any means by which that passage was not intended by the occupier of the house to be opened. (4) If he enters, or quits, by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass. (5) If he effects his entrance, or departure, by using criminal force, or committing an assault, or by threatening any person with assault. (6) If he enters, or quits, by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself, or by an abettor of the house-trespass.

Any outhouse or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section. "House-breaking by night" is house-breaking after sunset and before sunrise.[5] As to right of private defence, see "*Offences*," pp. 488, 489.

All persons jointly concerned in lurking house-trespass by night, or house-breaking by night, are punishable for death or grievous hurt caused by one of their number.[6]

Breaking open closed receptacle.—Whoever dishonestly, or with intent to commit mischief, breaks open, or unfastens, any

4) Penal Code, ss. 442–444, 448, 449—459. 5) ib., ss. 445, 446. 6) ib., s. 460.

closed receptacle which contains or which he believes to contain property, is punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both. Whoever, being entrusted with any closed receptacle which contains, or which he believes to contain, property, without having authority to open the same, dishonestly, or with intent to commit mischief, breaks open, or unfastens that receptacle, is punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both.[7]

Trespass by cattle.—The term "Cattle" ncludes elephants, camels, buffalos, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, ewes, sheep, lambs, goats and kids.[8] The cultivator or occupier of any land, or any person who has advanced cash for the cultivation of the crop or produce on any land, or the vendee or mortgagee of such crop or produce or any part thereof may seize any cattle trespassing on such land and doing damage thereto or to any crop or produce thereon and send them to the village pound. So also officers of police or any person in charge of public roads, pleasure-gardens, plantations, canals, drainage works, embankments, and the like may seize any cattle trespassing on or doing damage to such roads, etc., and send them to the nearest pound. Any person whose crops or other produce have been damaged by trespass of cattle may further sue for compensation in a Civil Court. Any compensation paid to such person under this Act, by order of the convicting Magistrate, will be set-off and deducted from any sum claimed by or awarded to him as compensation in such suit.[9]

Delivery or sale of cattle.—If the owner of the impounded cattle or his agent appear and claim the cattle the pound-keeper must deliver them to him on payment of the fines and charges. If the cattle are not claimed within 7 days of their being impounded, notice and proclamation will be made, and if within 7 days of such notice the cattle are not claimed they may be sold by public auction.[1] If the owner disputes the legality of the seizure he must deposit the fines and charges and make his complaint in the manner mentioned below; the cattle will then be delivered to him. If the owner or his agent appear and refuse or omit to make the aforesaid deposit or refuse or omit to pay the fines and charges the cattle (or as many as may be necessary) may be sold by public auction, and after deduction of fines and expenses the balance and unsold cattle (if any) will be made over to him. The owner is

7) Penal Code, ss. 461, 462.
8) Act I of 1871, s. 3 : Act I of 1871 (Cattle-Trespass) extends to the whole of British India except the Presidency-towns and Districts and Tracts especially exempted by the Local Government.
9) Act I of 1871, ss. 10, 11, 29.
1) ib., ss, 13, 14.

entitled to an account showing sale-proceeds and charges. No officer of police or other officer or pound-keeper appointed under this Act can directly or indirectly purchase any cattle at a sale under this Act.[2]

Illegal seizures.—Any person whose cattle have been seized may at any time within 10 days of the seizure make complaint personally, or by an agent personally acquainted with the circumstances, and either verbally, or in writing. If the seizure is adjudged illegal the Magistrate must award to the complainant reasonable compensation, not exceeding Rs. 100, to be paid by the person who made the seizure, together with all fines paid and expenses incurred by the complainant in procuring the release of the cattle: if the cattle are not already released their release will be directed.[3]

Pigs.—Any owner or keeper of pigs who through neglect or otherwise damages any land, crop or produce, or any public road, by allowing pigs to trespass thereon, is liable to a fine not exceeding Rs. 10.[4]

Fines.—Any fine imposed under the preceding section or for the offence of mischief by causing cattle to trespass on any land may be recovered by the sale of all or any of the cattle by which the trespass was committed, whether they were seized in the act of trespassing or not, and whether they are the property of the person convicted of the offence, or were only in his charge when the trespass was committed. All fines recovered may be appropriated in whole or in part as compensation for loss or damage.[5]

Cattle trespass on railways.—The owner or person in charge of any cattle straying on a railway provided with fences suitable for the exclusion of cattle is liable to a fine which may extend to Rs. 5 for each head of cattle in addition to any amount which may have been recovered or may be recoverable under the Cattle-Trespass Act, 1871 (v. *ante*). If any cattle are wilfully driven, or knowingly permitted to be, on any railway otherwise than for the purpose of lawfully crossing the railway, or, for any other lawful purpose, the person in charge of the cattle, or, at the option of the Railway Administration, the owner of the cattle is punsihable with fine which may extend to Rs. 10 for each head of cattle in addition to any amount which may have been recovered or may be recoverable under the Cattle-Trespass Act. The fine may be recovered by sale of the cattle. The expression "public road" in the Cattle-Trespass Act (v. *ante*) includes a railway. The word "cattle" has the same meaning as in the Cattle-Trespass Act.[6]

2) Act I of 1871, ss. 15, 16, 19.
3) ib., ss. 20—23.
4) ib., s. 26, the Local Government may direct that this section shall be read as if it had reference to cattle generally, or to cattle of a particular kind instead of to pigs only, or as if the words "Rs. 50" were substituted for the words "Rs. 10" or as if there were both such reference and such substitution. (Added by Act I of 1891, s. 8.)
5) ib., ss. 25, 28.
6) Act IX of 1890, s. 125.

TRUSTS AND TRUSTEES.

AUTHORITIES—Act II of 1882 (Indian Trusts Act): Agnew's Law of Trusts in British India, 1882: Lewin on Trusts, 9th Ed., 1891: Act I of 1877 (Specific Relief); 29 Car. II, c. 3 (Statute of Frauds): Indian Penal Code: Act XXVIII of 1866 (Trustees and Mortgagees): Act XXVII of 1866 (Indian Trustee): Civil Procedure Code: Act XV of 1877 (Limitation): Act XVII of 1864 (Official Trustees): Acts relating to Societies and Endowments (XXI of 1860: XX of 1863; I of 1880): Cases cited.

Law of Trusts in British India.—The Law of Trusts for the territories to which the Indian Trusts Act (II of 1882) extends[1] is mainly contained in that Act. With but a few exceptions the law contained in that Act is substantially that now administered by English Courts of Equity and (under the name of "justice, equity, and good conscience") by the Indian Courts in those territories to which that Act does not extend. For all general purposes therefore, the Indian Trusts Act (though not extending to the whole of British India) may be taken to contain a statement of the Law of Trusts administered throughout the whole of British India.[2] Portions of the Law of Trusts are also contained in the Penal Code (v. *post*); the Specific Relief Act (I of 1877);[3] the Code of Civil Procedure;[4] the Limitation Act (XV of 1877);[5] the Official Trustees Act (XVII of 1864); the Indian Trustee Act (XXVII of 1866);[6] the Trustees and Mortgagees' Powers Act (XXVIII of 1866)[7]; the Literary, Scientific, and Charitable Societies Act (XXI of 1860; see "*Societies*," pp. 581, 582);

1) Extends in the first instance to the territories respectively administered by the Governor of Madras in Council, the Lieutenant-Governors of the North-Western Provinces and the Panjâb, the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam; and the local Government may from time to time, by notification in the Official Gazette, extend it to any other part of British India.

2) See the Statement of Objects and Reasons of the Indian Trusts Bill. *Gazette of India*, Nov. 13, 1880.

3) See s. 3: Part II, ch. I: (see "*Possession*," pp. 510—512); ss. 12 (*a*), 21 (*e*), (see "*Contract*," pp. 167, 168); 54 (*a*) (see "*Injunctions*," p. 315.)

4) See ss. 15, 16; (see "*Action & Actionable claim*," pp. 1, 2); s. 437; (see "*Administration*," pp. 30, 31); s. 539, (see "*Charities*," p. 130); s. 502 (v. *post*).

5) See, ss. 3, 10; Art. 98 (see "*Limitation*," p. 403); Arts. 100, 133, 134 (v. *post*).

6) This Act applies only in cases to which English law is applicable (see "*Mortgage*," p. 467). But see, I. L. R., 5 Bom., 154.

7) This Act also applies only in cases to which English law is applicable. In those parts of India to which the Indian Trusts Act extends, sections 2, 3, 4, 5, 32, 33, 34, 35, 36 & 37 and the portions of 39 & 43 dealing with Trusts are repealed. The Indian Trusts Act, Chapter IV, embodies and re-enacts the substance of sections 2, 3, 5, 32, 33, 36, 37, and those portions of sections 39 & 43 dealing with trusts.

the Religious Endowments Act (XX of 1863); the Religious Societies Act (I of 1880, see "*Societies*," p. 581); and the Statute of Frauds (29, Car. II, c. 3).[8]

Nothing in the Indian Trusts Act affects the rules of Mahommedan Law as to *waqf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private, religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second chapter of the Act (dealing with the creation of trusts) applies to trusts created before the 1st March 1882, on which day the Act came into force.

Nature of trusts.—A "trust" includes every species of express, implied, or constructive ownership: "trustee" includes every person holding, expressly, by implication, or constructively, a fiduciary character: *e.g.*: A, one of several partners, is employed to purchase goods for the firm. A, unknown to his co-partners, supplies them, at the market price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. A is a trustee, for his co-partners, of the profit so made.[9] The **English law of trusts** recognises two estates or interests in the subject-matter of the trust: *viz.*, the 'legal' estate of the trustee and the "equitable" estate of the beneficiary or *cestui-que-trust*: there may therefore be according to that law two persons holding different estates in the same property: "Both are entitled to convey their estates, both are entitled to the rents and profits; one the legal owner to receive them; the other the equitable owner to enjoy them."[1] Trusts in the sense of confidences, to the existence of which a 'legal' and an 'equitable' estate are necessary, are unknown to **Hindu and Mahommedan Law.**[2] Under the Indian Trusts Act also, the beneficiary has no estate or interest in the subject-matter of the trust: his interest is *his right against the trustee* as owner of the property. Trusts, in the wider sense of the word, that is to say, obligations annexed to the ownership of property which arise out of a confidence reposed in, and accepted by, the owner for the benefit of another, are constantly created by the natives of India and are frequently enforced by the Courts.[3] Trusts of various kinds have been recognised and acted on in India in many cases.[4] **"A trust"**

8) This Statute is in force only in the Presidency-towns of Calcutta, Madras and Bombay: but, ss. 7—11 relating to declarations of trust, resulting trusts, transfer of trusts, and to judgments *of cestui-que-trust* are, as regards the Town of Madras, repealed by the Indian Trusts Act.

9) Act I of 1877, s. 3, illust. (*e*)

1) Agnew, p. 8.

2) 2 B. L. R., O. C., 36; 4 B. L. R., O. C., 231: ib., 278.

3) See 4 B. L. R., O. C., 134: *Gazette of India*, Nov. 13, 1880.

4 18 W. R. 359.

is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another or of another and the owner; the person who reposes or declares the confidence is called the "**author of the trust**;" the person who accepts the confidence is called the "**trustee**"; the person for whose benefit the confidence is accepted is called the "**beneficiary**"; the subject-matter of the trust is called "**trust-property**" or "**trust-money**"; the instrument (if any) by which the trust is declared is called the "**instrument of trust.**[5]"

Creation of trusts.—A trust **may be created for any lawful purpose.** The purpose of a trust is lawful unless it is (*a*) forbidden by law, or (*b*) is of such a nature that, if permitted, it would defeat the provisions of any law, or (*c*) is **fraudulent**, or (*d*) involves or implies injury to the person or property of another, or (*e*) the Court regards it as **immoral or opposed to public policy**:[6] *e.g.*: a trust to provide for *future* illegitimate children.[7] Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.[8] A declaration of trust of *immoveable* property must (in the territories to which the Act extends) be made in **writing** signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee; and no trust in relation to *moveable* property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee. These rules do not apply where they would operate so as to effectuate a fraud: *e.g.*: where a father having power to bequeath certain land is induced not to make a will of that land by the promise of his heir presumptive that he will provide thereout for his relations.[9] In the Towns of Calcutta and Bombay writing is necessary for the declaration by European British subjects of a trust in relation to immoveable property, but not moveable property.[1] The Hindu Law, in no transaction, absolutely requires a writing,[2] nor does the Mahommedan Law.[3] Declarations of trust, therefore, by Hindus and Mahommedans not governed by the Indian Trusts Act, may be made by word of mouth. **A trust**

5) Act II of 1882, s, 3.
6) Act II of 1882, s. 4; cf. Act IX of 1872, s. 23. (see "*Contract*," pp. 157, 158); 9 B. L. R., 377; 14 B. L. R., 175: Agnew, pp. 19, 32, *et seq.*
7) L. R. 9, Ch. 147.
8) Act II of 1882, s. 4: Lewin, p. 96 *et seq.*, p. 112 (trusts partly lawful and partly unlawful).
9) Act II of 1882, s. 5.
1) 29 Car. II, c. 3, s. 7: 3 Bro. C. C., 587: 31 Beav., 250.
2) 2 Mad. H. C. R., 37.
3) Agnew, pp. 51, 52.

is created when the author of the trust indicates with reasonable certainty by any words or acts—(*a*) an intention on his part to create thereby a trust, (*b*) the purpose of the trust, (*c*) the beneficiary, and (*d*) the trust-property,[4] and (unless the trust is declared by will, or the author of the trust is himself to be the trustee[5]) transfers the trust-property to the trustee.[6] The rule established by the English cases is that whether there was transmutation of possession or not, a trust will be supported, provided it was in the first instance perfectly created.[7] It is not necessary there should be any consideration to support a trust.[8] No one is bound to accept a trust. A trustee may accept the office either by signing the trust deed, or by an express declaration of his assent, or by proceeding to act in the execution of the duties of the trust.[9] After acceptance a trustee cannot renounce (v. *post*).

Duties and liabilities of Trustees.—"As soon as a trustee has accepted the office, he must bear in mind that he is not to sleep upon it, but is required to take an *active* part in the execution of the trust." The law knows no such person as a *passive* trustee. If, therefore, an unprofessional person be associated in the trust with a professional one, he must not argue, as is often done, that because the solicitor is better acquainted with business and with legal technicalities, the administration of the trust may be safely confided to him, and that the other need not interfere except by joining in what are called formal acts. If he sign a power-of-attorney for sale of stock, or execute a deed of re-conveyance on repayment of a mortgage sum, he is as answerable for the money as if he were himself the solicitor and had the sole management of the transaction."[1] A trustee must inform himself as to the state of the trust-property and take such steps by suit or otherwise as may be necessary for the due protection of it.[2] The first duty of trustees is to place the trust-property in a state of security; and (subject to the provisions of the instrument of trust) to get in trust moneys invested on insufficient or hazardous security: *e.g.*: (*a*) the trust-property is a debt outstanding on personal security; the instrument of trust gives the trustee no discretionary power to leave the debt so outstanding; the trustee's duty is to recover the debt without unnecessary delay;[3] (*b*) the trust-property is money in the hands of one of two co-trustees; no discretionary

4) Act II of 1882, s. 6: 2 M. & K., 197.
5) ib.; 35 Beav., 621.
6) Act II of 1882, s. 6: Lewin, pp. 66, 68 *et seq.*: 6 Ves., 662: 35 Beav., 621.
7) 6 Ves., 656: 18 Ves., 99; ib., 140: 1 Hare, 476; followed in 2 Bom. H. C. R., 143: Lewin, p. 66.
8) Boul., 706.
9) Act II of 1882, s. 10: Lewin, 211.
1) Lewin, p. 217.
2) ib.; Act II of 1882, ss. 12, 13. Act I of 1877, s. 10, Expl. 1.
3) Act II of 1882, s. 12: 4 Moo. I. A. 452: Lewin, p. 305.

power is given by the instrument of trust; the other co-trustee must not allow the former to retain the money for a longer period than the circumstances of the case require.[4] A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction, or deterioration of the trust-property.[5]

Breach of trust.—A breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust."[6] Where a trustee commits a breach of trust he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has, by fraud,[7] induced the trustee to commit the breach, or the beneficiary, being competent to contract (see "*Contract*," pp. 152, 153), has himself, without coercion or undue influence (see "*Contract*," pp. 154, 155) having been brought to bear on him, concurred[8] in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee.[9] But the breach of trust must be brought home to the trustee, and if there is a doubt whether the trustee has acted honestly and *bonâ fide* in the discharge of his duty, although he may have made mistakes, the doubt should be determined in favour of the trustee.[1] **Co-trustees** are generally answerable each for his own acts only, and are not liable for the acts or defaults of a co-trustee. Subject to the provisions dealing with the care required from a trustee, and the duty of a trustee to protect the title to trust-property (v. *ante*. Act II of 1882, ss. 15, 13), one trustee is not, as such, liable for a breach of trust committed by his co-trustee: provided that, in the absence of an express declaration to the contrary[2] in the instrument of trust, a trustee is so liable[3]—(*a*) where he has delivered trust-property to his co-trustee without seeing to its proper application; (*b*) where he allows his co-trustee to receive trust-property and fails to make due enquiry as to the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require; (*c*) where he becomes aware of a breach of trust committed or intended by

4) ib.; 9 Bom., 333.
5) Act II of 1882, s. 15: 12 App. Cas., 727, 733: Lewin, 313: cf. Act IX of 1872, ss. 151, 152: see "*Bailment*," p. 81.
6) Act II of 1882, s. 3.
7) Lewin, pp. 1053 and 38, and cases there cited.
8) 11 Ves. 319: 3 Sw. 64: Lewin, p. 1053: 37 Ch. D., 329.
9) Act II of 1882, s. 23; Lewin, 1028, 1029.
1) Per Jessel, M. R., 47 L. T. N. S., 61.
2) 3 Giff., 116; 29 W. R. (Eng.), 332.
3) Act II of 1882, s. 26: Lewin, 279, 284.

his co-trustee, and either actively conceals it,[4] or does not, within a reasonable time, take proper steps to protect the beneficiary's interest.[5] If a trustee threatens a breach of trust, his co-trustees (if any) should, and the beneficial owners may, sue for an injunction to prevent the breach.[6] Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.[7] Where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor.[8]

Remedies in case of breach of trust.—In the event of a breach of trust, the beneficiary is entitled to institute civil proceedings against the trustee to compel a compensation from him personally for the loss which the trust estate has sustained. It is immaterial whether the trustee was a gainer or loser by the breach of trust.[9] Where there is a *dishonest* misappropriation, conversion, use, or disposition of property within the definition of the Penal Code, the trustee may be made the subject of a criminal prosecution (v. *post*).[1]

Breach of trust for public, charitable, or religious purposes—See "*Charities*," p. 130.

Following trust-property.—The general rule is that "no party to an illegal or fraudulent contract can derive any benefit from it, and that all persons who obtain possession of trust funds with a knowledge that their title is derived from a breach of trust, will be compelled to restore such trust funds.[2] And if the trust estate has been wrongfully disposed of by the trustee, the beneficiary may attach and follow the property that has been substituted in place of the trust estate, so long as the metamorphosis can be traced."[3] But a beneficiary has no right in respect of property in the hands of—(*a*) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or (*b*) a transferee for consideration from such a transferee. Nor do the provisions relating to the following of trust-property into the hands of third persons apply to money, currency notes and negotiable instruments in the hands of a *bonâ fide* holder to whom they have passed in circulation, or affect the provisions of the Contract

4) 1 B. C. C., 68.
5) Act II of 1882, s. 26 : 11 Ves. 319 : 2 Beav., 472 : Lewin, 290.
6) Act I of 1877, s. 54, ill. (b) : 6 Price, 279 : 3 Sw., 71.
7) Act II of 1882, s. 27 : 1 M. & K., 146 : Lewin, p. 1039, and cases there cited.
8) Act II of 1882, s. 25.
9) 12 Ves., 129.
1) Penal Code, s. 405.
2) 8 L. R. Eq., 520 : Lewin, 983 : Act II of 1882, ss. 63, 64.
3) Lewin, 1019.

Act relating to the title conveyed by the seller of goods to the buyer.[4] See "*Title*," pp. 583, 584.

Delegation.—"Trustees who take on themselves the management of property for the benefit of others have no right to shift their duty on other persons, and if they do so they remain subject to responsibility towards their beneficiaries for whom they have undertaken the duty."[5] A trustee cannot delegate his office, or any of his duties either to a co-trustee, or to a stranger, unless (*a*) the instrument of trust so provides;[6] (*b*) the delegation is in the regular course of business;[7] or (*c*) the delegation is necessary; or (*d*) the beneficiary being competent to contract, consents to the delegation.[8] The appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of this section.[9]

A Trustee cannot renounce after acceptance.—A trustee who has accepted the trust cannot afterwards renounce it except (*a*) with the permission of a principal Civil Court of original jurisdiction, or (*b*) if the beneficiary is competent to contract, with his consent, or (*c*) by virtue of a special power in the instrument of trust.[1]

Co-trustees cannot act singly.—The office of trustee is a *joint* one. When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.[2] "Where the administration of the trust is vested in co-trustees, they all form as it were but one collective trustee, and therefore must execute the duties of the office in their joint capacity. It is not uncommon to hear one of several trustees spoken of as the *acting* trustee, but the Court knows no such distinction: all who accept the office are in the eyes of the law acting trustees."[3]

Joining in receipt for conformity.—A co-trustee who joins in signing a receipt for trust-property and proves that he has not received the same is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee.[4]

A trustee may not make a profit of his office, or use, or deal with trust-property for purposes unconnected with the trust; and, in the absence of express directions to the contrary contained in the instrument of trust, or of a contract to the contrary entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to **remuneration** for his trouble,

4) Act II of 1882, s. 64.
5) Per Lord Langdale, 5 Beav., 517.
6) 2 Moll., 199: Lewin, 269.
7) 3 M. & Cr., 497.
8) Act II of 1882, s. 47: Lewin, 267—274.
9) ib.; 1 Ves., 413.
1) Act II of 1882, s. 46; Lewin, 266,
2) Act II of 1882, s. 48.
3) Lewin, 274; 2 Gl. & J., 116.
4) Act II of 1882, s. 26; 3 K. & J. 317; Lewin, 280.

skill, and loss of time in executing the trust. But a trustee has a right to be reimbursed his expenses.[5]

Rights and liabilities of beneficiary.—The beneficiary has a right to the rents and profits of the trust-property; and is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest and may sue for the execution of the trust.[6] The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by *proper persons* and by a *proper number* of such persons.[7] The beneficiary has a right that his trustee shall be compelled to perform any particular act of his duty as such, and restrained from committing any contemplated or probable breach of trust; *e.g.*, a trustee for B is about to make an imprudent sale of a small part of the trust-property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.[8] When the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.[9]

If a partner, being a trustee, wrongfully employs trust-property in the business, or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries unless he had notice of the breach of trust. The partners having such notice are jointly and severally liable for the breach of trust.[1]

Survival of trust.—On the death or discharge of one of several co-trustees, the trust survives and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.[2]

Trustees of religious, literary, scientific, and charitable societies—See "*Societies*," pp. 581, 582.

Benami transactions.—Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.[3]

5) Lewin, 292—304, 669: Act II of 1882, ss. 48, 50, 32. Nothing in section 50 (trustee may not charge for services) applies to any Official Trustee, Administrator-General, Public Curator, or person holding a certificate of administration. (v. *post.*)
6) Act II of 1882, ss. 54, 55, 58: Act I of 1877 (Specific Relief), s. 12, cl. (*a*).
7) Act II of 1882, s. 60: Lewin, p. 962.
8) Act II of 1882, s. 61; Act I of 1877. s. 54, and ill. (*f*) to this section,
9) Act II of 1882, s. 66: Lewin, pp. 317, 1021, *et seq.*
1) Act II of 1882, s. 67: 31 Beav., 579: 1 Ch., 337, 352, 547: Lewin, 1030: cf. 53 & 54 Vic., c. 39.
2) Act II of 1882, s. 76: Lewin, 277.
3) Act II of 1882, s. 82.

Advantage gained by fiduciary.—Where a **trustee, agent, executor, partner, director of a company, legal adviser** or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained:[4] *e.g.*:—(1) A is the **legal, medical, or spiritual adviser** of B. By availing himself of his situation as such adviser, A gains some pecuniary advantage which might otherwise have accrued to B. A is a trustee for B of such advantage.[5] (2) A, being B's **banker**, discloses for his own purposes the state of B's account. A is a trustee for B of the benefit gained by him by means of such disclosure.[6] (3) A, one of several **partners**, is employed to purchase goods for the firm. A, unknown to his co-partners, supplies them, at the market price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. A is a trustee, for his co-partners, of the profit so made.[7] (4) A, an **executor**, buys at an under-value from B, a legatee, his claim under the will. B is ignorant of the value of the bequest. A must hold for the benefit of B the difference between the price and value.[8] (5) A, a **trustee**, uses the trust-property for the purposes of his own business. A holds for the benefit of his beneficiary the profits arising from such user.[9] (6) A, the **manager** of B's indigo factory, becomes agent for C, a vendor of indigo seed, and receives, without B's assent, **commission** on the seed purchased from C for the factory. A is a trustee for B of the commission so received.[1] A similar rule applies in the case of advantages gained by the exercise of **undue influence**,[2] or advantages gained by qualified owners of property (*e.g.*, **tenant for life, co-owner, mortgagee, etc.**) *e.g.*:—A, the mortgagee of certain leaseholds, renews the lease in his own name. A is a trustee of the renewed lease for those interested in the original lease.[3]

Property acquired with notice of existing contract.—Where a person acquires property with notice that another person has entered into an existing contract affecting that property of which specific performance could be enforced (see "*Contract*," p. 166 *et*

4) Act II of 1882, s. 88 : L. R., 2 Ind. App., 18 : Act I of 1877, s. 3.
5) Act I of 1877, s. 3, ill. (*b*).
6) ib., ill. (*c*).
7) ib., ill. (*e*).
8) Act II of 1882, s. 88, ill. (*a*).
9) ib., ill. (*b*).
1) Act I of 1877, ill. (*f*).
2) Act II of 1882, s. 89. See "*Contract*," pp. 154, 155.
3) Act II of 1882, s. 90 : Act I of 1877, s. 3, ill. (*a*).

seq.), the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract[4]: *e.g.*: (1) A buys certain land with notice that B has already contracted to buy it. A is a trustee for B of the land so bought. (2) A buys land from B, having notice that C is in occupation of the land. A omits to make any enquiry as to the nature of C's interest therein. A is a trustee for C to the extent of that interest.[5]

Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors the advantage so gained.[6]

Suits by and against trustees — See "*Administration*," pp. 30, 31, and "*Limitation*," p. 403.

Deposit of trust-property in Court during suit.—When the subject-matter of a suit is money or some other thing capable of delivery, and any party to the suit admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party; the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.[7]

Limitation.—(1) A suit by a co-trustee to enforce against the estate of a deceased trustee a claim for contribution, must be brought within three years from the time when the right to contribution accrues. (2) A suit to recover moveable property conveyed or bequeathed in trust, deposited, or pawned, and afterwards bought from the trustee, depositary, or pawnee for a valuable consideration, and (3) a suit to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged, and afterwards purchased from the trustee or mortgagee for a valuable consideration must be brought within twelve years of the date of the purchase.[8] See "*Limitation*," p. 403.

Trustees to charity—See "*Charities*," p. 130.

Official trustees.—In each of the Presidencies of Fort William in Bengal, Fort St. George and Bombay, there is an official trustee called the Official Trustee of Bengal, Madras, and Bombay respectively. The Administrator-General is eligible for the office of official trustee.[9] If any person is about to grant, assign, or settle any property, moveable or immoveable, of what nature or kind soever, upon or subject to any trust, whether for a charitable purpose or otherwise, such person may, with the consent of the official trustee, appoint him, by the deed creating the trust, to be the trustee of such settlement: the property then vests in the

4) Act II of 1882, s. 91,
5) Act I of 1877, s. 3, illus. (*f*) (*g*).
6) Act II of 1882, s. 93.
7) Civil Procedure Code, s. 502.
8) Act XV of 1877, arts, 100, 133, 134.
9) Act XVII of 1864, ss. 4, 5, 6.

official trustee. No trust, however, for any religious purpose can ever be held by the official trustee.[1] The official trustee so appointed is entitled to such remuneration as is fixed by the deed of settlement.[2] If any property is subject to a trust, whether for a charitable purpose or otherwise, and there is no trustee willing to act or capable of acting, who is within the local limits of the ordinary or extraordinary civil jurisdiction of the High Court, or if property is subject to a trust, and all the trustees, or the surviving or continuing trustee and all the persons beneficially interested in the trust, are desirous that the official trustee shall be appointed in the room of such trustees or trustee, then and in any such case the High Court may, with the consent of the official trustee, appoint him to be trustee of such property: upon such appointment such property vests in the official trustee and his successors in office and must be held by him and them upon the same trusts as the same were held previous to such appointment.[3] The trust-property may also be re-transferred.[4] If any **infant or lunatic** is entitled to any gift or legacy or residue or share thereof, the **executor or administrator** by whom such legacy, residue or share may be payable or transferable, or the party by whom such gift may be made, or any trustee of such gift, &c., may, with the leave of the Court, pay or transfer the same to the official trustee.[5] Any order under this Act may be made on the application of any person beneficially interested in any trust-property, or of any trustee thereof whether under disability or not.[6]

Property held in trust for judgment-debtor liable to attachment—See "*Attachment*," p. 72 : and see p. 75.

Criminal breach of trust.—Whoever being in any manner entrusted with, or with any dominion over property, *dishonestly* misappropriates, or converts to his own use, that property, or *dishonestly* uses, or disposes of, that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust:" *e.g.* : (1) A being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust. (2) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed the same offence. (3) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract

1) Act XVII, 1864, s. 8. 3) ib., s. 10 : Rate of commission is fixed by s. 11, ib.
2) ib., s. 9. 4) ib., s, 16. 5) ib,, s. 32. 6) ib., s. 31.

between A and Z that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions, and employs the money in his own business. B has committed criminal breach of trust.[7] But if A, in the last illustration, not dishonestly, but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobey's Z's directions, and buys shares in the Bank of Bengal for Z instead of buying Company's paper—here though Z should suffer loss, and should be entitled to bring a civil action against A on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.[8] As to the meaning of the word "dishonestly," see "*Offences*," p. 483. As to the meaning of "misappropriation," see "*Offences*," p. 485. Criminal breach of trust can only exist where some relation of trust exists between the parties; there must be *first* an original trust, and *secondly* a dishonest misapplication of the trust-property.[9] The punishment for the offence when committed by carriers, wharfingers, warehouse-keepers, clerks, servants, bankers, public servants, merchants and agents is heavier than that imposed for its commission by others.[1] See "*Carriers*," p. 121.

Commission or reduction of price obtained by servants.—In cases where a servant, employed to pay a bill for his master, obtains a commission or a reduction of the price for his own benefit, it has been held "that if the account be an open one, that is an account of which the items have never been checked or settled, and if the transaction amounts to a taxation of the bill, and a reduction of the price by the servant, it is evident that the servant obtains the reduction for his master; that the money in his hands always remains the master's property, and that if he appropriates it, he steals it. But if the master himself has settled the account with the tradesman for a specific sum, and he sends the servant with the money and the servant, after making the payment, asks the tradesman for a present then, if the servant takes the present and keeps it, he is not guilty of stealing, because he has no intention to steal; the money is given to him by a person whom he believes to have a right to give it. It may be that the servant is bound to account to his master for the money. But, however this may be, his act is a very different matter from a criminal offence, and he cannot be convicted of a criminal breach of trust merely because it was obligatory on him to render an account."[2] See "*Agency*."

7) Penal Code, s. 405: illus. (*a*) (*f*) (*c*).
8) ib., ill. (*d*).
9) See Mayne's Penal Code, pp. 363, 367, *et seq.*

1) See Penal Code, ss. 406—409.
2) Per Petheram, C.J., I. L. R., 8 All., 120, 135, 138.

False statement by insolvent as to property held in trust—See "*Insolvency*," p. 325.

Administration to trust-property—See "*Administration*," p. 27.

Arrest of trustee judgment-debtor—See "*Arrest*," p. 64.

Undue influence employed by trustee—See "*Contract*," pp 154, 155.

Specific performance of trust—See "*Contract*," pp. 167, 168.

Slander of a person in an office of public trust—See "*Defamation*," p. 194.

See *Index*.

UNLAWFUL ASSEMBLY, RIOTING, AND AFFRAY.

AUTHORITIES—Indian Penal Code · Mayne's Penal Code, 14th Ed.: Criminal Procedure Code Cases cited.

Unlawful assembly.—An assembly of *five* or more persons is designated an unlawful assembly if the common object of the persons composing that assembly, is—(1) to overawe *by criminal force, or show of criminal force,*[1] the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor, or any public servant in the exercise of the lawful power of such public servant; or (2) to resist the execution of any law, or of any legal process; or (3) to commit any mischief,[2] or criminal trespass,[3] or other offence; or (4) by means of *criminal force, or show of criminal force,* to any person, to take or obtain possession of any property,[4] or to deprive any person of the enjoyment of a right of way, or the use of water, or other incorporeal right of which he is in possession or enjoyment, or to enforce any right, or supposed right;[5] or (5) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.[6] To be a member of an unlawful assembly is an offence punishable under the Penal Code.[7] Hiring, or conniving at hiring, of persons to join an unlawful assembly is also an offence.[8]

A "member of an unlawful assembly" is a person who, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it.[9]

Power to disperse.—A Magistrate, or officer in charge of a Police-station, may command any unlawful assembly *or* any assembly of five or more persons, likely to cause a disturbance of the public peace to disperse, and it thereupon becomes the duty of the members of such unlawful assembly to disperse accordingly. On failure to do so the Magistrate or officer is authorised to use civil force to compel them to disperse, and if such assembly cannot be otherwise dispersed, the Magistrate of the highest rank may cause it to be dispersed by military force. When the public security is manifestly endangered, and no Magistrate can be

1) See "*Assault.*"
2) See "*Mischief.*"
3) See "*Trespass.*"
4) See "*Possession.*"
5) See "*Easements and Licenses,*" "*Highways and Ways.*"
6) Penal Code, s. 141.
7) ib., ss. 143, 144, 145.
8) ib., s. 150.
9) ib., s. 142.

communicated with, any commissioned military officer may disperse such assembly by military force.[1]

Rioting.—Whenever force or violence is used by an unlawful assembly, or by any member thereof, *in prosecution of the common object of such assembly*, every member of such assembly is guilty of the offence of rioting.[2] The act done must be "in prosecution of the common object"; *e.g.*, a gathering of ryots to prevent a revenue officer from distraining would be an unlawful assembly; and if any one of them were to beat the officer, or rescue the goods seized, this would be a riot, for which every one of the resisting party would be liable, even though he took no part in such act. But if a fight were to spring up between two of the persons unlawfully assembled, this would only make them individually responsible, and not convert the assembly into a riot.[3] *Every* member of an unlawful assembly will be deemed guilty of an offence committed in prosecution of the common object of the assembly.[4]

Duties of owners and occupiers of land.—The owner or occupier of land upon which an unlawful assembly is held or riot committed, and any person having, or claiming, an interest in such land, is punishable with fine (not exceeding Rs. 1,000) if he, or his agent, or manager, knowing that such offence is being or has been committed, does not give the earliest possible notice to the Police, and does not use all lawful means to prevent, or suppress it. Whenever a riot is committed for the benefit, or on behalf, of any person, such person is punishable with fine if he, or his agent, or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, does not use all means in his power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same. The agent or manager of such person is, under similar circumstances, similarly punishable.[5]

Affray.—When two or more persons by fighting in a *public* place (a quarrel in a private room only amounts to an assault and battery by each) disturb the public peace, they are said "to commit an affray;" and are punishable with imprisonment of either description for a term which may extend to one month, or with fine which may extend to Rs. 100, or with both.[6] See "*Assault.*"

Bond to keep the peace in case of rioting, intimidation, assault, etc.—See "*Assault,*" p. 70.

See "*Assault,*" "*Hurt,*" "*Intimidation,*" "*Mischief,*" "*Offences,*" "*Prosecution,*" "*Possession,*" "*Trespass.*"

1) Crim. Pr. Code, ss. 127—129, 131, see Chap. IX, ib.: Penal Code, ss. 145, 151, 152.
2) Penal Code, s. 146.
3) Mayne's Penal Code, p. 139: 5 N.-W. P., 208.
4) Penal Code, s. 149.
5) ib., ss. 154—156, I. L. R., 10 Cal., 338.
6) ib., ss. 159, 160.

WARRANTY.

AUTHORITIES—Act IX of 1872 (Contract): Act IV of 1889 (Merchandise Marks): Cases cited.

Goodness and quality.—An implied warranty of goodness or quality may be established by the custom of any particular trade.[1]

Soundness.—On the sale of provisions, there is an implied warranty that they are sound.[2]

Bulk and sample.—On the sale of goods by sample, there is an implied warranty that the bulk is equal in quality to the sample.[3]

Title.—If the buyer or any person claiming under him, is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract.[4] See "*Title.*"

Denomination.—Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk. But if the contract specifically states that the goods, though sold as of a certain denomination, are not warranted to be of that denomination, there is no implied warranty: *e.g.:* (*a*) A, at Calcutta, sells to B 12 bags of "waste silk," then on its way from Murshedabad to Calcutta. There is an implied warranty by A that the silk shall be such as is known in the market under the denomination of "waste silk." (*b*) A buys, by sample and after having inspected the bulk, 100 bales of "Fair Bengal" cotton. The cotton proves not to be such as is known in the market as "Fair Bengal:" there is a breach of warranty.[5]

Where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose: *e.g.:* B orders of A, a copper manufacturer, copper for sheathing a vessel. A, on this order, supplies copper. There is an implied warranty that the copper is fit for sheathing a vessel.[6]

Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of its fitness for any particular purpose: *e.g.:* B writes to A, the owner of a patent invention for

1) Act IX of 1872, s. 110.
2) ib., s. 111.
3) ib., s. 112, 4 B. & Ald., 387; 2East, 304.
4) ib., s. 109: as to sale of land see "*Sale,*" p. 560.
5) ib., s. 113.
6) ib., s. 114: L. R., 3, Q. B., 197.

cleaning cotton—"Send me your patent cotton-cleaning machine to clean the cotton at my factory." A sends the machine according to order. There is an implied warranty by A that it is the article known as A's patent cotton-cleaning machine, but none that it is fit for the particular purpose of cleaning the cotton at B's factory.[7]

Latent defects.—In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it: *e.g.*: A sells to B a horse. It turns out that the horse had, at the time of the sale, a defect of which A was unaware. A is not responsible for this.[8]

Buyer's right on breach of warranty.—Where a specific article, sold with a warranty, has been delivered and accepted, and the warranty is broken, the sale is not thereby rendered voidable, but the buyer is entitled to compensation from the seller for loss caused by the breach of warranty: *e.g.*: A sells and delivers to B a horse warranted sound. The horse proves to have been unsound at the time of sale. The sale is not thereby rendered voidable, but B is entitled to compensation from A for loss caused by the unsoundness.[9] See "*Horses*," p. 289.

Right of buyer on breach of warranty in respect of goods not ascertained.—Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may (1) accept the goods or refuse to accept the goods when tendered; or (2) keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them: provided that, during such time, he exercises no other act of ownership over them than is necessary for the purpose of examination and trial. In any case the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty; but if he accepts the goods and intends to claim compensation, he must give notice of his intention to do so within a reasonable time after discovering the breach of the warranty: *e.g.*: (*a*) A agrees to sell and, without application on B's part, deliver to B 200 bales of unascertained cotton by sample. Cotton not in accordance with sample is delivered to B. B may return it if he has not kept it longer than a reasonable time for the purpose of examination. (*b*) B agrees to buy of A 25 sacks of flour by sample. The flour is delivered to B, who pays the price. B, upon examination, finds it not equal to sample; B afterwards uses two sacks, and sells one. He cannot now rescind the contract and recover the price, but he is entitled to compensation from A for any loss caused by the breach of warranty. (*c*) B makes two

7) Act IX of 1872, s. 115. 8) ib., s. 116. 9) ib., s. 117.

pairs of shoes for A by A's order. When the shoes are delivered, they do not fit A. A keeps both pairs for a day. He wears one pair for a short time in the house, and takes a long walk out of doors in the other pair. He may refuse to accept the first pair, but not the second. But he may recover compensation for any loss sustained by the defect of the second pair.[1]

Warranty on an exchange of money—See "*Exchange.*"

Implied warranty on sale of marked goods.—On the sale, or in the contract for the sale, of any goods to which a trade-mark, or mark, or trade description has been applied, the seller is deemed to warrant that the mark is a genuine mark and not counterfeit or falsely used, or that the trade description is not a false trade description, *unless* the contrary is expressed in some writing signed by or on behalf of the seller and delivered at the time of sale or contract to, and accepted by, the buyer.[2] See "*Trade and Trade-Marks.*"

See "*Contract.*"

1) Act IX of 1872, s. 118.

2) Act IV of 1889, s. 17.

WILLS.

AUTHORITIES—Act X of 1865 (Succession): Act XXI of 1870 (Hindu Wills); Act V of 1881 (Probate and Administration).

The law relating to wills is contained in the Indian Succession Act (X of 1865) which constitutes the law of British India applicable in the case of all persons except Hindus, Mahommedans, and Buddhists. Hindus, Jainas, Sikhs, and Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay are governed by the Hindu Wills Act (XXI of 1870), which re-enacts many of the sections of Act X of 1865,* and makes them applicable to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist, on or after the 1st September 1870, within the territories subject to the Lieutenant-Governor of Bengal, or the local limits of the ordinary original civil jurisdiction of the High Courts at Madras and Bombay, and to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property within those territories or limits.[1]

"Will" means the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death.[2]

Proof of will—See "*Probate.*"

It is not necessary that any technical words or terms of art shall be used in a will, but only that the wording shall be such that the intentions of the testator can be known therefrom. It has been said that "a testator in making his own will should always remember that if he uses legal expressions it will be held that he understood their import; so, if he uses a legal expression and does not know its legal significance, the construction put upon his will by the Court may be very different from what he intended. He is therefore advised to use none but the most ordinary expressions of every-day life and to state his wishes as clearly and simply as possible." A will or bequest not expressive of any definite intention is void for uncertainty: *e.g.*, if a testator says—"I bequeath goods to A;" or "I bequeath to A;" or "I leave to A all the goods mentioned in a schedule," and no schedule is found; or "I bequeath 'money,' 'wheat,' 'oil,'" or the like, without saying how much: this is void (H).[3] As to the rules of construction of wills see part XI, Act X of 1865. Where two clauses or gifts in a will are irreconcileable, so that they

* *Note.*—These incorporated sections are marked with the letter **H**. As to the provisos in the case of wills of Hindus, etc., see pp. 642—645.

1) Act XXI of 1870, s. 2.
2) Act X of 1865, s. 3.
3) ib., ss. 61, 75, 76. For a form of will, see "*Appendix.*"

cannot possibly stand together, the last prevails. (H) Wills are of two kinds: privileged and unprivileged (v. *post*).

Persons capable of making a will.—Every person of sound mind and not a minor may dispose of his property by will. A **married woman** may dispose by will of any property which she could alienate by her own act during her life. See "*Husband and Wife.*" Persons who are **deaf**, or **dumb**, or **blind** are not thereby incapacitated for making a will if they are able to know what they do by it. One who is ordinarily **insane** may make a will during an interval in which he is of sound mind. No person can make a will while he is in such a state of mind, whether arising from **drunkenness** or from **illness** or from any other cause, that he does not know what he is doing: *e.g.*: (*a*) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his will. A cannot make a valid will. (*b*) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument nor the effect of its provisions. This instrument is not a valid will. (*c*) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a will. This is a valid will (H).[4]

Testamentary guardians.—A father, whatever his
be, may by will appoint a guardian or guardians for
during minority.[5]

Executor of will—See "*Executor.*"

Fraud, coercion, importunity.—A will, or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void: *e.g.*: (*a*) A falsely and knowingly represents to the testator that the testator's only child is dead, or that he has done some undutiful act, and thereby induces the testator to make a will in his (A's) favour: such will has been obtained by **fraud**, and is invalid. (*b*) A, by fraud and deception, prevails upon the testator to bequeath a legacy to him. The bequest is void. (*c*) A threatens to shoot B, or to burn his house, or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B in consequence makes a bequest in favour of C. The bequest is void, the making of it having been caused by **coercion.** (*d*) A, being of sufficient intellect, if undisturbed by the influence of others, to make a will, yet being so much under the control of B that he is not a free agent, makes a will dictated by B. It

4) Act X of 1865, s. 46.

5) ib., s. 47.

appears that he would not have executed the will but for fear of B. The will is invalid. (*e*) A, being in so feeble a state of health as to be unable to resist **importunity**, is pressed by B to make a will of a certain purport, and does so merely to purchase peace and in submission to B. The will is invalid. (*f*) A being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent **intercession and persuasion** with him to induce him to make a will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his will in the manner recommended by B. The will is not rendered invalid by the intercession and persuasion of B. (*g*) A, with a view to obtaining a legacy from B, pays him attention and flatters him, and thereby produces in him a capricious partiality to A. B, in consequence of such attention and **flattery**, makes his will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A (**H**).[6]

Execution of unprivileged will.—Every testator, not being a soldier employed in an expedition, or engaged in actual warfare, or a mariner at sea, must execute his will according to the following rules :—(1) The testator must **sign or affix his mark** to the will, or it must be signed by some other person in his presence and by his direction. (2) The signature or mark of the testator, or the signature of the person signing for him, must be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. (3) The will must be **attested by two or more witnesses**, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the **witnesses must sign the will** in the presence of the testator, but it is not necessary that more than one witness be present at the same time, and no particular form of attestation is necessary. If a testator, in a will or codicil duly attested, refers to any other document then actually written, as expressing any part of his intentions, such document is considered as forming a part of the will or codicil in which it is referred to (**H**).[7]

Privileged wills of soldiers and sailors. — Any soldier being employed in an expedition, or engaged in actual warfare, or any mariner being at sea, may, if he has completed the age of eighteen years, dispose of his property by a will made as is mentioned in the next paragraph. Such wills are called "privileged" wills: *e.g.*: (*a*) A, the **surgeon** of a regiment, is actually employed

6) Act X of 1865, s. 48.

7) ib., ss. 50, 51.

in an expedition. He is a soldier actually employed in an expedition, and can make a privileged will. (*b*) A is at sea in a merchant-ship, of which he is the **purser.** He is a mariner and, being at sea, can make a privileged will. (*c*) A, a soldier serving in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged will. (*d*) A, a mariner of a ship in the course of a voyage, is temporarily on shore while she is lying in harbour. He is, in the sense of the words used in this clause, a mariner at sea, and can make a privileged will. (*e*) A, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make a privileged will. (*f*) A, a mariner serving on a military expedition, but not being at sea, is considered as a soldier, and can make a privileged will.[8]

Making and execution of privileged wills.—Privileged wills may be in writing, *or* may be made by word of mouth. The execution of them is governed by the following rules:—(1) The will may be written wholly by the testator, with his own hand. In such case it need not be signed nor attested. (2) It may be written wholly or in part by another person and signed by the testator. In such case it need not be attested. (3) If the instrument purporting to be a will is written wholly or in part by another person, and is not signed by the testator, it will be considered to be his will, if it be shown that it was written by the testator's directions, or that he recognized it as his will. If it appear on the face of the instrument that the execution of it in the manner intended by him was not completed, the instrument will not, by reason of that circumstance, be invalid, provided that his non-execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument. (4) If the soldier or mariner shall have written instructions for the preparation of his will, but shall have died before it could be prepared and executed, such instructions will be considered to constitute his will. (5) If the soldier or mariner shall, in the presence of two witnesses, have given verbal instructions for the preparation of his will, and they shall have been reduced into writing in his lifetime, but he shall have died before the instrument could be prepared and executed, such instructions will be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him. (6) Such soldier or mariner, as aforesaid, may make a **will by word of mouth** by declaring his intentions before two witnesses present at the same time. (7) A will made by word of mouth is null at the expiration of one month after

8) Act X of 1865, s. 52.

the testator shall have ceased to be entitled to make a privileged will.[9]

Effect of marriage.—Every will is revoked by the marriage of the maker, except a will made in exercise of a power of appointment (v. *post*), when the property over which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the person entitled in case of intestacy. "Power of appointment" is defined as follows:—"Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.[1]"

A will may be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will (**H**).[2]

Revocation of unprivileged will.—No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by—(1) marriage (under the Hindu Wills Act marriage does not revoke a will or codicil);[3] or (2) by another will or codicil; or (3) by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is required to be executed (v. *ante*); or (4) by the burning, tearing, or otherwise destroying the same by the testator, or (5) by some person in his presence and by his direction, with the intention of revoking the same: *e.g.*: (*a*) A has made an unprivileged will. Afterwards A makes another unprivileged will which purports to revoke the first. This is a revocation. (*b*) A has made an unprivileged will. Afterwards A, being entitled to make a privileged will, makes a privileged will which purports to revoke his unprivileged will. This is a revocation (**H**).[4]

Revocation of privileged will.—A privileged will or codicil may be revoked by the testator—(1) by an unprivileged will or codicil; or (2) by any act expressing an intention to revoke it, and accompanied with such formalities as would be sufficient to give validity to a privileged will: in order to the revocation of a privileged will or codicil by an act accompanied with such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should, at the time of doing that act, be in a situation which entitles him to make a privileged will; or (3) by the burning, tearing, or otherwise destroying the same by the testator, or (4) by some person in his presence and by his direction, with the intention of revoking the same (**H**).[5]

Gift to attesting witness.—A will is not insufficiently attested by reason of any benefit thereby given, either by way of bequest

9) Act X of 1865, s. 53.
1) ib., s. 56.
2) ib., s. 49.
3) Act XXI of 1870, s. 3.
4) Act X of 1865, s. 57.
5) ib., s. 59.

or by way of appointment, to any person attesting it, or to his or her wife or husband: but the bequest or appointment is void so far as concerns the person so attesting, or the wife or husband of such person, or any person, claiming under either of them. A legatee under a will does not, however, lose his legacy by attesting a codicil which confirms the will.[6]

Witness not disqualified by interest or by being executor.—No person, by reason of interest in, or of his being an executor of, a will is disqualified as a witness to prove the execution of the will, or to prove the validity or invalidity thereof (H).[7]

No obliteration, interlineation, or other alteration made in any unprivileged will after its execution has any effect except so far as the words or meaning of the will are thereby rendered illegible or undiscernible, unless such alteration is executed in like manner as is required for the execution of the will (v. *ante*); save that the will, as so altered, will be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will (H).[8]

Revival of will.—No unprivileged will or codicil, nor any part thereof, which is in any manner revoked, will be revived otherwise than by the re-execution thereof, or by a codicil executed in manner above-mentioned and showing an intention to revive the same; and when any will or codicil which is partly revoked and afterwards wholly revoked, is revived, such revival will not extend to so much of the will or codicil as was revoked before the revocation of the whole, unless an intention to the contrary is shown by the will or codicil (H).[9]

Bequests—See "*Legacy and Bequest.*" The undermentioned sections lay down certain rules of construction, which are to be followed by the Court in determining questions as to what person or what property is denoted by any words used in a will[1] (v. *post*).

Bequests to religious and charitable uses—See "*Charities.*"

Residuary legatee.—A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property: *e.g.*: (*a*) A makes her will, consisting of several testamentary papers, in one of which are contained the following

6) Act X of 1865, s. 54.
7) ib., s. 55.
8) ib., s. 58.
9) ib., s. 60.
1) ib., ss. 61—98: ss. 61—77 apply to Hindus, &c., under Act XXI of 1870.

words:—"I think there will be something left, after all funeral expenses, &c., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to." B is constituted residuary legatee. (*b*) A makes his will, with the following passage at the end of it:—"I believe there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire B to do, and keep the residue for her own use and pleasure." B is constituted the residuary legatee. (*c*) A bequeaths all his property to B, except certain stocks and funds, which he bequeaths to C. B is the residuary legatee (**H**). Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect: *e.g.*: A, by his will, bequeaths certain legacies, one of which is void, and another lapses by the death of the legatee. He bequeaths the residue of his property to B. After the date of his will, A purchases a zamindari, which belongs to him at the time of his death. B is entitled to the two legacies and the zamindari as part of the residue (**H**).[2]

Death-bed gifts—See "*Donatio Mortis Causa.*"

Vesting of legacy.—If a legacy be given in general terms without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it will pass to his representatives (**H**).[3]

Lapse of legacy.—When a legacy "lapses" it becomes void and falls into the residue. If the legatee does not survive the testator the legacy cannot take effect, but will lapse and form part of the residue of the testator's property, unless it appear by the will that the testator intended that it should go to some other person. In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator: *e.g.*: (*a*) A bequest is made to A and his children. A dies before the testator, or happens to be dead when the will is made. The legacy to A and his children lapses. (*b*) A legacy is given to A, and, in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B (**H**).[4] But where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made (**H**).[5] Where the share that lapses is part of the general residue bequeathed by the will, that share will go as undisposed of: *e.g.*: the testator bequeaths the residue of his estate to A, B and C, to be equally divided between them: A dies before

2) Act X of 1865, ss. 89, 90.
3) ib., s. 91.
4) ib., s. 92.
5) ib., s. 97.

the testator. His one-third of the residue goes as undisposed of (**H**).[6]

Joint legatees.—If a legacy be given to two persons jointly and one of them die before the testator, the other legatee takes the whole: *e.g.:* The legacy is simply to A and B. A dies before the testator. B takes the legacy. But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee die before the testator, so much of the legacy as was intended for him will fall into the residue of the testator's property: *e.g.:* A sum of money is bequeathed to A, B and C, to be equally divided among them. A dies before the testator. B and C will only take so much as they would have had if A had survived the testator (**H**).[7]

Provisos in case of wills by Hindus, &c.—Nothing in the Hindu Wills Act authorizes a testator to bequeath property which he could not have alienated *inter vivos;* or to deprive any person of any right of maintenance of which, but for this Act, he could not deprive them by will; or to create in property any interest which he could not have created before September 1, 1870. See also p. 642.[8]

Registration of wills—See "*Registration.*"

Deposit of wills with Registrar—See "*Registration.*"

Filing of original wills with District Judge or Delegate.—Every District Judge or District Delegate must file and preserve all original wills of which probate or letters of administration with the will annexed may have been granted by him among the records of his Court, until some public registry for wills is established. The Local Government are empowered to make regulations for the preservation and inspection of the wills so filed.[9]

See "*Administration,*" "*Charities,*" "*Domicile,*" "*Donatio Mortis Causa,*" "*Executor,*" "*Intestacy,*" "*Legacy and Bequest,*" "*Probate,*" "*Trusts and Trustees,*" "*Transfer of Property,*" and *Index.*

6) Act X of 1865, s. 95.
7) ib., ss. 93, 94.
8) Act XXI of 1870, s. 3.
9) Act X of 1865, s. 259; Act V of 1881, s. 81.

WRONGFUL CONFINEMENT AND RESTRAINT.

AUTHORITIES—Indian Penal Code. Draft Indian Civil Wrongs Bill, 1886: Pollock on Torts, 2nd Ed.: Mayne's Indian Penal Code, 14th Ed.: Criminal Procedure Code · Cases cited.

The civil wrong of.—To wrongfully confine or restrain a person is both to commit an offence punishable under the Indian Penal Code, and a civil wrong (tort) for which an action for damages may be brought in a Civil Court. Whoever wrongfully restrains or wrongfully confines any person within the meaning of the Indian Penal Code (ss. 339, 340; see next paragraph), wrongs that person.[1]

The offence of wrongful restraint.—Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.[2] *Exception.*—The obstruction of a private way over land or water, which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section: *e.g.:* A obstructs a path along which Z has a right to pass, A *not* believing in good faith that he has a right to stop the path. Z is thereby prevented from passing: A wrongfully restrains Z.[3] The offence of **wrongful confinement** which corresponds to the "False Imprisonment" of English law is defined as follows:—Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond *certain circumscribing limits*, is said "wrongfully to confine" that person: *e.g.:* A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building: A wrongfully confines Z.[4] See "*Habeas Corpus.*"

Freedom of the person includes immunity not only from the actual application of force, but from every kind of detention and restraint not authorised by law. The infliction of such restraint is the wrong of false imprisonment. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. The detainer must, however, be such as to limit the party's freedom of motion in all directions.[5] When an action for false imprisonment and arrest is brought and defended, the real question in dispute is mostly, though not always, whether the imprisonment is justified. With regard to the

1) Pollock, p. 541; s. 29, Draft Indian Civil Wrongs Bill.
2) Penal Code, s. 339.
3) ib.
4) ib., s. 340.
5) 7 Q. B., 742.

lawfulness of arrest and imprisonment there are elaborate provisions in the Criminal Procedure Code, the main feature of which is that a Police-officer may arrest a person on a reasonable suspicion of his having committed a cognizable offence without a warrant. A person who puts in motion a ministerial officer who confines another will be guilty of the wrongful confinement according as the confinement was his act, or that of the officer. When a person states his case to a judicial officer, who thereupon acting on his own judgment commits the accused to prison, the informant may be guilty of a malicious charge under s. 211, Penal Code (v. "*Malicious Prosecution and Abuse of Process*"), but not of wrongful confinement.[6] In making the arrest the officer must be satisfied that there is reasonable and probable cause for suspicion. It is difficult to define reasonable and probable cause in this connection, but it can be affirmed with certainty that on the one hand a belief honestly entertained is not of itself enough; on the other hand, a man is not bound to wait until he is in possession of such evidence as would be admissible and sufficient for prosecuting the offence to conviction, or even of the best evidence which he might obtain by further enquiry.[7]

Search for persons wrongfully confined.—If any Presidency Magistrate, Magistrate of the First Class, or Sub-divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined. The person if found must be immediately taken before a Magistrate, who will make such order as in the circumstances of the case seems proper.[8] See "*Prosecution*," pp. 527, 528.

Powers to compel restoration of abducted females—See "*Habeas Corpus*," p. 281.

See *Index*.

6) Mayne's Penal Code, p. 313 : L.R., 5 C. P., p. 540.

7) L. R., 3 Ex., p. 202

8) Criminal Procedure Code, s. 100.

APPENDIX.

(1)

SCHEDULED DISTRICTS.

(See "*Action and Actionable Claim*," p. 5.)

VARIOUS parts of British India have never been brought within, or have *from time to time been removed from*, the operation of the general Acts and Regulations and the jurisdiction of the ordinary Courts of Judicature. Doubts arose in some cases as to which Acts or Regulations were in force in such parts, and in other cases as to what were the boundaries of such parts: Act XIV of 1874 (Scheduled Districts) was passed in order to provide readier means than then existed for ascertaining the enactments in force in such territories and the boundaries thereof, and for administering the law therein.

The term "Scheduled Districts" means the territories mentioned in the schedule given below.

The Local Government, with the previous sanction of the Governor-General in Council, may, from time to time, by notification in the *Gazette of India* and also in the local Gazette (if any)—(*a*), declare what enactments are actually in force in any of the Scheduled Districts, or in any part of any such District, (*b*) declare of any enactment that it is not actually in force in any of the said Districts or in any part of any such District.

On the issue of a notification declaring what enactments are in force, or not in force, in any Scheduled District, the enactments so notified shall be deemed to be in force, or not in force, according to the tenor of the notification in such District, and every such notification shall be binding on all Courts of Law. The Local Government, with the previous sanction of the Governor-General in Council, may, from time to time, by notification in the *Gazette of India* and also in the local Gazette (if any), extend to any of the Scheduled Districts, or to any part of any such District, any enactment which is in force in any part of British India at the date of such extension.

Nothing contained in this Act or in any notification issued under the powers conferred by this Act shall be deemed—(*a*) to affect the criminal jurisdiction of any Court over European British subjects, or (*b*) to affect any law other than laws contained in Acts or Regulations or in rules made in exercise of powers conferred by such Acts or Regulations.

SCHEDULE.

PART I.

Scheduled Districts, Madras.

I.—*In Ganjam.*

(1.) The Gumsur Maliahs, including Chokapad.
(2.) The Surada Maliahs.
(3.) The Chinna Kimedi Maliahs.
(4.) The Pedda Kimedi Maliahs.
(5.) The Bodaguda Maliahs.
(6.) The Surangi Maliahs.

I.—*In Ganjam*—(contd.)

(7.) The Paıla Kimedi Maliahs.
(8.) The Muttas of Korada and Ronaba (otherwise called Srikarma).
(9.) The Jurada Maliah.
(10.) The Jalantra Maliah.
(11.) The Mandasa Maliah.
(12.) The Budarasinghi Maliah.
(13.) The Kuttingia Maliah.

II.—*In Vizagapatam.*

(1.) The Jeypur Zamindari.
(2.) Golconda Hills, west of the River Boderu.
(3.) The Madugol Maliahs.
(4.) The Kasipur Zamindari.
(5.) The Panchipenta Maliahs.
(6.) Mondemkolla, in the Merangi Zamindari.
(7.) The Konda Mutta of Merangi.
(8.) The Gumma and Konda Muttas of Kurpam.
(9.) The Kottam, Ram and Konda Muttas of Palkonda.

III.—*In the Godavari District.*

(1.) The Bhadrachalam Taluq.
(2.) The Rakapilli Taluq.
(3.) The Rampa Country.

IV.—*In the Indian Ocean.*

The Laccadive Islands, including Minicoy.

PART II.

Scheduled Districts, Bombay.

I.—The Province of Sindh.
II.—The Panch Mahals.
III.—Aden.
IV.—The villages belonging to the following Mehwassi Chiefs :—
(1.) The Parvi of Kathi.
(2.) The Parvi of Nal.
(3.) The Parvi of Singpur.
(4.) Walwi of Gaohalli.
(5.) The Wassawa of Chikhli.
(6.) The Parvi of Nawalpur.

PART III.

Scheduled Districts, Bengal.

I.—The Jalpaiguri and Darjeeling Districts.
II.—The Hill Tracts of Chittagong.
III.—The Santhal Parganas.
IV.—The Chutia Nagpur Division.
V.—The Mahals of Angul and Banki.

PART IV.

Scheduled Districts, North-Western Provinces.

I.—The Jhansi Division, comprising the Districts of Jhansi, Jalaun and Lalatpur.
II.—The Province of Kumaon and Garhwal.

Scheduled Districts, North-Western Provinces—(contd.)

III.—The Terai Parganas, comprising—Bazpur, Kashipur, Jaspur, Rudarpur, Gadarpur, Kilpuri, Nanak-Mattha and Bilheri.

IV.—In the Mirzapur District :—

(1.) The tappas of Agori Khas and South Kon in the Pargana of Agori.
(2.) The tappa of British Singrauli in the Pargana of Singrauli.
(3.) The tappas of Phulwa, Dudhi and Barha in the Pargana of Bichipar.
(4.) The portion lying to the South of the Kaimor Range.

V.—The Family Domains of the Maharaja of Benares, comprising the following parganas :—

Bhadohi and Kheyra Mangror in the Mirzapur District, Kaswa Raja in the Benares District.

VI.—The tract of country known as Jaunsar Bawar in the Dehra Dun District.

PART V.

Scheduled Districts, Panjab.

The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan, Dera Ghazi Khan, Lahaul and Spiti.

PART VI.

Scheduled Districts, Central Provinces.

Chhattisgarh Zamindaris, viz.:—

(1.) Khariar.
(2.) Bindra Nawagarh.
(3.) Sahezpur.
(4.) Gandai.
(5.) Silheti.
(6.) Barbaspur.
(7.) Thakurtola.
(8.) Lohara.
(9.) Gondardehi.
(10.) Fingeswar.
(11.) Pandaria.
(12.) Pendra.
(13.) Matin.
(14.) Uprora.
(15.) Kenda.
(16.) Lapha.
(17.) Chhuri.
(18.) Korba.
(19.) Chapa.
(20.) Bora Sambhar.
(21.) Phuljhar.
(22.) Kolabira.
(23.) Rampur.

Chanda Zamindaris.

(1.) Ahiri.
(2.) Ambagarh Chauki.
(3.) Aundhi.
(4.) Dhanora.
(5.) Dudhmala.
(6.) Gewarda.
(7.) Jharapapra.
(8.) Khutgaon.
(9.) Koracha.
(10.) Kotgal.
(11.) Muramgaon.
(12.) Panabaras.
(13.) Palasgarh.
(14.) Rangi.
(15.) Sirsundi.
(16.) Sonsari.
(17.) Chandala.
(18.) Gilgaon.
(19.) Pawi Mutanda.
(20.) Pategaon.

Chhindwara Jagirdaris.

(1.) Harai.
(2.) Chhater.
(3.) Gorakhghat.
(4.) Gorpani.
(5.) Baktagarh.
(6.) Bardagarh.
(7.) Pachmarhi.
(8.) Partabgarh.
(9.) Almod.
(10.) Sonpur.
(11.) Bariam Pagara.

PART VII.

The Chief Commissionership of Coorg.

PART VIII.

The Chief Commissionership of the Andaman and Nicobar Islands.

PART IX.

The Chief Commissionership of Ajmere and Mairwara.

PART X.

The Chief Commissionership of Assam.

PART XI.

The Hill Tracts of Arakan.

PART XII.

The Pargana of Manpur.

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(2)

FORM OF PLAINT.

(See "*Action and Actionable Claim*," p. 7.)

IN THE COURT OF....., AT.....

Civil Suit No.....

A. B. of.....

against

C. D. of.....

A. B., the abovenamed plaintiff, states as follows :—

1. That on the.....day of.....18....., at....., he lent the defendant.....rupees, repayable on demand [*or* on the.....day of.....].

2. That the defendant has not paid the same, except.....rupees paid on the.....day of.....18..... .

The plaintiff prays judgment for.....rupees with interest at.....per cent. from the.....day of.....18.....

[*The plaint is here to be signed and verified in the following form.*]

I, A. B., the plaintiff named in the foregoing plaint, do declare that what is stated therein is true to my knowledge, except as to matters stated on information and belief, and that as to those matters I believe the same to be true.

FORM OF CONCISE STATEMENT.

Money lent. The plaintiff's claim is.....rupees for money lent [and interest].

(3)

FORM OF WRITTEN STATEMENT.

(See "*Action and Actionable Claim*," p. 9.)

IN THE COURT OF....., AT.....

Civil Suit No.....

A. B. of .....

against

C. D. of .....

C. D., the abovenamed defendant, states as follows:—

1. [*In this and succeeding paragraphs set out the facts which constitute the defence.*]

2, 3, 4, etc.

The defendant submits that under the circumstances aforementioned this suit should be dismissed with costs.

[*The written statement is here to be signed and verified*].

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(4)

APPLICATION TO SUE *in formâ pauperis*.

(See "*Action and Actionable Claim*," p. 15.)

The application for permission to sue by a pauper must be in writing, and must contain the particulars required in regard to plaints in suits (*v.* p. 6 and *ante*): a schedule of any moveable or immoveable property belonging to the petitioner, with the estimated value thereof, must be annexed thereto; and it must be signed and verified in the manner prescribed for the signing and verification of plaints (v. *ante*).

IN THE [HIGH COURT OF JUDICATURE] AT.....

[*Ordinary Original Civil Jurisdiction.*]

A. B. of.....

against

C. D. of.....

To

[The Honourable.....Chief Justice and his companion Justices of the said Court.]

The Humble Petition of the Plaintiff abovenamed

Sheweth,

1. [*Set out claim.*]

2, 3, 4, etc.

5. That your petitioner has no means whatsoever, and that save and except the amount of your petitioner's claim the subject-matter of this suit and the articles mentioned in the schedule hereunto annexed and marked with the letter A and worth about Rupees..... he has no other property to meet the expenses of this suit.

Your petitioner therefore humbly prays your [Lordships for an order that he be at liberty to proceed with this suit *in formâ pauperis* and that [*set out relief prayed for*] and for such further and other relief as the nature of the case may require and to this [Honourable] Court may seem fit.

And your petitioner, as in duty bound, shall ever pray, etc.

[*Verification* (v. *ante*)].

Schedule A referred to in annexed petition.

(*State articles and their value*).

(5)

FORM OF A MEMORANDUM OF APPEAL.

(See "*Appeal, Revision, Review and Reference*," pp. 51, 52.)

MEMORANDUM OF APPEAL.

*Filed on the .....day of .....*189 .....

No.....of 18 .....

IN THE [HIGH COURT OF JUDICATURE] AT .....

Appellate Civil Jurisdiction.

Original Suit No. .....of 18.....

A. B., residing at .....*Defendant, Appellant*

versus

C. D., residing at.....*Plaintiff, Respondent.*

MEMORANDUM OF APPEAL.

A. B., the defendant abovenamed, appeals to this Honourable Court in its appellate jurisdiction against the judgment and decree of the Honourable .....one of the Judges of this Honourable Court in the above suit, dated the.....day of..... .....189....., for the following amongst other reasons, namely:—

1. For that [*In this and succeeding paragraphs set out the grounds of appeal*].....

and generally. For that the judgment and decree of the learned Judge are in other respects erroneous in fact and bad in law and ought to be set aside.

(6)

A FORM OF POWER OF ATTORNEY.

(See "*Power of Attorney*," p. 516.)

KNOW ALL MEN by these Presents, that I do hereby appoint C. D., of ..... etc., to be my Attorney, for the purposes hereinafter expressed, that is to say, to..... .....[*State the purpose for which the power is given; the power must be adapted to the purposes for which it is given, and to the extent of the authority which the person giving the power wishes to entrust to his Attorney*] ....

AND GENERALLY to do, execute and perform any other act, deed, matter or thing whatsoever relative to the premises as fully to all intents and purposes whatsoever as I might or could do in my own proper person in case these Presents had not been made .....

[AND* to appoint one or more Substitute or Substitutes under him, and again to remove and displace, and another or others to appoint], GIVING and hereby GRANTING unto my said Attorney [and his Substitute or Substitutes] my full and whole power and authority in the Premises. AND WHATSOEVER my said Attorney [and his Substitute or Substitutes] shall lawfully do or cause to be done in or about the Premises by virtue and in execution of these presents, I hereby agree to ratify and confirm. IN WITNESS whereof I have hereunto set my Hand and Seal this.....day of..... ..... in the year.....

Signed, Sealed and delivered in the presence of }

* *Note.*—The words within brackets will be omitted where the grantor does not wish to confer on his Attorney a power of appointing Substitutes.

(7)

COMPOUNDING OF OFFENCES.

(See "*Prosecution*," pp 535, 536.)

The offences punishable under the sections of the Indian Penal Code, described in the first two columns of the table next following, may be compounded by the persons mentioned in the third column of that table :—

Offence.	Sections of Indian Penal Code applicable.	Person by whom offence may be compounded.
Uttering words, &c., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt ...	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use of criminal force.	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour.	374	The person compelled to labour.
Mischief when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.
Criminal trespass ...	447	The person in possession of the property trespassed upon.
House-trespass ...	448	
Criminal breach of contract of service.	490, 491, 492	The person with whom the offender has contracted.
Adultery ...	497	The husband of the woman.
Enticing or taking away or detaining with a criminal intent a married woman.	498	
Defamation ...	500	The person defamed.
Printing or engraving matter knowing it to be defamatory.	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	502	
Insult intended to provoke a breach of the peace.	504	The person insulted.
Criminal intimidation, except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.

(8)

FORM OF WILL.

(See "*Wills*," p. 638.)

This is the last Will and Testament of me *A. B. of* .....

I DIRECT that all my just debts, funeral and testamentary expenses be paid and satisfied by my Executor [*or* Executrix] hereinafter named as soon as conveniently may be after my decease. I give, devise and bequeath my [*state property*] .... to [*state person*] ....

And I nominate constitute and appoint [*state person*] . ... to be Executor [*or* Executrix] of this my Will, and [hereby revoking all former or other Wills and Testaments by me at any time heretofore made] I declare this to be my last Will and Testament.

IN WITNESS whereof I, the said ..... have to this my last Will and Testament set my hand the.....day of .....in the year..... .

A. B. [*Signature of Testator.*]

Signed and acknowledged by the abovenamed A. B. (the Testator) as and for his [*or* her] last Will and Testament in the presence of us both present at the same time who in his [*or* her] presence at his [*or* her] request and in the presence of each other have hereunto subscribed our names as Witnesses.

C. D...... .....

E. F......

[*Names and Addresses of Witnesses.*]

ACT I OF 1894 (LAND ACQUISITION).

(See "*Land*," p. 363.)

This Act, which extends to the whole of British India, and which came into force on the 1st March 1894, repeals the previous Land Acquisition Act (X of 1870).

Preliminary investigation.—Whenever it appears to the Local Government that land in any locality is likely to be needed for any public purpose, a notification to that effect is published in the Official Gazette and public notice of the substance of such notification is given at convenient places in the said locality. A Government officer and his servants and workmen may enter upon and survey and take levels of any land in such locality: dig or bore into the subsoil: and do all other acts necessary to ascertain whether the land is adapted for such purpose; set out the boundaries and the intended line of the work; mark such levels, boundaries, and line by placing marks and cutting trenches; and where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, cut down and clear away any part of any standing crop, fence, or jungle. No person, however, can enter into any building, or upon any enclosed court or garden attached to a dwelling-house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so.[1] The officer must pay for all damage, and in case of dispute as to the sufficiency of the amount paid or tendered must refer the dispute to the decision of the Collector, or other chief revenue officer of the district.[2]

Declaration of intended acquisition. — Whenever it appears to the Local Government that any particular land is needed for a public purpose, or for a company (v. *post*), a declaration is made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders. No such declaration will be made unless the compensation to be awarded is to be paid by a company, or wholly or partly out of public revenues, or some fund controlled or managed by a local authority. The declaration is conclusive evidence that the land is needed for a public purpose, or for a company, as the case may be; and after making such declaration, the Local Government may acquire the land in the manner prescribed by the Act.[3]

1) Act I of 1894, s. 4. 2) ib., s. 5. 3) ib., s. 6.

After declaration the Collector takes order for the acquisition of the land, which is marked out, measured and planned, if this has not already been done. Notice is given that the land is to be acquired, and that claims to compensation for all interests in such land may be made to him. All persons interested in the land must appear personally or by agent before the Collector and state the nature of their respective interests in the land, and the amount and particulars of their claims to compensation for such interests. The Collector has power to require and enforce the making of statements as to names and interests.[4]

Enquiry and award by Collector.—On the day fixed the Collector proceeds to make enquiry into objections (if any) and into the respective interests of the persons claiming the compensation, and will make an award of—(1) the true area of the land; (2) the compensation which, in his opinion, should be allowed for the land; and (3) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him. The award is filed and is (except as hereinafter provided; v. *post*) final and conclusive evidence as between the Collector and the persons interested, of the true area and value of the land and the apportionment of the compensation. In determining the amount of compensation the Collector must be guided by the provisions of sections 23 and 24 (v. *post*).[5]

Taking possession.—When the Collector has made an award he may take possession of the land, which thereupon vests absolutely in Government, free from all incumbrances. The Local Government is given special powers in cases of urgency.[6]

Reference to Court.—Any person interested who has not accepted the award may, by written application to the Collector, require that the matter may be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested. The application must state the grounds on which objection to the award is taken. Every such application must be made—(*a*) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks of the date of the award; (*b*) in other cases within six weeks of the receipt of the notice from the Collector of his award given to the persons who were not present when the award was made, or within six months from the

4) Act I of 1894, ss. 7—10. 5) ib., ss. 11, 12 (1), 15. 6) ib., ss. 16, 17.

date of the Collector's award, whichever period shall first expire. The Collector then makes his statement to the Court, which will thereupon give notice of the day on which it will proceed to determine the objection. The proceedings will be in open Court.[7]

In determining the amount of compensation to be awarded for land acquired under this Act the Court must take into consideration—(1) the **market value** of the land at the date of the publication of the declaration relating thereto; (2) the damage sustained by the person interested, by reason of the taking of any **standing crops or trees** which may be on the land at the time of the Collector's taking possession thereof; (3) the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of **severing** such land from his other land; (4) the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition **injuriously affecting his other property** moveable or immoveable, in any other manner, or his **earnings**; (5) if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to **change his residence or place of business,** the reasonable expenses (if any) incidental to such change; and (6) the damage (if any) *bonâ fide* resulting from **diminution of the profits of the land** between the time of the publication of the declaration and the time of the Collector's taking possession of the land.

In addition to the market value of the land, the Court must in every case award a sum of **15 per cent. on such market value,** in consideration of the compulsory nature of the acquisition.[8]

But the Court must not take into consideration—(1) the degree of urgency which has led to the acquisition; (2) any disinclination of the person interested to part with the land acquired; (3) any damage sustained by him, which, if caused by a private person, would not render such person liable to a suit; (4) any damage which is likely to be caused to the land, after the date of the publication of the declaration, by or in consequence of the use to which it will be put; (5) any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired; (6) any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put; or (7) any outlay or improvements on, or disposal of, the land acquired, commenced, made or effected without the sanction of the Collector after the date o the publication of the declaration.[9]

7 Act I of 1894, ss. 18—22. 8) ib., s. 23. 9) ib., s. 24.

Rules as to amount of compensation.—(1) When the applicant has made a claim to compensation, the amount awarded to him by the Court cannot exceed the amount so claimed or be less than the amount awarded by the Collector. (2) When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded by the Court can in no case exceed the amount awarded by the Collector. (3) When the applicant has omitted for a sufficient reason (to be allowed by the Judge) to make such claim, the amount awarded to him by the Court cannot be less than, and may exceed, the amount awarded by the Collector.[1]

Costs.—When the award of the Collector is not upheld, the costs will ordinarily be paid by the Collector, unless the Court is of opinion that the claim of the applicant was so extravagant or that he was so negligent in putting his case before the Collector that some deduction from his costs should be made, or that he should pay a part of the Collector's costs.[2]

Apportionment.—Where there are several persons interested, if such persons agree in the apportionment of the compensation, the particulars of such apportionment will be specified in the award, and as between such persons the award will be conclusive evidence of the correctness of the apportionment. When the amount of compensation has been settled by the Collector, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof is payable, the Collector may refer such dispute to the decision of the Court.[3]

Payment.—On making an award the Collector must tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award, and must pay it to them unless prevented by some one or more of the following contingencies. If they do not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation, or as to the apportionment of it, the Collector must deposit the amount of the compensation in Court.[4]

Temporary occupation of land.—Whenever it appears to the Local Government that the temporary occupation and use of any waste or arable land are needed for any public purpose, or for a company (v. *post*), the Local Government may direct the Collector to procure the occupation and use of the same for such term as

1) Act I of 1894, s. 25.
2) ib., s. 27 (2).
3) ib., ss. 29, 30.
4) ib., s, 31 (1), (2).

it shall think fit, not exceeding three years from the commencement of such occupation.[5]

Acquisition of land for companies.—A company may be authorized to enter on and survey land and to exercise the powers conferred by section 4 (v. *ante*).[6] The preceding provisions[7] relating to the acquisition of land will not be put in force in order to acquire land for any company, unless with the previous consent of the Local Government, nor unless the company execute an agreement with the Secretary of State in Council.[8] (See "*Land*," p. 367.)

Exemption from stamp duty and fees.—No award or agreement made under this Act is chargeable with stamp duty, and no person claiming under any such award or agreement is liable to pay any fee for a copy of the same.[9]

Suits for anything done in pursuance of Act.—No suit or other proceeding can be commenced or prosecuted against any person for anything done in pursuance of this Act, without giving to such person a month's previous notice in writing of the intended proceeding, and of the cause thereof, nor after tender of sufficient amends.[1]

Procedure.—Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure apply to all proceedings before the Court under this Act.[2] See "*Action and Actionable Claim.*"

Appeals.—Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees (see "*Appeal, Revision, Review, and Reference*") an appeal lies to the High Court from the award or from any part of the award of the Court in any proceedings under this Act.[3]

5) Act I of 1894, s. 35 (1).
6) ib., s. 38.
7) ss. 6—37.
8) ib., ss. 39—41.
9) ib., s. 51.
1) ib., s. 52.
2) ib., s. 53.
3) ib., s. 54.

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