

GENERAL DIGEST
OF THE
CIVIL RULINGS AND DECISIONS OF HER MAJESTY'S
PRIVY COUNCIL AND OF THE HIGH COURTS
IN INDIA,

IV.
W OF CONTRACT
AND
MORTGAGE.

FROM 1862 TO 1876.

FOR THE USE OF THE BENCH THE BAR AND THE PUBLIC.

COMPILED-ARRANGED AND PUBLISHED

GANPUTRAO HARI KHANDEKAR

POONA.

REGISTERED UNDER ACT XXV OF 1867.

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Printed at the "Law Printing Press" Poona Narayan Pait.

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A

GENERAL DIGEST

OF THE

CIVIL RULINGS AND DECISIONS OF HER MAJESTY'S
PRIVY COUNCIL AND OF THE HIGH COURTS
IN INDIA.

LAW OF CONTRACT.

A.

ACQUIESCENCE.

1. Before a man can be held to have given by his conduct an implied assent to a transaction, especially one which operates as a conveyance of a valuable estate, it must be shown that he was fully aware of what the transaction was, and what effect it would have upon his interests at the time he so conducted himself as to indicate assent. 22 W. R. 341.

ACCOUNT.

2. A member of an ordinary partnership dissoluble at will cannot, except under special circumstances, seek an account without praying a dissolution. 2 M. H. R. 28.

3. Where a defendant refused to render accounts, and there was evidence of spoliation of the Banking Books, the Court charged him with the principal sum for which he was accountable, with interest at 12 per cent. per mensem in lieu of the profits he failed to account for. 10 M. I. A. 491.

ACCOUNT (Adjustment of).

4. An adjustment of accounts may be proved by oral evidence. 1 M. H. R. 183.

ACCOUNT (Settled).

5. Principles which regulate a Court of Equity in opening stated and settled accounts.

Accounts of long standing and great complication of a mercantile firm at Calcutta one of the partners of whom afterwards acted as agent in England, involving charges for agency and partnership transactions, were mutually agreed to be investigated and closed. After long negotiations and discussion respecting some of the charges, an agreement was come to, the parties agreeing to strike the general balance at a given sum, reserving one item of the account, amounting to a considerable sum, for future investigation. This reserved item was subsequently settled by the acceptance of a Bill of exchange for a lesser amount, as such reserved item, if opened, would have disarranged the settled general account. The Bill of exchange was dishonoured, and an action brought to recover the amount. A bill was then filed for an injunction, for the cancellation of the Bill of exchange, and that the accounts so settled might be opened. The Supreme Court at Calcutta held, that the reserved item being left open, was evidence that the account was not finally closed, and decreed the accounts to be opened, referring the cause to the Master.

Upon appeal, held by the Judicial Committee (reversing such decree and dismissing the bill, with costs) that the transaction amounted to an adjustment of the general accounts between the parties, subject to the reserved item which was ultimately settled, and that the accounts so settled and closed could not, in the absence of fraud, be re-opened. 5 M. I. A. 372.

6. Where two parties having dealings think it necessary to inspect the state of accounts between them, and the debtor inspects the books of the creditor and signs them in acknowledgment of what is due from him, he may be sued on such settlement of account without a bond executed on stamp paper. 19 W. R. 246.

ACCOUNT (Stated).

7. An entry of an account stated, made by a debtor in his creditor's books, is not a contract in writing within the meaning of Act IX of 1871 section 21. 10 B. H. R. 375.

ACT XIV OF 1840.

8. Act XIV of 1840 does not apply to contracts between Hindus. 1 M. H. R. 9.

ACT IX OF 1872 SS. 1 & 27.

9. The Statute 21 Geo. III, c. 70, which applied to the Supreme Court, and gave to Hindus the right to have matters of contract decided by their own laws, became, if its provisions apply to the High Court, part of the law of that Court not by virtue of the Statute itself, but by virtue of the Charter, which was subject to alteration by the Governor General in Council; and having ceased to have any operation as an Act, it was unnecessary to repeal it expressly by the Contract Act (IX of 1872).

That Act is applicable to Hindus residing in Calcutta; therefore, where the plaintiff (a Hindu) agreed with the defendants, also Hindus,

that he would cease to carry on his business in a certain locality in Calcutta, in consideration of receiving from them a specified sum, it was held in a suit to enforce the contract that such an agreement was void under section 27 of the Contract Act. The words "not consistent with the provisions of this Act" in section 1 of the Contract Act apply to "any usage or custom of trade" or any incident of any contract".
14 B. L. R. 70.

ACT IX OF 1872 S. 108.

10. The possession which is meant by the first part of Exception I section 108 of the Indian Contract Act, 1872, is a possession which is unqualified and not to be restricted otherwise than by the owner giving instructions to the person who has it.

It is the kind of possession which a factor or agent has, where the owner of the goods, although he has parted with the possession, may give instructions to the person in possession what to do with the goods. It is such possession as an owner has; and in such a case the person selling contrary to his instructions, gives a title to a buyer acting in good faith. The Exception does not apply where there is a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose, in which case the owner has no right to give instructions.
20 W. R. 467.

ACT (Disputing Validity of One's own).

11. An act done by a party with the view of defeating a claim made against him does not estop him from disputing afterwards the validity of that act. 24 W. R. 392.

ACTS (Of Government Officials).

12. Where, by a decree of the Special Commissioner's Court, established under Act IX of 1853, a decree was made directing property to be made over to a claimant, the proceedings of officials making over that property were, when followed by a suit against Government to obtain possession of a portion of that property, in which suit the Government raised no question as to the property of the decree, or of the making over of the bulk of the property under it: Held, to bind the Government as to the right of the decree-holder to the property. 5 B. L. R. P. C. 312.

ADVOCATE AND CLIENT.

13. A barrister enrolled as an Advocate of the High Court is incapacitated from making a contract of hiring as an Advocate, and cannot maintain a suit for the recovery of his fees. 3 N. W. P. 83.

14. Taking it that the rule of English law, that the relation of Counsel or Advocate and Client creates the mutual incapacity to make a binding contract of hiring and service either express or implied, governs the relations of Advocate and Client generally in this country, there must be the relation of Advocate and Client to give rise to the incapacity, the incapacity is strictly confined to contracts relating to service as Advocate in litigation and matters ancillary to such service.

The degree of Barrister is but one of the qualifications for admission and enrolment as an Advocate of the High Court.

Where the defendant, a Barrister who was not admitted an Advocate of the High Court, or specially authorised to plead in the Session Court, accepted a vakalatnamah from the plaintiff to defend him upon a charge pending in the Session Court, and the defendant failed to appear on the day to which the trial of the plaintiff was adjourned, and the plaintiff sued the defendant to recover the amount of the fee paid:—Held that the suit was maintainable. 4 M. H. R. 244.

AGENT * (Gratuitous).

15. A gratuitous agent is liable for any loss sustained by his principal through the gross negligence of the agent. What is gross negligence is a question on the facts of each particular case. 2 M. H. R. 449.

AGENT (Mercantile).

16. A special authority is required to empower a mercantile agent to draw or endorse bills and notes, but the authority may be implied from circumstances. 7 M. H. R. 369.

AGENT (Of Government).

17. An agent on the part of Government (an Officer of the Public Works Department as in this case) cannot bind the Government with a contract made by him in excess of his authority. Nor can any payment made by the Officer who has so exceeded his authority in making the contract, make that contract binding. 17 W. R. 498.

AGENT (Of Insolvent Debtor's Estate).

18. A suit for recovery of moneys due by an agent of the Official Assignee of an Insolvent Debtor's Estate, and for delivery of certain papers and documents belonging to such Insolvent Estate, will lie against the legal representative of such agent after his decease, and the right of action will not expire on his death. 2 N. W. P. 103.

19. Agents who have collected money on account of an Insolvent Estate are severally bound to prove to the assignee or his representative that the expenditure of the several amounts charged in their accounts has been actually and properly made, and the *onus probandi* rests on such agents.

It is incumbent on such agents to offer proof in support of all the items in their accounts which are impugned, and the property, or the actual expenditure, of such items should form the subject matter of issues properly framed. 2 N. W. P. 104.

AGREEMENT.

20. If a plaintiff sues upon an *ikrar*, he is not entitled to a decree contrary to its terms. Thus, if the *ikrar* makes each of se-

veral shares severally liable, all the co-sharers cannot be made jointly liable. 7 W. R. 157.

21. An *ikramamah* executed between plaintiffs and defendants, by which plaintiffs undertook to satisfy any claims to mesne profits that might be advanced by the parties dispossessed was held to be no protection to defendants in the case of parties dispossessed by plaintiffs. 17 W. R. 229.

22. When an agreement provides that an act is to be done by one of the parties within a limited time, and the party fails to perform the act within such time, if the other party elects, notwithstanding, to take the benefit of the contract, the latter must perform his part of it; and though exact and literal performance of the original stipulation has become impossible, the terms of the contract must be carried out as nearly as possible. 13 W. R. 360.

23. An agreement entered into by two brothers, who never were constituted by Hindu law members of an undivided family, provided for the mode in which self-acquired property to a moiety of which they were each entitled should be managed during their lives, for the right of survivorship, and for its descent upon the death of the survivor. One clause of the agreement, literally translated, was in these words:—"To the married wives of both of us if there is not male offspring in the event of there being sons not born in wedlock must devide into equal shares for their own benefit". Upon the construction of this clause, held that the estate was to be equally divided amongst the wives and the sons born in concubinage. 2 M. H. R. 369.

24. Where there was a written agreement between the 1st defendant's father and the Collector, in which the first defendant's father undertook to pay a certain rent "for ever," but these general words were qualified by the words that he is to pay the rent "as long as the village remains in his possession," and the document did not contain any express agreement or undertaking on the part of the Collector:—Held, that the enjoyment of the land by the first defendant's father at a certain rent for as long as he retained possession of it was ample consideration and motive for his agreement to pay the rent, and that it was not necessary, in order to prevent the consideration and motive for his agreement from being wholly defeated, to imply on the part of the Collector an agreement that he should hold the land for ever at that rent
3 M. H. R. 106.

25. Where the proprietors of a mehal had agreed with an *ijaradar*, that, in the event of their granting a *putnee* to any body, he should have the refusal, and notwithstanding their agreement gave a *putnee* to another *ijaradar*: Held, that the latter having been no party to the stipulation, was not bound thereby, and that the *putnee* granted to him cannot be set aside. 10 W. R. 254.

26. Where a document, although blank when signed and put into the

hands of one of certain parties, is afterwards filled up by the consent of those parties with words which have already been agreed upon by them and have in consequence of such consent been already drafted, the signature to the fair copy, although written before the words were filled in, is just as binding as if it was attached to the document after the words had been written down in it. 11 W. R. 217.

27. Plaintiff, who was a broker, agreed to give up an admitted claim to brokerage on 2,000 Corahs previously disposed of, in consideration of defendant, who was a commission agent for different kinds of goods, employing him to sell a like quantity of other Corahs and all his other goods for the future, employing plaintiff alone as his broker for the sale of his goods. It was also agreed that if defendant did not sell the second batch of Corahs through plaintiff, the brokerage on the whole would be payable by defendant.

Held that the agreement was not void either as being in restraint of trade or for uncertainty. 23 W. R. 146.

28. Where the plaintiff, a native artist, agreed to supply and the defendants agreed to purchase pictures as ordered from time to time, subject to the approval of each picture by the defendants, the prices to be fixed on delivery and acceptance:—Held that a distinct contract become complete in respect of the pictures as they were from time to time delivered and approved of, at the price then fixed, and that the case came within clause 9 of section 1 of the Limitation Act XIV of 1859, and not within clause 8 nor clause 2 of the same section. 2 M. H. R. 6.

29. Certain property was handed over by a judgment-debtor to the decree-holder for the purpose of satisfying the decree, and an arrangement was between them under which it was stipulated that if, within a given interval, there should hereafter be found to be a defect in the title of the judgment-debtor, and the decree-holder should be dispossessed, then, whatever the unrealized portion of the amount of the decree, the decree-holder should be at liberty to realize it by execution of the decree. Held, that the reasonable construction to be put upon this agreement was that, if there appeared to be a defect of title to any portion of the property handed over, and the decree-holder should be dispossessed of it by reason of such defect, then the transaction was to be put an end to, and he was to revert to his original right. 18 W. R. 497.

30. In one character the defendants claimed the whole 16 annas of certain churs as former proprietors; in another, as arrears of a small share of another hostile estate. In the former character they entered into an agreement with the plaintiff that, if he, at his own expense and trouble, obtained a settlement of the churs for them, they would assign, a 4 annas share of them to him.

After some time the Revenue Authorities finally decided against the defendant's claim in the former character, but made a settlement with them in the latter capacity. Plaintiff now sues for his share under the agreement. Held that as the basis of that agreement was the

establishment of the first right, and as that right had failed, the plaintiff was not entitled to take from the defendants any thing of that which they held in virtue of their second right. 6 W. R. 166.

31. Plaintiff's father and defendant entered into an agreement in 1850, by which the former delivered over certain lands to the latter in consideration of his promises to perform certain services. Plaintiff brought this suit for restoration of the land, alleging that defendant had failed to perform the services. Defendant denied failure to perform and pleaded that the contract was not revocable: Held in Special Appeal, reversing the decisions of the Lower Courts, that the question was whether there was in this case the offer of one performance for the other, and whether the continuous performance of the services on the one side was the pre-supposition of the continuous existence of the gift on the other, or whether there was a mere gift with a charge upon it, the primary intent being to give. That this was a question of construction, and that, in the present case, taking the agreement and counterpart together, there was clearly a covenant for the hereditary enjoyment of the land, to be exchanged for an hereditary performance of the services. 7 M. H. R. 167.

32. K. being in urgent want of money entered into an agreement in writing with N., acting as the agent of F., for an advance of Rs. 19,000. The agreement recited that N had undertaken to procure this amount from F., on his return, he being then absent from the place where the agreement was executed, and K. promised, in consideration of the loan, to grant N. a lease of his *Zemindari*, and it was provided that K. should on F.'s arrival, execute a regular deed. N. could only accommodate K. with a part of the proposed loan, and as the matter was urgent, and F.'s return was expected to be within a few days, it was verbally agreed, that the remaining portion of the loan should be advanced within eight days. F. did not return till 19 days after, when he was willing to make the advance required; but in the interim, and after 15 days from the date of the agreement, K., from pressure for money had been obliged to get the advance from another party, and had, thereupon, granted him a lease of his *Zemindari*. N. then brought a suit for specific performance of the agreement. He afterwards died, when his heir assigned N.'s interest under the agreement to F., who thereupon brought an action against K. for breach of contract. The Civil Court awarded damages for the breach, but, upon appeal, the *Sudder* Court dismissed the suit, on the ground that the assignment by N.'s heir to F. was void for champerty.

Held: that as N. was only the agent of F., the party really interested in the performance of the agreement, the assignment by his heir of his interest under the agreement, for the purpose of enabling F. to bring the suit, was not champerty or maintenance, as it was wholly unnecessary, as F. was suing in respect of his own interest for a breach of contract.

Held further, that as the agreement to grant the lease was incomplete in itself, and conditional upon the advance by F. within 8 days, a delay

of 19 days in the circumstances of the want of money by K to meet his pressing demands, was an unreasonable delay, which defeated the object of the loan, and avoided the agreement to grant the lease. 8 M. I. A. 170, 171; 3 W. R. P. C. 33.

AGREEMENT (Illegal).

33. The plaintiff, under threat of a criminal prosecution for the offence of criminal trespass, executed an agreement in writing which conferred certain rights on the defendant. There was no foundation for the charge made by the defendant. In a suit to set aside the agreement. Held that the plaintiff was entitled to maintain the suit. 7 M. H. R. 378.

AGREEMENT (Social).

34. An agreement to remain for ever in a particular community cannot be enforced by a suit in Court. 10 W. R. 349.

35. An agreement between members of different *somajes* to have social intercourse with each other and to inter-marry, is not opposed to public policy, but rather in accordance therewith. 22 W. R. 517.

AGREEMENT (To avoid Litigation).

36. A mutual agreement to avoid further litigation is not an agreement void of consideration. 5 B. H. R. A. J. 75.

AGREEMENT (To Compromise).

37. Where a contract for sowing indigo was entered into, and advances made in part performance of an agreement of compromise between the parties to a suit for enhancement of rent:—Held that the non-completion of the agreement of compromise did not exonerate the defendant from performing his part of the contract for sowing indigo. 10 W. R. 420.

38. By deeds of *farigh-kutti* (release) and *ikrar-nama* (acknowledgment) entered into by parties to a suit then pending, a compromise was agreed upon in consideration of Rs. 2,000, to be paid by the defendants to the plaintiff, the plaintiff undertaking to execute and deliver in to the Court, a deed of *razi-nama*; which the plaintiff afterwards refused to execute: Held by the Judicial Committee of the Privy Council, affirming the Sudder Court's decree, that the deeds of *farigh-kutti* and *ikrar-nama* constituted a binding obligation on the plaintiff, and that he could not avoid the compromise, by refusing to execute and enter up the *razi-nama*.

The plaintiff instituted the suit, in *forma pauperis*, and by the terms of the deed of compromise, the defendants undertook to pay the costs, upon his entering up the *razi-nama*. The Courts in India sustained the compromise, and decreed the plaintiff to pay, out of the consideration-money to be received by him, the costs incurred subsequent to the deeds of compromise. Such decree affirmed on appeal. 4 M. I. A. 114.

39. A. sued B., a debtor of his intestate, upon a bond debt, and obtained a decree against him for the amount. B. appealed from this decree to the *Sudder* Court. By a deed of arrangement entered into by A. and C., after the commencement of the suit, C. became entitled to a six-anna share of the debt. Pending the appeal to the *Sudder* Court, A. entered into a compromise with B., postponing the payment of the amount recovered by the decree, for three years, and foregoing altogether interest upon the principal. This was done without the privity or consent of C. B. failed to pay the amount within the stipulated time, and proceedings were taken by A. against him, but he had not realized the amount of the decree. In a suit by C. against A. to make him chargeable for the six-anna share in the decree, the *Sudder* Court held that A. was chargeable to C. for such share, with interest.

Upon appeal, such decree reversed; the Judicial Committee holding that A. must be treated as a trustee for C., and that in the absence of fraud upon the *cestui que trust* in executing the compromise, or that it was not beneficial for all parties, he was responsible only to C. for such amount of the debt as had been recovered, or without his wilful default might have been recovered. 4 M. I. A. 452.

40. Pending the execution of decrees in suits between A, lessee and B, under-lessee, for the balance of rent, C purchased B's interest in the under-lease. For the protection of the property suits were then brought by C against A. An *Ikrarnamah*, or agreement, was afterwards entered into by A and C, to put an end to the litigation. This agreement recited that C, was indebted to A in a certain sum which C agreed to pay, upon a remission by A, of part of his claim, by two instalments at specified dates; and the agreement then provided that, if default was made by C in paying the instalments then that the remitted money was to be held due to A. by C, and secured upon certain property comprised in the underlease, as well as by making C himself liable. No place was specified, nor was there any custom established by the evidence, where the money was to be paid. The instalments were paid, but not until some time after the days specified in the agreement. The money had been tendered to A's mookhtar, but refused by him from the fact of A, being absent, and also on the ground that interest was not tendered. A afterwards brought an action against B and C to recover the sum remitted by the *Ikrarnamah*, on the ground that by the conditions of that agreement, the instalments should have been punctually paid upon the specified days, which had not been done, nor had any legal tender been made. Held by the Judicial Committee (affirming the decree of the *Sudder Dewany Adawlut*), (1) that although A had agreed to remit part of his demand on condition of receiving payment on specified days, or in default that the remitted sum was to be paid, yet that there was nothing in the agreement which made the payment of the instalments on the days fixed the essence of the contract, and that the Judicial Committee would not apply the technicalities of the English law with respect to breach of contracts to such an agreement, (2) that the penalty could not be enforced, as there was a *bona fide* endeavour to pay the money on the specified days, and (3) that the agree-

ment was substantially performed by the payments, and that a strict legal tender was not necessary. 8 M. I. A. 239, 240; 2 W. R. P.

AGREEMENT (To execute Conveyance).

41. Where a party borrowing money gave the lender an *ikrar* agreeing to execute a conveyance of certain landed property: Held that the instrument was in substance an agreement the registration of which was optional, and which might be given in evidence in a suit for specific performance of the agreement to execute the conveyance for which it stipulates. 15 W. R. 355.

AGREEMENT (To officiate as Patil).

42. An agreement between two members of a *patil* family that they are to officiate in turns is not illegal as being opposed to public policy. The Court will not however compel the actual *patil* to vacate office under such an agreement as long as his appointment under Act XI of 1843 is unrevoked. 6 B. H. R. A. J. 243.

AGREEMENT (To Transfer).

43. Where it was agreed between A and B that in consideration of certain proceedings to be instituted jointly by A and B, and payments to be made by B, for the recovery of certain property claimed by A, against C, A, would make over the half of the property recovered to B; but A, contrary to the terms of the agreement, without the consent of B, compromised his claim with C, and obtained possession,—Held, the agreement did not operate as a transfer of the property to B, she could not sue to eject A.

Semble.—B's proper remedy was a suit for specific performance or for damages for breach of the contract, to support which it would have been necessary to allege performance of her part of the contract, or at least readiness and willingness to perform, but prevention by A. 15 B. L. R. P. C. 36.

AGREEMENT (Verbal).

44. When a plaintiff attempts to enforce as a contract of loan binding upon the defendant immediately upon its execution an instrument which he verbally agreed at the time should not so operate, and for which the defendant received no consideration, the latter may give evidence of the verbal agreement. 1 M. H. R. 457.

ASSIGNEE.

An assignee of property is not entitled to recover against his assignor on the footing of a champertous contract. 22 W. R. 507.

46. An assignee of property whose assignor was not in possession when the assignment was made, can only recover even from the hands of third persons, upon showing that he would have a right to enforce specific performance of his contract against his assignor if the property were come back to the hands of the assignor. 22 W. R. 535.

ASSIGNMENT [By Debtor of Property to Trustees]

47. A *bona fide* assignment by a debtor of his entire property to trustees for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor, until the trusts of the deed of assignment have been carried out. 1 B. H. R. 233.

ASSIGNMENT (By Debtor in favour of one Creditor over others).

48. It is not illegal for a debtor to execute a security, or make an assignment in favour of one creditor over others. The provisions of the bankrupt laws, made to promote the equal distribution of the trader's assets among all his creditors, are not in force in these provinces. 1 N. W. R.

ASSIGNMENT (By Hindu woman without Consideration).

49. A Hindu woman signed a deed giving away her whole property which was considerable. There was no consideration for the deed, and it was executed by the woman when surrounded by the friends of the person in whose favour the gift was made, and without her having any proper or independent advice. She subsequently refused to carry out her gift. The Court declined to enforce the deed, and set it aside as improperly obtained. 5 W. R. 246.

ASSIGNMENT (Of Contract).

50. According to Hindu law not only is the beneficial interest in the subject matter of the contract but the contract itself is assignable.

The assignee therefore may sue in his or her own name. This doctrine is applicable to suits brought in the Madras Small Cause Court. 4 M. H. R. 176.

ASSIGNMENT (Of Debt).

51. Defendant assigned a debt due to him by certain parties, to plaintiff. Plaintiff accepted the assignment and gave defendant a release from the amount of the debt assigned to him: Held that plaintiff the assignee could have no action against defendant the assignor. 5 W. R. 171.

ASSIGNMENT [Of Equity of Redemption].

52. The question whether an assignment of an equity of redemption admitted by the assignor, was made for a valuable consideration or not, is no material in determining the rights of the assignee against a party who holds adversely to the assignor. 10 B. H. R. 491.

ASSIGNMENT (Of Indigo Factory).

53. A., by deed duly registered, assigned his interest in an Indigo Factory to B. In the deed was a recital that it had been agreed that B. should take over the *bensa pouna* account of the Factory as the same stood on the 30th September 1853. C. sued A. and B. jointly to recover rent in respect of lands which had been occupied under a lease from

which was due on the 30th September 1856. B. raised the defence that the debt was not included in a schedule dated the 30th September 1856 signed by A., and which he alleged had been furnished to him by A. as containing a list of the liabilities of the factory. Held, if a trader or other person in this country assigns his stock-in-trade and effects to another, and such other person enters into a contract with the first to pay the debts of the concern, or a certain portion of such debts, the contract and assignment create a liability to the creditors in whose favor such contract is made, which they may enforce by suit; nor is the creditor bound to elect between his original debtor and the assignee, but he may join them as co-defendants in the same suit.

Held also per Peacock C. J., and Norman and Kemp J. J. (dissentientibus Steer and Seton Karr, J. J.) the case must be remanded to the lower Court to try what was the agreement between A. and B., as to B. taking over the *dena pouna* account of the factory, whether the schedule was an essential part of the contract or not. B. L. R. S. V. F. B. 54.

ASSIGNMENT (Of Common Money-Bond).

54. The obligor's consent is not necessary to the assignment of a common money-bond. 1 M. II. R. 139.

55. The obligee of a common money-bond of which a *bona fide* valid assignment has been made, is not liable to be made a defendant in a suit by his assignee to enforce payment of the bond and to a decree against himself jointly with the obligor. 1 M. II. R. 140.

ASSIGNMENT (Of Rent).

56. The defendant, in satisfaction of his debt, gave the plaintiff bills on his ryots in the nature of assignment of the rents due by them to him, and the ryots accepted the bills. Held that, on the failure of the ryots to pay, the plaintiff was bound to give the defendant notice of such non-payment within a reasonable time, instead of bringing his suit 11 years after the money was borrowed, and eight years after the acceptors of the bills failed to pay. 5 W. R. 231.

57. The obligee of a bond for Rs. 7,000 gave the obligor an assignment of Rs. 5, 319 on account of rent due to the latter by the former, and the question in Special Appeal being whether the item of Rs. 350 paid on account of Government revenue had been twice credited as alleged by the obligor (appellant), the Court held that it had only once been credited.

The respondent on cross-appeal claimed interest on the Rs. 350 for 6 years and 8 months at 12 per cent per annum, on the strength of a stipulation in the bond that, from a certain date, interest should accrue on the principal; but the Court dis-allowed the claim, on the ground that payment of interest on the item paid as Government revenue was neither expressly stipulated nor contemplated by the parties, and because it was

open to the respondent to take measures to realize the sum so paid instead of letting it lie over and double itself by interest. 17 W. R. 71.

A lent money to B. on bonds, payment of which was secured by assignment of the rents of B's estate. A instead of liquidating the bonds from the collections of the estate assigned, brought a suit on the bonds and obtained a decree. B now sues for a refund of the collections made and not appropriated to the payment of the bonds. Held that such a suit was not one for rent, and must be tried in the Civil Court. 8 W. . 128.

ASSIGNMENT (Of Salary).

59. An assignment by a Puisne Judge of the Supreme Court at *Madras*, of the sum "equal to the amount of six months salary," directed by the 6 Geo. IV. c. 85, to be paid to the "legal personal representatives" of such Judge, in case he shall die, in and after six months' possession of office, is a valid assignment, being a vested contingent interest in such Judge: and not being payable during the lifetime of the Judge, is not an assignment of salary, within the 5 and 6 Edw. III., c. 16, and 49 Geo. III., c. 126, and, therefore, contrary to public policy. 3 M. L. A. 435.

ATTORNEY AND CLIENT.

60. D, an attorney, who had a lien against C for costs on the title deeds of certain property belonging to C, for whom he had been acting in negotiations for the sale of the property, delivered the deeds at the request of C to M, who was acting as attorney for J, an intending purchaser M, on obtaining the deeds, signed a receipt for them, by which he undertook to "return them on demand without claiming any lien for costs or otherwise." D. subsequently ceased to act for C in the matter of the sale of the property, of which J became the purchaser. The title deeds remained with M. Held that D was entitled to have re-delivery of the deeds to him from M, even independently of the express contract to return them. He did not give up possession of them to C by delivering them to M, though that was done at C's request. 15 B. L. R. App.

B.

BAILEE [For Hire].

61. Goods conveyed by the Government bullock-train are not entrusted to the Post Office for conveyance within the meaning of Act XIV of 1866.

In respect of the Government bullock-train, Government must be regarded as an ordinary bailee for hire, and not as a common carrier

As such bailee, apart from any special condition limiting its liability, it is bound to take ordinary care of goods entrusted to it for conveyance, and if goods are stolen through the negligence of its servants, it is liable to make good the loss to the consignor.

But it may, as may any other bailee for hire, limit its liability by conditions, provided those conditions are not repugnant to public policy or positive law.

A condition that it will not be responsible for loss occasioned by the negligence of its servants is certainly not repugnant to positive law, nor a condition repugnant to public policy. 3 N. W. P. 195.

BAILMENT.

62. The general principles of the law of bailment are applicable in the Mofussil, and they are substantially the same as those which prevail under English law. 17 W. R. 90.

BANKING.

63. The law of merchants is not applicable to banking transactions in the Mofussil. 13 W. R. 420.

BANKRUPTCY.

64. The principle that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in *pari passu* with the other creditors, for satisfaction out of the remainder of that fund, does not apply, where that creditor obtains by his diligence something which did not, and could not, form a part of that fund.

The Orphan Chamber of *batavia*, being the executors of a foreign creditor in the island of *java*, by their agent in Calcutta, proved the amount of their whole debt against the estate of A. B., who had been declared insolvent under the Indian Insolvent Act, IX Geo. IV, c. 73, and after making such proof, and receiving the dividends upon the whole debt, instituted a suit in the island of *java*, to recover a plantation or estate there, held by one of the insolvents as trustee for the firm of A. B., and C. D., in equal shares; to which suit, the assignees of the insolvent appeared as defendants, but judgment was given in favor of the creditor, and for the sale of the estate for his benefit; the proceeds of which amounted to three-fifths of his whole debt. The assignees of A. B., filed a bill on the equity side of the Supreme Court at Calcutta, against the agent of the foreign creditor, resident within the jurisdiction praying that the dividends might be refunded, and that the defendants might be restrained by injunction from receiving any further dividends, until all the other creditors were put on an equal footing with the creditor at *java*, the defendant demurred, and obtained judgment against the assignees. Held, on Appeal, by the Judicial Committee, that the estate in *java*, not passing to the assignees under the assignment, did not form any part of the fund that was available for the benefit of the general creditors, and that the creditor was therefore not bound to refund the dividends, nor ought to be prevented from receiving any future dividends, provided he did not receive more than 20 s. in the pound upon his whole debt.

But the bill having stated that the creditor had also instituted proceedings against certain debtors of the insolvents at Bencoolen: Held that

the assignees were entitled, under the prayer for general relief, to an injunction to stay the receipt of further dividends until the proceedings at Beucooleu were abandoned. 2 M. I. A. 353.

65. Palmer and Co. having borrowed a large sum of the Bank of Bengal, deposited Company's paper with the bank to a greater amount as a collateral security, accompanied with a written agreement, authorizing the bank, in default of repayment of the loan by a given day, "to sell the Company's paper for the reimbursement of the bank, rendering to Palmer and Co. any surplus". Before default was made in the repayment of the loan, Palmer and Co. were declared insolvent, under the Indian Insolvent Act, IX Geo. IV, c 73, by the thirty-sixth section of which it was declared, that where there had been mutual credit given by the insolvents and any other person, one debt or demand might be set off against the other; and that all such debts as might be proved under a commission of bankruptcy in England, might be proved in the same manner under the Indian Insolvent Act. At the time of the adjudication of insolvency, the bank were also holders of two promissory notes of Palmer and Co., which they had discounted for them before the transaction of the loan, and the agreement as to the deposit of the Company's paper. The time for repayment of the loan having expired, the bank sold the Company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus. In an action by the assignees of Palmer and Co., against the bank, to recover the amount of this surplus. Held that the bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the Bankrupt Act. 1 M. I. A. 87.

66. Assumpsit by the surviving assignee of a Bankrupt, under an English Commission, against a debtor, a native of India, and resident within the jurisdiction of the Supreme Court of Calcutta. Plea: That the defendant had not undertaken or promised in the manner or form as the plaintiff, assignee as aforesaid, had complained against him. Two days after issue joined the defendant gave notice that he intended to dispute the trading, petitioning creditor's debt, and bankruptcy. At the trial, copies of the proceedings in the Bankruptcy Court, the Commission, Adjudication and Assignment to the plaintiff, and his co-assignee, which purported to be certified by the clerk of the Enrolments, and to be under the seal of the Court of Bankruptcy in England, pursuant to the 2nd and 3rd Will. IV., c. 114 S. 9 were given in evidence, but no proof was given that these copies were authentic, nor was the seal proved to be that of the Court of Bankruptcy in England: A verdict was given for the plaintiff, liberty being reserved for the defendant to move for a non-suit. A *rule nisi* was afterwards granted, and after argument made absolute, and the verdict set aside, and judgment of non-suit entered for the defendant, on the grounds that there was no evidence of an Act of Bankruptcy, of trading subsequent to the passing of the 6th Geo. IV c. 16 and that neither that Act, nor the 2nd & 3rd Will. IV c. 114 extended to India:—Held on Appeal affirming the judgment of the Court below,—

1. That the plea of *non-assumpsit* put the Bankruptcy and Assignment at issue sufficiently without any notice.

2. That the form of the plea "Assignee as aforesaid" was not an admission of the plaintiff's title as Assignee of the Bankrupt, but only used in reference to the description the plaintiff had given of himself in the declaration.

3. That the Statutes 6th Geo. IV c. 16 and the 2nd & 3rd Will. IV c. 114 made to facilitate the proof of Bankruptcy and Assignment in England, did not extend to the Courts in India, and that in those Courts such evidence of the Bankruptcy must be given, as would have been required to prove the fact if no statutory regulations, had been made. 2 M. I. A. 264.

BENAMEE.

67. If it is once established that a transaction is benamee, the mere fact that the deeds and proceedings involved bear the benameedar's name is of no essential weight on the one side or the other of the question, *who is the principal?* 21 W. R. 257.

68. Held, that a benamee transaction does not create the relationship of trustee and *cestuique* trust between the benameedar and the real principals. It would be dangerous to hold that a benameedar is a trustee for the real owner within the meaning of section 2 Act XIV of 1859. 11 W. R. 73.

69. Even where the object of a benamee transaction is to obtain a shield against a creditor, the parties are not precluded from showing that it was not intended that the property should pass by the instrument creating the benamee, and that in truth it still remained with the person who professed to part with it. 21 W. R. 423.

70. Follows ruling in (21 W. R. 423), in which it was decided that parties are not precluded from showing what is the real nature of a transaction, although it may have been entered into for the purpose of setting up against creditors an apparent ownership different from the real ownership. 23 W. R. 42.

71. Claim by father against the execution creditors of his son, on the ground that his son held the estate benamee for him, dismissed.

The Courts look with jealousy on benamee transactions, and require from the claimant under such title strict proof, and he can only recover on the strength of the case he asserts. 13 M.I.A. 395 ; 14 W.R.P.C. 14.

72. Suit by A, to establish his right to execute decrees, against B. and another, by attachment and sale of lands in possession of C., B.'s son, on the ground, that the lands were held by C. benamee, to defeat B.'s creditors. Evidence was given that C. was the real purchaser of the property sought to be attached, and not a benamee holder for B. Nothing but hearsay evidence was given by A. that it was a benamee transaction. Hold, by the Judicial Committee, that although there may be

with respect to benamee transactions, circumstances which might create suspicion and doubt as to the truth of the case, yet that the Appellate Court will not decide upon mere suspicion, but upon legal grounds established by evidence, and that from the evidence in the suit a *bona fide* purchase by C. was established. 14 M. I. A. 234.

73. B, a Mohomedan married woman, but separated from her husband, contracted an irregular marriage with V, and cohabited with him for many years, until her death. V, during the time he so cohabited with B, purchased an estate, which was registered in his name as the owner.

Eleven years after the date of the purchase, B and V. being then both deceased, a suit was brought by the then *Shajada Nusheen* to recover the estate bought by V, on the ground, that it was purchased by him benamee with moneys which belonged to the *Shajada Nusheen* or lay owner of an *Imambarah*, or a Superintendent of Mahomedan religious establishment, which he assumed to be. Held, upon the evidence (1) that it was not a benamee transaction, as the purchase-money was partly V's, and partly obtained by gifts from B to V, and (2) that it was not from the proceeds of a misappropriation by her as Trustee of the *Imambarah*, as she was lay proprietor, and had power of disposition, and, therefore, that the doctrine of resulting trusts did not apply. 14 M. I. A. 433.

BENAMEE [Conveyance].

74. In a suit by an heir to recover property which had been transferred by a benamee and fictitious conveyance on the part of plaintiff's father, where the object was found to have been to defraud creditors. Held, that plaintiff could not be permitted to plead the fraud of his father from whom he derived his title. 13 W. R. 87.

75. Where the *bona fides* of a conveyance is called into question, it is not sufficient for the claimant under such conveyance to give formal proof of the transactions involved, amounting simply to what might be expected if the transfer were benamee. 16 W. R. 211.

76. The Lower Court found that, notwithstanding an alleged conveyance and mutation of names, the possession remained with the original owner of the estate. Held, that, considering the conveyance was between near relations, this was a finding of the conveyance being a mere benamee transaction. 1 W. R. 217.

BENAMEE (Holding Land).

77. Although the habit of holding land *benamee* is prevalent in India, such fact does not justify the Court in making every presumption of such holding against apparent ownership. 11 M. I. A. 552 ; 8 W. R. P. C. 3.

BENAMEE (Lease).

78. The mere taking a *benamee* lease, unaccompanied by any other circumstances of suspicion, does not *per se* constitute fraud. 6 W. R. 283.

79. Suit by A for unpaid balance due from B on a bond. B pleaded that he gave A, a lease in C's name, out of the proceeds of which lease A was to pay himself the stipulated instalment according to the bond. Held that it was a necessary issue in the case whether the lease in C's was really given for A's benefit. 2 W. R. 40.

80. Where the ostensible lessees stood in the position of wives to the alleged beneficial lessees, and it was improbable that three ladies (one of whom was in no way connected with, but was a perfect stranger to, the other two) should enter into a transaction involving the payment of a bonus amounting to Rs. 12,000; and applying the crucial test in such cases, viz. the source from which the consideration-money came, and finding that the money had not been supplied by the ostensible lessees, and looking to the fact that there was no proof beyond the vague and unsatisfactory statements of two of the husbands that the ladies had any separate funds of their own from which they could have paid this large bonus, as well as to the very unsatisfactory explanation given by the two husbands for not producing their account-books, which would have shown at once how and by whom the consideration-money was paid, and to the nature of the dealings with the property by the three husbands. Held that the case was *benamée*; and that though the lessees, had all along received the rent from the ostensible lessees, yet when the tenure had passed away by sale in execution of a decree to a third party, and the lessor was unable to recover from them any longer, he was entitled in equity to claim the rent from the beneficial lessees. 18 W. R. 132.

BENAMÉE (Mortgage).

81. In a mortgage deed the mortgagee was described as one "M. J. B., otherwise B. K. the wife of M.," and it recited, that the consideration-money was advanced by her M. J. B. was not the wife of M., but his concubine. In the absence of satisfactory proof that the money advanced was M. J. B.'s separate property, and upon evidence that the consideration-money was really advanced by M. Held, (affirming the decrees of the Courts in *India*), that the preponderance of the evidence was in favour of M., being the person who advanced the money, and that the transaction was to be considered as *benamée*; or in trust for M. as mortgagee. 13 M. I. A. 346: 13 W. R. P. C. 38.

BENAMÉE (Obligor).

82. In a suit upon a bond where defendant pleads that the bond, though executed in the names of the plaintiff, was really executed in favor of a third party, if it is found that plaintiff is not the real holder of the bond, the suit must be dismissed. 23 W. R. 446.

BENAMÉE (Plea of).

83. Where a woman sues to recover money advanced on a bond executed in her name, it is open to the obligee to plead that the money was not lent by the woman, but that the bond was merely an acknowledgment of indebtedness from him to her husband. 22 W. R. 414.

BENAMEE (Purchase).

84. *BenamEE* purchases in India, not having been declared by law to be illegal, must be recognised and have effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course. There is nothing in section 260 of Act VIII of 1859, either taken by itself, or taken in connection with sections 259 and 261 to 266, from which an inference can be drawn of an intention to prohibit *benamEE* transactions. 18 W. R. 157.

Parties who choose to buy property in another person's name, and allow that person the opportunity of dealing with it as his own cannot be allowed in equity to intervene in a suit brought by him for the rent of such property. 18 W. R. 526.

86. In cases where the question is whether property bought and held in the name of another than the party claiming as the real purchaser, is the property of that other or merely bought and held in his name (*benami*) for the claimant, the criterion is to consider from what source the purchase-money came; the presumption is that a purchase made with the money of A. in the name of B. is for the benefit of A; and where the purchase is by a father, whether Mahomedan or Hindu, in the name of his son, there is no presumption of an advancement in favor of that son. Upon the facts the decision of the Courts below reversed. 4 B. L. R. P. C. 1.

87. In the case of a *benamEE* purchase, the mere use of the *furzee* name is sufficiently disposed of if the party whose name is used sets up no claim, and if there appears to have been long continued possession on the part of the person claiming to be the beneficial owner. 14 W. R. 58.

88. Where property is acquired by a Mahomedan lady, being in a state of wedlock, and also by the daughter of such parents, a very small amount of evidence would suffice to dispose of the presumption arising from the fact of the title-deeds being with the lady, against the supposition of a *benamEE* purchase. 14 W. R. 366.

89. A suit to recover possession of property which was purchased by a *vakcel* from his client *benamEE* in the name of another, and which was never made over to that other, cannot be maintained in the name of the ostensible purchaser. 10 W. R. 469.

90. A's property is sold under a decree to B. a *bona fide* purchaser, who offers to A. to reconvey to him on being repaid the purchase-money: Held that if A. accepts the proposal, section 260 of the Civil Procedure Code does not preclude a contract from arising. 10 B. H. R. 3

91. The purchase of property in the name of an idol where the purchase-money does not come from funds appropriated to the use of the idol, is not tantamount to a dedication of the property to the idol; it may be *benamEE* or merely fictitious transaction. 11 W. R.

92. A purchaser of immovable property sold in execution of

obtained a certificate under section 259 Act VIII of 1859, and then instituted a suit to recover possession. Held, (L. S. Jackson, J., dissenting) that unless the latter, the defendant in the suit was in possession under circumstances which amounted to a transfer to him of the title which the plaintiff derived from the purchase, he was debarred by the general provisions of Act VIII of 1859 from pleading that, although the plaintiff is the certified purchaser, he did not purchase on his own behalf, but merely on behalf of and benamee for the defendant, and therefore that the plaintiff is not entitled to recover possession. 11 W. R. F. B. 16.

93. The ruling of the Full Bench in (11 W. R. F. B. 16) that a benamee purchaser is debarred from setting up his title in opposition to a certified purchaser, was held not to apply in a suit in which the plaintiff was a certified purchaser who had brought at a sale for arrears of revenue under Act I of 1855.

It is not a principle of law that the issue to be framed in such cases is,—From what source the purchase-money came; though that is an excellent criterion and test for determining the character of the purchase. 14 W. R. 372.

Where a purchase of real estate is made by a Hindu in the name of one of his sons, the presumption of the Hindu law is in favour of its being a benamee purchase, and the burthen of proof lies on the party in whose name it was purchased, to prove that he was solely entitled to the legal and beneficial interest in such purchased estate.

Purchase of a Talook in Bengal by a Hindu in his eldest son's name, the conveyance, though in the English form of lease and release, held to be a benamee purchase, and the son in whose name it was purchased declared to be a trustee for the father; and the talook part of the father's estate. 6 M. I. A.

95. As between Hindus oral evidence is admissible to show that land nominally purchased for A and conveyed to him by an instrument in writing was really purchased for A. B. and C. 2 M. H. R. 26. (6 M. I. A. 53) followed.

96. The principle with respect to benamee purchases between Hindus laid down in (6 M. I. A. 53) is equally applicable to similar transactions between Mahomedans.

Lands purchased in the name of a son, held, on the evidence, *furzee* or benamee, in trust for his father, who paid the consideration-money for the purchase, and was in possession.

Semble.—There is no presumption of an advancement, by the name of the son being used as purchaser, other than in the case of a stranger being used. 13 M. I. A. 232; 13 W. R. P. C. 1.

97. A husband who puts his wife into the position of being the true owner of an estate, and allows her to deal with the world as the true owner, deprives himself of the right to set up, or rely on, his benamee title. 24 W. R. 79.

98. In a suit to recover possession of property which was purchased by one party in the name of another, the real purchaser ought, by the rule of Courts of Equity to be a co-plaintiff. Where this is not the case, a decree obtained by the plaintiff may be reversed on appeal as the real purchaser not having been a party would not be bound by such decree. 19 W. R. F. B. 434.

99. Construction of Act I of 1845 sections 20 and 21 :—Held, not to raise a presumption of law against a benamee purchase by a Hindu Widow in trust for her husband.

A hibbanamah (deed of gift) by a Hindu Widow (a purdah woman) of real estate, purchased by her out of her *stridhan*, of which she had a disposing power, when in a state of ill-health and shortly before her death, in favour of her Brothers, in their Wives' names, to the exclusion of her husband's adopted son; in circumstances raising suspicion of fraud, and in the absence of satisfactory proof that she knew the nature of the deed, pronounced against. 13 M. I. A. 419

100. A purchased a Talook at a sale, in execution of a decree obtained by a judgment-creditor. The assignee of another judgment-creditor, who had obtained a decree in a separate suit against the estate, brought a suit against the purchaser to set aside the sale, on the ground that the purchase was not *bona fide*, being made in collusion with the judgment-debtors. Held, on a review of the evidence, that there was not sufficient evidence to warrant the decree of the High Court at Calcutta that it was a benamee transaction; or that the purchaser was acting as an agent for the judgment-debtors; and the decree of the Court below reversed. Held further, that the *onus probandi* was on the plaintiff to establish the affirmative issue that the money for the purchase of the Talook was supplied by the judgment-debtors, or a third party for them, and not by the purchaser: Evidence showing circumstances which may create suspicion is not enough to justify the Court making a decree resting on suspicion only. 11 M. I. A. 28; 7 W. R. P. C. 10.

101. It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can over-throw that of the purchaser by showing, either that he had direct notice or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an enquiry which, if prosecuted, would have led to a discovery of it.

There is nothing in the position of a vendor being a Mahomedan woman living with her children upon the estate, and sometimes letting it which should put any one upon enquiry whether she was the real owner or not.

The mere fact of a man building upon, or, spending money to improve property belonging to the woman with whom he was living cannot lead

to the inference that, contrary to the apparent title, he had purchased the land for himself; and neither this fact, nor the circumstances of the deed of sale from a Mohammedan woman containing the apparently usual clause that she had made the sale with the consent of the family, was sufficient to put the purchaser on enquiry.

Without laying down any general rule as to the circumstances which should prompt enquiry in cases of this kind, the Privy Council were of opinion that the circumstances must be of such a specific character that the Court can place its finger upon them, and say that upon such facts some particular enquiry ought to have been made. 18 W. R. P. C. 166, 167.

102. A brought a suit for a debt against B, obtained a decree, and attached certain land in execution. C intervened, claiming the property as his; but on the 28th March 1868, his claim was disallowed, on the ground that in two suits previously brought against C and others for possession of the same property, on the 30th December 1863, by X and Y, whose interest had, pending the suit been purchased by B, it had been decreed that the land belonged to B. The decrees in these suits were dated 13th and 19th January 1864; they were in favour of B, and ran in his name alone. C had purchased a moiety of the property at an auction sale on the 7th March 1859; X and Y claimed under a pre-existing mortgage over the same property, the equity of redemption under which had been foreclosed.

C now brought a suit against A and B for confirmation of his possession and a declaration of his title to the property. He alleged that B was his servant, and had purchased the interest of X and Y in the property benami for him; that he (C) had made the purchase with his own money in the name of B; that the suits, originally brought by X and Y, had really been compromised; that while the decrees of the 13th and 19th January 1864 were nominally in favour of B, they were really in his (C's) favour; and that the suit brought by X and Y had been allowed to proceed in B's name, in order that C's title might be strengthened by a decree in his favour, B being only nominal by the decree-holder. C also stated that, since his purchase on 7th March 1859, he had always been in possession, and he dated his cause of action from the 28th March 1868, when his claim to the property which had been attached by A in his suit against B was disallowed.

The Subordinate Judge gave a decree in favour of the plaintiff C. B alone appealed to the High Court.

Held, that C not having been disturbed in his possession, and seeking a declaration of his title only and no relief, should have stated clearly and precisely what that title was; that against A, who had not appealed the decision of the Subordinate Judge was final; that as between B, and C, the matter was *res adjudicata*; that C could not go behind the decrees of the 13th and 19th January 1864, which had been passed in favour of B, and show that the purchase by B and subsequent decrees were really benami for C and in his favour. A decree until it is set

aside, is, as between the parties to it, conclusive both as to the rights of those parties and the character in which they sue.

An application for review of judgment, held a party applying for a review of judgment must show that there is good and sufficient cause for granting the review before he can be heard to argue that the decision is erroneous. In so showing cause *first*, no point can be raised, which has been already discussed and decided on the original hearing of the appeal; and *secondly*, no new point, which has not been raised at the hearing of the appeal, can be argued on the application for review. 5 B. L. R. 321, 322.

BENAMEE (Sale).

103. Where a deed of sale is executed under circumstances which suggest an intention to defraud creditors, it is not sufficient that the sale was formerly made, and the deed duly registered: the Court must be satisfied as to consideration having actually passed from the purchaser to the former owner, and as to the source from which the purchase-money was derived. 15 W. R. 305.

104. In a suit to establish plaintiff's right under a Kobala to attached in execution of a decree against her husband, the question arose whether she was the real purchaser or only a benamee for her husband. The Lower Appellate Court, supposing that the sale to plaintiff had been made just before the decree was passed, found that the transaction, though *prima facie* a sale to the wife and supported by possession, was one in which there was much suspicion of *mala fides*, and dismissed the suit: Held that the Judge committed an error of law in resting its decision upon circumstances of this kind. 22 W. R. 402.

105. In a suit for possession of a tank on the allegation that plaintiff purchased it in execution of a decree against one S. D., and that, after being put in possession, she was subsequently ousted; defendant's plea being possession after prior purchase at an execution sale under a decree against the same S. D., the Lower Court found that the defendant's purchase was a fictitious transaction, being in reality for the benefit of S. D., who was in actual possession and enjoyment of the property at the time of the plaintiff's purchase.

Held that the case did not come under the purview of section 260 Act VIII of 1859. 14 W. R. 111.

106. Where property was sold nominally by beenameedars, but in reality by the real owner, and the consideration was the bebt due from him to the vendee: Held that the sale was perfectly legal as against the real owner, and therefore as against creditors seeking to execute their decree against him after such sale. 24 W. R. 253.

107. In a suit brought under Act VIII of 1859 section 246, to establish that certain property, which had been successfully claimed by defendant No. 2, was still the property of plaintiff's judgment-debtor, defendant No. 1, upon the allegation that the conveyance set up by

defendant No. 2 was a benamee transaction, where it was found that No. 1 was largely indebted at the time of the sale transaction, and it was known to the vendee (No. 2) that one of the debts was a charge on the disputed property : Held, that the apparent passing of the consideration-money from hand to hand was not sufficient to establish the *bona fide* character of the sale. It was necessary to see that it was actually the money of the alleged vendee that was really paid to the vendor. 24 W. R. 400.

BENAMIDAR.

108. In determining the right to property seized in execution, the Court must not declare a person claiming as purchaser to be a benamidar for the debtor upon suspicion merely, but its decision must rest upon legal grounds established by legal testimony. 9 B. L. R. P. C. 456.

109. All the covenants made by a benamidar in the sale of a property are not necessarily binding upon the true owners ; though there may be circumstances under which a person whose name does not appear upon a contract may be liable to perform its conditions. 21 W. R. 398.

110. The real owner of property is the person who should institute a suit for it. A benamee holder may sue as trustee on behalf of the beneficial owner without disclosing the name of the real owner ; and if the defendant does not object to the suit proceeding in that form, and raises no issue upon the real title of the plaintiff, the suit may proceed and be decided. 3 W. R. 159.

BID (Sending a man to).

111. The sending a man to bid at an auction cannot be considered as conduct calculated (in the language of the Indian Contract Act section 237), to induce third persons to believe he had generally authority to buy. 22 W. R. 156.

BILL (Cross).

112. On a bill filed by Assignees of an Insolvent to cancel a deed made by the Insolvent as being fraudulent and void as against creditors, the property charged by the deed being immovable, and the defendants claiming a lien thereon for *bona fide* debts, the remedy, if any equity exists, independent of the deed, is by cross bill. 11 M. I. A. 317.

BILL (Of Costs)].

113. There is no law in force in India to prevent an executor of an attorney from maintaining a suit for business done by the attorney, without having previously delivered a bill of costs to the defendant, and left it with him for a reasonable time before bringing the action ; and the fact that the defendant had notice that the bill was to be referred to taxation is immaterial. Statute, 3 James 1, c. 7 has not been extended to this country. 3 B. L. R. O. J. 96.

BILL OF EXCHANGE.

BILL OF EXCHANGE.

114. Where Bills of Exchange are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And, where the money realised by the sale was wrongfully applied by the agent, it was held by the Judicial Committee (affirming the judgment of the Court at *Calcutta*) that the remitter was entitled to recover the value of the bills in assumpsit, upon an indebitatus count, from the purchaser of them, who had notice of the purpose for which they were remitted, and the misapplication of the proceeds by the agent: M. I. A. 328.

A decree obtained against the acceptor of a Bill of Exchange by the drawee but not satisfied, will not exonerate the drawer. 1 W. R.

116. A hoondee payable to the depositor is only payable to the drawer or his indorsee. When the drawer and his brother are members of an undivided Hindu family, it may be presumed that the latter is entitled to act for the former. W. R. S. N. 262.

117. The drawing of a hoondee on one's own factory and the delivery of it to another may be evidence of indebtedness to the amount of the hoondee, but it is not an item for which the drawer of the hoondee is entitled to credit. 7 W. R. 179.

118. A drawer, acceptor, and intermediate indorsers of a hoondee which is dishonored are all liable to the holder; but their liability is not joint as it arises out of different contracts: and a decree obtained against any one of them without satisfaction, cannot be pleaded as a bar to a suit against any other of them. 23 W. R. 444.

119. An endorsee for purposes of collection of certain hoondees, under circumstances detailed, ordered to cancel such endorsement, and to re-deliver the hoondees to the endorser.

Such an endorsee, not having received the amount of the hoondees, not liable to be sued for the value thereof. 2 N. W. P. 73.

120. Where there is a running account between the parties, a portion of which relates to amounts due upon dishonoured hoondees, plaintiff is not bound to sue upon the hoondees, but may base his claim upon the running account. 3 N. W. P. 323.

121. A suit for recovery of the amount of a dishonored hoondee drawn at Shehabad and payable at Furruckabad cannot be brought in the Court of the Moonsiff of Shahjehanpore, the abode of the endorsee of the dishonored hoondee, but where none of the drawers or indorsers resided. 3 N. W. P. 343.

122. A party resident at *Baroda* indorsed two *hoondies* or bills of exchange, in the name of a firm carrying on the business of banking a *Surat*, alleging himself to be the *Gomashtah* or agent of the firm, and

afterwards, on the bills being dishonoured, absconded. Held that in order to fix the firm at *Surat* with the amount of the bills, clear evidence ought to have been produced of the authority to act as *Gomashtah*, and their Lordships not being satisfied with the evidence admitted in the Courts below, reversed the decrees of both the Zillah and Suder Court with costs. 1 M. I. A. 351.

123. Held by the majority of the Court (Steer, J., dissenting) that, when a hoondee returns dishonored to the hands of the endorser, he may sue the drawer upon it, and, if it appears that he is the lawful holder, may recover. 5 W. R. F. B. 86.

124. In a suit upon a hoondee which was alleged to have been bought for a money-consideration, and to have been drawn by the first defendant in favor of the second, and indorsed by the second to the plaintiff: the first defendant denied having executed the document, or authorised his name being used, and the second defendant admitted his indorsement, but said he had made it by way of surety for the first.

Held, that it was incumbent on the Lower Court to try whether the signatures were genuine, and, if it found them genuine, to distinguish the cases and try them separately, as the defendants would in that case be separately liable to the plaintiff. 19 W. R. 304.

125. According to mercantile usage amongst Hindus, where a *hundi*, drawn "payable to holder" (*shah jogi*), is paid at maturity by the drawee to the *shah* or holder of the *hundi*, and such *hundi* afterwards turns out to be forged, the *shah*, though a *bona fide* holder for value, is bound to repay to the drawee the amount of such *hundi* with interest from the date of payment, provided the drawee has been guilty of no laches in discovering the forgery and communicating the fact of such forgery to the *shah*.

The *shah*, however, relieves himself from such liability by producing the actual forger. 6 B. H. R. O. J. 24.

126. The plaintiff obtained a hundi from a banker B, at Balachar, for a certain amount drawn upon the firm of the latter at Calcutta: Afterwards on her representing to B, that she had lost the hundi, B. granted the plaintiff a duplicate, in the body of which it was stated that if the original had been accepted before presentation of the duplicate, the latter was to become null and void. The duplicate was presented to the agent of B at Calcutta, and payment was refused on the ground that the original had been presented and accepted and paid in due time: Held, that the plaintiff had no cause of action against B, for non-payment of the duplicate hundi, nor for money had and received on account of the original consideration having failed. 7 B. L. R. 682; 15 W. R. 501.

127. S. R., the plaintiff's agents in Calcutta, accepted hundees for Rs. 12,000, drawn upon them by a branch house of the plaintiffs' firm, and the plaintiffs at different times sent to S. R. hundees amounting in value to R. 11,400 with instructions to realize them, and to apply the

proceeds towards payment of the Rs. 12,000. S. R. had paid Rs. 7,000 of this amount, and they had realized Rs. 6,400 out of the Rs. 11,400, when they stopped payment, at that time two unmatured hundees, for Rs. 2,500 each, remained in their hands, and these they endorsed over to the defendant after maturity in trust for their creditors. In an action by the plaintiff against the defendant to recover the two hundees;— Held, that the hundees, having been sent to S. R. for the special purpose of enabling them to meet their acceptances for Rs. 12,000, remained the property of the plaintiffs subject to a lien of S. R. for Rs. 600. 9 B. L. R.

BILL OF EXCHANGE (Notice of Dishonor of).

128. Though the strict English law regarding Bills of Exchange is not applicable to transactions which one of the parties is a native of India, and they are not shown to have been dealing with reference to the English mercantile custom, yet the holder of a bill, to be entitled to sue the maker, must give him notice of dishonour or non-payment within such reasonable time as will enable him to protect himself. If the maker, for want of notice, has sustained injury or risk of injury, he is no longer liable. 1 W. R. 75.

129. Ordinarily notice of the dishonour of a bill of exchange drawn in India and payable in England, should be posted by the first mail which leaves England after the dishonour of the bill. 3 N. W. P. 99.

130. In order to charge the indorser of a dishonored hoondee, the holder must give reasonable notice of such dishonour to the indorser he seeks to charge. The demand, of a *peth* cannot be deemed to be equivalent to a notice of dishonour. 7 B. H. R. O. J. 137.

131. As regards notice of dishonor in connexion with hoondee transactions amongst natives of this country, although the strict rules of English law as to the time within which service of such notice, must be made, do not apply, yet the endorsee is bound to give the endorser notice, within a reasonable time, of his intention to come upon him, so as to enable the latter to take the necessary steps for his own protection. The question as to what is reasonable notice is to be settled by local custom, and where a party has been prejudiced by the want of such notice, this is to be taken into consideration. 21 W. R. 62.

132. The admission by the holder to give notice of dishonor discharges the drawer of a hoondee from liability. 2 W. R. 214.

133. Although the English Law of prompt notice by return of post does not apply to cases of native hoondees drawn by natives upon natives, and endorsed by natives, yet reasonable notice of dishonor is essential. 6 W. R. 301.

134. A promise to pay, endorsed upon a hoondee after it had been dishonored, though not amounting to a waiver of notice, was held to be

good and sufficient evidence that the endorser had received notice that the bill had been dishonored. 13 W. R. 420.

125. A hundi which had been purchased by the plaintiff at Delhi for value was, he alleged, endorsed by him to the firm of R. B. D., of Calcutta, "for realization," and sent to that firm by post. Between Delhi and Calcutta the hundi was lost or stolen, and never reached the firm of R. B. D. It eventually came into the hands of the defendant bearing no endorsement to R. B. D., but endorsed to U. D. H., and by U. D. H., the defendant alleged that he took it in the ordinary course of business, and for valuable consideration, from the gomastah of the firm of U. D. H., after the acceptors to whom it had been sent for that purpose had acknowledged their acceptance in favor of the firm of U. D. H., of Calcutta, by whom it purported to be endorsed to the defendant's firm. When presented to the acceptors for payment, it was dishonored, the acceptors stating that they had received notice not to pay the note, as it had been stolen. On the same day, the defendant gave notice of dishonor to the firm of U. D. H., and demanded payment, but that firm stated that their endorsement to the hundi was forged, and refused to pay. It was proved that before taking the hundi, the defendant had sent to the acceptors' koti to ascertain if their acceptance was genuine.

In a suit for the recovery of the hundi, or its value,—Held by the Court below that the endorsement of U. D. H., was genuine, and that the plaintiff was not entitled to recover the hundi. The defendant having taken the hundi in the ordinary course of business, and after sufficient enquiry was entitled to retain it: this was so notwithstanding the endorsement "for realization" on the hundi. The hundi was one which passed by delivery without endorsement, and therefore if the endorsement of U. D. H. was forged, the defendant still had a right to the hundi.

On appeal, the Court held that the endorsement to the firm of U. D. H. was not genuine, and this being so, the fact that the defendant took the hundi in the course of business, for valuable consideration, and without notice, did not give him a good title to retain it as against the plaintiff. The hundi was specially endorsed and specially accepted, and there was nothing to show that by Hindu law such a hundi would pass as one payable to the holder without endorsement. 7 B. L. R. 275, 276; 16 W. R. O. J. 3

136. In a suit to recover the balance due on a hoondee brought by the drawees against the drawers upon the insolvency of the acceptor, there was evidence not only that the drawers were merely the ordinary gomash-tahs of the acceptor, but also that they had no interest whatever in the bill when drawn, that it was the local custom for gomash-tahs in similar situations to draw bills on their principals without being thereby rendered liable for the defections of their principals, that the money when procured on the hoondee was applied solely to the purposes of the acceptor, that the drawees considered the acceptor as their only debtor by receiving part payment of the hoondee from him and giving him time to pay the remainder, and that the notice of dishonor was not sent to the drawers

till ten months afterwards : Held that the drawers were not liable. 17 W. R. 442 ; 9 B. L. R. App. 1.

137. If the drawer of a bill does not on the face of the bill of exchange, show that he drew it as agent, he cannot set up as a defence that he drew the bill as an agent. Nor can he plead that the holder discharged the acceptor, and that no notice of dishonour was given to him, when the goods, on the faith of which the bill was accepted, were attached and sold with the drawer's consent in payment of his debt to a third party. 2 W. R. 302.

138. In an action brought in the District of Patna against the indorser and acceptors of bills of exchange, after a part payment by the acceptors, no objection having been taken as to the misjoinder of defendants, and the Judge having omitted to find whether the indorser had received notice of dishonor or not : Held, the case must be remanded to ascertain, first, whether notice had been given within reasonable time, and if not, whether thereby the indorser had been injured or exposed to material risk of injury ; and, secondly, whether (English law not being applicable to the case) by the usage of merchants at Patna, a part payment by the acceptors and receipt by the plaintiff discharged the indorser from liability. 3 B. L. R. A. J. 198.

139. The defendant endorsed to the plaintiff a bill of exchange drawn by N. S. and Co., and accepted by C. N. and Co. The bill, at the time it was endorsed to the plaintiff by the defendant, bore the previous endorsement of N. S. and Co., to the defendant. The bill fell due on December 3rd 1870, which was a Saturday, and on that day the plaintiff sent his Jamadar to C. N. and Co., the acceptors, to present the bill for payment.

The bill was taken by A, one of the members of the firm of C. N. and Co., who gave a cheque for the amount, and took a receipt from the plaintiff's Jamadar, striking out the signature of C. N. and Co., as acceptors, but without the plaintiff's consent. The plaintiff's Jamadar took the cheque immediately to the bank, but the bank was closed. Thereupon he returned to C. N. and Co., and informed them that the bank was closed, and demanded cash. The plaintiff alleged that it was then stated that the cheque would be honored on Monday. The plaintiff's Jamadar then went and informed the gomasta of the plaintiff of what had been done. The plaintiff's gomasta sent him to the defendant's firm to give him notice of what had taken place. It was alleged that at this interview the defendant's liability was admitted in case the cheque was not honored, and the plaintiff's Jamadar was advised to wait until Monday, the defendant stating that he also had a cheque for Rs. 7,000 from C. N. and Co. This was denied by the defendant. On Monday 5th December, the cheque was presented to the bank for payment, and was dishonored. The plaintiff's gomasta went to the defendant's kothi and gave notice of the dishonour of the bill and cheque, and asked him to pay the amount of the bill. The defendant asked for the bill, and the plaintiff's gomasta went to C. N. and Co., and brought back the bill

with the name of C. N. and Co., which had been struck out, replaced. The defendant seeing the bill was over due, refused to pay the amount. The cheque was thereupon returned to C. N. and Co., and the bill retained by the plaintiff, who, on 0th December, caused within notice of dishonour to be given to the defendant. Held, that the cheque must be taken to have been merely a conditional payment; and when it was dishonoured the liability on the original bill revived. Held also, that reasonable notice of dishonor was given, whether the bill be taken to have been dishonored on the Saturday or on the Monday.

Semble.—Notice of dishonor, as between endorsee and endorser on bill transactions among Hindus, is not necessary, unless, by want of it, the endorser would be prejudiced. 7 B. L. R. 431, 432.

140. The defendant, in the course of dealings with S A of Patna, used to draw hundees at Patna on himself at Calcutta, and sell them to S A at Patna; S A sometimes only paying part of the consideration for the hundi. On 13th September 1867, the defendant drew a hundi for Rs. 2,500, payable forty one days after date, in the usual way, and it was stipulated between him and S A that the value should be paid by S A in three days. On 15th September, the plaintiff in Calcutta discounted the hundi in the ordinary course of business, paying for it Rs. 2,468 or thereabouts. It then purported to be accepted by the defendant in favour of S A. Before the hundi fell due, S A failed, and the plaintiff took the hundi to the defendant in Calcutta, and informing him of S A's failure, asked him to pay the hundi. The defendant admitted he had drawn the hundi, denied that he had accepted it, and refused to pay, saying (he alleged) that he had received no consideration for it. Before the failure of S A, who had not paid the consideration as stipulated, the defendant pressed him for payment of the consideration for the hundi, and S A, wrote and delivered to the defendant the following letter, dated September 16th, 1867, from himself to his firm in Calcutta:—"Further I sent you a Chitty (hundi) for Rs. 2,500, drawn by Bhagwan Das (the defendant) upon Bhagwan Das upon (us), Calcutta. Value deposited by me on September 13th, 1867, payable forty one days after date in Company's rupees. I have taken a hundi of this description, which you will pay on its due date. The money has not been paid, for which I gave this purja in writing which you will know." After S A's failure, and after the defendant's refusal to pay on the due date, the plaintiff made the arrangement with S A to the plaintiff dated November 1867. "Further I discounted with you at Calcutta hundis for rupees 5,000, which on Pitam Das coming to Calcutta were paid off in the following manner:—a hundi for Rs. 2,500 drawn by Bhagwan Das on Bhagwan Das, value deposited by me on 15th day of the light side of the moon in Bhadra, payable forty one days after date in Company's rupees; and a hundi for Rs. 2,500 by Gupi Shaw, Debi Shaw, Radha Shaw, Ram Sapayi Roy, value deposited by me on 14th day of the light side of the moon in Bhadra, payable forty one days after date in Company's rupees. I discounted hundis of this description, and out of them I paid Rs. 2,200 in cash through Sayed Mahomed Hossen. The balance Rs. 2,800, is due, the condition for payment of which is

BILL OF LADING.

as follows (here follows the manner in which payment was to be made):—I made an agreement of this sort, and I will pay the whole of the amount, inclusive of interest at 8 annas, and will take the two hundis from Bhai Kun Kissin Puteh Chand, with whom they are kept. Should I not pay the money according to this condition then you have the authority.” For the defendant it was contended that the effect of the letter of 16th September was to make the defendant a surety only for S A; that the plaintiff had notice of this at the time of entering into the agreement giving time to S A, which therefore operated as a release to the defendant. In a suit by the plaintiff to recover the amount of the hundi from the defendant, the Court found that it was not proved that the hundi had been accepted by the defendant, but held that, whether the effect of the agreement contained in the letter of September 16th was to make the defendant a surety only or not, the defendant was liable.

Per Norman J.—Notice of the defendant’s position in regard to the hundi was not communicated to the plaintiff.

Per Macpherson J.—The agreement contained in the letter of 16th September did not alter the position of the parties so as to make S A the principal debtor, and the defendant his surety. 7 B. L. R. 535-537; 16 W. R. 16.

BILL OF EXCHANGE (Act V of 1866).

141. The Court will give leave to a defendant to appear and defend in suits under Act V of 1866, where he shows a defence apparently real, but where there is a doubt as to the *bona fides* of the defence, payment of money into Court will be ordered, or security directed to be given.

The Court has, in giving leave to defend, a discretion to order security for costs, not only where it doubts the *bona fides* of the defence, but also if it considers the matter of defence raised is unnecessary, though allowable.

If the plaintiff has not been heard at first against the defendant’s application, the Court will always allow him to come in afterward and show that the leave ought not to have been granted, or, if granted at all, on more stringent terms. 6 B. L. R. App. 64.

Under the Summary Procedure in Bills of Exchange Act V of 1866 the plaintiff is entitled to claim by his summons and obtain by his decree whatever sum, principal and interest, is, on the legal construction of the instrument, demandable. 6 M. H. R. 257.

BILL OF LADING.

143. The refusal of a master of a ship to sign Bills of Lading otherwise than with an endorsement as to the damage claimed, is a wrong that may be fully compensated for in damages. 3 W. R. 1.

144. When a shipmaster undertakes that goods shipped by him shall be delivered, subject to the exceptions and conditions mentioned in a bill of lading, in good order and condition, he takes upon himself

consequences and contingencies other than the exceptions expressed in the bill of lading, or which are implied by law. 22 W. R. 39.

145. A bill of lading purporting to be for 50 tons of coals and containing a printed clause "weight, contents and value unknown" and similar words written above the signature of the master, does not amount to an admission by the master that he has received 50 tons of coals on board.

Upon the true construction of the Bills of Lading Act IX of 1856 section 3, a bill of lading in the above form is not, in the hands of a consignee for value, conclusive evidence against the master of the shipment of 50 tons. 9 B. H. R. 321.

146. Piece goods were carried from London to Bombay under a bill of lading, the exceptions in which protected the master from "leakage, breakage, rust, decay, loss, or damage from machinery boilers * * * misfeasance, error in judgment, negligence or default of * * * persons in the service of the ship * * * and the ship not being liable for any consequences of causes therein excepted however originating."

The piece goods, on their arrival in Bombay, were found to be damaged by oil and by chafing, *i. e.*, by rubbing against other goods in the hold, but there was no evidence to show how such damage was occasioned. Held, that the term "leakage" did not include leakage from other goods on to the piece goods, nor did "breakage" include damage caused by chafing, and that, as no negligence was proved; the master was not protected by the exception "damage from negligence." 10 B. H. R. 60, 61.

The plaintiffs agreed with the defendant K. M. to purchase and ship cotton on account of K. M., and to retain the mate's receipts of the cotton so shipped until the purchase-money should be paid by K.

Under this agreement the plaintiffs shipped 609 bales on board the "Teresa." Before the greater part of the 609 bales had been shipped, and before paying for the same, K. M. without production of the mate's receipts, induced the master of the ship to sign bills of lading for the said 609 bales, and indorsed over the bills of lading for 310 of such bales to J. C. and Co., *bona fide* indorsees for value, without notice.

In a contest between the plaintiffs, holders of the mate's receipts, and J. C. & Co., indorsees for value of the bills of lading of the said 310 bales, it was held that the plaintiffs were entitled to the possession of the 310 bales, to the exclusion of J. C. & Co. 7 B. H. R. O. J. 97.

148. The owners of a steamer by their Bill of Lading stipulated that they would not land specie, but that they would deliver it on presentation of Bills of Lading, or carry it on at the consignee's risk, if delivery were not taken during the steamer's stay in port; and they reserved to themselves the right of carrying on goods; which could not safely be landed within the time stipulated for stoppage, without being liable to indemnity for delay, &c. The steamer arrived in port (Moulmein)

late on Saturday evening, and sailed from Moulmein at day-break on Monday without delivering the specie shipped by the plaintiff, who now sues for damages. Held, that the steamer remained in port as long as she was required to do; that the Lord's Day Act, XXIX Charles II c. 7, was not applicable to Moulmein, but that even if it was, it could not prevent the owners from availing themselves of the stipulation which they had made; and that no action for damages was maintainable against them. 3 W. R. 3.

149. The defendants, by a condition annexed to their bill of stipulated that they should not be responsible for "leakage or breakage or other consequences arising from the insufficiency of the address or package."

The plaintiff shipped, for conveyance from Hongkong to Bombay, certain goods on board a steamer of the defendants, in packages which were proved to be insufficient.

These goods, in accordance with a condition to that effect contained in the bill of lading, were transhipped at Galle.

On their being landed in Bombay it was found that all the packages were broken, and in a much more damaged condition than is usual in the case of such goods carried from Hongkong to Bombay in similar packages. The contents had, to a large extent, escaped from the packages, but were otherwise uninjured.

Held that, under a bill of lading in the above form, the *onus* of proving that the packages were insufficient, and that the injury which they had sustained was the consequence of such insufficiency, lay upon the defendants, but that when the result of the evidence on both sides was to leave it in doubt whether the injury was caused by negligence, or was the consequence of the insufficiency of the packages, the plaintiff was not entitled to recover. 5 B. H. R. O J. 118.

Neither by the Custom of the port of Bombay, nor by the provisions of the Custom Act, is the master of a ship bound to wait 15 days before commencing to land his cargo; but within a reasonable time after the arrival of his ship—48 hours in the case of a sailing vessel, some what less in the case of a steamer—he is at liberty, if the consignee has not then sent boats for them, to land the goods at the Custom Bandar or other place sanctioned by the Customs Authorities; and landing is not unlawful, or a breach of contract as carrier, on the part of the master.

The landing of goods under the above circumstances, and setting them apart on the Custom House Bandar for the consignee, do not constitute a delivery of them to the consignee; but such goods, after being so landed, continue in the possession of the master as carrier.

Quære.—Whether, (under the special circumstances of this case in the text,) the goods when so landed remained in the custody of master in his capacity of common carrier or as a warehouseman?

The master of a vessel who receives goods on board under a bill of lading which exempts him from liability from loss occasioned by the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature or kind, and lawfully lands the goods at the port of discharge, is, so long as the goods remain in his custody after being so landed, protected from liability from loss by fire under the above exemption in his bill of lading. 7 B. H. R. O. J. 186.

151. Where a bill of lading contained a clause to the following effect:—"Any claim for short delivery or damage done to goods and all other claims whatsoever to be made at the port of Calcutta, and at no other port, and the goods are shipped and this bill of lading granted subject to this express condition",—it was held by the Recorder of Rangoon to operate so as to make the preferring of a claim in Calcutta a condition precedent to a suit in his Court.

Held by the High Court, that this opinion is correct, and that a suit for short delivery under the bill of lading cannot be maintained without a claim being made in Calcutta. 9 W. R. 396, 397.

152. The defendants, Carriers between Hongkong and Bombay, by a condition annexed to their bill of lading, stipulated that they should not be responsible for damage to goods arising from insufficiency of package.

The plaintiff shipped certain goods in the defendants' steamer in packages which, though in fact insufficient, were packages of the kind ordinarily used for the conveyance of such goods from Hongkong to Bombay.

On their being landed in Bombay it was found that packages were more or less broken, and that the contents were in some instances injured, and had to a small extent escaped from the packages.

In an action brought to recover damages in respect of such injury, it was held—That evidence of mercantile usage or of custom would be admissible to show that the words "insufficiency of package" should not be taken in their ordinary sense, but as meaning insufficient according to a special custom of the China trade.

Held also that evidence of these packages being ordinary China packages, and of such packages having been always carried by the defendants without objection, was not sufficient, in the absence of proof of negligence, to fix the defendants with liability for damage done to them, there being no proof that it had been the practice either of the defendants, or any other shipowners protected by a similar clause in their bill of lading, to make compensation for injury to goods contained in such packages. 4 B. H. R. O. J. 169.

153. The defendant, master of the Steamer Scindia, signed a bill of lading, by which he agreed with C. & Co. of London to deliver at Calcutta to them or their order four casks of brass wire which were shipped on board the Scindia. The casks were described in the bill of lading as bearing a certain mark beneath which was the word "Calcutta," as being the port of destination and they were stated as

carried subject to the following exceptions:—“The ship is not liable for obliteration or absence of marks, numbers, address or description of goods shipped: and expenses and losses by detention of ship or cargo, caused by incorrect marking, or by incomplete or incorrect description of contents, shall be borne by the owners of the goods. In case any part of the within goods cannot be found during the ship's stay at the port of destination, they are, when found, to be sent by first back by first steamer at the ship's risk and expense, and subject to any proved claim for loss of market. The ship shall not be liable for incorrect delivery unless each package shall have distinctly marked by the shippers before shipment with the port of destination”. The bill of lading was endorsed by G. and Co. to the plaintiff, a trader in Calcutta, who, on the arrival of the *Sindia* at that port applied for delivery of the four casks; and it then appeared that they had been landed at Colombo. In a suit to recover the price of the goods. Held, the defendant was estopped from alleging that the casks were not marked as stated in the bill of lading. It was open however to the defendant to prove that the casks did not on their arrival at Colombo bear the word “Calcutta,” and thus to bring himself within the clause in the bill of lading exempting the ship liability for obliteration or absence of marks; but on proof of this in order to disentitle the plaintiff to succeed, the defendant must show that the absence or obliteration caused the landing at Colombo. It was found on the evidence that he had failed to do this, and a decree was given for the plaintiff. 13 B. L. R. 394.

The mere fact of the passing of some money from one hand to another does not necessarily constitute such a transfer of interest as would indicate a *bona fide* transaction. 17 W. R. 499.

BOND.

155. Though a bond may be genuine and duly executed, the receipt of consideration must nevertheless be proved. W. R. S. N. 197.

157. Whether a bond becomes due before or after the obligor's his sons are liable only to the extent of the assets which they receive of his estate and which remain unadministered in their hands. 12 W. R. 223.

157. Where a bond is given in renewal of former bonds, it constitutes a new security, to take effect from its date. 2 N. W. P. 37.

158. Where a plaintiff claiming under a bond desires to show that something was intended by the parties beyond the grammatical import of the terms of the contract, he should prove this by other evidence: the Court cannot supply the defect. 8 W. R. 466.

159. When a bond contains an agreement that no payment not endorsed on it should be recognised, a Court of justice will receive evidence of payments not endorsed on the bond, notwithstanding such agreement. 1 N. W. P. 146.

160. When the full sum specified in a bond was admitted to be due the fact of the plaintiff having on condition of the payment of half the amount by a certain day agreed to remit his claim to the other half, cannot affect his right to recover the entire amount due on the defendant failing to fulfil the condition. 1 M. H. R. 208.

161. The fact that the money raised on a bond is used to pay a debt due by a third party (G) does not make such third party liable to the party who executed the bond, unless the latter joined in the bond at the request of the third party or of some one acting under his authority. 24 W. R. 99.

162. The plaintiff sued on a bond, which recited that the defendant had received the consideration mentioned in the bond. Held that the *onus* was on the defendant to show that the recitals in the bond were not correct. 4 B. L. R. F. B. 54; 10 W. R. 407.

163. In a suit on a bond where defendant pleaded satisfaction, held, under the Evidence Act I of 1872 section 114, that as the bond was in the hands of the obligor who was not shown to have stolen it, it was rightly presumed that the obligation had been discharged. 22 W. R. 265.

164. Where in a suit on a bond which recites that consideration passed the defendant admits the execution of the bond, but avers that he received no consideration or only part of the consideration, the *onus* lies on the defendant to show that the recitals in the bond are not correct. 12 W. R. F. B. 25, 26.

165. The answer to a suit upon a bond was that the amount should be satisfied out of the purchase-money of property sold by defendant to plaintiff, and plaintiff claimed to avoid the sale as being bad. Held, that the Lower Courts, instead of deciding against plaintiff and leaving him to bring a new suit to try the question whether the sale was a good one or whether plaintiff could avoid it, were bound to try that question in this suit. 18 W. R. 394.

166. Where a suit was brought on a bond by the former proprietor of an indigo factory, and the holder of the bond was proved to have lain by for 12 years without making any demand on it or without apprising the different assignees of the factory of the existence of the debt as one due by the factory, — Held that the plaintiff was not entitled, after the lapse of so many years, to come down on the present proprietors of the factory, but that he must be held to have elected to look alone to the obligor of the bond for satisfaction of the debt, making it purely personal with the obligor. W. R. S. N. 266.

167. Suit to recover a bond. The plaintiff was security for payment of the bond on hypothecation of usufruct of a farm; and as the bond (save a few rupess) had been satisfied by that usufruct, the plaintiff was held absolved from liability, and the bond was directed to be made over to him on payment of the balance due, notwithstanding the defendant's at-

tempt to appropriate the usufruct in payment of other bonds more 12 years old. 1 W. R. 245.

168. The plaintiff, a creditor of the late Raja Chatpal Sing, from the Collector in charge of the estate, a composition, payment in adjustment of his claims. Held, that he could not sue the Raja or the infant son of the Raja, on a contract or bond for payment of the balance. 2 B. L. R. P. C. 98.

169. In a suit against T, on a *hat-chitta* bond, T, having pleaded that plaintiff was only the benamedar for J who had advanced the whole money, J was made a defendant and supported T's statement. Subsequently R. intervened and was made a defendant on the allegation that the money was half his and half J's. As the bond was not denied, plaintiff ought to have had a decree, leaving others interested to proceed against him. But the case was tried on the issue whether the money was plaintiff's or J's, and plaintiff having failed to prove that the money was his. Held that the Judge was right on refusing to give him a decree although he might have had some doubts as to whether the whole of the money belonged to J or not. 18 W. R. 125.

170. Where A wishes to charge Mahomedan ladies under a bond executed in their absence by B under a *mooktarnamah*, even if there was no collusion between A and B, A is bound to show that there was no negligence on his part—that the advance was made after satisfying himself that it was taken for their use, and was required by them for the purpose stated in the *mooktarnamah* (*viz.*, for the payment of their debts), and also that the money was applied to the use of the ladies. 18 W. R. 257.

171. Circumstances in which it was held, that a female whose estate was under the control of the Court of Wards was not to be considered a disqualified female, and that she had power to contract bond debts.

Where a plaintiff sued the obligor and other defendants on a bond, not affecting land, and there was an allegation in the plaint, that the obligor had transferred the land to those defendants to avoid judgments attaching on the land, it was held, that there was no right of action against those defendants, and they were improperly made parties. (Ben. Reg. X. of 1793) *followed*. 11 M. I. A. 469; 9 W. R. P. C. 9.

172. In a suit to recover the amount of principal and interest due upon two several bonds, one of which alone was forthcoming, the other being referred to and vouched by a note of hand of the obligor, the issues settled and recorded by the Court below for trial were, *first*, whether the first bond was the deed of the deceased obligor, and, *secondly*, whether the note of hand was under the seal of the obligor, and if so, whether it was a valid acknowledgment of the debt claimed on the second bond, and up to what time and at what rate interest was due. The Court below, notwithstanding that the first bond actually proved, purported to have been given on an account settled, allowed evidence of the accounts and dealings between the obligor and obligees previous to the execution of

both bonds, and, after having referred the same to an Accountant, decreed the plaintiffs entitled to a less sum than sued for, with interest upon the account thus taken:—Held on appeal by the Judicial Committee, that the Courts below had miscarried, *first*, in allowing the opening of and founding the decrees upon settled accounts, the only question upon the issues recorded for their judgment being the validity of both bonds, of which they were satisfied, and *secondly*, that from the frame of the issues neither the obligees nor their representatives were bound to prove the consideration for the bonds, but were entitled to recover the whole principal and interest due thereon, which was decreed, and the decree of the Court below amended to that effect. 11 M. L. A. 120, 121.

173. The period of limitation in the case of a bond stipulating not merely for the personal security of the debtor, but also for a security on the land mentioned therein, is 12 years.

Such a bond gives rise to a charge and interest in the land mentioned therein, and confers a right to sue to enforce the charge by sale of the property. 1 N. W. P. 181.

BOND (Bottomry).

174. A suit will not lie on an ordinary bottomry bond given by the master of a vessel against the owner to recover the amount thereof.

Such a suit cannot be brought in the Court of the Judge of the town of Moulmein, which has no admiralty jurisdiction against the owner personally; and the vessel cannot be declared to be primarily liable or be sold to satisfy the amount of the bond. 24 W. R. F. B. 50.

175. The charterer of a ship advanced money to enable her to complete the voyage, and obtained as security a "bottomry bond" signed by both the master and owner. On the completion of the voyage, the charterer got the ship arrested and sold, and the money was brought into Court. Before any order had been made for the payment of the proceeds out of Court, the master also had got the ship arrested at his suit for wages due, but no decree has been obtained. Subsequently, the charterer, without notice to the master, obtained an order of Court for the payment of the proceeds of sale to satisfy his bottomry bond. Thereupon, the master applied to restrain the charterer from taking the money out of Court, until the claim for wages had been first satisfied. Held that the master had a lien on the proceeds for wages due to him at the time of the sale of the ship, prior to that of the bottomry bondholder, and that he was entitled to have the proceeds retained in Court until the hearing of his claim. 5 B. L. R. 258.

176. The Stat. 7 Geo. 1, c. 21, section 2 (which declared void all contracts by way of bottomry made by any subject of His Majesty on any ship in the service of foreigners bound, or designed to trade, to the East, and all contracts for loading or supplying such ships with goods &c., or with any "provisions, stores, or necessaries," &c.), is repealed by implication.

The Stat. 3 and 4 Vict., c. 65, section 6, does not confer jurisdiction upon the High Court of Bombay on its Admiralty side to entertain causes for necessaries supplied to foreign ships, that statute not extending to India.

The Stat. 24 Vict., c. 10 (Admiralty Act of 1860), does not extend to India.

The jurisdiction of the High Court on its Admiralty side is the same as that exercised in the Court of Admiralty in England prior to the passing of the above statutes.

When a suit is brought by material men for necessaries supplied to a foreign ship against the surplus proceeds of such ship lying in the registry of the Court, and there is no opposition on the part of the owners of those proceeds, the Court has a discretionary power to allow the claim of the material men to be paid out of such unclaimed proceeds. 5 B. H. R. O. J. 64.

177. A ship was chartered for a voyage from Calcutta to Jedda and back, while at Jedda, the master found it necessary to borrow money for the wages of the crew and other purposes; and with the consent of the owner, tenders were invited by advertisement for a sum for which a bottomry-bond was to be given. Several tenders were made, and one by the charterer of the ship was accepted. A bottomry-bond was executed by the master, with the consent of the owner, in which was included the expenses of certain repairs which had been found necessary at an intermediate port on the voyage from Calcutta, and for which the master had made himself liable. By the bond the master bound himself, his heirs, executors, and administrators for the payment of the sum named therein, and part of the consideration was expressed to be the payment of the debt which the master had incurred at the intermediate port. On arriving in the Hooghly, the ship was taken in charge by a pilot, under whose advice the master engaged a steamer to tow her to Calcutta. He was sued in Calcutta for the hire of the steamer, and had to pay the claim. When the ship arrived in Calcutta the bond-holder obtained a decree on his bond, and had the ship arrested and sold; but on the application of the master, who had put in a claim for wages, the Court ordered; that the proceeds should remain in Court, pending the consideration of the master's claim. In a suit by the master to recover the balance of wages due to him as master of the ship, and for the expenses of the steamer which towed the ship up the river to Calcutta.

Held the towage was a disbursement fairly made, and of which bond-holder had the benefit; the master therefore had a lien on ship for such disbursement.

Semble.—The master also had a lien for wages down to the time when he was duly discharged, and not merely down to the time of the arrival in port and arrest of the ship.

The master, however, having bound himself by the terms of the bond, was precluded thereby from setting up his lien against that of the bond-

holder, to whom on the face of the bond, he had constituted himself

24 Vict. c. 10 (the Admiralty Act 1861), and 26 Vict. c. 24 (the vice Admiralty Act 1863), extend to India.* The High Court, as constituted by the Charter of 1862, had not, by virtue of the Admiralty Act 1861 or otherwise, any jurisdiction over claims for disbursements by the master. But after the passing of the Charter of 1865 the vice Admiralty Act 1863 applied to the High Court, as being "a vice Admiralty Court" established, after the passing of that Act, in a British possession." Held, therefore, that the High Court had jurisdiction, as a vice Admiralty Court, to entertain the claim of the master for wages and disbursements on account of the ship. 6 L. R. 323,324.

BOND [Instalment).

178. A suit may lie on an instalment bond notwithstanding the terms of the bond give the plaintiff a right to execute it as a decree. 4 W. R. 81.

179. The defendants, *purda-nushcen* ladies, having unsuccessfully defended the suit throughout on the ground of tender of payment and deposit in Court, and that they had done all they could to induce the plaintiff to take the money due on a *kistbundee* or instalment-bond. Held that it was too late for them now in appeal to urge that they had been overreached by the plaintiff, and made to execute a bond for money which they had never owed.

Held also that the Sub-Judge was right in restricting the plaintiff to the property pledged in the *kistbundee*, plaintiff having sued upon the *tbundee* and prayed to have his claim declared payable by the sale of property mortgaged therein. 18 W. R. 3

180. In a suit to recover from a ticcadar certain arrears of rent and (under the denomination of "interest") an increment of 50 per cent, on the amount reserved according to a stipulation in the *kuboolout* that such increment should become due in the event of non-payment of an instalment on the day on which it was to be paid.

Held that the 50 per cent, stipulated for was in the nature of a penalty, no relation to any actual or supposed loss which the Zemindar sustain from delay in the payment, and that plaintiff was entitled to recover only so much as would compensate him for such loss. 20 W. R. 257.

181. Plaintiff sued in a Small Cause Court, on an instalment-bond of 81 rupees. The bond had been executed for *nuzzar* or *salami* contemporaneously with the execution of a *potta* and *kabuliat*, by which the defendants agreed to pay the plaintiff 335 rupees a year, for two

BOND (WRITTEN).

1, as rent for certain land. The potta and kabuliat had not been registered. A previous suit brought by the plaintiff under Act X of 1859, had been, therefore, dismissed, and no oral evidence was admitted to prove the terms of the potta and kabuliat. The defendants now claimed a set-off against the amount claimed under the bond, on the footing of a contract contained in the potta and kabuliat. The Judge refused to receive them in evidence, or to receive oral evidence of their contents, and gave a decree in favor of the plaintiff, subject to the opinion of the High Court on four questions submitted by him.

Held, the suit on the bond was properly cognizable by the Small Cause Court as a simple debt due under the bond. It was clearly not for an *abwah* or illegal cess, whether it was *nuzzar* or *salami* was immaterial, the defendant having benefited in the Act X suit by the fact that no oral evidence had been admitted to prove the contents of the potta and kabuliat, it would have been contrary to rule and inequitable to admit such evidence now in support of his claim of set-off. 5 B. L. R. App. 1.

BOND (Joint).

182. A creditor who lends money on a joint bond or on several bonds, exercising the right which he possesses to resort to all his security till the debt is re-paid, is not fettered by any arrangements between the principal and the surety or sureties as to the mode in which the principal shall indemnify. 11 W. R. 461.

BOND (Novation of).

183. B became surety under bond to Government for the treasurer of a Collectorate. The Collector yearly examined the accounts, and struck a balance which he certified to be correct, B on each such occasion, executed a new bond, but the old bonds were not cancelled or given up. On subsequent enquiry, the treasurer was discovered to have embezzled moneys during each year. Held that, on such discoveries being made, B was still liable under the old bonds there having been no novation.

Where the Courts below had admitted evidence not properly admissible, the Judicial Committee examined the whole evidence, and being satisfied that there was independent of that inadmissible evidence, sufficient to justify the decision of those Courts, dismissed the appeal. 9 B. L. R. P. C. 364.

BOND (Under Seal).

184. A bond, although under seal, does not in India of itself import that there has been a sufficient consideration for it. 2 N. W. P.

BOND (Written).

Where a husband writes and signs a bond in the name of his wife, there is a tacit or implied contract by him that he had authority to do so. If he had not authority, the obligee may sue for damages for breach of contract or for false representation. 18 W. R. 249.

C.

CARRIER [By water].

186. A carrier by sea is obliged to make an actual delivery of goods carried by him to the consignee; but such *prima facie* obligation may be affected by the custom of the port where the goods are to be delivered.

Neither by the custom of the port of Bombay, nor by the provisions of the Custom's Act, is the master of a ship bound to wait 15 days before commencing to land his cargo, but within a reasonable time after the arrival of his ship 48 hours in the case of a sailing vessel, and some what less in case of a steamer—he is at liberty to land goods, if the consignee has not then sent boats for them, and such landing is not unlawful, or a breach of contract as carrier, on the part of the master.

The landing of goods under the above circumstances and setting them apart for the consignee, do not constitute a delivery of them to the consignee, but such goods after being so landed continue in the possession of the master as carrier.

The defendant received goods on board his steamer under a bill of lading which exempted him from, liability for loss occasioned by the act of God, the Queen's enemies, fire, and all every other dangers and accidents of the seas, rivers and navigation of whatsoever nature or kind, and lawfully landed them on the Custom House Bander at Bombay where they were accidentally burned before they were delivered to the consignee.

Held, that he was protected by the above exception in the bill of lading. 6 B. H. R. O. J. 71.

187. Plaintiff shipped some bales of cloth from Calcutta to Rangoon under a bill of lading by which the defendants were bound to deliver, "accidents, loss or damage from fire, machinery, boilers, steam, and all the accidents of the sea, rivers, land-carrriage, and steam navigation, &c." excepted. On the voyage, one of the boilers leaked, and steam and water escaping, some of the bales were damaged.

Held that the damage was within the exceptions in the bill of lading and therefore that the defendants were not liable to make good the loss.

Quera.—Whether, notwithstanding the exceptions in the bill of lading, the defendants might not have been made liable in a suit on the implied warranty if it had been proved as a fact that the boiler was not reasonably fit for the voyage.

The bill of lading contained a provision that any claim for short delivery or for damages done to goods should be made at the port of Calcutta and not elsewhere. Held that this clause did not affect the plaintiff's right of suit in the Court at Rangoon, and that if the defendants meant to object that no claim had been made in Calcutta before the commencement of the suit, they should have done so in proper time,

viz., in his written statement. An objection on that ground taken for the first time at the hearing of the appeal was disallowed. 8 W. R. 35.

CARRIER (Common).

188. So long as goods, though delivered to a common carrier appointed by the consignee, remain at the risk of the consignor, they are not delivered to the consignee. 1 M. H. R. 200.

169. In an action to recover damages for injury caused to the goods by the negligence of the defendant as a common carrier, it is not necessary for the plaintiff to give evidence of such negligence unless the defendant has shown that the injury was occasioned by a cause which was within the exceptions. Then the plaintiff would be at liberty to show that there was negligence so as to deprive the defendant of the benefit of the exceptions. 22 W. R. 40.

190. Plaintiff delivered certain jute to the India General Steam Navigation Company at Serajgunge, for delivery at the Eastern Bengal Railway Company's station at Sealdha, and it was arranged by the bill of lading (the contract in the case) that the freight from Serajgunge to Sealdha should be payable to the Eastern Bengal Railway Company at Sealdah, and it was so paid upon the delivery of the goods. A portion of the jute was not delivered, and this suit having been brought against the Eastern Bengal Railway Company for the value thereof, the Small Cause Court Judge was disposed to dismiss the suit without further enquiry, on the ground of want of privity between plaintiff and defendant: Held that it was premature for the Judge to say that the suit could not lie against defendant without proceeding with the further investigation of the case, and that although plaintiff might have a remedy against the Indian General Steam Navigation Company, it by no means followed that he had none against the defendant Company also. 17. W. R. 240,241.

191. A person carrying on the ordinary business of a proprietor of dak-carriages does not come within the term "common carrier" as that term is understood in the English law.

Such a person is bound to exercise reasonable and ordinary care in respect of baggage entrusted to him, but is not responsible for any loss which may not arise from the negligence or default of himself or his servants, he not being a common-carrier bound to insure the safe conveyance of the baggage against all risk, save the act of God or the Queen's enemies.

He is to be regarded as a bailee for hire, and the fact that he does not deliver the baggage at the end of the journey should be accepted as *prima facie* proof that the loss has been occasioned by negligence for which he is responsible, and, consequently, the *onus* of proof lies on him that reasonable care was exercised by him. 2 N. W. P. 237.

192. A and Co. at Madras shipped by the B. I. S. N. Steamer "Meh-ratta" a box of coral to be delivered to their agent M. at Bimlipatam. At the time of shipment they declared the value and paid enhanced freight on account of such value. By the bill of lading the Company undertook to

deliver the case in good order at Bimlipatam to the consignee M. Subject to certain conditions annexed. By one of those conditions if the consignee did not take delivery when the ship was ready to discharge, the goods might be ware-housed at the merchant's risk, and the Company's liability was to cease when the goods left the ship's side. The consignee did not take delivery at the ship's side, and the Company's agent at Bimlipatam took the case to the custom house as he was bound to do by the Regulations of the port. If the Superintendent of the Custom House had known that the case contained corals, it would have been placed in an inner room, but the Company's agent did not know the contents of the case, and, therefore was unable to give any such information to the Superintendent. While the case was lying at the Custom-house, application was made on plaintiff's behalf to the Company's agent for delivery of the case upon the usual guarantee. The agent refused to deliver the case without the production of the bill of lading. Afterwards the bill of lading was received from Madras and the case was delivered up. At some time between its leaving the ship's side and delivery to the consignee the case was opened and a portion of the contents stolen. Held, that the defendants were not liable. 6 M. II. R. 353.

193. In March 1871 T and Co. brokers in Calcutta, sold to S and Co. on account of C an up country seed merchant, 200 tons of poppy seed, and allowed C to draw upon them to the extent of the value of 50 tons before despatch, on the terms of a previous contract by which they had allowed C to draw against cotton to arrive in Calcutta before the drafts matured, C authorizing them to receive payment on his account on goods sold and delivered through them. Towards the end of March C entered into an arrangement with E, a merchant in Calcutta, under which E accepted bills to a large amount for C upon C's promise to cover the bills before maturity. In June C ordered the defendant Railway Company to consign all goods despatched from Fyzabad to E's address and empowered E to take delivery of, and give receipts for all such goods. In the same month C despatched from Patna, in bags supplied by S. & Co., 55 tons of poppy seed to Calcutta, and sent the Railway receipt to E, who was therein named as the consignee. One of the terms printed on the receipt stated that goods would only be delivered to the consignee named in the receipt or to his order. In advising E. of the despatch of the poppy seed, C. informed him that it had been sold to S. & Co., and that delivery was to be made through T. & Co., and E. had also seen letters which passed between C. and his agents in which the following passages occurred, "our Calcutta firm will deliver the poppy to T. & Co.," and "Do your best and hurry off despatches of 50 tons of poppy. The rest of the poppy and linseed can go to E. E. endorsed the railway receipt to S. and Co., who paid the freight, and sircars of E, and S. and Co., together went to the railway station and demanded delivery which the Railway Company at first promised to give, but afterwards, under an order from C. to deliver 50 tons to T. and Co. and to no other party, the rest of the seed to be delivered according to documents," they at T. and Co's request delivered the

whole 55 tons to them. In an action by E. against the Railway Company for non-delivery of the deed to him.

Held (per Markby, J.,) E, was a mere agent of the vendor for the delivery of the goods; T. & Co. had a superior title to the goods, of which E, had notice.

Held (per Couch, C. J., and Macpherson J., on appeal) the Railway Company was bound to deliver to E. The property in the goods and right of possession was in him; he had an authority coupled with an interest which C could not revoke; he had no notice of the title of T. & Co, which was an equitable right only. 8 B. L. R. 581, 582.

CHAMPERTY.

194. *Quere.*—Whether Champerty or Maintenance according to English Law is forbidden by the Law of India. 3 W. R. P. C. 33.

195. By the English law, to maintain an action for Champerty or Maintenance, it is necessary to establish that the transaction was against good policy and justice, or tending to promote unnecessary litigation. 8 M. L. A. 170; 3 W. R. P. C. 33.

196. Held by Glover J. (Macpherson, J., dissenting), that there is no law against Champerty or Maintenance in Bengal. 9 W. R. 490.

197. Every purchase of a suit is not Champerty. 9 W. R. 243.

198. Where the purchaser of a share of land joins his vendor in a suit to recover his own property, his action cannot be termed "Champerty." 12 W. R. 133.

199. *Quere.*—Whether contracts involving Maintenance and Champerty, as those offences are defined by English law, will be enforced. 1 N. W. P. 1.

200. The law of England as to the offences of Maintenance and Champerty does not apply to Natives of India. In dealing with objections to their contracts, on the ground of Maintenance or Champerty, the Court must look to the general principles regarding public policy and the administration of justice upon which that law at present rests.

To constitute "Maintenance" improper litigation must have been stirred up with a bad motive or purpose, contrary to public policy and justice.

"Champerty" is a species of "maintenance," and of the same character, but with the additional feature of a condition or bargain, providing for a participation in the subject-matter of the litigation. 1 M. H. R. 153.

201. Maintenance and Champerty are not offences in India, and the ground on which agreements which are champertous, and agreements as to Maintenance, are considered void here, is because they are considered void and against public policy. Accordingly, in this country no action lies against a person for Maintenance. 22 W. R. 138.

202. The Courts will not interfere when a transfer is completed at once *e. g.* where a party buys a certain share of a litigant's risk and stands or falls by his purchase, having only the right to recover his share from the party suing if the latter wins his case, and having no claim at all if the Courts decide against him.

Quære.—Whether, in the present state of the law in India, Champerty can be pleaded at all. W. R. S. N. 300.

203. In consonance with the principles laid down by the High Court of Calcutta in several decisions, the Lords of the Privy Council held that, although the law of Champerty was not applicable to the Mofussil, the Courts would be exercising a very unsound discretion, and acting on a very erroneous principle, if they were to allow a stranger to interfere in family affairs, by an agreement between him and the real heirs that if he should establish their claim he should be entitled to a share of their estate; and that such an agreement could not be enforced, being something against good policy and justice, something tending to promote unnecessary litigation, and something that in legal sense is immoral. 22 W. R. P. C. 148.

204. R entered into an agreement with G, that if a suit, which was then about to be brought by G for the recovery of certain land, should be decided in favour of G R was to pay G Rs. 85, and G was to make over to R half the land recovered. R was to pay G Rs. 50 in certain proportions which R was to lose if the suit was not decided in favour of G, G recovered the land and R then sued him upon the above agreement.

No issue was taken in the Court of first instance on the question whether the agreement was void for Champerty.

An issue was raised on this question by the Appellate Court and (no evidence being taken) was decided in favour of the defendant.

Held in special appeal that, as it was not manifestly apparent on the face of the proceedings that the agreement was against morality or public policy, the Appellate Court ought not have held it void.

Semble.—That the above agreement was not void on the ground of Champerty; at any rate, that it was capable of explanation by a consideration of the surrounding circumstances which the plaintiff should have had an opportunity of giving in evidence. C B. H. R. A. J. 63.

205. In a suit by a Mahomedan mooktear for specific performance of an agreement under which he advanced money to carry on a suit by members of a Hindu family to set aside alienation made by their father, on the understanding that he was to be entitled to a share of the estate recovered from the purchasers in the event of success: Held, that the agreement savored of Champerty, and that a suit involving such interference in the affairs of a Hindu family could not be countenanced. 13 W. R. 427.

206. The three childless widows of zemindars instituted a suit against

the rightful heir to their husband's estate, in which unsuccessfully disputed his legitimacy. Previously thereto they had obtained advances of money from the present plaintiff, and executed in his favour an agreement and a bond, whereby they secured to him the payment of large sums in case they recovered their husband's estate, and virtually gave to him the entire control of their suit. Subsequently they agreed with the rightful heir to compromise the suit, which compromise however was never acted upon, partly owing, it was alleged, to the subsequent conduct of the heir. At the date of the compromise, the heir, who had just attained his majority, and was without proper Counsel or assistance, and acted under threats from the plaintiff, a powerful and wealthy banker, that he would carry on the litigation against him *per fas aut nefas*, was induced, contrary to his own judgment and sense of right, and without any evidence that the sum claimed was really due to the plaintiff, to execute a bond in his favour, whereby he bound himself to pay a large sum of money claimed by the plaintiff as being due from the widows; the plaintiff on his part agreeing that he would treat such payment as a satisfaction of his claim against the widows, but meanwhile that he retain the securities which he held from them.

In a suit brought by the plaintiff against the heir to enforce the last mentioned bond. Held that the bond was wholly invalid and fraudulent as against the defendant, and that as there was no privity of contract between the plaintiff and defendant independently of the it could not stand as security for anything which might be justly from the widows.

—The transaction, even if valid, did not amount to a novation; for the plaintiff never abandoned his claim against the widows, but only agreed to abandon his remedy against them, in case he obtained satisfaction of his claim from the heir.

vere.—Whether the plaintiff could have recovered from the widows, if they had been successful against the heir, the large sums of money secured by their bond and agreement?

The law of Champerty and Maintenance is not the same in India as in England. The English Statute with regard to Champerty is not applicable in the mofussil in India. The Indian Courts in every transaction must decide upon the facts whether it is merely the acquisition of an interest in the subject of litigation *bona 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 or other improper motive. 13 B. L. R. 519.

207. N, claiming to be entitled to certain real and personal property as heir of one J, brought a suit under Act XIX of 1841 to obtain possession thereof; and, in order to provide funds to carry on the litigation executed an *ikrarname*, whereby he purported to relinquish and convey to one K a moiety of his right, title and interest in the property, in consideration of the sum of Rs. 50 K agreeing to take all proper steps, and to defray all expenses necessary for the recovery of the property, which was valued in the *ikrarname*, at Rs. 75,000. K, accordingly, carried on the

suit and incurred costs to the extent Rs. 1,700, but the suit was ultimately dismissed. The property was afterwards taken possession of by the Court of Wards on behalf of one S, who claimed under an alleged adoption by one A, the person last in possession. Thereafter K, sold his interest under the *ikrarnama*, which he valued at Rs. 2,18,000, to the plaintiff for the sum of Rs. 1,700. In a suit brought against the Court of Wards as representing S, for the recovery of a moiety of the property or its value, in which N refused to join as plaintiff and was made a defendant: Held that the suit was not maintainable, the conveyance by N. to K did not operate as a present transfer of the property, but only as an agreement to transfer it on conditions which were never fulfilled; the plaintiff was not entitled to recover as against S, who was no party to the deed. Held also that the transaction was void as being contrary to public policy, and one to which effect ought not to be given by the Court. 13 B. L. R. 495.

208. A Commissariat Officer named Mackellar had a butler named Lalah Miyah, who was employed to put forward with the money of Mackellar, or his own, various large contracts. Two accounts were opened in several houses of agency in the names of Mackellar and Lalah Miyah. To secure himself, Mackellar caused Lalah Miyah to execute a will leaving his whole estate to Mackellar. Testator and legatee perished together in the Persia steam ship, in 1864. The Administrator General of Madras administered to Lalah Miyah's estate, but the personal representatives of Mackellar contested the right of the Administrator General to pay over the fund to those of Lalah Miyah. The result was that Lalah Miyah's representatives, the present defendants, were driven to a suit to establish their rights. Not having funds to prosecute that suit, Lalah Miyah's representatives were recommended by their attorney, C, to apply to one Jaffarji Tyab Ali (the present plaintiff) who was also a client of C's, for the necessary funds. Jaffarji consented to advance money for the purposes of the suit and on the 28th July 1869 a so-called deed of mortgage drawn up by C, was executed between the present defendants as mortgagors and the plaintiff, Jaffarji, as mortgagee, whereby in consideration of an advance of the sum of rupees 5,000 (the receipt of 1,800 rupees of which was by the instrument acknowledged) to be made by Jaffarji to such attorney as he should select, before the 31st December 1869, the defendants mortgaged every thing to which they might be entitled or recover by suit, the mortgage to be defeasible on payment of 50 per cent. of what they might recover by suit, and a further 50 per cent. upon all to which they might be entitled as the persons entitled to Lalah Miyah's estate. They also covenanted to repay the money lent with interest. The present defendants succeeded in their suits against the representatives of Lalah Miyah, and this suit was brought by Jaffarji to recover a commission of 50 per cent. on the sum recovered, and the sums advanced, with interest. Defendants denied that plaintiff had fulfilled his part of the agreement and alleged that in consequence of his neglecting to supply funds they had been compelled to borrow of a third party. They also pleaded that the agreement was void for Champerty and Maintenance. Held that by the Law of England, which prevailed in the present suit, this con-

tract was clearly void, being contrary to the plain provision of the common and statute law against Maintenance, and that it was also void as being contrary to public policy. The Court further found that the plaintiff had failed to fulfil his part of the contract, but allowed him, *viz.*, Rs. 2,200, with interest. 7 M. H. R. 128.

209. The Mofussil Courts of India, administering justice according to the broad principles of equity and good conscience, will not apply the English law of Champerty and Maintenance according to the practice of the English Courts, but they will consider whether a transaction impeached on the ground of Maintenance is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair or illegitimate transaction got up merely for the purpose of spoil or of litigation, and they will not allow a stranger to interfere in family affairs by an agreement between him and the real heirs that he should be entitled to a share of the estate. (8 M. I. A. 170) *distinguished*.

A., a stranger, advanced money to enable B. C. and D., childless Hindu widows, upon a false claim of inheritance, to take the estate of the family from E., the rightful heir; A got the entire control of the suit and of the affairs of B. C. and D; and B. C. and D. executed an instrument purporting to secure to A. a large sum of money upon their obtaining the property and also gave him their bond for a sum alleged to have been advanced by him.

B. C. and D. having agreed with E. to withdraw the suit upon terms of compromise, E. was induced to enter into a bond to A., by which E. in effect engaged to pay to A., in discharge of his claim upon B. C. and D. a fixed sum, which was claimed by A. as the amount due to him; and A. agreed to abandon his claim upon them on such payment, retaining the securities he held from them until E's bond was satisfied.

At the time of entering into this bond, E. had only just attained his majority, was without proper counsel or assistance, and was threatened by A. with the consequences of not immediately acquiescing in his demand, the threats not being of bodily violence, but of carrying on the suit to his ruin; and such threats overcame his free will, and induced him contrary to his own judgment and sense of right, and without any evidence that the sum claimed was due, to execute the bond.

On a suit by A. to enforce the bond:—

Held, that the taking of the bond from E did not amount to novation; that the bond was wholly invalid as against E., and could not even be made to stand as a security for what might really have been advanced by A. to B. C. and D., as nothing was ever due from E. to A., and there existed no privity of contract between them. 1 L. R. P. C. 241, 242.

210. B, a childless Hindu widow, entered into an arrangement with G, whereby she appointed G her irrevocable attorney to institute,—and G agreed to institute and prosecute (with funds which he was to provide),—a suit in B's name to recover her husband's estate from her brothers: and as part of the arrangement B conveyed and assigned to G all that she might recover, with all interest and accumulations

thereon,—the agreement being that G. should retain half of all that was recovered, for his own absolute benefit as remuneration for his trouble, and that out of the remaining half G. should re-pay himself all sums of money spent by him in prosecuting the suit or for B's maintenance *pen deute lite*, making over only the residu of such remaining half to B. A suit was accordingly instituted and B obtained a decree, in execution of which a large sum of money was paid into Court:—

Held, that a suit would lie by the reversioners to restrain waste and to prevent the payment of the money out of Court to G.

Held, by Peacock, C.J., and Macpherson, J., that the contract was void against the reversioners, otherwise than as a mere security for sums properly paid and costs properly incurred by G, with interest on such sums and costs.

Held by Peacock, C. J., that the arrangement by which one half share was assigned to G absolutely as remuneration was not binding on the reversioners,—if not upon the ground of Champerty, upon the ground that it was an unconscionable bargain and a speculative, if not gambling, contract.

Held by Phear and Macpherson, J. J. that the whole contract and assignment were void under the English Law as savoring of Champerty and Maintenance, and as being an unconscionable and gambling transaction, and therefore contrary to public policy.

The suit by the reversioner was originally instituted in the Hooghly Court, and H, who was a defendant, was not subject to the jurisdiction of that Court. H however joined in an application to have the case tried by the High Court in the exercise of its extraordinary original civil jurisdiction, which application was granted.

Held by Peacock C. J., and Macpherson, J., that the case having been transferred from the Hooghly Court, the law applicable to it was the law which would have governed it if it had been tried in Hooghly.

Per Macpherson J.—Held that the law applicable to the case if tried in the Court of Hooghly was precisely the same as the English law applicable to it. 12 W. R. O. J. 13.

211. In a deed, dated 17th July 1867, it was recited that A. was entitled to certain property then in possession of D. and E. and that A. and B. her husband, "having no funds to adopt or to commence legal proceedings" for the recovery of the property, had applied to C. to assist them in commencing and conducting the necessary suits and to make all the requisite disbursements connected therewith until their final termination, and that C. had agreed to do so, and also, as A. and B. had "no means whatever," to pay to them or the survivor Rs. 150 a month until the final termination of the litigation. Then followed the appointment by A. and B. of C. to be their attorney to institute and prosecute all necessary suits, to sign all papers and documents, to receive all moneys take possession of all lands &c., to which A. and B. might become

CHAMPERTY.

entitled under any decree or order that might be made, and to appoint attorneys and vakeels. C. then covenanted to institute and prosecute the necessary suits and to make the necessary advances and payments and to pay Rs. 150 a month to A and B. Then it was agreed that out of the moneys or proceeds of lands &c., recovered, C. should, in the first place, retain and reimburse himself all advances and payments made by him with interest thereon at 12 per cent; in the second place, retain to himself by way of remuneration for his trouble and risk, one-third of the net proceeds of the litigation; and, in the third place, make over the remaining two-thirds to A and B. A and B. covenanted not to intermeddle with C. in prosecuting the litigation, that they would render him all possible assistance, and that the power of attorney given by them to C. should be irrevocable so long as he prosecuted the litigation and paid the monthly allowance Rs. 150. It was provided, however, that if B wished to devote all his time thereto, he might have the management of the litigation, but under the control of C; and that A. and B. might revoke the power of attorney on re-payment to C. of all money advanced by him with interest at 12 per cent.; and the sum of Rs. 2,000 by way of liquidated damages. A power was also reserved to A. and B. to compromise, but only with the consent of C. unless the sum to be received on the compromise should exceed the total amount of C's advances with interest at 12 per cent.

In pursuance of this agreement a suit was instituted in the names of A and B against D and E to recover possession of the property. This suit was by the High Court decreed in the plaintiff's favour, but was, on appeal, dismissed by the Privy Council with costs. While the suit was in the Court of first instance, D and E. applied to have C added as a party. This application was refused, and D and E did not appeal from that refusal.

Pending the litigation, A and B brought a suit against D and E for *wasilat*, and obtained a decree. On the 21st September A and B executed a memorandum of agreement, whereby C. purchased all their rights in the two suits brought by them against D and E. D and E now brought a suit against C. alleging that they had suffered loss and damage by the litigation instituted by A and B; that C was guilty of Champerty and maintenance; that the litigation was commenced and continued maliciously by C in the names of persons who had no legal or equitable right and without reasonable or probable cause; that the agreement of 17th July 1867 was illegal and contrary to public policy; that the litigation was carried on by C. at his own expense and for his own benefit; and that C was the real mover in the proceedings and illegally used the procedure of the Court to the damage and injury of the plaintiffs.

Held, in the Court below and on appeal, that there was reasonable and probable cause for the institution of the *wasilat* suit brought by A and B against D and E.

Held, by Macpherson, J.—That the agreement of July 1867 was illegal and against public policy, as also where the subsequent institution

and maintaining of the suit which he (substantially only for his benefit) had maintained against them.

Held on appeal (reversing the decision of the Court below), that the suit was not maintainable. The English Statutes with regard to Champerty and Maintenance were offences punishable by the Common Law; and the ground on which an action is allowed in England,—*viz.*, that C had been guilty of an offence by which the plaintiff had suffered damage, does not exist in India. The only ground on which agreements which savour of Champerty or Maintenance are held to be void in this country is that they are contrary to public policy. Assuming that the agreement of July 1867 was a valid one, and that C did thereby acquire an interest in the subject-matter of the suit, and supplied the means of carrying it on, such acts did not entitle the plaintiffs to maintain the present suit, or to recover against C the costs of the former suit. C ought to have been made a co-plaintiff with A and B in the former suit, or he ought to have been called upon to give security for the costs of that suit. 13 B. L. R. 530.

CHARTER PARTY.

212. A Charterparty made between the defendants (the owners of the seaforth) and H. and Co. (the freighters) provided that "the owners should employ at the ports of discharge the consignee nominated by the freighters to transact the ship business there inwards and outwards on the customary terms, not exceeding 2½ per cent on amount of freight payable inwards and 5 per cent outwards.

H and Co. nominated the plaintiffs to transact the ship's business in Bombay (a port of discharge) with the knowledge and consent of the master of the seaforth, and the plaintiffs accepted and acted under such nomination.

The defendants refused to pay the plaintiff's commission on the outward freight of the seaforth, on the ground that, under the circumstances under which such freight was procured, the plaintiffs were not, under the Charterparty, entitled to receive commission on it.

Held that the plaintiffs were sufficiently within the consideration of the Charterparty to maintain a suit for the breach of such clauses of it as were inserted for their benefit. 6 B. H. R. O. J. 144.

213. The plaintiff chartered a ship, of which he was master, to one C. H. C. of Calcutta, under a Charterparty by which it was agreed that the ship (which was then at Melbourne) should proceed to certain ports, and there load a cargo for Calcutta: "the cargo to be delivered to the Charterer at Calcutta, on being paid freight at and after the rate of the lump sum of £ 1,15), for the full reach of the ship; the said freight to be paid on the unloading, and right delivery of the cargo as customary, less any advances that may have been made." On the arrival of the ship at Calcutta, C. H. C. requested the plaintiff to deliver the cargo to the defendants as his agents, which the plaintiff agreed to do on having payment of the freight guaranteed by the defendants. The de-

endants were *bona fide* holders of the bills of lading which had been signed by the plaintiff in respect of the cargo. They sent to the agents of the plaintiff in Calcutta the following letter "as it will be necessary for us for the protection of our interest to get delivery of the cargo, and as we do not care about further trouble in the matter, we agree to guarantee payment of the balance of freight due on the Charterparty, less any claims for short delivery, &c.," On unloading there was found to be a deficiency in quantity between the goods mentioned in the bills of lading, and those actually shipped and delivered. Held that notwithstanding this the plaintiff was entitled to the whole of the freight specified in the Charterparty, and was justified in keeping the cargo until the freight was paid. 8 B. L. R. 340; 17 W. R. 49.

CHEQUE.

214. An order directing a servant to pay at an uncertain time a certain sum of money to the payee on account of advance, is not a cheque, and the payee cannot transfer the same to a third party so as to give such third party a right of action against the drawer of such order.

Nor is such a document evidence of a debt, enabling the person to whom the same is transferred to contend that by the sale to him he acquired the interest in a debt due by the writer of the order to the payee. 2 N. W. P. 335.

CLIENT AND ATTORNEY.

215. The principle that while the relation of client and attorney subsists in full rigor, the latter shall derive no benefit to himself from the contracts or bounty or other negotiations of the former applies with equal force to the relation of vakeel and client 10 W. R. 469.

216. Where a bond is given by a client to an attorney not only is the client not estopped from disputing the consideration alleged in it, but the *onus probandi* of the fairness of the transaction lies on the attorney. 2 W. R. 307.

CLIENT AND VAKEEL.

217. A *vakalutnamah* given by a plaintiff and couched in general terms, suffices *prima facie* to authorise the vakeel to apply on behalf of the plaintiff for leave to withdraw from the suit; and in the absence of any thing to show that the vakeel acted contrary to his instructions or otherwise was guilty of misconduct in making the application, the client is bound by the act of his vakeel. 5 W. R. 801.

218. The admission and consent of a vakeel made with due authority will bind his client, though not present at the time of making it. Where therefore an order was made for the payment of a certain sum, being the moiety of the profits of an estate founded on the amount for which security had been taken as the rental of the zemindary when possession was given up, and that amount was admitted and assented to

by the vakeel in Court, and the order made accordingly, held by the Judicial Committee, affirming the judgment of the Court below, that such consent was binding on the client, and precluded him from afterwards opening the account. 2 M. I. A. 253.

219. Though a vakeel is entitled to whatever charge his client agrees to, yet if a vakeel acts under an engagement constituting him the client's Mooktear and legal adviser, he is bound by the same rules as an Attorney, and is, therefore, entitled only to such reasonable remuneration as the law allows. 2 W. R. 307.

220. Suit by a pleader against his client to enforce a contract which provided for the payment to the former of a large remuneration for his services, including a portion of the property in suit, Held that such a contract stands on a different footing from one between private persons; and that the Court, before enforcing it should require the plaintiff clearly to show its fairness, and that no undue advantage has been taken of the client.

It is necessary in such a case to look to the whole of the circumstances and the substance of the transaction, and not merely to the language of the agreement. A contract made in good faith by a person with a litigant to supply him with funds to carry on the suit on the security of the property in dispute will be enforced.

Such a contract is distinguishable from an officious intermeddling in the suits of other persons or acts tending to promote unnecessary litigation. 1 N. W. P. 1.

COLLUSION.

221. Where a deed was executed conveying a man's entire property to his son, only two years old, and reserving to himself one rupee a day for his subsistence, and after execution the conveying party remained in possession; Held that in the absence of explanation no other inference could be drawn than that the deed was merely intended to be used as a blind. 10 W. R. 449.

222. Defendant having purchased a decree, caused the judgment-debtor's (B's) rights and interests in certain property to be sold in execution, and bought them himself. Plaintiff, who had purchased one B's rights and interests in a four annas share of the property, intervened; but his intervention having been rejected in the Summary Department, he sued to set aside the summary order, and to establish his vendor's right in the property. The vendor having admitted the sale to the plaintiff, the first Court thought it unnecessary to examine the witnesses to, and the writer of, the deed of sale, and finding the plaintiff in possession decreed the suit. This decision was reversed in appeal.

Held, that the Lower Appellate Court did wrong in presuming collusion between B and his vendee (the plaintiff) and ought not to have rejected the deed without examining the writer and witnesses, and that it should have decided whether plaintiff was in possession at any time under a deed of sale. 10 W. R. 451, 452.

COMPANY (Registered).

223. Where the Articles of Association of a Limited Company stated that the objects for which the Company was established were for the purchase of the business of an hotel-keeper, confectioner, and provisioner, the future working and carrying on of the said business, and the doing of all such other things as were incidental or conducive to the attainment of the above objects, it was held, that the Directors had power to bind the Company by the issue of negotiable securities in the ordinary course of business.

Where a note which had been taken by the Company as a security from two judgment-debtors of the Company was endorsed by the Company to a third party and discounted by him, and was, on the due date, not having been taken up by the makers, renewed by the Company,—Held, such negotiation of the note by the Company was within the ordinary scope of the business of the Company.

Also held, upon the facts, that the power of the Company to issue negotiable securities was well exercised, and that the Company had due notice of dishonor by the makers. 1 B. L. R. O. J. 14.

224. A member of a duly registered Company, whose shares have been forfeited is as much a past member as a member whose shares have been surrendered or transferred, but he is not liable to be placed on the list of contributories until it is established that the existing members are unable to satisfy the contributions required to be made by them, in pursuance of the Indian Companies Act, and that the debts, in respect of which he is called upon to contribute, were incurred prior to the date on which he ceased to be a member of the Company. 1 N. W. P. 101.

225. The Register of shareholders, required by section 14 of Act XIX of 1857, may consist of particulars entered in different books which taken together substantially contain all the information which the Act requires.

If there be a substantial compliance with the requisitions of the Act, the Register is not invalidated by reason of slight deviations from its directions, or by unimportant omissions or defects in the particulars of information specified in section 14.

If the certificate of Registration be not forthcoming, the fact of incorporation may be proved *aliunde*. 3 B. H. R. O. J. 106.

226. A suit may be brought in the Courts in India against a Company that is being wound up under "The Companies Act 1862," without the leave of the Court of Chancery being first obtained.

Semble.—The High Court will, in the exercise of its general power, stay the proceedings in a suit against such a Company where the circumstances are such as to render it proper to do so. 5 B. H. R. O. J. 83.

227. In a suit brought by a transferee of shares in a Joint Stock Banking Company, formed after the passing of Act VII of 1860, and neither incorporated nor registered when the plaint was filed, to compel the

Directors, Trustees, and Public Officer of the Company to give up the share certificates which had come into the possession of the Bank, or to pay damages to the plaintiff: Held, that the Company being illegal, under section 2 of Act XIX of 1857, the suit was not maintainable. 3 B. H. R. O. J. 159.

228. A Company was formed with the following objects, as stated in the Memorandum of Association, viz., "of securing valuable property in the new port and town of C and its immediate vicinity; and of improving the property so acquired by building upon, letting, or selling it as may be deemed most advisable; and of undertaking the construction of public works calculated to facilitate trade, and also of constructing tramways, roads, docks, wharves, and jetties upon the land so as to be acquired; and for all other purposes that may be essential or conducive to the attainment of or connected with the above objects". Soon after the establishment of the Company, the Directors were induced to take a share in and become liable for the cost of a mill for husking rice, which it was intended to establish by a separate Company; and a considerable sum was advanced out of the funds of the Company for the building of the mill and for machinery &c. The undertaking failed, and the Directors, to avoid losing the advances of the Company, resolved to take over the mill, and carry it on as the property of the Company. They accordingly purchased a large quantity of rice which was husked at the mill, and consigned to several firms in England. P M and Co. were appointed agents of the Company in Calcutta for the purpose of shipping the rice, under letters from the Directors guaranteeing that the Company would pay at maturity any re-drafts which might be drawn on P M & Co. as their agents in respect of the shipments. Bills of Exchange were drawn by P M and Co. on the firms to which the respective consignments were made, and these bills were sold in the ordinary course of business in Calcutta, P M and Co. realizing the proceeds for the benefit of the Company. These bills were honoured by the respective consignees. The rice was sold in England at a considerable loss, and re-drafts for the deficiency were drawn on P M and Co. or on the Company. The Company went into liquidation during these transactions. Some of these re-drafts had been accepted by the Company, and others merely registered by the liquidators as claims against the Company. Claims were now made on the Company by the drawees or endorsees of these re-drafts, but the liquidators declined to pay them, stating that the proceedings, in connection with the consignments of rice, were not authorized by the Memorandum and Articles of Association of the Company and that therefore the Company was not liable for any losses in respect of such consignments. Held that trading in rice was a transaction *ultra vires* of the Company; the Directors therefore could not bind the Company, and the consignees could not recover in respect of the shipments.

The Company was not liable on the re-drafts; it had no power to issue Bills of Exchange or to accept the re-drafts, and therefore the holders of those which had been in fact accepted were in no better po-

sition than the holders of those which had not been accepted. 7 B. L. R. 583, 584.

COMPENSATION.

229. A putneedar is entitled to compensation, although there was no agreement to that effect. 4 W. R. 40.

230. Compensation-money for land taken up by a Railway Company should be divided by the parties entitled to it in the ratio of their respective interests in the land. 18 W. R. 91.

COMPROMISE.

231. A *razinamah* to compromise a suit, and a bond arising out of the same transaction, recognizing a right in one-fourth of a Talook, declared null and void, as having been obtained by fraud and intimidation by the Manager of the Agent's Court at Ganjam, who used his official character, as a pressure upon a Zemindar in difficulties in that district, to effect from him the execution of such instruments. 10 M. I. A. 60.

232. Where the parties to a suit which went up on appeal to the High Court entered into an agreement in 1826, by one of the terms of which it was stipulated that both parties should provisionally take possession of certain portions of the land in dispute, but that either party would be at liberty within 12 months from the date of the agreement to apply to the proper tribunal to effect a rectification in the quantity of land which each was to hold permanently, and one of the parties did make such application to the local Judge, who refused to entertain it on the ground that the appeal (which under the agreement was to be abandoned) was still before the High Court: It was held by the Privy Council that the local Judge should either have entertained the application himself as an original suit, or have kept possession of it until a petition had been presented to the Sudder Court to make the agreement a proceeding of that Court, and to have an order giving effect to it by way of compromise. 15 W. R. P. C. 38.

233. A *solehnamah* or deed of agreement to compromise conflicting claims entered into in the presence of witnesses and solemnly acknowledged in Court, by parties who were mutually ignorant of their respective legal rights, cannot afterwards be set aside upon plea of ignorance of the real facts, when the party seeking to avoid the deed had the means of ascertaining those facts within his reach.

Gross fraud and imposition are not to be imputed upon mere suspicion, and unless the charge is proved, a party cannot be released from an agreement entered into by their own solemn act.

The *onus* of showing that a compromise has been fraudulently obtained by intimidation and false representation, is cast upon those who seek to impeach the validity of their own deed. 2 M. I. A. 181.

234. Immoveable property partly situated in Rohilkund and partly in Oudh, which had formerly belonged to the common ancestor of the

Appellant and the Respondent, was claimed by each on the ground of heirship. By a deed of compromise they agreed to divide it in certain proportions, and the agreement was carried out in Robilcund but not in Oudh, where the Respondent was, and continued, in possession. At the end of nine years from the date of the deed of compromise, the Appellant sued for possession of her share of the property in Oudh.

The Judicial Commissioner of Oudh having decided that the suit was founded on the contract contained in the deed of compromise or for a breach of it, and, therefore, barred by Act XIV of 1859 section 1 cl. 10.

It was held (reversing this decision), that the claim did not rest on contract only, but on a title to the land acknowledged and defined by the contract, which was part only of the evidence of the Appellant to prove her case, and not all her case; and that, consequently, the suit was not founded on contract or for a breach of it, but was a suit for the recovery of immovable property "to which no other provision of the Act applies", and, therefore, subject only to the limitation of 12 years prescribed by S.1 cl.12. (see Act IX of 1871 sch. 2 art.145). 1 L. R. I. A. 157.

235. A registered Joint Stock Company in Bombay, with limited liability, being in the course of voluntarily winding up under the Act of the Indian Legislature, No. XIX of 1857, section 69, and Official Liquidators having entered into an arrangement for compromise with a class of contributories, in discharge of their liabilities, for a specific sum, the "Indian Companies Act," No X of 1866, was passed. By sections 173 and 174 of that Act, power is given to the High Court of Bombay, to sanction compromises and arrangements. The Liquidators applied to the High Court, under the aforesaid Acts, to ratify the compromise above entered into which the Court accordingly sanctioned and ordered. On appeal, held:

First, that under the 173 and 174 sections of the Act X of 1866, the power of the Liquidators extended to making a general compromise of claims upon contributories as a class, abandoning an equal proportion in each case, notwithstanding the difference of position between the contributories, or inquiring closely into the means of each individual contributory, and

Secondly, that upon the evidence and the judicial knowledge of the existing state of affairs at Bombay, the Court had exercised a just discretion in the investigation, and the order of the Court sanctioning the compromise affirmed. 13 M. I. A. 15; 12 W. R. P. C. 27.

COMPROMISE (Between Co-partners).

236. Where the surviving partners of a firm, in the absence of a representative of a deceased partner, adjusted the partnership accounts and agreed to hand over a portion of the partnership property to one of the partners in compromise of his claim, and the partner whose claim was so agreed to be compromised prayed for a dissolution of the firm upon the basis of such compromise, it was held that a representative of the deceased partner was a necessary party to the suit.

COMPROMISE (BETWEEN HUSBAND AND WIFE).

Surviving partners are treated as trustees of the partnership property for the benefit of the representative of a deceased partner ; and an agreement entered into by such surviving partners in the absence of the representative of the deceased partner which is inconsistent with the nature of trust to deal with the partnership assets only by way of sale—will not be specifically enforced.

An ancestral trade descends like other Hindu property upon the members of an undivided family, and the manager of such family can on behalf of the family enter into co-partnership with a stranger. In carrying on such a trade infant members of the family will be bound by the acts of the manager which are necessarily incident to and flowing out of the carrying on of that trade. The manager can pledge the property and credit of the family for the ordinary purposes of that trade, and third persons dealing *bona fide* with such manager are not bound to investigate the *status* of the family, minor members being bound by the necessary acts of the manager.

By necessary acts are meant such as are necessary for the material existence of the undivided family or the preservation of the family property ; and a compromise between co-partners of partnership accounts and differences by a transfer and division of partnership property is not such a necessary act, but is one which is left to be dealt with by the ordinary rules of law, and one which must be shown clearly to be of benefit to the infant before the compromise will be enforced.

The avoidance of a suit to take partnership accounts is not sufficient of itself to render a compromise necessary for the preservation of family property or beneficial to a minor member.

A co-partner dealing with an undivided Hindu family is, with reference to its component members, in the same position that a partner according to English law is placed in with reference to his co-partners and their representatives. 1 B. H. R. 51, 52.

COMPROMISE (Between Husband and wife).

237. An agreement in the nature of a deed of compromise was executed in the English Form between a husband and wife (Armenian Christians) relative to the wife's separate property. The present suit was brought by the Official Assignee under the Insolvent Act of the husband, not for the specific performance of an agreement remaining *in fieri* in which a Court of Equity has a discretionary power to grant or to refuse relief beyond the law, but to set aside an act done in plain violation by the wife of an agreement which, in all its material parts, had been executed, and all the benefits of which the party violating it retained on her part, while as against the other party, she treated it as nullity.

Held that the fraudulent exclusion out of the settlement of a house alleged to have been purchased by the husband with the wife's money, which was the foundation of the defence, had not been established against the husband ; that, even if it had been, it could not have been used as a

defence in this suit ; that, if the house was bound by a trust for the children, it could not be subject to a right of execution for the wife's private debts ; and that her proper course would not have been to treat the agreement as a nullity, but to act upon it, and enforce it by a bill to compel a settlement of the property which had been improperly withheld. 4 W. R. P. C. 66 ; 8 M. I. A. 275.

COMPROMISE (Breach of).

238. A compromise must be treated as a new and positive contract. A breach of its stipulations may be ground for a suit for its enforcement, but not for a revival of the original claim. 2 W. R. 209.

CONCEALMENT (Of prior Charge).

239. A person who has represented to an intending purchaser of land that he has not a security over that land, and induced him, under that belief, to buy, cannot as against that purchaser subsequently put his security in force. 1 L. R. I. A. 144 ; 21 W. R. P. C. 21.

CONSIDERATION.

240. It is the established practice of the Courts in India, in cases of contract, to require satisfactory proof that consideration has been actually received, according to the terms of the contract, and a contract under seal does not of itself, in India, import that there was a sufficient consideration for the agreement.

A plaintiff, however, suing to set aside a security admittedly executed by himself, must make out a good *prima facie* case before the defendants can be called on to prove consideration. 2 B. L. R. P. C. 111.

241. Assuming that the same principles are applicable here as in the English Court of Chancery, the High Court held that although in a class of cases without positive fraud a contract may be set aside unless it is shown to have been made upon adequate consideration, yet, as a general rule, before the defendant is called upon to prove that he has given full value for property sold to him, the plaintiff must first make out that the parties to the bargain were dealing on terms so unequal as to render it improper for a Court of Justice to enforce any contract they may have made, unless it can be shown that the contract was in fact one which a prudent person with proper advice and assistance might well have made. 22 W. R. 341.

242. In order to establish a binding promise by the defendants' father to pay the bond, there must be proof of a consideration for such a promise. 18 W. R. 122.

243. Actual sight of the passing of the money is not the only mode of proving payment of the consideration for a bond. 17 W. R. 439.

244. By Mahomedan law an agreement to pay an annuity, though

signed and registered, has not the effect of a deed in English law, but requires consideration to support it.

The relationship existing between cousins is not a sufficient consideration to support such an agreement.

Parol evidence is inadmissible to show that in an agreement to pay an annuity there was a consideration for the granting of the annuity different from that expressed in the agreement. 5 B. H. R. A. J. 37.

245. In a written agreement the defendant, in consideration of a sum of money received by him, promise to obtain a more favourable assessment upon certain villages in respect of waste and cultivable lands, and in case of failure to repay the amount received. In a suit to recover the amount paid to the defendant:—

Held that the contract was not vitiated by reason of illegality.

Aliter if it appeared upon the face of the plaint, or if it were established by evidence independently of the written agreement, that the arrangement was that the defendant should use corrupt or illegal means or improperly exercise any personal influence which he possessed or professed to possess over a public servant. 2 M. H. R. 243.

246. The defendants entered into a contract with the plaintiff in writing, by which in consideration of the trouble taken and large sums of money advanced by the plaintiff on behalf of the defendants, the defendants promised that they would from generation to generation pay to the plaintiff Rs. 100 per annum out of a specified fund. The plaintiff brought a suit to recover a sum within the pecuniary jurisdiction of the Small Cause Court under the written contract.

Held, that the Small Cause Court had jurisdiction to entertain the suit, and that the undertaking of the plaintiff to forbear from enforcing the debt due to him prior to the contract was a sufficient new consideration to support the contract.

Held also that on the death of one of the co-contractors the whole liability to the plaintiff attached to the surviving co-contractors. 4 M. H. R. 447.

247. Where a *mehta*, without the knowledge of his master, agreed with his master's brokers to receive a percentage on the brokerage earned by such brokers in respect of transactions carried out through them by the *mehta's* master, and no express consideration was alleged or proved by the *mehta*, the Court refused to imply, as a consideration, an agreement by the *mehta* to induce his master to carry on business through such brokers, and was of opinion that such an agreement would be inconsistent with the relation of master and servant.

But where the same brokers agreed with the *mehta* not to charge him brokerage on such private transactions as he should carry on through them, and the *mehta* carried on private transactions through the brokers, it was held that the brokers were bound by that agreement, and could not maintain a claim for such brokerage. 7 B. H. R. O. J. 90.

248. Where certain putneedars agree at the time of a butwarra, that in the event of a particular village falling wholly to either of them, they would re-unite and hold jointly as before, the absence of mention of any money consideration in the agreement is no bar to its being enforced. 10 W. R. 69.

249. Where a ryot, in consideration of an advance of money, has stipulated to grow indigo for a certain number of years, the contract is not void as being without consideration because, during the period it had to run, the debt due from the ryot is extinguished by the delivery of indigo leaves. The contract is one entire contract upon one entire consideration, and a contract which was at its commencement based upon a valid consideration cannot become void for want of consideration by any change whatever in the situation of the parties. 17 W. R. 91.

250. In a suit to recover certain land alleged to have been granted under a pottah, the Judge, finding that no consideration had been given by the plaintiff, pronounced the contract *nudum pactum* on which no action would lie.

Held, that as defendant had admitted the grant of the pottah and contended that the whole of the lands had been made by the plaintiff's possession, no question of consideration could arise. 12 W. R. 283.

251. D. executed a razinama in favour of plaintiff on the 20th August 1868, transferring certain lands to the latter. Plaintiff, after passing the usual kabulayat to the Collector, was put in possession of the lands in question. On the 7th April 1869 T. obtained a money decree against D, and on the 3rd July 1869 attached the lands as belonging to D. Held that if the razinama were a real transaction made for a valuable consideration, although entered into with the intention of defeating the execution of the money decree, the title of plaintiff under that razinama would prevail.

A sale or mortgage, if real, though made for the purpose of defeating an intended or probable execution, is valid against the execution-creditor. But if it be only a colourable transaction, not intended to confer upon the vendee or mortgagee any beneficial interest in the property, but simply to substitute such vendee or mortgagee as a nominal owner in lieu of the real owner (the judgment-debtor), with the object of saving the property from execution, the vendee or mortgagee is a mere trustee, and the judgment-creditor is entitled to attach and sell the property.

A decree of 1862, which plaintiff held against D, though time-barred in 1868, was (being then still unsatisfied) held to afford a good consideration for D's razinama in 1868 in plaintiff's favour.

An executor may pay a debt justly due by his testator though barred by the Statute of Limitation, and will in equity be allowed credit for such payment.

The general rule of law is that a consideration merely moral is not valuable consideration, such as would support a promise. But there

CONSIDERATION.

are instances of enforceable promises which formerly were referred to new exploded principle of previous moral obligation, and which are still held to be binding, although that principle has been rejected. Amongst those instances is a promise after full age to pay a debt contracted during infancy, and a promise in renewal of a debt barred by the law of Limitation. The efficacy of such promises is now based upon the principle that where the consideration was originally beneficial to the party promising, and he be protected from liability by some provision of the Statute or Common Law meant for his advantage he may renounce the benefit of that law, and if he promise to pay the debt, he is bound by the law to perform that promise. 10 B. H. R. 206, 207.

252. Plaintiffs sued for certain lands under an agreement executed to their elder brother, Sundarappa, by defendants in the following terms: "You have this day received a loan of rupees 1,345-14-4 from Dewarapalli Venkappa and from me, Brahmanna, for the purpose of remitting to the Court in satisfaction of the warrant amount in the matter of the suit No. 26 of 1835 on the file of the Provincial Court, between your father the late Umapati, appellant, and Merala Agasti, respondent. You have, owing to the incumbrances consequent on a few more suits against you, caused all the property which you own in Vegayammipetta to be attached for the said (warrant) amount, and caused six puttis of land, houses, backyards and certain moveable property out of the same to be knocked down in auction in our names, and some other personal property in the names of some others: and have therefore proposed to us to execute a kararnama (to you), engaging (ourselves) to carry and pay the aforementioned rupees (1345-14-4) into the Court; to obtain receipts for the amount and certificates in our names for the real property; to allow the tiled house, backyard having fruit trees and moveable property to be held by you as hitherto; Venkappa and myself, Brahmanna, to enjoy the produce of the said six puttis of land for 20 years from Sarvari (1840) to Sittadri (1859) on account of the said loan and interest thereon; and to restore the land together with the certificates (to be) issued by the Court in our names. We have accordingly agreed to your proposal and we, the bidders, with the permission of Venkappa, do execute this kararnama. We shall hold the lands till the expiration of the term and put it in your possession without any incumbrances whatever, and return the said certificates to you,

The Principal Sudder Ameen considered that the agreement was invalid, on the ground that it appeared to have been executed with a view to defraud the other creditors of Sundarappa.

Held, on appeal, that the real nature of the transaction was that Sundarappa borrowed money from defendants to enable him to buy in his own land. That defendants purchased only for and on behalf of Sundarappa, taking from him an assignment of part of the property for 20 years in order to repay themselves the money lent. That there was, therefore, abundant consideration for the defendant's promise to give up possession at the end of 20 years.

Held also following the English law, that where there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transaction is valid even as against a creditor, though the object may have been to defeat an expected execution.

253. In the case of covenants in restraint of trade the deed of covenant must show a good consideration. The Courts will not enter into the question of the adequacy of the consideration. A covenant giving appellant the exclusive right to convey passengers to and fro on the road between Ootacamend and Metapolliem, is not a contract in general restraint of trade, and therefore is one which the law will enforce. 4 M. H. R. 77.

254. A certain amount of money had been paid by one Hindu to another in consideration of a promise by the latter that he would give his sister in marriage to the former. The girl's mother was alive. In a suit for recovery of the amount on the ground that the latter had failed to fulfil his promise. Held, that the suit would lie. 5 B. L. R. 395.

CONSIDERATION (Vicious).

255. A contract to pay money in consideration of foregoing a criminal prosecution is opposed to public policy and will not be enforced. The consideration to support the promise in such a contract is a vicious consideration. 2 M. H. R. 187.

256. A contract to pay money upon the consideration that the plaintiff would give evidence in a Civil suit on behalf of the defendant cannot be enforced.

Such a contract is either for true evidence and then there is no consideration, or for favourable evidence either true or false, and then the consideration is vicious.

Seemle. If the consideration had been the plaintiff's promise not to evade process that would still be no consideration for the defendant's undertaking. 4 M. H. R. 7.

257. Plaintiff sued to recover from defendants, his brothers, Rs. 25,000, with interest, on a deed of assignment "B" granted to him by one Rajah Gaundan, dated 30th October 1870, transferring to plaintiff a promissory note "A" for Rs. 25,000, executed by 1st and 2nd defendants to the aforesaid Rajah Gaundan, as one of the mediators in conjunction with one Subbraya Gaundan, in a division of family property between plaintiff and defendants and others, agreeing to pay over on demand by the 30th September 1870 to plaintiff, through the mediators aforesaid, 25,000 Rs. in lieu and on account of family property in possession of defendants.

The defendants admitted the execution by them of the document for 25,000 Rs. to be paid by them to plaintiff, (A) and pleaded that it was given on consideration of the withdrawal of a criminal prosecution or,

if not, that there was no consideration at all; and that, at the time of its execution by them, there was no dispute or question between them and plaintiff as to a partition of family property, which had been definitely settled by the Civil Court at Salem in original suit No. 2 of 1868, under the decree in which the defendants had recovered Rs. 18,000, and odd from the plaintiff.

They denied any division of family property by mediation, as also that they agreed to pay Rs. 25,000 on account of family property in their possession, also the validity of A and that it was legally binding upon them.

The Court of first instance found—(1) That a partition of family property was effected by mediation and the document A was executed to the mediators by defendants on account of family property in defendants' possession. (2) That A was valid in law and binding on defendants,—and gave judgment for plaintiff for the amount sued for.

Upon appeal by the first defendant—Held, by the High Court, that as the decree in original suit No. 2 of 1868 (finally disposed of in appeal by the High Court) settled all the rights of the parties and, among other matters, the question of this alleged concealment of theft, which the Court found the present plaintiff to have falsely asserted,—there was here, therefore, no “*res dubia*” or “*lis incerta*,” nor could either party believe that there was such. The final judgment of a competent Court in a suit to which the plaintiff was a party, had determined the matter.

That, on the facts of the case, it seemed impossible to doubt that the note was executed as a consideration for getting rid of the criminal proceedings, and that, as such a consideration is not only null and vicious, the decree of the Civil Judge should be reversed. 7 M. H. R. 200.

258. The plaintiff sued on a bond for Rs. 67,000, obtained from the defendant (the zemindar of Marangapuri) in the following manner. In July 1864, Tirumala Puchaya Naikar, the late zemindar, died leaving three widows but no issue, and, in September 1864, the Government with the consent of the widows recognised the defendant, who was then a minor, as successor to his step-brother, the said T. P. Naikar. The widows afterwards became dissatisfied, and in December 1866 executed a bond in plaintiff's favor, by the terms of which they bound themselves to prefer suits and claims with a view to obtain possession of the zemindaree on their own account by ousting the minor, and the terms upon which they agreed to take this action were these:—The plaintiff was to conduct the suit entirely at his own expense, and, as soon as the zemindaree should be handed over to the widows, they were to pay the plaintiff one lac of Rupees out of the income of the estate as a reward for his pecuniary and other services in assisting them to obtain it; together with a moiety of the savings which the Court of Wards might have effected during the management of the estate, and which estate the plaintiff was moreover to keep under his own management,

by appointing an agent to superintend it, until the widows should have redeemed it by payment of the lac of rupees promised; failing in which the widows bound themselves and heirs to make a lump payment out of their own funds to the plaintiff of one lac of rupees with interest, together with a moiety of the Court of Ward's savings. Accordingly, in September 1868 the plaintiff brought a suit No. 30 of 1868 in the name of Lakkamani, the senior widow, against the Collector for the zemindaree, and the minor attaining his majority in July 1869, he was thereupon made 2nd defendant in the suit by the plaintiff. The final hearing of this suit (No. 30 of 1868) was fixed for the 16th August 1869, and, on or about the 11th, the plaintiff, Lakkamani, sent for the 2nd defendant to her palace and proposed a compromise on the terms that the widows should have three villages and that 2nd defendant should settle the present plaintiff's "small" account. A razinamah to this effect was drawn up and the young zeminder was persuaded, by threats of ruining him with litigation if he did not comply, to sign it and to give a note of hand for Rs. 62,000 to plaintiff's agents. A few days afterwards plaintiff called on defendant, and by similar threats extorted from him a bond for Rs. 67,000 (now sued on) in lieu of the note of hand for Rs. 62,000. The razinamah was, on presentation, rejected by the Court, the suit (No. 30 of 1868) proceeded to judgment and decree, and at the time the present suit was brought was under appeal. The Civil Judge found that the bond was obtained under undue influence and by threats, and that the defendant received no consideration for it. The suit was accordingly dismissed. Held, on appeal, that, without dissenting from the judgment below on the ground of vicious grounds of determination of the defendant's will, the judgment of the Court might be put on the very satisfactory grounds. That the contract was made with the woman; that there was a promise to pay this sum to the plaintiff whom she believed to be her creditor; that in pursuance of that arrangement the document was given. The cause of giving it was the compromise of the suit. That cause had wholly failed. It was a case, therefore, of suing for money which, if it had been paid, the defendant could have recovered *ob causam datorum*. 7 M. H. R. 85.

CONSTRUCTION.

259. A benignant construction should be used in the case of transfers by gift, the real meaning of the document being enforced if it can be reasonably ascertained from the language used. 18 W. R. 359.

260. If a particular construction of a part of a document renders a contract evidenced by it inoperative, and another construction renders it operative and is reconcilable with other portions of the document, the first should give way to the second. 16 W. R. 119.

261. In a suit for damages sustained for breach of contract, where the Statute of Frauds does not apply and there has been an interchange of bought and sold notes, the plaintiff is at liberty to prove by parol evidence the existence and terms of a contract on which he can maintain the action.

-----, be a complete binding contract if the parties intend it, although bought and sold notes are to be exchanged or a more formal contract is to be drawn up.

If the bought and sold notes do not agree, they cannot be used as evidence of the contract; but the fact of their differing and not being returned is not conclusive evidence that at the conclusion of the negotiations the parties did not agree. 18 W. R. 414.

262. Where a lease of 1847 contained two provisions, one for the payment of Rs. 1300 as rent, and the other was a stipulation for forfeiture and re-entry on default of payment, and by a solehnamah of 1848 that rent was put an end to, and in lieu thereof the lessor received back a portion of the land leased in 1847, but by a subsequent solehnamah of 1858 the lessees agreed to pay Rs. 334 as rent, but no new provision was made for re-entry and no fresh stipulation for forfeiture. Held that the clause of forfeiture and re-entry, in respect of the Rs. 1,300 under the lease of 1847, did not apply to the Rs. 334 under the solehnamah of 1858. 18 W. R. 244.

CONTRACT.

263. In cases of contract in India it has never been held that a contract made under seal of itself imported that there was a sufficient consideration for the agreement. 12 W. R. P. C. 6.

264. He who would disaffirm a contract entered into by mistake must do so within a reasonable time and will not be allowed to do so unless both parties can be re-placed in their original position. 1 M. H. R. 390.

265. A kubooleut having been executed in favour of a zemindar who deceased, leaving two daughters, one of them sued the tenants to recover a moiety of the rents due for a series of years under the kubooleut but her claim was dismissed by the Lower Appellate Court, on the ground that she had not made out a title to sue alone. Held, that plaintiff was not entitled to treat a contract, which, when originally made, was single and indivisible, as if it had become by the death of her mother (the zemindar) separable into two contracts one with herself and one with her sister. 10. W. R. 109.

266. M C M and others took a share of a turuff in putnee by executing a kubooleut towards R L D and others, which contained a stipulation that if a suit brought by certain parties against the former and then pending in the High Court were decided against the lessors, the lessees would pay whatever costs of suit might be payable by the lessors, and if decided in favour of the lessors the costs awarded would go to the lessees. The case was decided against the lessors.

Held on the construction of the kubooleut that the lessees were liable to pay the whole of the costs paid by the lessors, not only the to which they were justly liable on account of their own share, costs that might be recoverable from them; but *Quere*, whe-

Court Judge should provide for the lessees being in a suit for contribution the costs which they had paid on behalf of the other parties to the suit. 14 W. R. 191.

267. In a suit to enforce delivery of a kobala where plaintiff was found not to have acted up to the original terms of the contract, inasmuch as he failed to pay a part of the consideration-money as agreed upon, and did not offer to pay the remainder until the suit was brought.

Held that defendant was no longer bound to deliver over or ratify the document which it was intended should be executed between them.

268. The terms of a contract made while section 10 Regulation XX 1817 was in force between a zemindar and his putnee—lessees, having imposed on the latter the charge of the maintenance of the zemindary dak, this liability is not affected by the subsequent repeal of the Regulation by Act VIII of 1862 B. C. 3 W. R. S. C. C. 17.

269. Plaintiff sued one M. M. Overseer of or for the Municipal Office, for the recovery of money due on a contract under which plaintiff had done certain work defendant contracting for the Municipality, and for the performance of work known by plaintiff to be Municipal work.

The Municipality having ignored the contract, it was held that the contract being a *quasi* contract, defendant could not be held personally liable in the present action of contract. 9 W. R. 206.

270. Defendants borrowed money from plaintiff without interest; but executed a deed stipulating that the sum borrowed was to be repaid on a given date, and that, if not paid then, the defendants should execute a putnee lease of certain properties set forth in the deed, the sum borrowed being considered as a bonus for such lease, and that if the borrowers did not execute such a lease, this deed should be counted as a putnee pottah. The money not having been paid, and the lease not executed, the plaintiffs sued for possession.

Held, that plaintiffs were entitled to possession on the footing of a putnee, from the date of suit, and that the transaction was not a conditional sale but a contract to create a putnee, for a certain consideration unless that sum was paid on a particular date. 19 W. R. 274.

271. Plaintiff took a putnee from defendants, and as a part of the consideration for the lease, agreed to be responsible for certain decrees outstanding at the time against the defendants. Thereupon was executed a second contract between the parties, by which that particular responsibility of paying the decrees was compromised and got rid of by plaintiff paying down a certain sum of money. Subsequently the defendants successfully contested payment of one of the decrees, after which plaintiff sued to recover the money of which payment had been thus withheld. Held, that as the second contract had absolved plain-

tiff from all responsibility as regards the decrees, he was not entitled to recover the money claimed in the suit. 13 W. R. 114.

272. Defendant granted to plaintiff a *zur-i-peshgee* lease for a period commencing with 1276. It was recited in the lease that the property was in the possession of the previous *zur-i-peshgeedars*, from whom it was redeemable at the end of the year 1275, and it was agreed that a part of the consideration-money should be applied to payment of those ticcadars to enable plaintiff to obtain possession. The previous ticcadars not accepting the tendered payment, plaintiffs took legal measures against them; but without success. Subsequently they accepted payment and gave up the land. Plaintiff now sues defendant for damages for not having been put in possession at the beginning of 1276: Held that in the lease there was an implied contract on the part of defendant to put plaintiff into possession at the beginning of 1276, and that as plaintiffs were unable, in spite of their best endeavours, to obtain possession, the contract was broken.

Held, also that even if the facts necessarily led to the assumption that the defendants could not give the possession stipulated for, still that was no reason why the defendants should not be compelled to make good the contract, so far as might be, if plaintiff thought proper to enter into the contract. 22 W. R. 260.

273. The plaintiffs contracted to supply the defendants with from 2,75,000 to 3,00,000 of gunny bags described as No. C quality, size 40 by 28 inches, "the defendants to have the option of taking bags of a longer or shorter length at proportionate prices, duly giving a fortnight's notice to the plaintiffs, delivery to be taken in August 1870." The defendants, after taking delivery of 11,600, of the bags, found that the bags tendered were mixed in size, some being longer, and some being shorter than the contract size, and refused to take delivery of the remainder. In an action for breach of contract in not accepting the bags, the Court below found on the evidence that out of 2,000 bags which were examined, 100 were short by from $\frac{1}{4}$ to $\frac{1}{2}$ an inch, but that the bags which were really short were very few out of a large quantity which came up to contract size, and held therefore that there had been a substantial performance of the contract on the part of the plaintiffs. On appeal the Court found that the parties did not contemplate any large margin of difference in the size of the bags, and that the proportion of those which differed was large enough to justify the defendants in refusing to take delivery, and held that the tender of such bags by the plaintiffs was not a substantial performance of the contract. 8 B. L. R. 285.

CONTRACT (Act IX of 1872).

274. The practice of looking more at the illustrations in the Contract Act than at the words of the sections of the Act pointed out to be a mistake. 22 W. R. 367.

275. The Contract Act IX of 1872 applies in the Calcutta Small Cause Court to suits between Hindoos for damages for breach of contract.

he words "restrained from exercising a lawful profession, trade or business" in section 27 do not mean an absolute restriction, and are intended to apply to a partial restriction—a restriction limited to some particular place. 22 W. R. 370.

CONTRACT (Alteration of terms of).

276. An application to have a contract altered in regard to the amount of rent to be paid under it in future cannot be generally entertained by a Civil Court, which can only re-form a contract so as to make its terms accord with the original intentions of the parties. Where a party was induced to agree by fraudulent mis-representation, this may entitle him to avoid a contract altogether; but if he abides by it, he cannot have its terms altered by the Civil Court. 9 W. R. 92.

CONTRACT [Altered after being signed].

277. The plaintiffs contracted with the defendant for the purchase from him of certain quantity, of hog's lard. The terms of the contract were contained in a letter which was drafted by the plaintiffs and sent to the defendant for signature. The defendant returned the letter unsigned, with two additional clauses. The plaintiffs not being able to agree to one of these clauses had an interview with the defendant, when the defendant took the document away with him, and subsequently on 17th May returned it signed, but with the additional clauses still remaining. The plaintiffs had another interview with the defendant on 5th June during which the additional clause objected to by the plaintiffs was struck out, one of the plaintiff's writing the word "cancelled". Against that clause, and the defendant putting his initials against the word "cancel". The plaintiffs then added to the contract the words "approved" together with "R and C" being the initials of their firm. Other alterations had been made in the document, and, it containing many erasures, the plaintiffs on the same day sent a fair copy to the defendant for signature, but the defendant wrote repudiating the alleged contract, and refusing to sign the document. Held (confirming the decision of the Court below) there was no binding contract between the parties. The signature of the defendant put to the document on 17th May was not a sufficient signature by the party to be charged, so as to satisfy the Statute of Frauds. 8 B. L. R. 305.

CONTRACT [Breach of].

278. A breach of contract to supply wood does not fall within the purview of Act XIII of 1859. 4 B. L. R. App. 1.

279. A contractor for work who by failing to fulfil the conditions of his contract forfeits the money deposited by him as security, cannot also be held liable for damages for breach of contract, unless the damages exceed the money which was deposited. 22 W. R. 254.

280. The breach of an agreement by one of the parties is a ground for an action for damages, or for specific performance, but not a ground for setting aside the contract or declaring it null and void. 19 W. R. 1. C.

281. Where a vendor received the majority of the in the shape of old debts recited in the deed; and for the remainder of the consideration, the vendee tendered a cash payment which the vendor refused: Held that the vendee was entitled to sue for specific performance or for breach of contract. W. R. S. N

282. Defendant, having contracted to sell two boats to plaintiff for Rs. 64, received the consideration-money, but did not deliver the boats to the plaintiff, who prosecuted him for cheating in the Criminal Court. The Magistrate convicted him of the cheating, and ordered the money which had been obtained by it to be returned to plaintiff. Plaintiff now sues in the Small Cause Court for the value of the boats and for damages for non-delivery of the boats. Held that the suit would not lie. 18 W. R. 247.

283. In a suit to recover a balance due for articles supplied to defendant on account current between the parties, where an oral contract existed to the effect that, on defendant's giving chittees as security, articles of food for daily consumption would be supplied to him from plaintiff's shop, the chittees to be returned to defendant at intervals after payment on presentation, it was found that plaintiff last, on the 1st Assar 1276, returned to defendant the unpaid chittees then on hand: but defendant did not pay their amount. Subsequently, on different dates, he paid a portion. The suit was for what remained due: Held that the breach of contract on which the suit was brought occurred when the defendant failed to pay, on presentation of the chittees, the amount then due and payable. 18 W. R. 450.

284. W purchased an estate from a Hindu widow. On her death the reversioners brought a suit to set aside the sale and recover possession. Upon this W entered into an *ikrar* or undertaking, in which he agreed, on consideration of their desisting from the suit, that he would remain in possession as long as he pleased, and when he had occasion to sell the property would give them the refusal. Several years after W entered into negotiations with third parties for the sale of the concern to which the property was annexed, but not being able to come to terms with them, he broke off the negotiation, and the property was subsequently leased to others. Upon this the reversioners sued to have the property conveyed to them:

Held, that W's promise not to alienate the property, coupled with the promise that he would personally retain possession, amounted to an undertaking which was violated by what had taken place. Plaintiffs were therefore entitled to the conveyance sought for upon payment of the price. 24 W. R. 214.

285. Certain factories, already sown with indigo, were given in lease by the Court of Wards; and the lessees agreed to take over all contracts and pay all expenses which had been incurred for that season's cultivation, depositing the amount of outlay incurred. The lease having been set aside by superior authority, the lessees agreed to give up

the factories and all the indigo manufactured by them while in possession, on condition of being re-paid the amount deposited by them.

Held, that if the lessees failed to deliver up all the manufactured indigo, the remedy against them was by suit for damages for breach of the contract to deliver it up. 9 W. R. 267.

286. In a suit to recover advances made to defendant to carry on an indigo factory under a *karbarnamah*, in which it was agreed that the advances should first be re-paid out of the profits realized from the manufacture,—where it was found that the sale of the indigo had yielded more than the amount advanced, but had been credited by plaintiff to old debts owing him by defendant's father instead of two defendant's personal debts: Held, that as plaintiff had violated the terms of the agreement, and the attempt to make defendant personally liable seems not to have been made in good faith, the suit could not be allowed to proceed against defendant as the representative of his father. 12. W. 113.

287. In a suit for damages for breach of contract to cultivate Indigo. Held (1), that, if the ryots sowed at any time in the sowing season within three years of the institution of the suit, they could not be deemed to have committed a breach of contract, and that, therefore, the cause of action on such breach of contract could not commence before the close of the sowing season.

(2). That only one set of damages for one breach of contract alone could be recovered, and not a separate set of damages for each breach or failure to do each of all the various acts specified.

(3). That such stipulated damages should be for one year only, *i. e.* that the first breach involves a liability to pay once, and once only, the stipulated damages, and that the contract ceases and determines therewith (Shumboonath Pundit, Judge, dissenting) 6 W R. 278.

288. The defendant purchased from the plaintiffs a cargo of Watson's Hartley steam coal at Rs. 21 per ton, to arrive by ship *Grecian*, but on its arrival the defendant, on being called upon to do so, refused to take delivery on the ground that the usual certificate that the coal was what it was stated to be did not accompany the cargo. The plaintiffs thereupon gave notice to the defendant that unless delivery was taken the coal would be sold on his account and at his risk, and on the defendant repeating his refusal to take delivery the plaintiffs caused the coal to be sold, and it was purchased in the name of M. & Co. for Rs. 13 per ton. In a suit, which was stated in the plaint to be for the loss sustained by the plaintiffs on the re-sale, the Court found that the plaintiffs themselves were the real purchasers, and that the sale had taken place without proper notice, and under the circumstances was invalid. Held, both in the lower Court and on appeal, that the plaintiffs had, by the way in which they had dealt with the coal, rendered themselves accountable to the defendant in respect thereof, and that notwithstanding the defendant had committed a breach of the contract in refusing to take delivery of the coal, the plaintiffs were bound to give an account of the coal and

prove that they had sustained a loss on the re-sale, and on their omission to do so they were not entitled to recover any damages.

Held on appeal *per* Markby, J., that the plaintiffs were not entitled to put aside the sale as invalid, and that the case was one for damages for breach of contract. Under the circumstances they were not entitled to even nominal damages. The mere shipment on board the *Grecian* did not pass the property in the coal to the defendant under S. 77 of Act IX of 1872.

Per Pontifex, J., whether, by virtue of the contract and the subsequent appropriation and shipment, the property in the coal passed or did not pass to the defendant within the meaning of S. 84 or S. 83 of Act IX of 1872, even if the sale were invalid, the plaintiffs were not entitled, considering their conduct in dealing with the coal, and the concealment of their interest in the purchase, and in the absence of satisfactory evidence of what ultimately became of the coal, to recover any damages. 15 B. L. R. 276.

289. Every breach of an agreement for a lease does not entail forfeiture of the lease, but where forfeiture is provided as the penalty for breach of a particular clause it may be enforced for such breach. 16 W. R. 103.

290. The sum agreed to be paid by a ryot as damages for breach of contract in respect to the sowing of certain lands with indigo, must be regarded as liquidated damages, and not as a penalty. 17 W. R. 94.

291. Plaintiff having agreed to assign certain arrears of rent due to him to defendant for a consideration, brought this suit in which he tendered the kobala of assignment and claimed the consideration-money with interest: Held that plaintiff had misconceived the shape in which his suit was brought; and as his claim was purely for money, he should have sued for damages for breach of contract, especially as it was found as a fact that the subject assigned was now worthless. 21 W. R. 434.

292. The Collector, when he has to enquire into contracts between the parties, and to determine whether breach of any such contract has been committed, cannot, upon supposed considerations of equity, set aside that which the parties have deliberately agreed upon between themselves, and substitute further terms of his own. 7 W. R. 132.

293. Where defendants sub-rented an Abkari farm for one year from 31st July 1864 under a *Muchulka*, by which the defendants covenanted to pay monthly instalments of rent to plaintiff, and plaintiff covenanted to furnish defendants with the accounts of the farm for the month of July 1864, during which period the management was in the hands of plaintiff's agent. In an action by plaintiff for rent due to him and the value of arrack supplied by him: Held that the non-performance by the plaintiff of the covenant to furnish accounts was sufficient to justify the entire dismissal of his suit against the defendants. 3 M. H. R. 209.

294. Defendants received a *mourosce* lease from plaintiff and an ad-

of *satames* and rent, and agreed that if they did not register the lease the whole amount was to be recovered with interest. They failed to register the lease and plaintiff took possession of the land. He then sued to recover the advance.

Held, that plaintiff was entitled to recover the stipulated amount notwithstanding he took possession, though he might be liable to pay the defendants a reasonable amount for the use and occupation of the land while he was in possession. 12 W. R. 287.

293. Certain putteedars applied for a butwarrah under the provisions of Reg. XIX of 1814. At the time of the butwarrah it was stipulated between the putteedars of a 6 annas and 7 annas shares that, in the event of a particular village falling by division wholly to either of them, they would re-unite and hold the 13 annas share joint as before.

One party having resiled from this agreement, it was held, that the other party was entitled to sue for specific performance, and such a suit would lie only in the Civil Court. 10 W. R. 69.

296. In 1857, the plaintiff gave a lease of a garden to defendant, who agreed to plant, within five years from the date thereof, 2,000 betel-nut trees. The defendant failed to do so.

In 1867, the plaintiff brought the present suit for ejectment, on account of the breach of the contract entered into by the defendant. Held, that by section 30 Act X of 1859, the suit was barred by limitation. 3 B. L. R. App. 47.

297. Where a party after contracting to sell land to another, executing a *bynapputtro*, and receiving a part of the consideration-money, sells the same land to other parties, such sale is vitiated if the vendees are aware of the contract into which their vendors had previously entered, even though specific or formal notice of the contract had not been given to the vendees. 20 W. R. 386.

298. Defendants for a consideration granted to plaintiffs a lease of certain churs, which were an accretion to a Zemindary and had been in the possession of Government; but were at the time under temporary settlement with the defendants. Subsequently defendants sold their Zemindary to a third party reserving to themselves the chur. Ultimately it was ordered by the Commissioner of Revenue that the churs should be settled, not with defendants, but with the purchasers (the third party), as appertaining to the Zemindary. Defendants having thus become unable to give plaintiffs possession were sued for a re-fund of the premium or consideration-money. Held that it was the duty of the defendants to take steps to call in question the decision of the Commissioner, and that their manager's admission of their liability to re-pay the premium with interest put an end to any claim for damages for the original breach of contract and constituted a fresh cause of action from which limitation ran. 15 W. R. 298.

299. For breach of a covenant by an Ijaradar not to excavate a tank in the lands leased to him, or, if so, to be liable to eviction by the Ze-

to pay the cost of filling up the tank, no suit will lie at the instance of the Zemindar for the recovery of a fractional portion of the lands covered by the lease, but the Zemindar may declare the lease cancelled and resume the whole of the lands, or he may sue for cancellation of the lease, and he may also sue for damages occasioned by the excavation of the tank. 17 W. R. 29.

300. In a suit to recover a sum of money (principal and interest) on account of rent paid for a certain mouzah which had been formed out to plaintiff by defendant No. 1, but of which plaintiff could not get possession : Held, that the cause of action as laid in the plaint was a breach of contract on the part of the principal defendant, and the action was one for damages falling under Act XIV of 1859 section 1 within the meaning of cl. 9, if the contract of lease was verbal, and within cl. 10 if it was in writing.

Held, that the case was not that of a suit for breach of an implied contract as distinguished from a contract of actual agreement, and that the obligation of the defendant to make good the loss caused to the plaintiff was not one merely which the law raises upon a state of circumstances independently of any actual agreement. 19 W. R. 244.

301. D contracted to sell to P a piece of land for Rs. 4,500 of which he received 700 as earnest-money. A contract was drawn up by which D agreed to execute and register a bill of sale and deposit a part (Rs. 1800) of the price, and P was to execute a bond for Rs. 2,000 to bear interest conditioned for the payment of that sum by a fixed date, the transaction to be completed within a specified period. D was ready and willing to perform his part of the contract by the time named, but finding that P would not complete the purchase but demanded back the earnest-money, he sold the property to a third party for Rs. 3,800. P then sued to recover the earnest-money and damages. Held that P was bound to show that the circumstances were such as to give him an equitable right to have back the earnest-money, and that had it not been deposited D could have justly sued for damages to the extent of the loss incurred by the second sale, and therefore P was not entitled to recover the 700 Rupees. 15 W. R. 41.

CONTRACT (By Minor).

302. A contract made by a minor though voidable is not necessarily void, and if made for a consideration which is of the nature of a necessity, is not even voidable.

If a minor remains quiet for a considerable period after attaining his majority without doing any thing to repudiate the contract, a Court of Equity is bound to presume that the consideration was of such a character as to bind him, or that he has after coming of age ratified the contract, unless his silence can be explained or the contract impeached on its merits. 13 W. R. 166.

CONTRACT (Compounding Assault).

303. A contract compounding an assault is not illegal and may be

sued upon. The fact of two of the defendants being Mahomedans, does not affect the principle of this decision. 5 W. R. S. C. C. 16.

CONTRACT (Compulsory execution of).

304. In a suit to enforce performance of a contract where defendant pleads that the contract was executed under compulsion and intimidation, it is not sufficient for him to prove that it was executed from fear of a criminal complaint, as that might have been a righteous fear and not simply a bodily fear imposed on him in order to his doing that which he would not of his own free-will have done.

Should he plead that the contract was based upon the condonation of a criminal complaint against the plaintiff which might have been of a nature not condonable by law, and that the contract was therefore void it would be for him to show what the nature of the offence complained of was. 11 W. R. 314.

CONTRACT (For Compounding Criminal Prosecution).

305. The plaintiff, a resident of Pondicherry, held a bond from one of the defendants (the 2nd) for a certain sum of money. This bond the plaintiff charged the said defendant before the French legal Authorities with having fraudulently abstracted from his house in Pondicherry and he obtained the arrest and extradition from British Territory of the 2nd defendant, as also of his brother the 1st defendant. The latter on his way to Pondicherry met the plaintiff, and a settlement of accounts took place. The 5th, 6th, 7th, and 8th defendants made themselves liable by executing the bond sued on for the sum found due to the plaintiff, and took indemnity bonds to themselves from the 1st defendant, the consideration being the agreement of the plaintiff to discontinue further proceedings on the criminal charge.—The Court at Pondicherry sanctioned the agreement as a compromise by civil redress, and suspended further proceedings in accordance with the law in force in the settlement. Held, that the contract was enforceable the facts of the case not showing the compromise to be in its nature prejudicial as being in contravention of public policy under the Government of British India, or injurious to the good order and interests of society in regard to the administration of public justice.

The English Common Law rule, that contracts for the compounding or suppression of criminal charges for offences of a public nature are illegal and void, has no application to a contract for compounding the prosecution of criminal proceedings for an offence against the Municipal law of a foreign country.

The rule of International law that the law of the place of a contract governs its validity is subject to the qualification that every state may refuse to enforce a contract when it is for the fraudulent evasion of its laws, or is injurious to its public institutions or interests. 4 M. H. R. 14.

CONTRACT (Fraudulent).

306. In a suit brought upon two bonds for Rs. 2000 and Rs. 1,000

respectively, where the transaction was found to be that property having been about to be sold in execution of a decree for a sum much more than Rs. 3,000, he was made to appear to borrow from the plaintiff, at 75 per cent. interest, Rs. 3,000 which were immediately applied to the payment of the debt, the defendant deriving no other benefit, and the plaintiff not binding himself to stay execution:

Held, that the contract in these bonds was of such a nature as to involve the conclusion that defendant was imposed upon and was not a free agent; and that the transaction was of a kind not to be supported by a Court of Equity. 23 W. R. 49.

307. A contract to provide for the collection and payment of an legal cess is illegal. 11 W. R.

308. A contract which is against public policy and intended to evade the course of law cannot be enforced in a Court of Justice; and money paid under such contract *e. g.*, for an illegal purpose, such as bribing a darogah, cannot be recovered by a suit in Court. 18 W. R. 450.

309. In a suit filed on the 28th of April 1866, and brought by a Joint Stock Company, after registration, to recover damages for breach of a contract made with the defendants before registration:—Held that the contract was illegal under section 4 of Act XIX of 1857, and that the plaintiffs could not sue upon it. 3 B. H. R. O. J. 45.

310. Where, to suppress a criminal prosecution for having accidentally caused the death of his wife, plaintiff voluntarily paid money to defendant, knowing defendant to be the nearest relative of the deceased who could take a part in the prosecution, the contract was held to be void as against morality and public policy, and plaintiff held not entitled to sue for the money so paid. 17 W. R. 84.

CONTRACT (Implied).

311. No implication of a contract to pay rent to the zemindar on the part of the tenant can arise in a case in which the tenant has been paying rent to another zemindar than the one now suing for a kubuleut. 7 W. R. 126.

312. By an agreement made on the 10th of January 1857, between K N and several other persons, it was agreed that they should form a co-partnership for the purpose of erecting a mill for the manufacture of yarn. The capital of the partnership was fixed at Rs. 300,000, divided into 100 shares of Rs. 3,000 each.

By the 4th clause of the agreement it was provided that, in return for the trouble K N had been at in establishing the factory, "whatever cotton had to be purchased for the factory K N was to purchase, and whatever yarn should be made in the factory, K N was to sell, and for

whatever he should sell on account of the factory he was duly to receive from the co-partnership, his commission at the rate of 5 per cent. during his lifetime ;” and it was also provided that though the purchases and sales by the co-partnership should not be made through K N, “ yet upon the whole amount of the sales the co-partnership was duly to pay 5 per cent. to K N during his lifetime.”

The factory was built, and its machinery procured and set up by K N, and both financially and otherwise the factory was wholly managed by him. Shortly after it commenced to work, it was found that the co-partnership had expended all its capital and was heavily involved in debt—incurred by K N without the sanction of his co-partners—and that the factory was working at a loss ; and at the suit of some of them, but against the ~~interest~~ consent of K N and a minority of the co-partners, the co-partnership was ordered to be dissolved. K N then claimed to be entitled to compensation for the loss of the commission he should have earned upon the sale of the yarn of the factory during his lifetime,

Held that he was not so entitled ; that as between his co-partners and K N there was no obligation on the former to subscribe more capital after the original capital of the co-partnership had been exhausted, and that there was no implied covenant on the part of the co-partnership to continue to work the factory in order that K N should be in a position to earn his commission during his lifetime. 8 B. H. R. O. J. 209.

CONTRACT (Introduction of new Term into).

313. A held debentures of B, a municipal body, and had a right to exchange them for lots of equal value, to be selected by him from building lands belonging to B ; the rent of which lots was to be set off against the interest on the debentures. A notified to B that he had selected certain lots, and asked permission to retain the debentures for a time, setting the interest against the rent. B consented to A’s proposal, and at the same time informed A that the selected lots exceeded the value of his debentures, and that he must pay the difference. A made no reply to this communication.

A afterwards sued B for interest on the debenture :—

Held, that A was not entitled to interest, the contract being complete, and the indication by B of the difference in quantity not amounting to an introduction of a new term into the negotiation.

A correspondence between A and B amounted to a contract for a purchase of a future interest in immovable property :—

Held that such correspondence did not require registration under the Indian Registration Act, 1866. 1 L. R. I. A. 124.

CONTRACT (Joint).

314. If a party sues upon a joint contract, which is not also several and gets a judgment, he cannot bring a fresh suit against the persons who were jointly liable with the defendant but were not included in the

former suit: such second suit being expressly prohibited by Act VIII of 1859 section 2. 18 W. R. 458.

CONTRACT (Joint and Several).

315. Whether the remedy for breach of contract is joint or several, depends upon circumstances according as the contracting parties rendered themselves jointly or severally liable. 3 W. R. S. C. C. 25.

316. Plaintiff, defendant, and another party had jointly and severally contracted with Government to do certain work depositing security and stipulating that a percentage upon the worth of the work done should be retained in the hands of Government to meet the contingency of the Government incurring expense in case of failure on the part of the contractors. The contract was completed by one of the contractors, who received the amount which had been deducted as above and gave a joint receipt for the same: Held that there was nothing in law to prevent plaintiff from recovering as from defendant his share of the said amount.

Such a suit was not one for money due on a contract and was not cognizable by Small Cause Court. 15 W. R. 513.

CONTRACT (Post-nuptial).

317. Post-nuptial contracts are not a mere nullity at law.

Where husband stipulated in such a contract to do nothing without the permission of his wife on pain of immediate divorce and realization of *den mohhur* and also to pay over to her all the money he might earn, these stipulations were held to be illegal, because contrary to public policy. The last stipulation, however, was construed to mean payment after reasonable deduction on account of the husband's necessary expenses, and in a suit to enforce such a contract, the Court decreed to the plaintiff (the wife), a fair sum for her maintenance holding that under the Contract law (Act IX of 1872 section 57), such part only of the agreement should be enforced as was legal. 23 W. R. 67.

CONTRACT (Renewal of).

318. Where, upon a talookdar's refusal at the end of the period of his settlement to re-settle with Government at an increased rate, the *jumma* was put up to auction, after which the Government did re-settle with the talookdar upon the former conditions and the former description of the nature of the talook, it was

that Government renewed the contract and placed the talook in exactly the position in which he would have stood had he never refused to pay the increased rent. 11 W. R.

CONTRACT (Repudiation of).

Where a party to a contract seeks release from its obligations on the ground that, for some reason or another, he is entitled to repudiate it, he must assert this right as soon after becoming aware of it as he reasonably can. Long inaction unaccounted for must be held in equity to be a ratification of the contract. 9 W. R. 110.

CONTRACT (Rescinding).

320. In case of violation of a contract by one party, the other party may ordinarily rescind it totally or partially; provided he himself is guilty of no default or violation, and exercises the right within a reasonable time. If, after default of the other party, he does an act recognizing the contract, he cannot afterwards rescind it. 11 W. R.

321. A purchaser of property of which possession was contracted to be given him, but which contract the vendor is unable to fulfil, is at liberty to rescind the contract and sue for the re-payment of the purchase-money, and is not obliged to bring a suit for possession of the property. 3 N. W. P.

CONTRACT (Special or Implied).

322. Where there is a special agreement between two parties and that agreement has been performed, and one of them has had all the benefit to which he is entitled thereunder, the other may sue him either upon the special agreement or upon what has been called the implied contract which arises out of the receipt of the benefit. 12 W. R. 521.

CONTRACT (Specific performance of).

323. Parties seeking specific performance of a contract should come to the Court for relief within a reasonable time. 6 M. H. R. 75.

324. Specific performance decreed of a lease, though the lease formed part of an arrangement whereby, as a consideration for the lease, the plaintiff was to lend the defendant money to enable him *inter alia* to commence legal proceedings against the then tenant of the subject-matter of the intended lease. 1 M. H. R. 153.

325. One who asks the Court for a decree for specific performance of an agreement must show that he is willing and able to carry it out in all its material parts so far as he is concerned, and also that no act of his own in relation to the agreement has in any material degree damaged his opponent. He cannot select one part of the agreement for breach and another for performance. He must be prepared to carry out the entire of his own part of the contract before he can call upon his adversary, through the instrumentality of the Court, to specifically execute the latter part of the agreement.

In resisting specific performance of an agreement it is competent to the defendant to show by oral evidence that the real intention of the parties to the agreement has not been correctly expressed in the written document. 1 B. H. R. 262.

326. In a suit for specific performance of a contract, the cause of action is sufficiently shown by a statement of the terms of the contract followed by the averment of the refusal of the defendant to perform it, with a readiness and willingness of the plaintiff to do his part in it. 14 W. R. O. J. 15.

327. A agreed to sell certain property to B and, after having received part of the consideration-money, sold the property to C at an advanced price. B not having in any way neglected to carry out his part of the agreement, was held entitled to specific performance of the contract and to possession of the disputed property on paying down the consideration-money. A deed of agreement to sell at some future period may be registered under Act XIX of 1843. 8 W. R. 103.

328. A specific provision in the administration paper protecting the ryot from enhancement of rent during the term of the settlement will be enforced. 1 N. W. P. 8.

329. The application of the doctrine of specific performance to partnerships is governed by the same rules as those which govern it in other cases.

There are only two classes of cases in which specific performance of an agreement to enter into a partnership has been decreed: first, where the parties have agreed to execute some formal instrument which would confer rights that would not exist unless executed; secondly, where there has been an agreement, which has come to an end, to carry on a joint adventure, and the decree that the agreement is valid, prefaced by the declaration that the contract ought to be specifically performed, is made merely as the foundation of a decree for an account. 1 M. H. R. 341.

330. Where a purchaser of a right to sue for possession brings a suit for specific performance, and it is not shown that he has left undone anything necessary to entitle him to what he claims, it must be taken in special appeal that plaintiff is entitled to insist on specific performance of his contract with his vendor. 22 W. R. 188.

331. When proprietors endorse approval on a petition for a lease, such endorsement is not the acceptance of a consideration entitling petitioners to sue for specific performance of contract. 7 W. R. 142.

332. Where in a former suit, brought by the present defendant for specific performance of the same contract, plaintiff who was defendant resisted successfully and without qualification, he cannot afterwards treat the contract as subsisting. 21 W. R. 434.

333. It is very questionable in any case whether the effect of the execution of a bill of sale by a Hindu vendor is to pass an estate irrespectively of the actual delivery of possession. Where the vendor sells an estate, of which he is not in possession, in consideration of advances to enable him to sue for its recovery, it is not open to the purchaser, after failing to complete his part of the contract, to claim specific performance and delivery of the recovered estate, on tendering the balance of the purchase-money. 2 B. L. R. P. C. 111.

334. Where the purchaser of an estate paid earnest-money, and no time was fixed for the payment of the balance, and the vendor re-sold the property within a week,—Held that the vendor was bound to have

waited a reasonable period, that the second purchaser took nothing, and that the first purchaser was entitled to a decree for specific performance. W. R. S. N. 281.

335. A suit for specific performance to sell land will not lie if the plaintiff neglects to enforce his rights for a long time (in this case three years) after his rights under the contract for sale accrued, and if he does not act up to a condition precedent to the sale to him. If he has any claim at all, it would be for damages against the person breaking the contract for loss sustained by the non-fulfilment thereof. 8 W. R. 280.

336. Where assignees sue the assignor for property never in his possession and for declaration of right to ownership in other property already in the possession of one or more of themselves. Held that the assignor at the time of the assignment not being in actual or constructive possession could not pass the property, the bill of sale being only evidence of a contract to be performed on the happening of a contingency. 21 W. R. 101.

337. The plaintiff contracted with the defendant for the purchase of a piece of land, and paid him part of the purchase-money, it being agreed that the balance should be paid after registration of the bill of sale. The defendant kept the document with him, but failed to get it registered, In a suit by the plaintiff to enforce a specific performance, held, the suit would lie. 6 B. L. R. App. 134.

338. Plaintiff had entered into a contract with one of the defendants for the purchase of certain immovable property, and after he made a small advance the contract was written out and registered. The purchaser refusing to pay up the purchase-money unless the vendor paid the costs, or half the costs, of registration, the latter re-sold the property to a third person.

The present suit was to compel the completion of the contract and delivery of the property. Held that as the parties had entered into a written contract, the Court was bound to see whether it was, or was not, their intention that a complete and binding sale should take place, although the purchase-money was not paid. 15 W. R. 44.

339. Suit for specific performance of a contract providing (on defendant obtaining a decree for a certain property) for the conveyance to plaintiff of a portion of it. Held, that plaintiff's cause of action commenced from the date that the defendant obtained the decree. 1 W. R. 144.

340. The result of a long pending litigation was that the defendants were directed to pay *wasilat* for certain lands which they had possessed under an invalid *lakheraj* claim. They subsequently entered into a compromise with the plaintiff their Zamindar and agreed that, if they defaulted in rent, or if the lands became *khas* of the Zemindar, or were by any means to be alienated, the defendants would point out the lands, or, on failure to do this, pay damages for the loss of the same. Held

that lapse of time and surrender of the lands were no impediment to the Court granting relief to the plaintiff in the shape of a decree for specific performance. W. R. S. N. 77.

341. In a suit brought by plaintiff for the specific performance of an agreement entered into between the plaintiff and defendant, whereby the defendant, an Abkarry contractor, undertook to sub-let to plaintiff the Abkarry of a Talook, and also to recover damages for the breach of contract. Held, that section 9 of the Abkarry Amendment Madras Act III of 1864 did not affect the rights and liabilities of the parties *inter se* under the terms of an unexecuted contract to sub-rent, although the Act would prevent the sub-renter deriving any benefit under an executed contract of sub-renting from the exercise or the manufacture or sale of liquor as defined in section 2, until he had complied with the condition prescribed in section 9 of the Act. 5 M. H. R. 1.

342. Where plaintiff had contracted with defendant to purchase from him a share of certain landed estates, excluding from the contract certain land in those estates situated within a defined boundary, defendant binding himself to make over to plaintiff other lands in exchange: Held, that if defendant failed to make over the lands last mentioned, plaintiff might sue him for specific performance or for damages, but could not, under the contract, sue to recover lands which he did not buy. 9 W. R. 269.

343. In a suit against K. H, and G (a minor), to recover possession of an 8 anna share of a putnee talook, and to have a conveyance executed in plaintiff's favor, on the allegation that one of the defendants K had agreed that the putnee should be bid for at the sale advertised by the Zemindar, and if purchased, should be taken in the name of K, who should convey half to the plaintiff, the cause of action was stated to be that defendants had fraudulently got a putnee lease executed in their names and had taken possession, and refused to make over the stipulated share or take the balance of the consideration-money. The defendant K's substantial plea was that the mahal had been sold in one lot along with others, and taken by the head member of the family without knowledge of the agreement, and that plaintiff had himself through an agent competed for the putnee at the sale: consequently that the event contemplated had not happened, and that plaintiff had himself avoided the agreement. He pleaded that he was not privy to the agreement, and the minor that he was not bound.

The Lower Appellate Court found that both parties had abandoned and avoided the agreement:

Held, that, even if the agreement were binding on K, the Court could not compel a partial performance, which was all that could take place; for as plaintiff claimed half the putnee, and K's share was at most one-fourth, plaintiff would be entitled to one-eighth only. A specific performance could not be decreed, for plaintiff could have resisted an action brought by the present defendants for fulfilment of con-

tract, as he could not have been compelled to buy what he had not agreed to. 24 W. R. 434.

344. A sued B on a deed of sale for possession of 4 annas of certain lands, which A alleged B had sold him in consideration of an advance of a some of money which A said he paid to B when the deed was executed. B answered that, being in want of funds to carry on a suit for the recovery of the very lands, 4 annas of which A now sues for, he gave A the deed in question on condition that A was to advance him the amount mentioned in the deed, but that A only advanced portions of the sum from time to time. The allegation of A that he paid the money to B when the deed was executed was found to be false.

Held, that the execution and transfer of the deed of sale from B to A, and the partial payment of the purchase-money by A to B, did not pass to A a complete title to the lands, and that B in retaining possession could not be regarded as having only a lien for the unpaid portion of the purchase-money or liable to account to A as a mortgagee in possession of the rents and profits.

Held, that even if part of the purchase-money had been paid by A to B at the time of the execution of the deed, and A tendered to B the remainder of the purchase-money, A would not have been entitled to a decree for specific performance, the contract sued on being eminently a speculative, not to say a gambling, one. 12 W. R. P. C. 6.

CONTRACT (Time and Place of Performance of).

345. If a person contracts to deliver goods *at a specified place*, he must be there in person or by agent, and ready to deliver them: if to deliver them *by a certain time*, he must tender them so as to allow sufficient time for examination and receipt. But when a thing is to be performed at a certain place, on or before a certain day, to another party to a contract, the tender must be to the other party *at that place*, and that other party must be present at some particular part of the day before sun-set, so that the act may be completed by day light. Where a thing is to be done *any where*, a tender at a convenient time before mid-night is sufficient. 11 W. R. 58.

CONTRACT (Void).

346. The agreeing not to enforce a contract which is void for illegality is an illegal consideration, and the contract is void. 18 W. R. 424.

347. A contract as to an adoption after payment of price cannot be enforced, for it would come within the meaning of Act IX of 1872 section 23 as immoral and contrary to public policy. 21 W. R. 381.

348. One who repudiates a contract and asks to have it treated as void, is bound to take steps for this purpose at the earliest moment without avoidable delay. 22 W. R. 529.

349. A contract, the effect of which is to assist another in carrying on the litigation against a third party, made with the express declaration

that it was out of spite and ill-feeling against such third party, is a contract against public policy, and a suit cannot lie upon it. 10 W. R. 140.

357. Every contract relating to the collection from ryots and payment to the Zemindar of an illegal cess, is *ab initio* void. 3 B. L. R. A. J. 44.

351. Although one of the parties to a contract was induced to enter into it by fraud of the other, he is nevertheless bound by the contract until he repudiates it; and this he cannot do when he has allowed that to occur on the footing, or in view, of the contract, which renders it impossible that the parties should be put *in statu quo*. In such circumstances his proper remedy is by an action for damages. 22 W. R. 529.

352. J., having represented to C. that there were good roads, metalled to within six or seven miles of the place where he wanted C. to forward a certain engine and boiler, and a fair kucha road the remainder, C. relying on his statement, agreed to forward the same to the place of destination for a certain sum, part of which C. received on different occasions, and duly forwarded to the place the engine, but, on passage across an iron suspension bridge on the road being refused to the boiler by the officer in charge of the brigade on account of its weight, C. threw up the contract. J. having conveyed the boiler across the nala spanned by the bridge, and finally, to the place of destination, sued to recover from C. the money expended by him in so doing alleging breach of contract. It was held that the suit was rightly dismissed on the ground that the agreement was voidable by C. under the provisions of section 19 Act IX of 1872. It was also held that the plaintiff could not recover in the suit any portion of the monies advanced to the defendant. 6 N. W. P. 350.

353. One M H, being apprehensive that (in consequence of an action of trespass in the Supreme Court which M R and A R had brought against P P) he was in danger of being deprived of a piece of land of which he was then possessed, entered into an agreement with K N that he K N should conduct the pending case at his own costs and necessary expenses, and that after M H should have proved that the piece of land was his sole property, K N and M H should erect a building on it at their joint expense, and that the rents and profits of such building should be enjoyed by K N and M H jointly during the lifetime of M H, after whose death the property, with the building, was to be the sole and absolute property of K N: Held that the above agreement (when considered in connection with its surrounding circumstances) did not savour of Maintenance or Champerty, nor was it void as being against public policy.

Quære.—Whether that law was ever applicable to cases where pecuniary assistance is afforded to defendants.

Where K N, claiming under the above agreement, sued to recover the property comprised in it from the mortgagee of the administrator of M

H, who was in possession of the property, it was held that the representatives of the mortgagor were not necessary parties to the suit. 8 B. H. R. O. J. 1.

CONTRACT (Wagering).

354. A wager contract in India (before the passing of the Legislative Act XXI of 1848) upon the average price opium would fetch at a future Government sale, held legal, and an action thereon maintained.

The plaintiff and defendants, by contracts in writing, wagered as to the average price to be obtained for opium "of the 30th of November," of the first *lelaam*, or public Government sale of opium." At the time when these contracts were entered into the first Government sale had been advertised for the "30th of November 1846." The sale on that day was prevented by a combination of opium speculators interested in similar contracts. The Government sale was again advertised, and took place on the 7th of December following, when opium of the quantity and description advertised for sale on the "30th November" was sold. Held: *First*, that the date mentioned in the contracts, the "30th November" was a mere description of the period when the first public Government sale of opium usually took place, and formed no part of the risk contemplated by the wagers, the subject of the contracts, and was immaterial; and, *Secondly*, that according to the true construction of the contracts, the first actual public Government sale of opium which took place next after the date of the contracts, satisfied the terms of the contracts; and upon a certain average being realised thereon, the event on which the plaintiff had wagered was determined in his favor, and he was entitled to recover the differences under the averages. 6 M. I. A. 251.

355. After the contracts were entered into, and an action commenced in the Supreme Court, wager contracts were declared invalid by the Act of the Indian Legislature, No. XXI of 1848, which enacts "that all agreements, whether made in speaking, writing, or otherwise, by way of gaming or wagering, shall be null and void, and no suit shall be allowed in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won on any wager, or intrusted to any person to abide the event of any game, or on which any wager is made."

Held, that this Legislative Act did not affect existing contracts, or actions already commenced upon such contracts; there being no words in the Act sufficient to show the intention of the Legislature to affect existing rights.

Statutes are, *prima facie*, deemed to be prospective only, *Nova constitutio futuris formam imponere debet, non præteritis.*" 5 M. I. A. 109.

356. By the Common law of England, in force in India, an action may be maintained on a wager, although the parties had no previous interest in the subject-matter on which it is laid, if such wager be not against the interest or feelings of third persons, does not lead to indecent evi-
, and is not contrary to public policy.

The mere circumstance that a wager concerns the public revenue, or creates a temptation to do a wrong, will not render it illegal.

A wager upon the average price which opium should fetch at the next Government sale at Calcutta, the plaintiffs having to pay the defendants the difference between such price and a sum named, per chest, and the defendants having to pay the difference between such price and the sum so named, if the price should be above that sum ; is not an illegal wager, or contrary to public policy, though the proceeds of the opium sold at Calcutta formed part of the Government Revenue. The judgment of the Court below, holding such wager illegal, reversed.

The Statute, 8 and 9 Vic., c. 109, amending the law relating to games and wagers, does not extend to India. 4 M. I. A. 339.

357. The Legislative Act XXXII of 1839 (extending to India the provisions of Statute, 3rd and 4th Wm. IV, c. 42, section 28), concerning the allowance of interest in certain cases, enacts that "upon all debts of sums certain, payable at a certain time, the Court before which they may be recovered, may, if it shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time."

Held,—That a wager contract (before the passing of Act XXI of 1848), upon the average price which opium would fetch at the next Government opium sale, was not within the scope of the Act XXXII of 1839, as that Act supposes a party to have been sued for breach of a contract for the payment, by virtue of a written instrument, of a sum certain at a certain time, and did not affect debts contingent in amount and time of coming due.

Whether the discretion vested in the Court by Act XXXII of 1839, in allowing or refusing interest, in cases within the Act, is liable to review. *Quære?* 7 M. I. A. 263, 264 ; 4 W. R. P. C. 8.

358. An agent employed to effect a wagering contract is entitled to recover from his principal money paid on his account in respect thereof, his authority not having been revoked. The claim is not affected by Act XXI of 1848. *see Act III (Bom.) of 1865.* 1 B H. R. 34.

359. In an action on contract, known as *Tajee mundees Chitties*, opium wager contracts (before the passing of the Act, XXI of 1848, which prohibited such gambling contracts) the plaintiff claimed interest on the sum recovered. Held, that as there was no stipulation as to interest in the contract, or satisfactory evidence of mercantile usage at Calcutta to import interest into the contract, the interest claimed could not be allowed. 9 M. I. A. 256.

360. A promissory note which has for its consideration a debt due on a wagering contract is not binding in the hands of the original payee. 8 B. H. R. A. J. 131.

361. Wager contracts between the plaintiffs and defendants upon the price that *Patna* opium would fetch at the next Government sale at *Calcutta*; each party knowing that the other might use means to enhance or depress such price. Held, that the bidding at the sale by one of the plaintiffs, though done colourably, and as it appeared only to enhance the price, was no fraud on the defendants, or upon the public, as he had a right in common with all the world to bid at such sale, and was not precluded from recovering the amount of such wager contracts by the fact, that such bidding tended to bring about the event by which the wager was to be won.

Held also, that employing agents at such sale (all of whom were cognizant that object was to enhance the price of opium sold) to bid, there being no *crimen falsi* committed, did not constitute an illegal conspiracy, or such fraud as would vitiate the wager contracts.

By the 6th Article of the Convention between *Great Britain* and *France*, the French Government had a right to demand, out of the quantities sold at the Government sale, 300 chests of opium at the average rate of sale. Held, that no fraud on the vendors was committed by inducing the French Council to exercise that option in favour of the plaintiffs. 5 M. J. A. 109.

CONTRACT (With Person in position of Confidence).

362. A contract of sale or conveyance entered into by any one with a person who stands relatively to him in a position of confidence or trust, is liable to be called in question by the vendor, and to be set aside at his instance if it be found that the other party made an unfair use of his advantages. This rule of equity applies strongly in a case where any person, acting as an attorney; or as a legal adviser, enters into a contract with his client in respect of the subject of litigation or advise, Undue influence is presumed to have been exerted until the contrary is proved, and the purchaser is bound to show that all the terms and conditions of the contract are fair, adequate, and reasonable. 1 B. L. R. A. J. 95; 10 W. R. 128

CONTRACT (Written).

363. The law in this country does not require that any agreement between natives, whether in regard to the transfer or creation of an interest in land, or otherwise, should be in writing; nor does it distinguish between agreements under seal and by parol. 4 M. H. R. 98.

364. Where a contract is reduced to writing, and the only cause of action between the parties arises out of the document, no oral evidence is admissible to prove the terms of the contract. 24 W. R. 88.

365. Where a writing signed by the defendant was in these terms, "S (defendant) holds Rs. 475 which sum is the property of L, (the plaintiff)". Held, that the document could not be considered a written contract or engagement. 4 M. H. R. 216.

CONVEYANCE.

366. Persons having a right of possession may dispose of property though it is not actually in their possession. 11 W. R. 134.

367. The general rule in India is that, upon a contract of purchase and sale, the ownership is acquired by the purchaser, though the transaction has not been followed by delivery of possession; delivery not being necessary to complete the title of the vendee. 23 W. R. 131.

368. As a general rule of law when the vendee has got, not a mere contract to convey, but a conveyance, that is to say, a document which in terms professes to make over the property, and the document is registered, he becomes at once the owner without further ceremony. 23 W. R. 131.

369. The conveyance of property while the owner is a minor is not necessarily inoperative: if the sale is effected by the guardian and acquiesced in by the minor when he comes of age, it may be valid notwithstanding. 11 W. R.

370. When several persons join in a conveyance, and convey "the whole and entire property absolutely," they must be taken to have exercised every power which they possess, and to have parted with their whole interest whether in possession or expectation. 14 W. R. 379.

371. Where a person who has made a voluntary gift or settlement of an estate sells the same to another for value, the conveyance operates as a conveyance of the estate which the settlor had before the voluntary settlement, the Statute 27 Elizabeth, C. 4, putting the settlement out of the way, so that it shall not affect the conveyance which is made to the purchaser.

Words showing an intention, on the part of the person who made the voluntary gift, to convey to the purchaser all the interest or estate that he had, are sufficient to avoid such gift. 22 W. R. 60.

372. The conduct of the parties, after the making of an instrument, affords a clue to their intentions in regard to its effect only where they are voluntary actors in the conveyance; not where it is made against their will by coercion of a Civil Court. 21 W. R. 119.

373. The signing of a deed of conveyance of property made with full knowledge of the contents of the deed and of the object of the signature, may convey the right of the person signing, even if the signature be not made in the assembly where deed was executed. 1 W. R. 66.

374. Where a deed of conveyance is signed and handed over, the best mode of testing its *bona fides* is to scrutinize the acts of the parties which follow, particularly whether consideration is given or possession taken. 21 W. R. 105.

375. Where the executants of a deed of conveyance *kobola* omit to have it registered, and the property is sold to a third party who takes it

bona fide for valuable consideration, the party in whose favour the conveyance was executed should seek his remedy against the executants, not in a suit for specific performance, but in an action for damages. 22 W. R. 165.

376. In a suit to recover possession, with mesne profits, of property alleged to have been purchased by plaintiff from one A, where defendant U was a daughter of A's sister R, who claimed the property through her son V, the question was whether plaintiff had obtained the property by a valid deed of sale:—

Plaintiff was a pleader, and, while a suit was in progress in which on behalf of his step-mother and another client he contended that V had no property at all in the mouza, he obtained a conveyance from A whose sole title was derived from V, which conveyance nominally made to S T was never asserted by plaintiff till 7 years later when he commenced this suit. The evidence for the payment by plaintiff of the consideration-money was so unsatisfactory that the High Court summoned the plaintiff and examined him :

Held, that it was somewhat dangerous to allow plaintiff, a professional man, who did not give evidence in his own suit in his own behalf, to be called for the purpose of supporting his case which had broken down; that plaintiff's evidence as to payment of the consideration-money was very unsatisfactory and at variance with his previous deposition; and that though the mere *factum* of the deed was proved, it was not a *bona fide* conveyance.

Held, that the circumstance of U having in a previous suit admitted the execution of the deed, did not preclude her from contesting its validity and maintaining that it was colorable, not real. 19 W. R. P. C. 118, 119.

377. R. the owner of certain property, having died, and his immediate heirs having subsequently demised without leaving issue, N, as the next-of-kin, attempted to take possession, and, being opposed, brought a suit, under Act XIX of 1841; but afterwards alienated a moiety of his right, title, and interest, in the property to one K in order to meet the expenses which would be incurred for its recovery. This was done by an *ikrar*, wherein, in consideration of Rs. 50 received in each, and the trouble and assistance of managing and conducting the necessary law suit and defraying the expenses thereof, N relinquished to K and 8 annas' share, valued at Rs. 75,000. K took proper steps and defrayed the expenses; but the suit was dismissed. K subsequently sold the interest which he had thus acquired, including *wasilat*, to T in consideration of Rs. 1,7000 advanced by the latter and expended in the proceedings, valuing the interest thus sold at Rs. 18,000. The purchaser then brought a suit against the person in possession, claiming a half share of the property adversely to N, making N a defendant, and praying for a declaration of N's right of inheritance :

Held, that the *ikrar* did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be

CONVEYANCE (TO MOOKTEAR WITHOUT CONSIDERATION)

recovered in a suit; and that even if plaintiff were entitled to complain of breach of contract by N, she could not recover against the principal defendant, the person in possession, who was no party to the deed.

Held too, that the suit could not be maintained by reason of the nature of the transaction on which it was based, which was void as being contrary to public policy, and therefore not giving plaintiff any right to sue for the property professed to be passed. 20 W. R. 446.

CONVEYANCE (By Minor).

378. A conveyance by a minor may be voided by him when he comes of age; but unless after coming of age he promptly does some act to repudiate the contract, it must be taken to be ratified. 13 W. R. 172.

CONVEYANCE (Fraudulent).

379. Where a conveyance is effected under a fraudulent arrangement whereby nothing is sold, *bona fides* on the part of the purchaser cannot make a title in his vendor. 15 W. R. 308.

380. A party claiming through A is not at liberty to plead A's fraud as against a defendant in possession, although that defendant claims under the fraudulent conveyance. 4 W. R. 37.

381. A declaration of title cannot be granted to the purchaser under a *kobala* from two parties where the conveyance has been found to be fraudulent and collusive, even though one of the parties really had an interest in the property and transferred it in the same conveyance. 11 W. R.

CONVEYANCE [Fraudulent—by Husband to Wife].

382. If a man largely indebted executes a conveyance of property to his wife as in satisfaction of dower, the conveyance is void as against his creditors if executed for the fraudulent purpose of keeping the property in his own hands out of the reach of the creditors. So also a conveyance by a man in such circumstances to his wife is fraudulent and void if no dower is due and the conveyance is voluntary and not made in satisfaction of any debt due to him. 7 W. R. 513.

CONVEYANCE [Fraudulent--to defeat Sequestration].

383. A deed of sale conveying real estate, the property of a defendant in a suit then pending in the Supreme Court at *Bombay*. Held, in the absence of satisfactory evidence of a *bona fide* consideration having been paid by the vendee, to be fraudulent and void, as against the creditors of the vendor, and to have been executed for the purpose of defeating a sequestration. 6 M. I. A. 27.

CONVEYANCE (To Mooktear without Consideration).

384. On 25th July 1866; M. C. K. executed a *Kobala* purporting to convey certain properties to R. L. (her mooktear) whose representative by a deed dated 15th September 1867 conveyed a portion of the property to the appellant, who now claims to be the prior purchaser for

valuable consideration without notice. By deed dated 17th September 1867, M C K conveyed the property to respondents who were in receipt of rents at the time when the two appellants instituted suits to recover possession of the property and to set aside the deed, the ticcadar and M C K being also made defendants.

Held that the conveyance by the native lady to her mooktear without consideration could not be upheld, for to uphold it would be a denial of justice and contrary to sound policy, even if the grantor as plaintiff sued the mooktear as defendant to set it aside. Still less could it be upheld in a case like this, where the parties pleading the fraud were defendants and in possession. 19 W. R. 145.

CO-SHARER.

385. The consent of all the sharers to a joint holding being necessary to give validity to any agreement regarding the same, certain sharers in a joint holding cannot by the devise of deducting from their claim a portion of the holding representing the share of some of their co-sharers, non-consenting parties to an agreement, sue to enforce such agreement, all the sharers having an undivided share in every biswa of the joint holding. 3 N. W. P. 216.

386. A co-sharer may sue for profits, alleging a sum to be due, and although it may be necessary to go into the accounts, this fact alone will not alter the character of the suit, and make it one for settlement of accounts. 3 N. W. P. 49.

387. In a suit against co-partners in a joint firm to recover money deposited as plaintiff's share and to have accounts rendered of the profits, before any order can be made to the effect that plaintiff is entitled to be paid by any one of his partners or out of the assets of the firm the actual money advanced, the whole accounts of the firm ought to be taken and the ultimate liability of each of the partners ascertained. 21 W. R. 300.

388. Three brothers carrying on business jointly borrowed money from one G. M., after which one of them died, and the survivors (plaintiff and T), for the purpose of making up the consideration-money of certain property purchased, borrowed a further sum from G. M. and executed a bond to secure repayment of all those sums. The property was purchased and joint possession obtained. Subsequently plaintiff and T separated after executing each to each certain *ikrarnamahs* by which each undertook to pay his share of the joint debts. The bond-holder then sued plaintiff and the representatives of T, and obtained a decree against plaintiff only, who, upon the decree-holder, being about to sell his property, sued the representatives of T for a moiety of the debt. Defendants objected that as plaintiff had not paid the decretal money, no cause of action had accrued. Held that the objection was good, and that plaintiff had no right to come into Court and ask to be paid by his co-sharers before he had done anything himself, even to discharge his own portion of the obligation.

Held also, that as defendants had been acquitted by a competent Court of all obligation to pay the original creditor, plaintiff's only right (if any) was to call upon them to pay himself, and this he could not do until he could show that he had done something on their behalf. 19 W. R. 24.

CREDITORS.

389. The creditor of a deceased proprietor is not prevented, in the way in which the deceased would have been were he alive, from questioning acts done by the said proprietor's benamedar ; for the rule of law by which an heir or assignee stands in no better position than the party through whom he derives his title admits of an exception in favour of those who would be themselves aggrieved or defrauded by the party through whom they claim. 15 W. R. 333.

CUSTOM.

390. Custom cannot affect the express terms of a written contract. 7 B. L. R. 682.

D.

DAMAGES.

391. A suit will not lie for damages apart from the cause of action out of which the damages arise. 21 W. R. 151.

392. In a suit for damages on account of failure to deliver goods (kullaye) sold, where the contract was to deliver by weight, the weighing taking place in the seller's own premises : Held, that as plaintiffs did not apply for delivery, the seller defendants, were not, under the Contract Act section 93, bound to deliver the goods. 24 W. R. 178.

393. The plaintiffs entered into a contract in writing by which the defendant was to deliver 2450 bundles of Gingeely Seed on being put in possession of the necessary funds. In a suit for damages by reason of non-delivery : Held that the plaintiffs before they could recover must show that they paid or tendered the amount stipulated, and that the vendor's rights under the contract cannot be controlled by the course of dealing between the parties. 2 M. H. R. 193.

394. K received into his godown certain goods belonging to the plaintiff and in charge of his servant, concerning which there was a dispute between the plaintiff's agent and B, of which circumstances K was aware and he advanced money to B on the security of such goods, which were subsequently delivered to B and sold by him with the knowledge of K, and notwithstanding the plaintiff's servant objected to it, delivered them to the purchaser. Held, that K was liable to an action for damages at the instance of the plaintiff. 1 N. W. P. 107.

395. The plaintiff alleged that he had given possession to the defendant of a certain estate, in consideration of the payment by the defendant of annual rent for a term of five years that the defendant had paid the rent for the first three years of the term, but had neglected to pay any for the last two years, and that since the expiry of the term the defendant had remained in possession; and he claimed to recover possession of the property and a certain sum for its use and occupation by the defendant. He also claimed to recover the same sum as damages for the retention of the estate by the defendant, from the date up to which the defendant had last paid rent. The agreement between the parties was contained in certain letters which were unstamped. Held, that although the claim to relief made by the plaintiff on the basis of the contract must fail, because there was no evidence of the contract on which the Court could act, yet he could fall back on his claim to recover damages for the use and occupation of the land, as the defendant could not defend his possession, being equally incompetent with the plaintiff to rely on the terms of a contract of which he could not give proof, and as he did not deny the use and occupation alleged, he had no answer to the claim for damages. 5 N. W. P. 65.

DAMAGES (Alternative).

396. Where alternative damages are awarded to the plaintiff in a suit for the recovery of timber which defendants have at their own risk brought down from T'onghoo to Rangoon. Held that plaintiff may insist on delivery or in default to recover the value of the timber without any deduction on account of charges incurred by defendant in removing the timber. 19 W. R. 123.

DAMAGES (For Breach of Contract).

397. A party failing to perform the contract may be sued, at the pleasure of the other party, either for specific performance or for damages. 12 W. R. 149.

398. Defendant borrowed a sum of money below 500 rupees from plaintiff with a view to redeem a mortgage, on condition that after redemption he would sell the property to plaintiff. He did not, however, redeem the property. Held, that plaintiff's suit to recover his dues was one for damages as upon a breach of contract in which under section 27 Act XXIII of 1861 no special appeal would lie. 12 W. R. 269.

399. Ordinarily on a breach of a contract of sale the vendor can only recover as against the purchaser the difference between the price contracted for and the price at which the vendor might or could have sold the goods at the time of the breach. 15 W. R. 392.

400. Where the parties to a contract stipulate for the payment of a specified sum for any breach of it, and the damages resulting from any such breach are uncertain and incapable of accurate valuation, the sum agreed to be paid, will be treated as liquidated damages and not as penalty.

A plaintiff who sues for damages and is entitled to them, cannot likewise be entitled to specific performance or to an injunction against the further breach of the agreement.

In a suit for breach of contract, it is open to the defendant to plead in that suit (without being obliged to bring a fresh suit) that the plaintiff, being the first to break the agreement, cannot now sue for damages for some thing subsequently done by the defendant in contravention of it. 7 W. R. 303,304.

401. Suit for breach of contract to sow Indigo in consideration of an advance. Held that the failure to sow not having been shown to be owing to accident, must be presumed to have been fraudulent or dishonest, and that, therefore, the case did not fall within clause 4, section 5, Regulation VI of 1823, which limits the amount of penalty to three times the sum advanced ; but that the plaintiffs were entitled to recover an amount of damages not exceeding the sum which the defendant stipulated to pay on failure by him to perform his contract. 4 W. R. 62.

402. In a suit for damages for breach of contract to supply wood which defendant had engaged to supply for the construction of a house, where the intention was found to have been that the plaintiff should from time to time give defendant notice of the different articles of wood work required : Held that defendant was only liable for damages to the extent of the wood which he did not supply according to the order given to him, not for the wood for which requisition had not been made. 15 W. R. 217.

DAMAGES (Liquidated).

403. The hinge upon which the decision of every particular case turns, is the intention of the parties collected from the language they have used. The mere use of the term " penalty," or " liquidated damages," or interest, does not determine the intention ; but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument.

If the instrument contains many stipulations of varying importance or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation applying generally to a breach of all or any of them, was intended to be a penalty, and not liquidated damages. Similarly, where a very large sum becomes immediately payable in consequence of the payment of a very small sum, the former should be considered a penalty. Applying these principles to the case, the Court held that the decision of the Lower Appellate Court was correct. 19 W. R. 271.

404. Where a bond stipulated for a higher rate of interest in the event of the money not being paid at the appointed time, the stipulation was held to be not of the nature of a penalty but a liquidated damages : for it provided not an unvarying lump sum, but a sum increasing with

the time during which the obligee was kept out of his money, and was therefore very appropriate as a measure of the proper compensation.

Even where a stipulation is intended to operate as a penalty, it is incumbent on the Court to consider what amount of money would properly measure the damages consequent on the default. 22 W. R. 223.

405. In a suit to recover damages under a kubooleut in which defendant had engaged to sow and cultivate indigo, and, in case of failure, to pay as damages a specified sum for every year: Held, that the amount agreed to be paid should be treated as liquidated damages. 11 W. R. 558.

404. Defendant agreed to supply 100 kantlams of jaggery by a specified date at 4½ Rupees per kantlam, and received 100 Rupees advance. Defendant further agreed that in default he would pay interest at 1 per cent. per mensem and *masfa* at 7 Rupees per kantlam. No delivery was made by defendant.

In a suit by the plaintiff to recover 7 Rupees per kantlam and the interest. Held, that the amount sued for was in the nature of liquidated damages which plaintiff had a legal right to enforce, and not a penalty against which the Court would relieve. 2 M. H. R. 451.

407. Where a contract for the sale and delivery of 2000 *baras* of stone contained a provision that in case of breach by the purchaser, damages (liquidated) were to be paid by him at the rate of one rupee per *baras*, and the purchaser paid Rs. 1,000 earnest-money, but made default in accepting the stone:—Held that, though in default of acceptance, the earnest-money, Rs. 1,000 was forfeited, the vendor could not retain the earnest-money and sue for the whole amount of the liquidated damages (Rs. 2,000), but that his proper course was to sue the purchaser for the difference only, and, such difference amounting to Rs. 1,000, that the suit was properly brought in the Small Cause Court. 5 B. H. R. O. J. 147.

DAMAGES (Measure of).

408. In a suit for recovery of damages, the Court which tries the case must, before passing a final decree assess the damages, and not leave them to be assessed in execution of the decree. 4 B. L. R. App 66.

409. The ascertainment of the amount of damages is a necessary preliminary to a decree under Act VIII of 1859, section 192 for specific performance of a contract and payment of damages as an alternative in case of non-performance. 1 M. H. R. 341.

410. Interest at the bazar rate on the value of the goods awarded and recovered may not be an adequate measure of damages. The Judge should take into consideration all the circumstances of each case presumably within the knowledge of the defendant at the time he committed the act which forms the cause of action, and allow for their natural and immediate consequences. 18 W. R.

411. Where the parties to a contract assess by agreement the amount

of damages payable in case of a breach of the contract, it is of the Court to enforce the terms of the contract which they made. W. R. S. N. 354.

412. In estimating the measure of damages to be paid for breach of contract to cultivate indigo, the period of the breach should be taken as the time for estimating the damages. Generally, the natural and immediate consequence of the breach of contract should alone be looked to, and not some possible remote result. Supposed profits ought not to be given as part of the damages, unless under special and extraordinary circumstances. W. R. S. N. 251.

413. Suit on breach of contract to cultivate and deliver Indigo, for recovery of the amount specified in the contract.

Held (1) that the stamp duty depended upon the amount of consideration for the undertaking; and (2) that, unless it was clear that the intention of the parties to the agreement was to treat the sum mentioned as liquidated damages behind which the Court should not look, the Court could not award damages beyond the amount of injury actually sustained. 5 W. R. S. C. C. 10.

414. Damages assessed at a gross sum by the Judicial Committee, no sufficient evidence being furnished in the cause, to calculate the exact amount of the loss sustained. 4 M. I. A. 321.

415. In an action by a vendee against a vendor for non-performance of a contract to deliver goods, which specifies no time for delivery, the measure of damages is the difference between the contract-price and that which goods of a like description bore on the lapse of a reasonable time for delivery. 1 M. I. R. 162.

416. In an action by the vendee against the vendor for breach of a contract to deliver goods "in two or three days":—Held, that the measure of damages was the difference between the contract-price and the price which similar goods bore on the lapse of a reasonable time for delivery, not less than three days from the date of the contract. 1 M. I. R. 168.

417. In an action of damages for the detention of ornaments ed with the defendant which the defendant has wrongfully converted to his own use, the measure of damages is the value of the ornaments less the sum for which they have been pledged. 5 B. H. R. O. J. 140.

418. Suit for damages sustained by plaintiff during the period she was out of possession of an Indigo factory with appurtenances. Held that the Lower Court was right in taking; as the basis of its calculation of damages, a *bona fide* agreement entered into between the plaintiff and her lessees showing the amount of rent which she would have received yearly but for the illegal act of the defendant; that as the Indigo land was an appurtenance to the factory, by ousting the plaintiff from the factory, all benefit derivable from *chur* lands fit only for Indigo was lost

by her ; and that the sum which represented that loss had been rightly included in the calculation of damages to which plaintiff was entitled. 5 W. R. 104.

419. Where a ryot took advances from a planter for the cultivation of indigo, stipulating to deliver a certain number of bundles of the plant, and further stipulating that if he failed to do so by neglecting to cultivate or cut, he would "pay as damages the price of manufactured indigo for the bundles ascertained to be due :

Held, that if the ryot's failure to supply the bundles stipulated for arose through his neglect to cultivate, he was bound to pay as damages the profit which the planter would have derived from converting the indigo plant which ought to have been delivered into indigo and selling that indigo at a fair price : the risk of failure in the course of manufacture to be reckoned in estimating the damages. 12 W. R. 534.

420. The plaintiff entered into a contract of Charterparty with the defendants, whereby it was agreed between them and the defendants "acting for the owners" that "the steamer *Atholl*, now on her passage to Calcutta, being tight, staunch, and strong, &c., shall receive on board from the Charterers a complete cargo of merchandise to consist of 700 tons dead weight, &c., and being so laden shall therewith proceed to London with liberty to call for any legal purpose at any intermediate port or ports &c., freight to be paid on the above cargo on right delivery of the same at and after the rate of £4,2,6 per ton. Charterers to have the option of cancelling the Charterparty, if the steamer has not arrived in Calcutta on 15th April 1871." The defendants signed the Charterparty as "agents of steamer. *Atholl*." The steamer was not, at the time the Charterparty was entered into, on her way to Calcutta, being then in the port of London, and she did not start for some days after the date of the Charterparty. She touched at Madras and Colombo on her way, and did not arrive in Calcutta until 11th April. Rates of freight having declined since the middle of March, at which time, it was alleged, the steamer ought to have arrived, the plaintiffs sued the defendants for damages. Held, the defendants were liable. The statement in the Charterparty, that the steamer was on her passage to Calcutta was a condition precedent. The measure of damages was the difference between the value the steamer would have been to the plaintiffs, as an instrument for earning freight at market prices, if she had been put at their disposal at the time when she ought to have been under the contract, *i. e.*, a fortnight or three weeks earlier, and what she was worth to them in the same view at the time when she actually was delivered. 8 B. L. R. 544-

421. The plaintiff chartered a ship of the defendant ; and by the Charterparty it was stipulated, that the said ship, being tight, staunch, and strong should receive from the plaintiffs a full cargo of rice or grain ; and being so loaded, should therewith proceed to St. Denis, the freight to be paid there on right delivery of cargo : The penalty for non-performance of the Charterparty was to be the estimated amount of

freight. The plaintiffs began to load on May 3rd, and continued doing so until June 10th, having then shipped very nearly the full cargo; they then stopped loading in consequence of a notice from the defendant that the ship was leaking; in consequence of the leakage, the cargo had to be shifted, and a portion of it, found to be damaged, had to be replaced after the leak was stopped. The charges of shifting the cargo and the cost of the cargo substituted were paid by the defendant, considerable delay occurred in consequence of the leak, and the loading was not completed until the end of July. On May 28th, when the plaintiffs had loaded a portion of the cargo, and had obtained bills of lading, they drew a bill of exchange at 60 days for the value of the cargo covered by the bills of lading on their agent at St. Denis, which they sold to the Comptoir d'Escompte de Paris, hypothecating the cargo for the amount of their draft, other similar drafts were subsequently drawn and sold. When the plaintiffs received notice of the leakage, they, in anticipation of the delay which would occur in consequence, arranged with the Comptoir d'Escompte that the bills should not be forwarded forthwith, but should be held by the Comptoir d'Escompte, and renewed by the plaintiffs on the completion of the loading, the plaintiffs paying interest on the bills in the meantime at 9 per cent per annum, on renewing the bills, the plaintiffs in consequence of the difference in the rate of exchange, were out of pocket rupees 400. In an action against the owner for breach of the Charterparty in not supplying a ship tight, staunch, and strong, as stipulated, the plaintiffs sought to recover, as damages arising out of such breach of the Charterparty, the interest paid by them on the drafts in pursuance, of their arrangement with the Comptoir d'Escompte, the sum they had to pay on renewing the bills, a further sum for interest on bills they could not negotiate in consequence of not being able to obtain bills of lading from the defendant, and the value of the stamps on "the bills which had been cancelled in pursuance of the plaintiff's arrangement with the Comptoir d'Escompte. Held that such damages were too remote. 6 B. L. R. App. 20,21.

DAMAGES (Special).

422. In a suit for money claimed on account of the carriage of goods in which defendant pleaded non-indebtedness and a set-off on account of damage caused to the goods :

Held, that defendant could not answer the claim with the set-off on account of damages; though the extent, if any, to which defendant was entitled to draw back might be put in issue, after which it would still be open to defendant to bring an action against plaintiff for special damages. 10 W. R. 295.

DAMAGES (To Cargo and Vessel while under Attachment).

423. Suit by the 6 anna owners of a vessel for damages to cargo and vessel in consequence of the former having sunk while under attachment by the defendant in execution of a decree against the 10 anna owners. Held. that if the defendant merely attached the vessel, he is not liable for damages. But if he discharged the crew and left the vessel in the

charge of an officer of the Court without any efficient crew on board, or did any thing to prevent the plaintiffs from taking proper care of their property, he is liable for any damages proved to have been done.
1 W. R.

DEBENTURE.

424. The Port Canning Municipal Commissioners invited loans on debentures convertible into leasehold titles to lands in the town. The Port Canning Land Company subscribed to the loan, declaring their desire to take land in lieu of the debentures. After the debentures were issued a correspondence commenced between the parties with the object of effecting the conversion, in which correspondence the Commissioners intimated to the Company the construction they put upon the Company's tender, *viz.*, that they elected to take land to the full value of their debentures. The Commissioners also intimated to the Company that the latter had selected lots amounting to a part only of their debentures, and required them to select others, giving notice at the same time that they did not consider themselves liable to pay interest. The Company after this proposed to differ exchanging the debentures till their due date, and, if the Commissioners consented, not to call for the interest in the meantime, but agreeing to pay a quit-rent equivalent to the interest. The Commissioners agreed to this and asked the Company to declare the lots which they would receive in commutation. A selection was made but not in accordance with the contract; the lots selected being of more value than the debentures. The Commissioners then proposed that the Company should return the debentures and pay quit-rent upon the additional lots. This was not accepted, but the matter was left in an imperfect state. The Port Canning Land Company subsequently brought an action against the Port Canning Municipality for two years' interest on the debentures:

Held that the non-acceptance of the proposal as to the additional lots could not affect the previous agreement to exchange debentures then held for equivalent lots: and that such previous agreement had been made involving quit-rent which extinguished the interest.

Held that the letters did not require registration, for they did not amount to a lease, or an agreement for a lease; but were evidence of a contract of a special character not coming within any of the definitions in the Registration Act. 21 W. R. P. C. 315.

DEBT.

425. The provision of law (section 30 Act IV of 1862) which forbids the Bank of Bengal making a loan or advance on the security of immoveable property, is not intended merely to regulate its affairs as amongst Share-holders and Directors: it is not *ultra vires* for the Bank to take the security of immovable property as a protection against loss for a debt already incurred and due.

A written authority given to the Bank by a debtor to sell his immoveable property of which the title-deeds are in deposit with it, and to

apply the proceeds towards payment of his liabilities, creates an equitable lien upon that property, even if the circumstances under which the deposit was originally made rendered the transactions *ultra vires* of the Bank. 16 W. R. 203.

DEBT (Joint).

426. A person paying to one member of a partnership a debt jointly due to all the members, is bound to show that he is acting *bona fide* on the understanding that it is for the benefit of the partnership. 16 W. R. 224.

DEBTOR AND CREDITOR.

427. The defendant being indebted to the plaintiff in the sum of Rs. 574-5-0, the amount of plaintiff's bill against the ship "Compta" of which the defendant was master, they both went to the office of the ship's dubash in Bombay, where the defendant signed the bill as correct, and ordered the dubash to pay the amount. The dubash gave the plaintiff Rs. 500 in cash, saying he would pay the balance next day. The plaintiff said he would prefer a "receipt" for his bill, and returned the Rs. 500. An acknowledgment was then given to him, by which the dubash promised to pay the bill for Rs. 574-5-0, "immediately on the money being received from Mr. S".

On the day following, the plaintiff took out a summons in the Small Cause Court against the defendant, whom he arrested, on making an affidavit that he was about to leave Bombay; and the Court held that "there was no valid substitution of the liability of any person or fund, in place of the original liability of the defendant;" and gave judgment for the plaintiff for Rs. 574-5-0 and costs; which judgment as to the principal sum, was affirmed by the High Court, but costs on the sum of Rs. 500, originally paid to, and returned by, the plaintiff, were disallowed. 3 B. H. R. O. J. 150.

DEED (By Minor).

428. Where a "bond" (usufructuary mortgage) was signed in presence of a Deputy Commissioner by the agent of a minor, in open Court and duly registered by him, the transaction was held to be the same as if the minor himself had executed the deed.

Until avoided by a distinct act on the part of the minor on his coming of age, it was held that the transaction must be considered as valid for the purpose of vesting in the obligees (mortgagees) the minor's interest in the property during the pendency of the usufructuary lease, leaving in the minor nothing more than a bare right to sue to recover after he came of age.

The minor's right, title, and interest, having been subsequently sold in execution of a decree, it was held that the purchaser acquired the reversion of the minor after expiry of the usufructuary lease, but nothing more as mere rights of suit are incapable of being seized and sold under Act VIII of 1859. 12 W. R. 378.

DEED (By Purda Woman).

429. A document obtained by the chief male member of a family from a purda woman should receive a strict construction. 13 W. R. P. C. 3.

DEED (False).

437. Where, on the appeal of one of several judgment-debtors, the bond on which the plaintiff sued is found to be false and not binding at all, all the other parties to the bond are also released, notwithstanding that they did not appeal. 6 W. R. 323.

DEED, FALSE (In support of true Claim).

431. A party is not precluded from succeeding upon a title established by a genuine deed, because he sets up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title. 8 B. L. R. P. C.

DEED (Fraudulent alteration in)

432. An alteration made in a deed without the consent of the parties who originally executed the deed, and with the fraudulent view of benefiting him who propounds it, vitiates the deed wholly. The materiality or otherwise of the alteration does not affect this rule of law. 10 W. R. 25).

DEED (Intention to execute—in Fraud of Creditors).

433. The admission by the plaintiff of an intention to execute a deed (for the purpose, as it appears, of defrauding her creditors) held not to affect her present suit for the cancelment of a deed alleged to have been executed by her. 1 W. R. 128.

DEED (Mistake in).

The plaintiff sold to the defendant a field containing a well. Tax was payable to Government on the field as well as a tax on the well. The deed of sale expressly provided for the payment of the tax on the field by the defendant, but was silent as to the tax on the well. Government recovered the amount of the tax on the well from the plaintiff for 1871, as the well stood entered in the Government Books in the plaintiff's name. The plaintiff sued to recover the amount from the defendant. Held that under the deed of sale the defendant was not liable to reimburse the plaintiff the amount paid by him to Government.

Held also that if the omission in the deed of sale, to provide for the payment of the tax on the well by the defendant, should have arisen from a mistake, his only remedy was a suit for reforming the deed so as to make it in accord with the actual agreement between the parties at the time of sale. 10 B. H. 3, 51.

DEED (Of Compromise).

435. Case.—A suit for a kubooleut having been brought in the Revenue Court, a deed of compromise was filed in the suit, in which it was stipu-

lated that a certain sum would be paid by the defendants to the Zemindar as rent of four kanes of land including homestead after mutation of names, that Rs. 15-8 on account of outstanding balance and charges connected with the rents would be paid to plaintiffs within a month, and that in default the defendants would have no right to the lands specified. The defendants having failed to fulfil the conditions, plaintiffs executed their decree and realized from them the balance above mentioned, and having sued them for the rent obtained a decree. Plaintiffs then brought this suit to recover possession, in virtue of *itmamee* right, of the land on the ground of non-fulfilment of the conditions of the compromise. The first Court gave them a decree, which the Lower Appellate Court recovered holding that the deed merely imposed a penalty with a view to punctual payment.

Held, that as what the defendants had to do was of a perpetually recurring nature, and no action which the Court might take would be effectual in preserving the plaintiff from being sued by the Zemindar, the intention was that the terms should be strictly enforced on failure to perform the conditions, and that the defendant should be obliged to surrender the lands. 19 W. R. 434.

DEED [Of Conveyance].

436. If, in order properly to apply and understand the provisions of a deed, it be necessary to inquire into the circumstances under which it was executed, a Court may rightly make such inquiry. 21 W. R. 119.

437. Where the vendee, after arranging with the vendor to pay up the balance of the consideration-money due on a deed of conveyance, by writing up satisfaction of a decree which he held against the latter, took out execution and recovered under the decree, the vendor taking no steps to notify the arrangement to the Court at the time of execution: Held, that if the vendee executed contrary to the terms of the deed, the vendor may have a remedy by a separate action. 19 W. R. 152.

DEED (Of Gift).

438. A deed of gift, valid and operative between the parties thereto, cannot be avoided because in another suit between different parties it has been held to be fraudulent as against creditors.

Quere.—Whether a donor can avoid his own deed on the ground of his own fraud? 12 B. L. R. P. C. 433.

DEED [Of Weak man].

439. A Court of Equity will not set aside the voluntary deed of a weak man who is not absolutely *non compos*, unless the weakness, as well as the facts surrounding the transaction, and the nature of the transaction itself, be such as to satisfy the Court that the person had not at the time a mind adequate to the business, and that he might be imposed upon, or as to the entire good faith of all the parties to the transaction. W. R. S. N.

DELIVERY (Variation in Time for).

440. Where a principal instructed his agent to enter into a contract for the delivery of cotton at the end of *Kartik*, but the agent entered into a contract for the delivery thereof by the middle of that month :

It was held that the agent exceeded his authority in such a manner as to exempt the principal from liability upon the contract.

Though the objection assigned by a principal for repudiating a contract at the time of such repudiation be unfounded, he is not precluded from subsequently availing himself of other valid objections.

A custom which allows a broker to deviate from his instructions is unreasonable, and the Courts of law will not enforce it. 8 B. H. R. A. J. 19.

(Wrongful).

441. Suit against a Railway Company for the value of poppy seeds consigned by C and Co. to plaintiff in order to meet the acceptances which he had given for the accommodation of C and Co., which seeds had been received by defendants at Patna for delivery to plaintiff or his order at Howrah according to a Railway receipt sent to plaintiff by C and Co. wherein plaintiff was named as consignee but which seeds, instead of being delivered to plaintiff or to S and Co. (plaintiff's vendees) by plaintiff's order upon payment of the freight by S and Co., had been delivered by defendants to T and Co.

Held, that the handing over by C and Co. of the Railway receipt to the plaintiff passed the right of possession and property in the seeds from C and Co. to plaintiff, and that the putting of the seeds into S and Co's. bags at Patna did not vest the property in S and Co. and affect plaintiff's right; that plaintiff was not a mere agent of C and Co., but had a substantial interest in the consignment, and that the authority given by C and Co. to plaintiff was an authority coupled with an interest which neither C and Co. nor defendants could revoke; and that as there was nothing in the correspondence to show that plaintiff had notice of T and Co's. equitable title, defendants were not justified in delivering the goods to T and Co. and were liable for the wrongful delivery 17 W. R. 532.

DEMURRAGE.

442. Where a purchaser engaged to take delivery of cargo from a ship at a certain rate *per diem*, and, in the event of failure, to pay demurrage, and the contract contained a stipulation in the following terms :—
“ But should the Captain be unable to deliver weightment of the goods on account of the lightness of the vessel to which I have no objection, but would not hold myself liable for any demurrage,—”

Held that according to a reasonable construction of the contract, if delay took place in unloading, demurrage was to cease so long as the delay was caused by the inability of the Captain to deliver the goods; not that the matter was to be thereby set at large, and that there was no

longer to be any period under the contract within which delivery was to be taken of the cargo. 23 W. R. 139.

DEPOSIT.

443. In a suit by a purchaser of immoveable property to recover a deposit, paid by him on account of the purchase-money to the auctioneer; the vendor having refused to convey to the purchaser, save by a deed which should describe the premises by reference to another deed, not shown to the purchaser at the auction, and of the contents of which he had not then any notice:—Held (1) that the purchaser was not bound to have tendered a conveyance engrossed to the vendor for execution, together with the residue of the purchase-money, before suing to recover the deposit; and (2) that the money having been deposited with the auctioneer as a stake holder and being in his hands, the action to recover it lay against the auctioneer, and not against the vendor. 4 B. H. R. O. J. 125.

DEPOSIT (Of Mortgage Debt).

444. Under section 7 Regulation XVII of 1806, if a mortgagee has obtained possession at any time before a final foreclosure of the mortgage, the mortgagor's payment or tender of the principal sum, due under the mortgage debt, saves his equity of redemption. Held, that the section applies where the mortgagee has obtained a decree for possession and *wasilat*, whether he executes it or not. 3 B. L. R. A. J. 141.

DEPOSIT (Of Title-deeds)

445. The firm of C. N. and Co. in Calcutta, had an account with a Bank, of which R, was the manager, under an arrangement that the Bank should discount bills accepted by C. N. and Co, to a certain amount, and that C. N. and Co., should keep in the Bank a certain fixed cash balance. In November, R, finding that the limit of the discount accommodation had been exceeded, and on the cash account overdrwn, declined to discount any more bills unless security were given for the amount then due to the Bank. A, the only partner in the firm of C. N. and Co., then in Calcutta, verbally promised on 24th November to deposit with the Bank the title-deeds of the premises, in which C. N. and Co., carried on their business; and in consideration of such promise, R, discounted further bills from 24th to 29th November, A, sent to R, a letter on 25th November as follows:—"in pursuance of the conversation the writer had with you yesterday, we now deposit the title-deeds of landed house property, as security against our discount account." The letter enclosed certain title-deeds, of which R, acknowledge the receipt, R, subsequently discovered they were not the title-deeds which A, had promised to deposit and of this he gave A. notice by letter on 28th November. C. N. and Co., on 5th December 1870, suspended payment, and by the usual order their estate and effects vested in the Official Assignee, who thereupon finding that the Bank claimed, a lien on the deeds, brought a suit against the Bank for recovery of them:—Held, that the deposit of the title-deeds was not void under section 24 of the Insolvent Act.

, that the Bank was entitled to retain the deeds as security both for the balance of the discount account existing at the time of the promise to deposit, and also for the bill discounted between the 2 and

.—The bank was entitled to hold the deeds actually deposited, as if they were the deeds which formed the subject of the verbal promise to R. 6 B. L. R. 701.

DEPOSIT (Recovery of).

446. Suit for recovery of Company's paper. The Judge having found the plaintiff's ownership and its deposit with the defendants; the latter were bound either to account to the plaintiff what they had done with his paper, and to prove that they had a right to retain it; or to return the paper or its value to the plaintiff. 2 W. R. 57.

DEPOSIT [Recovery of—under verbal Contract].

447. The plaintiff alleging a verbal contract by the defendants to satisfy the plaintiff's creditors under a deposit of certain goods to be restored on demand or at a fixed date, sued for their restoration. Held that mere payment by the defendants to one or two creditors without distinct proof of the contract, could not entitle the plaintiff to a decree, particularly when it was in his power to tender his own evidence or to examine the defendants, and he did neither. 2 W. R. 63.

DIRECTOR (Of Public Company).

448. Although a Director of a Public Company is always clothed with a fiduciary character in regard to any dealing with property of the Company in his capacity of Director, the rule that a trustee is not allowed to make a profit of his trust does not apply to such a Director, *qua* Director only. When a partner of one of the Directors of a Company did work for the Directors as solicitor, and there was nothing to show that he had not been duly appointed by the Directors, his claim in respect of such work was allowed. 6 B. L. R. 278.

DOMICILE [Of Original].

449. The *lex loci contractus* *out actus* determines the capacity of a person to contract, and reference ought not to be made to the law of his domicile of origin. 3 N. W. P. 338.

DONEES (In Existence).

450. A person capable of taking under a will must be such a person as can take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator. 18 W. R. 359.

DURESS.

451. Ejectment by A against B to recover possession of lands conveyed by a deed of sale by A to B.

plaint; filed six years after the date of the that A had by duress and coercion by B A had received the consideration-money offer to account for the same. Held, reversing the decrees of the Courts in India, that upon the evidence, no case of duress had been made out.

Held, further, that A could only be entitled to relief in a suit properly framed, upon terms of accounting for the consideration-money and interest, as A, if he had been coerced and subjected to such duress as destroyed his free agency, could not, at the same time, avoid the contract and retain the consideration-money. 14 M. I. A. 53; 15 W. R. P. C. 57; 7 B. L. R. P. C. 630.

F.

FORFEITURE.

452. A condition of forfeiture should not be extended beyond the words in which it is expressed; unless, perhaps, it is impossible without so extending it to give a reasonable construction to the instrument in which it appears. 23 W. R. 10.

FRAUD.

453. Fraud must not be presumed without good and probable grounds. 6 W. R. 235.

454. Imputations of fraud should be disposed of at the hearing, and should not be left to be proved before the master on the taking of accounts 8 B. H. R. O. J. 279.

455. A party should not expect redress from a Court of Equity, justice and good conscience when he avows before such Court that, granting all his intentions to be fraudulent, he has a perfect right to seek to render inoperative a contract into which he willingly entered. 11 W. R. 314.

456. A party cannot allege or plead his own fraud. Nor can his representatives or private purchaser from him do so, unless they are themselves the defrauded parties and seek relief from the fraud. 3 W. R. 92.

457. The principle of law which would prevent the plaintiff from asserting the invalidity of the benamie deed, applies just as strongly to the defendant asserting its validity, and the question is, how the matter would stand if the deed were not in existence 11 W. R. 185.

458. A suit founded on an admission of fraud, and seeking protection from the consequences of that fraud, cannot be maintained. 6 W. R. 287.

459. A defendant may plead the joint fraud of himself and the plaintiff as a bar to an action upon a contract which the plaintiff seeks to enforce by suit. 2 M. H. R. 279.

460. A person cannot recover a deed of sale in fraud of creditors, even against a party to the fraud, except it may be against the person who executed the deed. 6 W. R. 98.

461. In considering a case of alleged fraud in the purchase of an it is material to enquire what relation the purchase-money paid bore to the value of the estate. 7 W. R. P. C. 10.

462. It is a sufficient proof of fraud if the fact of ownership as represented in an advertisement inviting purchasers is false, and the person making the representation had a knowledge of a fact contrary to it. 9 W. R. 371.

463. In a suit to enforce an instrument which is on the face of it a deed of sale, where plaintiff does not admit that he was a party or privy to any fraud, it is not competent to the defendant to set up that the deed was concocted for fraudulent purposes. 12 W. R. 264.

464. Plaintiff had executed a *kistbundee* for arrears of rent decreed against him by a Revenue Court. He then sued to set aside the decree and *kistbundee* on the ground that the decree had been based on a fraudulent and fictitious *kubulent*. The suit though dismissed in the first Court was decreed in appeal.

Held in special appeal, there being no evidence of the fraud in the record of the case, that the plaintiff was not entitled to a decree. 12 W. R. 380.

465. Where the agreement which formed the basis of a suit was found to have been entered into by the plaintiff, and the defendant's ancestors in furtherance of a fraud, it was held that the defendant was at liberty to show what the real circumstances were under which the agreement was entered into, even though it disclosed the fraud of his own ancestor. 19 W. R. 238.

466. The relationship between parties to a conveyance of property may be immaterial if the purchase is found true, but is not immaterial where the question to be decided is whether the purchase was true or fraudulent. The mere handing over of the purchase-money from one party to the other in the presence of strangers, and the registration of the deed, are not sufficient to prove the transaction to be *bona fide*. 10 W. R. 445.

467. A by deed of trust charged real estate to secure, among other things a debt alleged to be due by him to his grandfather's estate, an account of sums received by him from a debtor to that estate. A at that time was in a state of indebtedness, which occasioned his afterwards becoming an insolvent. Such deed, in the circumstances, held, so far as related to A's alleged debt, fraudulent and void as against his creditors. 11 M. I. A. 317.

468. A, a gamasta of B's deceased husband, represented to B that he had her husband's will in his possession, containing a legacy in A's

FRAUD.

favour, and obtained from B an agreement for Rs. 2000, expressed to be in consideration of the alleged will being given up to B, of A foregoing his legacy, and of services to be rendered by A in winding up the affairs of the shop. In pursuance of this agreement B paid a sum of money to A; but, upon discovering that the alleged will was not a will at all, sued to recover back the money so paid by her.

Held that, under the circumstances, the taking of the agreement was a fraud upon B that the payment of the sum of money by B was not a voluntary payment, and could not be recovered back; and that the Court could not apportion the amount (if any) that might be claimable by B for work done under the agreement. 8 B. H. R. A. J. 102.

469. R joined K in a suit to have certain Government *chittahs* rectified, and the lands to which they related re-placed as part of an estate which R held in share with K. The suit was dismissed. Subsequently the defendant in that suit sued R and K successfully for possession of the same land with *wassilat*. While this suit was pending, K executed an *ikrar* in favor of R, to the effect that as R had no interest in the land, if a decree were given against them, K would hold R harmless.

Held, that whether R's joining K in the first suit was right or wrong there was nothing illegal or immoral in the *ikrar*; and the circumstances of the former suit could not bar R's recovering under the *ikrar*. 11 W. R. 208.

470. In a suit by a Wife a (Mahomedan woman) against her husband to recover the value of Company's paper and real, and personal estate, the plaintiff alleged, that such paper being her separate property, had been, as she lived in seclusion, indorsed and handed over by her to her husband for the purpose of receiving the interest thereon. The defence of the husband was, that he had purchased such paper from his wife, and on the indorsement and delivery had paid the full value of his wife, who had appropriated the proceeds to her own use. Held, upon a review of the evidence, that although the wife failed to prove affirmatively the precise case alleged by her in the plaintiff, the husband was bound to show something more than the mere indorsement and delivery of the Company's paper, and that from the relations subsisting between the parties, the *onus probandi* was upon him to establish; first that the transaction which he set up was a *bona fide* sale; and second, that he gave full value for the Company's paper so received from his wife.

Held, further, that in the absence of proof of the husband having the means of purchasing the Company's paper, he being at the time in embarrassed circumstances, and the condition of the wife, a secluded woman, that no purchase had taken place, and that the transaction was fraudulent as against her. 11 M. I. A. 551; 8 W. R. P. C. 3.

471. Where an overseer in the Public Works Department, who is prohibited by the rules of his office from entering into any trade or contracts with that Department, enters into an agreement of partnership for carrying on business under contract with the Department, such agreement

is therefore one which a Court of justice ought to treat as an absolute nullity. 11 W. R.

472. A putnee talook being about to be brought to sale under Regulation VIII of 1819, the agents of the sharers were in attendance at the collectorate on the day of sale, prepared to pay the rent due. Two of the agents (G and B) happening to be out of the way at the time the lot was about to be called up, the third (K) without informing the Collector or Zemindar's agent of their intention to pay, or giving notice to the others, purchased the putnee: Held that K's act was one of bad faith and that the 4 annas share-holders whom he represented could not in equity be allowed to benefit by adopting the fraud. Held that as between the Collector and Zemindar and the defaulting putneedars the sale was valid; but that it was void so far as it created a title in favour of the 4 annas share-holders to the 12 annas share, and K must be treated as having made the purchase on account of, and as a trustee for, the 12 annas share-holders. 16 W. R. 80, 81.

G.

GUARANTEE.

473. A contract of guarantee is a "matter of contract and dealing" within the terms of section 17 of 21 Geo. III c. 70 and therefore such a contract made by a Hindu is not affected by section 4 of the Statute of Frauds. When a defendant raises a claim of set-off, on the trial of that issue he must be considered as plaintiff. 5 B. L. R. 639.

474. A purchaser aware of the doubtful character of the title to the estate, he is about to purchase is justified in taking a guarantee from the seller, and the seller cannot successfully plead to a suit on the guarantee that the purchaser was aware of the facts which induced him to stipulate therefor. 3 N. W. P. 106.

H.

HYPOTHECATION.

Hypothecation of property as security for a debt gives the party so secured a right to the application of such property, or its sale proceeds, in satisfaction of his claim. But if such property has been sold under execution of another decree, the secured party cannot cause re-sale without obtaining a decree for that purpose in a fresh suit. 1 N. W. P. 29.

476. Where an instrument whereby certain persons, describing themselves therein as Zemindars and shareholders of a certain named mouzah, declared that for the consideration therein expressed they mortgaged their "respective Zemindary shares" and all other movable and immovable property owned and possessed by them, to secure the payment of the debt therein mentioned. Held to be such an hypothecation as to create an interest in favour of the mortgagees which could not

he defeated by a subsequent *bona fide* purchaser for value. 2 N. W. P. 263.

477. Land subsequently sold is liable for a debt for which the land was previously hypothecated. 5 M. H. R. 457.

478. When land is hypothecated, the contract gives the creditor an interest in immovable property, and the period of limitation for actions on such contract is 12 years under clause 12 of section 1 of Act XIV of 1859.

A creditor suing under such a contract must prove that there was an actual pledge, and that the land was part of the debtor's estate at the time of pledge. The decree will then be for sale of the property hypothecated, unless the debtor pay the amount due with interest within a period to be named by the Court. 2 M. H. R. 51.

479. A decision of the Principal Sudder Ameen, which declared the decree-holders entitled to satisfy their decree by the sale of certain hypothecated properties, having been reversed by the High Court, an appeal was preferred to the Privy Council, which reversed the decree of the High Court and affirmed the original decision, and provided for the payment of costs :

Held, that the lien established by the Privy Council decree was not lost to the decree-holders by their previous conduct in receiving a portion of the decretal money by the sale of part of the mortgaged premises, which money was subsequently returned by them to the judgment-debtor, on the decision of the Principal Sudder Ameen having been reversed by the High Court. 23 W. R. 194.

HYPOTHECATION (Bond).

480. A bond which hypothecates property for money advanced is a deed of simple mortgage. 14 W. R. 401.

481. An instrument of hypothecation is a mortgage-instrument and may as such be registered under Reg. XVII, of 1802, section 3 ; and a suit for the recovery of the money lent must be brought within three years pursuant to Act XIV of 1859, section 1 cl. 10. 2 M. H. R. 108.

482. The holder of a bond hypothecating property who seeks to recover the debt due under the bond from his debtor, and to bring to sale the hypothecated property which is in the hands of a purchaser, is at liberty to implead the debtor and the purchaser in the same suit. 6 N. W. P. 323.

483. In suits upon two hypothecation bonds executed by different defendants, the plaintiffs, in the first suit sued for recovery from the defendants personally, and in the second suit for recovery from the defendants and also from the property hypothecated, and in each case obtained a decree. The Lower Appellate Court reversed both decrees on the ground that the bonds were vitiated by a fraudulent alteration

of them in a material part, viz the date fixed for payment. Held the documents might be used as evidence of the debt between the parties and also of the creation of a charge upon the property hypothecated. 3 M. H. R. 247.

484. A stipulation in a bond to the effect that the obligor will make no transfer of certain property hypothecated by such bond until the debt thereby secured has been paid up, cannot be used by a third person not a party to the bond to defeat a subsequent charge upon the same property granted in favour of another creditor of the obligor. 3 N. W. D. 905

I.

INJUNCTION.

Injunction granted to restrain a partner from excluding his co-partner from the partnership-business, and from doing any act to prevent its being carried on according to the articles. 1 M. H. R. 341.

INJUNCTION (Mandatory).

486. Where the plaintiff and the defendant, being owners respectively of two adjoining houses and the verandahs immediately in front of those houses, agreed that they should keep the verandahs open and not build upon them or divide them by a wall:—Held that the mere fact that the defendant, when re-building his house, built its new front wall in advance of the plaintiff's, thus encroaching on the defendant's own verandah in breach of the agreement, is not sufficient in itself to justify the Court in granting a mandatory injunction ordering its removal. It should also be satisfied that the new wall so materially interferes with the comfort and convenience of the plaintiff, that the consequences of the breach of agreement cannot adequately be compensated by damages. It should also satisfy itself whether the plaintiff protested against the new wall being built, whilst in course of erection or quietly acquiesced in what the defendant was doing, and only objected when the wall was completed. In the latter case the Court should only award damages. 10 B. H. R. 95,96.

INNKEEPER AND GUEST.

487 In a suit brought to recover the value of certain articles stolen from the plaintiff's rooms at an hotel in Bombay; the defendant being the licensed proprietor of the hotel, who was in the habit of entertaining, for shorter or longer periods, all comers willing to pay the usual rates; and the plaintiff being an exchange broker doing business in Bombay, who had lived at the hotel for more than a year paying for his accommodation, at first by the day, and afterwards, by agreement, at a rate of so much a month—but neither was the plaintiff under any obligation to remain, nor the defendant to accommodate him, for any fixed time:—Held that the relation of innkeeper and guest (and not that of boarding-house-keeper and lodger) subsisted between the par-

ties ; and that the defendant was, *prima facie* and without proof of actual negligence, liable to make good the loss sustained by the plaintiff.

There is no law but the Common Law of England to regulate the relation of innkeeper and guest in Bombay, in a case between a European and a Parsi. 3 B. H. R. O. J. 137.

INSOLVENCY.

488. An authority (assuming it to be sufficient) given by the Official Assignee to settle the outstandings of one who has filed a petition of insolvency does not enure after the dismissal of the petition, and cannot entitle the person so authorised to sue at all.

The mere fact that a payment was made to a person at a time when his petition was upon the file of the insolvent Court, which petition was afterwards dismissed, does not invalidate the payment.

Semble.—The general notice published by the chief clerk of the Insolvent Court is not sufficient, but a special notice of insolvency is necessary, to prevent a payment made to the insolvent from being *bona fide*. 17 W. R. 85.

INSOLVENT Debtor's Act ss 47 and 50.

Where, under section 51 of the Insolvent Debtor's Act (XI and XII Vict., c. 21) it has been adjudged that an insolvent shall be forthwith discharged from all his debts, &c., except as to certain specified debts, and as to these that he shall be discharged so soon as he shall have been in custody, at the suit of the person or persons who shall be creditor or creditors for the same respectively, for such period as the Court shall direct.

Such an order of adjudication does not in itself operate as an order for the imprisonment of the insolvent, but the detaining creditor, if he wishes to arrest or detain the insolvent for such period, must (if he have not already done so) place himself in a position to issue execution against the insolvent. 5 B. H. R. O. J. 55.

490. A Commissioner sitting in insolvency, while sentencing an insolvent to imprisonment on the criminal side, under section 51 of the Insolvent Debtor's Act, has power, in addition, to order that the further hearing of the Insolvent's petition be adjourned, with or without protection, under section 47, beyond the expiration of such term of imprisonment. 5 B. H. R. O. J. 61.

INSOLVENT TRADER.

491. The order of discharge of an insolvent trader under section 60 of the Indian Insolvent Debtor's Act, operates to discharge such trader from all debts that could be proved in the matter of his insolvency, whether they are specified in his schedule or not. 7 B. H. R. O. J. 22.

492. An insolvent trader, who has obtained his discharge under section 24 of Act XXVIII of 1865, is not liable for calls made, after he has obtained his discharge, in respect of shares held by him in a

Joint Stock Company, when the order for the winding up of such Company has been made prior to the time of the insolvent trader obtaining his discharge. 9 B. H. R. 27.

INSTALMENT.

493. Where, after default in payment of an instalment upon a bond, conditioned, that upon such a default the whole amount of the bond should become due, plaintiff accepted payment of such instalment, as also of several subsequent ones: Held, that by so doing the parties reverted to the old arrangement for payment by instalments, or made a new one to the same effect, and that the penalty occasioned by the first default could not be enforced. 2 N. W. P. 83.

INSURANCE.

494. To prove the authority of an agent who underwrites a policy of insurance, it is not necessary, in order to charge his principal, that the instrument appointing such agent should be produced, if it is shown that he has been in the habit of underwriting policies for his principal, and that the latter has been in the habit of paying losses upon policies so subscribed. 6 B. H. R. O. J. 39.

495. In a suit on a policy of insurance, as for a total loss, where goods were shipped for the voyage from Surat to Karachi, and the vessel, having sprung a leak, was forced to put into Dwarka, at which place the goods (with the exception of some iron thrown overboard during the voyage) were landed and placed in a warehouse, from which a portion (some castor oil and jagari) was carried off by robbers; and the larger residue of the cargo consisting principally of cotton seeds, which were dried and cleaned—was sold; and the proceeds, after deducting freight expenses, remained in the hands of the Mahajans of Beyt, to be paid to whomsoever might be entitled to them:—

Held, 1st, that the loss by robbers, although not expressly mentioned in the policy, was one of the perils insured against.

2nd. That the Judge below, being erroneously of opinion that, when the goods were once landed damaged, there was nothing to do but to sell every thing for the benefit of the underwriters, and having consequently recorded no finding on the material question, whether the whole or any part of the cargo was practically capable of being sent in a marketable state to the port of destination;—the suit must be remanded in order that the Judge may determine, whether there was a constructive total loss, which entitled the plaintiffs to abandon, and, if not, that he may award such a proportion of the value of the iron and of the jagari and oil which were actually lost, and of the amount of the deterioration in the cotton seeds and other articles, as the sum insured by the defendant bore to the whole sum insured, taking into account, also, in that case what proportion the sum insured bore to the actual value of the goods. 3 B. H. R. A. J. 1.

1. A cargo, consisting of railway sleepers, was insured by the plaintiff in the Heimthal from geography? to Calcutta,

pressed in the policy to be warranted from all risks, except total loss. In proceeding up the river Hooghly, in charge of a pilot, on the 3rd April, the vessel ground on the Rungafulla sand, heeled over, and lay imbedded in the sand. Endeavours were made unsuccessfully to get her off. On May 5th, Lloyd's surveyor inspected the vessel, and reported that, considering her position, the state of the tide at that season, and the expense of getting her off, it was unadvisable to go to further expense in doing so; and that the cost of repairs would, in all probability amount to much more than the value of the ship when repaired. Some of the sleepers had been then jettisoned, and the surveyor recommended that the vessel and cargo should be abandoned and sold by public auction to the highest bidder. Attempts were made, but unsuccessfully, to get some of the cargo off, and the sleepers were of such a quality that they would not float. The consignees, accordingly, caused the ship and cargo to be sold by public auction in Calcutta, on 12th May. No notice of abandonment was given. The sleepers realized the sum of Rs. 450. The purchaser hired boats and began unloading the ship; he unloaded 78 sleepers in all. On 14th May, the ship floated off and came up the river, with the rest of the cargo in safety, proving not to be so much damaged as was supposed. Held, that there was not such a total loss of the cargo as entitled the plaintiffs to recover as for a total loss without giving notice of abandonment. 6 B. L. R. 218.

INTEREST.

The provision contained in Act XXVIII of 1855, that any rate of interest which the parties may have agreed upon shall be awarded, in no way prevents a Civil Court in India, which administers both equity, from examining into the character of agreements made between persons, such as mortgagor and mortgagee, trustee and *cestui que trust*, between whom relations exist, enabling one party to take advantage of the other, and from declining to enforce such agreements when they are shown to be unfair and extortionate. 4 B. H. R. A. J. 202.

498. In a suit relating to balance of accounts, probabilities are not sufficient to support a decree for interest in the absence of a contract for interest. 16 W. R. 148.

499. A Court has no power to interfere with the contracts of parties in respect of interest. 6 W. R. 254.

Where a plaintiff sought to recover more than what was actually due, and it did not appear that defendant would have refused payment if the sum actually due had been demanded, the Court reduced the rate of interest to 6 per cent. 23 W. R. 403.

501. In the absence of contract to pay interest it is in the discretion of the Court to give or withhold it, and that discretion is rightly exercised in withholding interest where a claimant for contribution sleeps over his rights for a long time. 19 W. R. 98.

Interest at the rate of one per cent per mensem, to be calculated at the end of each year, does not mean compound interest, so as

to admit of interest being charged upon the rests, but interest calculated per mensem, but payable per annum. 2 M. I. A. 277.

503. In a suit for compensation for the use and occupancy of demised lands where lessor had known that the lessees were nominally such, and their husbands the beneficial lessees, were held disentitled to interest. 18 W. R. 133.

504. In a suit to recover a sum of money due on an agreement under the terms of which interest for 15 days only was payable at the rate of one rupee per diem. Held that as no rate was agreed upon after the expiration of the 15 days, the Court had power to fix a reasonable rate of interest subsequent to that time. 14 W. R. 450.

505. Neither by the English nor the Hindu law, unless there be mercantile usage, can interest be imported into a contract, which contains no stipulation to that effect. 9 M. I. A. 256.

INTEREST (At Penal Rate).

Section 2 of Act XXVIII of 1855 is the law applicable to suits on contracts whereby interest is recoverable, and it applies to such contracts indiscriminately of the creed of the contracting parties.

Where it was stipulated in a bond that, on default of the payment of the principal amount together with interest at the rate of $1\frac{3}{4}$ per cent. per mensem within a certain period, interest should be payable at the rate of $6\frac{1}{4}$ per cent. per mensem from the date of the execution of the bond, and that, on default of payment of such interest at the end of any six months compound interest should be payable at the rate of $12\frac{1}{2}$ per cent. per mensem, the Court, treating the rate of interest agreed to be paid on default as intended as a penalty, came to the conclusion that the rate was so high that it would not be equitable to enforce the penalty, and therefore decreed the principal amount claimed with interest at the rate of $1\frac{3}{4}$ per cent. per mensem. 6 N. W. P. F. B. 359.

507. Where a subsequent addition to a document, though unauthorized by the executant, serves only to state explicitly what is already implied in the document, and what the law would infer from it, such addition is immaterial, and does not vitiate the instrument. Interest at a penal rate should not be awarded if there be no demand for it, or for a sum by way of compensation for special damage, on the part of the plaintiff. 11 B. H. R. 203.

508. In a suit to recover money lent upon an agreement to the effect that it should be re-paid with interest, at 8 annas per cent. per mensem, by instalments payable in a particular month of each year, with a promise that if the instalments were not paid in 4 years the interest would be at the rate of one rupee per cent. per mensem, where plaintiff demanded interest on the allegation that the instalments had not been paid for 5 or 6 years: Held that as the first rate was below the ordinary terms on which money is lent in this country, and the penalty

was but the ordinary rate to be imposed in case of delay in payments, the plaintiff was entitled to a decree. 14 W. R. 437.

509. A bond stipulated for payment of principal and interest at one per cent per mensem within six months from the date of the bond, and in default that the rate of interest should be raised to six and a quarter per cent per mensem:—Held that the higher rate of interest was not in the nature of a penalty, and that the plaintiff had a right to enforce payment thereof. 2 M. H. R. 205.

510. Where parties distinctly stipulate that, in the event of a failure to repay the amount advanced with interest at a certain rate on a certain day, the lender was to be entitled to interest at a different rate, such stipulation cannot be regarded as a penalty, but the Court is bound to give effect to the contract entered into between the parties. 17 W. R. 373.

511. Where a promissory note stipulated that, in default of payment of principal within three months after date, interest should run at the rate of 75 per cent per mensem, the increased rate was held to be a penalty and relieved against on payment of interest at 9 per cent per annum notwithstanding Act XXVIII of 1855. 10 B. H. R. 382.

(2 M. H. R. 205, and 17 W. R. 373) *dissented from.*

512. The defendant executed a bond in favour of the plaintiff by which he agreed to pay "interest at 8 annas per cent, month after month and to repay the principal money within the period of three years". It was further stipulated in the bond that, "should I fail to pay the principal and interest as agreed upon, I shall pay interest at 4 per cent per mensem from the date of this bond to that of liquidation." The defendant made default in payment. Held in a suit brought on the bond that the stipulation in the bond for the payment of interest at 4 per cent per mensem was in the nature of a penalty, and the plaintiff was only entitled to recover interest at a reasonable rate. In this case 1 per cent per mensem was given. 11 B. L. R. 135.

513. Where money was borrowed at an interest of one rupee 6 annas per cent per mensem, under a bond in which was stipulated that if principal and interest were not repaid within a given time, the borrower would have to pay interest at the rate of 3 rupees per cent per mensem from the date of the bond to the date of payment: Held, that the clause relating to the higher rate of interest was a penalty clause not enforceable in a Court of Equity. 22 W. R. 474.

514. The suit was to recover principal and interest under the terms of an *ikrar* which was as follows:—Plaintiff agreed to advance Rs. 20,000 to defendants who were to give him, as security for repayment with interest at 18 per cent per annum, an *ijara* for a term of ten years; one-fourth of the profits to be taken by plaintiff for the interest, one half of the remainder in reduction of the principal, and the remaining half to be received by defendants. It was also stipulated that if the defendants failed to give the *ijara* they should repay the advance with

interest at 75 per cent per annum, and that if the plaintiff would not accept the *ijara* he should receive back his money without interest within six months from his refusal. The *ikrar* also contained a provision that if, at the end of ten years the one-fourth share of the profits should not cover the interest, defendants would pay the deficiency in cash: Held that the interest at 75 per cent was not intended to be in the nature of a penalty, or any thing more than an estimate of damages for breach of contract.

Held that in the absence of any confidential relation between the parties, of any imposition or misrepresentation, or any want of capacity, the Court could not say that the contract to give the *ijara* for the breach of which interest at 75 per cent was to be paid, was of itself to be held invalid as being unreasonable and oppressive. 21 W. R. F. B. 352.

515. The plaintiff advanced money to the defendants on an *ikrar*, by which it was agreed that he was to allow them to draw on him to the extent of Rs. 20,000 within three years.

On appeal by the defendants to the High Court, the contention was raised that the high rate of interest amounted to a penalty which the Court would not enforce, and that the contract was unreasonable and oppressive in character. The Judges differed in opinion, Birch, J., holding that the contract was equitable and oppressive, and that, notwithstanding the repeal of the Usury laws by Act XXVIII of 1855, the Court was not bound to decree interest at the rate stipulated for by the parties; and Markby, J. (whose opinion prevailed) being of opinion that since the passing of Act XXVIII of 1855, there was no legal restriction on the rate of interest; that the stipulation for interest at 75 per cent was not a penalty, but an alternative stipulation for interest at a higher rate on the happening of events under which the lender incurred a greater risk, and that the contract, should be enforced.

Held (on appeal under cl. 15 of the Letters Patent) that the stipulation in the *ikrar* for interest at 75 per cent, was not in the nature of a penalty, nor was it an alternative stipulation; it was an estimate by the parties of the damages to which the plaintiff would be entitled in the events of a breach of the contract by the defendants in not giving the *ijara*.

Held also that, in the absence of evidence of any fiduciary relation between the parties, of any imposition or misrepresentation on the part of the plaintiff, or any want of capacity the plaintiff to repay himself by having an *ijara* of the defendants' share in certain property which his loan was to aid them in recovering. A 4 anna share of the profits, after deducting Government revenue and expenses, was to go in payment of interest on the money lent; half of the remaining three-fourths to go towards payment of the principal, and the other half to the defendants.

If, at the end of the term, any balance remained due to the plaintiff, the defendants were to pay it with interest at 18 per cent. If the defendants failed to give the *ijara*, they agreed to pay the amount borrowed with interest at $6\frac{1}{4}$ per cent per mensem. The plaintiff advanced the

money and obtained a receipt therefor from the defendants. The defendants failed in giving the plaintiff the *ijara*. In a suit brought to recover the sum lent by the plaintiff with interest, the first Court gave a decree for the plaintiff for the sum claimed with interest at the higher rate stipulated for in the *ikrar*, viz. 75 per cent.

On the parts of the defendants, and there being nothing in the circumstances which led to the execution of the *ikrar* to show that there was any constructive fraud on the part of the plaintiff, or any undue advantage taken by him, the contract was not one which the Court would set aside as being unreasonable, inequitable, or oppressive in character.

Sembla. The contract Act (IX of 1872) is not retrospective. 12 B. L. R. 451, 452.

INTEREST (From what date to be given).

Interest ought not to be given before the date of the ascertainment of the principal. 1 W. R. 310.

517. In a suit to recover (with interest) money which had been advanced as part of the consideration for the purchase of land under a contract which defendant broke, the Court, in decreeing the claim, awarded interest from the time when the demand of payment was made, i. e. from the date the suit was instituted. 24 W. R. 457.

518. When a Civil Court awards interest under an admitted contract it is bound to award it at the stipulated rate up to the date of decree ; but for any time after that date it has power to exercise its own discretion as to the rate of interest to be awarded. 23 W. R. 309.

519. In the absence of a demand in writing, interest up to the date of suit cannot be awarded upon sums, not payable under a written instrument, of which the payment has been illegally delayed. 1 M. H. R. 369.

Where, under section 6 Reg. XV of 1793, interest upon the principal prior to the institution of the suit was adjudged to the plaintiff, limited to a sum equal to the principal, although that Regulation was repealed when the suit was brought, yet, looking to the time when his contract was made, the plaintiff was held not entitled to any further interest before suit, but interest upon the principal was allowed to him from the date of suit to the date of decree 7 W. R. 173.

521. Where land was taken by Government for public purposes and, in consequence of the claim of the defendant, the amount of compensation was invested by the Collector under section 29 Act VI of 1867 in Government securities, the plaintiff was declared not entitled, over and above the principal of the sum of compensation and its accruing interest in the hands of the Collector, to demand interest from the defendant at the rate of 12 per cent. per annum upon the principal sum from the date it might have been payable to him but for the counter-claim of the defendant. W. R. S. N.

522. On a question of construction of an order of Her Majesty, the words "the plaintiff is to have judgment for his moiety, with interest at the full legal rate, and the costs of the proceedings in the Court below" were held as intended to give plaintiff the moiety claimed by him of the sum which he alleged to be due for principal and arrears of interest (at 12 per cent) equal to the principal upon a certain *kurar-namh* and bond, and to allow the interest from the date of the institution of the suit up to realization.

Held further that, in the account taken by appellant as the foundation for his proceeding in execution, he was not warranted in making a rest at the date of the order of the Principal Sudder Ameen dismissing the suit and assuming that interest should run upon the consolidated sum from that date; as in the absence of special directions it could not be presumed that the Appellate Court intended to make an order *nunc pro tunc* which would give compound interest from the date of the decree of the Court of first instance. 19 W. R. P. C. 41.

INTEREST [In Excess of Principal].

523. Section 6 Regulation XV of 1793 (prohibiting the Courts from awarding as interest a sum larger than the principal) is not applicable to a suit instituted after the passing of Act XXVIII of 1855. Even under Regulation XV of 1793, it was the practice of the Court to allow interest in excess of principal, where the interest had accumulated owing to reasons not ascribable in any degree to procrastination on the part of the creditor. 5 W. R. 51.

524. Where part payments were made on a bond and credited in discharge of the principal, and an action was brought for the balance of the principal and for interest, and the lower Court allowed a sum for interest as due at the date of the plaint which was greater than the principal, the High Court disallowed this excess.

The provision in section 4 of Regulation XXXIV of 1802 against an award of interest in excess of the principal refers only to the amount claimed for interest at the time the suit is brought. 1 M. H. R. 5.

INTEREST (On Bond).

525. There is no fixed rate at which interest must by law be allowed for the period between the time when a bond becomes payable and the commencement of a suit for the amount due; the matter being entirely in the discretion of the Court, regard being had to all the circumstances of the case. 11 W. R. 68.

526. Under the present law a Court is bound to enforce an agreement between the parties as respects the amount of interest to be paid upon a bond instead of limiting a claim for accumulated interest to a sum not exceeding the principal. 2 W. R. S. N. 3.

527. When a bond is silent as to any interest to be allowed after the due date of the bond, it is in the discretion of the Court to fix the

amount of interest, if any, to be paid from the due date of the bond to the date of the commencement of suit. 2 B. L. R. App. 10.

528. Where a note of hand promised re-payment of a loan with interest at 5 per cent., without stating either per mensem or per annum : Held that the construction that interest was to be calculated, without reference to time was contrary to all practice, and that the ambiguity was one which might fairly be explained by previous transactions between the parties and by custom. W. R. S. N. 379.

529. A transaction having all along been treated by both parties and by the Courts hitherto as a mortgage for a loan on which interest was not only due, but had in part been paid, it is not competent to one of the parties or the Court on remand to raise the question that by the terms of the *ikrarnamih* no interest was due. 1 W. R. 136.

530. When the rate of interest stipulated for in a bond is exorbitant, and there is no express understanding that the interest is to continue at the same rate after the expiration of the period fixed for repayment, a Court need not assume that the parties are bound by contract to that rate after such period. 15 W. R. 284.

531. In a suit upon a bond where the genuineness of the bond and the defendant's liability under it are clearly established, the plaintiff is entitled to interest from the time the defendant declined payment of the sum due upon the bond. W. R. S. N. 291.

532. Where a party borrowing money entered into a bond stipulating to pay 24 rupees per cent per annum as interest until the whole debt, principal and interest, was paid off; and if the whole was not paid within the time mentioned that the bond should be enforced as a registered deed : Held that the rate of interest was not a question of discretion, but must be paid at the rate stipulated. 16 W. R. 396.

533. Where a debtor by his bond stipulated to pay interest at 12 per cent per annum up to the time fixed for payment, but the money remained unpaid for a long time, the High Court refused to interfere with the decree of the Lower Court awarding plaintiff interest at the rate stipulated for up to the time fixed for payment, and a lower rate afterwards. 18 W. R. 322.

534. Where a bond provided for the payment of interest from the date of the bond on failure of payment of the principal on a certain date, and the decree awarded "the entire sum of money covered by the bond." Held that the decree meant something more than the principal, and could only mean the principal together with the interest accruing thereon. 18 W. R. 277.

535. Where payment was made upon a bond, the amount paid being less than the interest due, held the payment ought to go to reduce the amount of interest due, and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest up to date of decree. 8 B. L. R. P. C. 110.

536. By the Act XXXII of 1839, extending the provisions of the Statute, 3rd, and 4th Wm. IV c. 42, section 28, to India, it was enacted. "That upon all debts or sums certain, payable at a certain time, the Court before whom such debt or sums may be recovered may, if it shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums be payable, if such debts or sums be payable by virtue of some written instrument at a certain time."

An instrument, in the nature of, though not strictly, a bond, was executed in 1833, which provided for the liquidation of the amount therein specified by instalments, but no provision was made for the allowance of interest. The condition for payment not having been performed: Held in an action brought in 1849, to recover principal and interest upon the bond, that the Act XXXII of 1839, was retrospective in its operation, and authorised the allowance of interest, although it was not provided for by the bond. 6 M. I. A.

537. Upon the adjustment of an account of the principal and interest due upon a bond, a *kararnamah*, or deed of agreement, was entered into by the parties, in which, besides the original sum, a further sum for interest accrued thereon was declared due and agreed to be paid off by instalments before a given time. Payments were made at irregular periods, which payments the bond-holder claimed to appropriate to keeping down the interest upon the whole sum composed of both the original principal sum as well as the sum mentioned in the *kararnamah* as accrued thereon for interest. Held, upon the construction of the instrument, that the principal sum alone carried interest, and that all payments made in pursuance of the stipulations were to be applied in the first instance to satisfy such interest, the excess of the payments only being appropriated towards the liquidation of the principal sum due. 6 M. I. A. 289.

538. A Small Cause Court Judge has no discretion to allow interest at a rate below that stipulated in the bond. 17 W. R. 431.

INTEREST (On Hudees).

539. According to the usage of a native bankers at Moorshedabad, interest is claimable on hudees drawn at 111 days' sight. 4 W. R. 85.

INTEREST (On Interest of Government Promissory Notes.)

540. Interest may be claimed on the interest of Government Promissory Notes withheld by another. 3 W. R. 148.

INTEREST (On Judgment-debt.)

541. In reversing a decree of the Supreme Court at Calcutta the Judicial Committee directed, that interest at the usual rate allowed by that Court, should be allowed. 6 M. I. A. 1.

542. The purchaser of a decree may apply for rectification of an error in the calculation of interest. 1 W. R. Mis. 15.

543. If a decree awards interest from the date of decree on a certain sum ascertained to be due at the time of the decree (consisting of the sum sued for with interest thereon up to date of suit). Held, that it is not compound interest, and that the decree-holder is entitled to it. Mis. 15.

A Court is justified in giving interest at the rate the bond down to the date of decree. After that date the decree-holder recovers such interest as according to the course and practice of the Court is allowed on debts for which the creditor has the security of the decree. 11. W. R. 456.

INTEREST (On Mesne Profits).

According to the practice of the Native Courts in Bombay, a sum found due for mesne profits, in a judgment-debt, and terest by its own force.

On petition in the Native Court, after decree upon appeal in England, interest awarded on the amount of mesne profits decreed, although not prayed for in the plaint, or given by the decrees in India, or the order of affirmance in England. 3 M. I. A. 220.

INTEREST (On Money Deposited under Decree subsequently

546. A suit will not lie for interest in respect of money deposited under a decree subsequently reversed on appeal. 6 W. R.

INTEREST [On Money under Attachment with Collector).

547. In the case of money under attachment with the invested by him in Government 4 per cent promissory notes, the difference between that and legal interest is only claimable from the date of release from attachment. 3 W. R.

Plaintiffs, in execution of a decree against A, attached money deposited in the Collectorate to which A was entitled; but were opposed by B alleging that A's rights in the money had been transferred to him. Plaintiffs finally succeeded in obtaining the money, and now sue B for the interest upon it for the time he prevented their obtaining the money. Held that the suit was S.

549. In an action for the balance due on a Promissory Note on demand, the Court refused to allow interest, there being no proof of a demand in writing. 1 B. L. R. O. J. 41.

550. A advanced to B, his son-in-law, two sums of money for the purpose of trade. These advances were secured by Promissory Notes, by

which B agreed to repay the loans in three years, with interest at five per cent. B paid in his lifetime, and debited himself in his account with interest upon these loans at the rate of eight per cent. There was, however, no fresh agreement as to such increased rate of interest, nor did A press for it. At B's death A claimed against his estate the principal sum due with eight per cent interest. Held (reversing the decree of the High Court at Calcutta), that although B had voluntarily debited himself in his accounts with interest at the rate of eight per cent, yet the legal relation created by the Promissory Notes was a contract to pay five per cent, on the money borrowed, and the voluntary payment of eight per cent being without consideration, did not constitute a new contract so as to bind his estate with the payment of eight per cent. 11 M. I. A. 180 ; 6 W. R. P. C. 59.

INTEREST (On unliquidated Damages).

551. Interest should not be awarded on unliquidated damages. 7 B. H. R. A. J. 89.

INTEREST (Prior to Suit).

552. Interest cannot legally be awarded prior to suit in cases governed by the provisions of Act XXXII of 1839. 6 W. R. 288.

K

KOBALAH.

553. A *kobala* may be in one sense collusive and still it may pass the property away from the party executing it. 24 W. R. 138.

554. Where a Hindu executes a *kobala* in favour of another at a time when he has no title to the property, his subsequently becoming entitled as heir would not make the *kobala* good. 16 W. R. P. C. 12.

555. In a suit for possession of land on the ground of title under a *kobala*, it is not enough for the plaintiff to prove the writing and signature of the *kobala*; he must also prove that it was delivered as a complete instrument. 22 W. R. 367.

L

LANDLORD AND TENANT.

556. Where two parties have mutually contracted as landlord and tenant, and the latter has occupied the land in pursuance of the contract, he cannot be allowed to maintain possession free from the payment of rent because the landlord has the misfortune to lose, or is unable to produce, the paper which contained the terms of the agreement. 12 W. R. 521.

LIABILITY.

557. A person cannot discharge himself from legal liability to refund

monies which he has received belonging to one man of whose title he has notice, by paying them to another. 7 W. R. 225.

558. In a suit to recover a sum of money being the balance of purchase-money alleged to be due on a bill of sale executed by defendant No. 1 but said to have been fraudulently taken possession of by him, before payment of the stipulated price, from defendant No. 2 in whose custody it had been left and with whom the portion paid had been deposited. Held, that defendant No. 2 could not be exempted from liability without satisfactory explanation of his neglect to keep the deed entrusted to his custody. 12 W. R. 328.

LIABILITY (Division of).

559. Where money is advanced on a mortgage, the liability cannot be divided. 14 W. R. 216.

LIABILITY (Joint).

560. In a suit to recover the value of the produce of land from defendants, who had agreed to cultivate it but had failed to do so, it was held that as defendants were jointly liable, a specification of liability was not required. 12 W. R. 309.

561. Where an obligee sues some of the persons jointly liable to him under a bond, and takes another bond from the rest for what he considers to be their share of the debt, he does not discharge the latter from their liability to contribute according to the shares in which they are liable among themselves, nor does his transaction with them (they not being sureties) destroy the joint liability. 22 W. R. 193.

LIABILITY (Of Agent of one Share-holder to other Share-holders).

562. A and B cannot obtain a decree for their share against their co-heir C's agent who may have under a power from C drawn money held in deposit in a Court and belonging to all the co-sharers, if the agent did not draw as trustee for A and B, though he may have, when paying over to C the money drawn by him under C's authority, taken from him a bond by way of precaution to protect himself from any future possible claim by A and B. 5 W. R. 172.

LIABILITY (Of Agent to third Parties).

563. Two letters were presented to M., one addressed to himself and the other to the manager of the Mussorie Savings Bank, both purporting to be written by K. In the letter to M, M was requested to deliver to the Manager of the Bank, the letter addressed to him. In the letter to the manager he was asked to send Rs., 2500 in currency notes through M., payment being promised by a remittance through another Bank or through M. M. delivered the letter to the manager, who upon the strength of it made over the notes to M. who gave a receipt for them for and on behalf of K., and afterwards handed them over to the who had brought him the letters. The letters were forgeries. In a against M. by the Bank to recover the money paid to M :—Held, that in

e letter, in receiving the for them, the defendant was in some sense an agent of K.; but inasmuch as the notes were given on the authority of the letter addressed and not in consequence of any representation made by the defendant, the latter could not be held liable for the loss sustained by the former.

LIABILITY (Of Carriers).

564. A Steam Navigation Company was employed by plaintiff to carry from Calcutta to Rangoon and to deliver it into the receiving ship, or to land it at the consignee's expense, their liability ceasing as soon as the goods were free from the ship's tackle. arrived at port, the consignee not having had his own boats alongside, the goods were put into other boats, one of which, through the negligence of the boatmen, was swamped and the contents damaged. Plaintiff sued for damages. Held that as defendants were not shown to have neglected the duty of taking reasonable and proper care in the selection of boats they were not liable for the loss incurred. 24 W. R. 74.

565. The consignees of two bundles of cow hides which had been carried by a Railway Company having refused to take delivery on the ground of shortness in the number of pieces, the Railway Company pleaded that they were not indebted, as they had contracted to carry such and such a number of bundles, and had done so. The bills of lading so many bundles said to contain such a number of pieces. The also contested plaintiff's enumeration of pieces: Held that the Railway Company was not liable, there being no evidence that the bundles had been broken or the hides counted by pieces. 21 W.

Of Consignees).

566. The defendant requested the plaintiffs to send coals gunge and Rajmehal, and the plaintiffs put the coals upon the Railway at Raneegunge where there depot is. In the absence of all proof as to the amount of coals delivered at Sahabgunge and Rajmehal and of all notices of despatch and delivery to the consignee, the fact of delivery at Raneegunge was held insufficient to throw on him the liability for the coals sued for. 3 W. R. 163.

LIABILITY [Of Heirs].

567. The heirs and representatives of a deceased person are liable according to equity and good conscience to pay, not merely the actual of the deceased, but also the damages which arise from his of contract. 22 W. R. 494.

568. A decree declaring the heir of a mortgagor liable to pay the mortgage-debt out of such assets as he had received from the estate of father (the mortgagor) was held not to include assets which came him after passing through the hands of another heir, (his brother) right of inheritance from that brother. 12 W. R. 240.

Where a brother promised in a letter to repay a debt contracted by his deceased brother, which was secured to plaintiff by a note of hand which had been given by the deceased, it was held, on a consideration of the terms of the letter, that the defendant, who was sued on the letter, had taken upon himself the liability of re-paying the debt, although the amount of the loan was not stated in the letter. A promise to pay a debt is binding in many cases, although the amount of it may not be ascertained at the time. 9 W. R. 140.

LIABILITY (Of Purchaser).

570. A ganteedar having assigned over his gantee tenure to A, who was to pay the Zamindar not only the gantee rent reserved, but also Rs. 100 a year until a debt due from this ganteedar to the Zamindar was paid off: Held that, where the assignee having mortgaged his tenure, it was subsequently sold by the mortgagee, the purchaser was liable to pay the Rupees 100 annually as well as the original gantee rent reserved. 2 W. R. 121.

LIABILITY (Of Registered Share-holder).

571. The liability under sections 6, 11, 18, 22, 36 and 37, of a registered shareholder, as member of a Company, to contribute, is a *prima facie* liability only: it being open to him to show that although his name is in the register, yet he did not agree to become a member; and that as appellants were not cognizant of (much less did they assent to) the registration of their names as shareholders, whilst they refused to receive any shares or pay up any calls or deposits, the sole steps taken by them of joining others imputing for the prospectus and affixing their names therein to a certain number of shares cannot be said to be an agreement to become members of the Company, and so they are not contributories. 9 W. R. 540.

LIABILITY (Of Surety).

Where a bond was taken by a creditor from a principal debtor without the knowledge or consent of the sureties, fixing certain periods for the payments of the sums named in the bond: Held that the sureties were entitled to be discharged from all liability. 15 W. R. 253.

The defendant executed a bond which, after reciting that the President of the Allahabad Municipal Committee required security to the extent of Rs. 100 from Sheikh Akbur Ali, mohurrir in the Octroi Department, for the honest and faithful discharge of his duties to Government, went on to say that the defendant of his own free-will and pleasure pledged a certain dwelling house in lieu of security for the mohurrir, and to promise that if any sort of embezzlement or misappropriation was proved against the mohurrir in Court, the property might be seized. There was a proviso that if he deposited Rs. 100, the money and not the property would be liable. If he failed to deposit the money the property was to be liable for the payment of the amount of the security. The mohurrir fraudulently allowed certain goods to pass the

choonges without payment of duty, whereby he caused the Municipality a loss of Rs. 8. He was convicted under section 161 of the Indian Penal Code. The plaintiff sued to recover the amount of the security. Held, that the defendant could only be liable under the bond for sums shown to have been misappropriated, and that he could not be held liable for losses which accrued to the Municipality from misconduct on the part of the mohurrir other than misappropriation; and that in any case he could only be liable for the actual damage sustained by the Municipality. 6 N. W. P. 170.

LIABILITY (Of Vendor).

574. Where a party sells property to others, and it afterwards appears that he had not the right to do so, and the purchasers are in consequence dispossessed, the loss ought to fall on the vendor, and not on the vendees who put faith in his act of selling. 22 W. R. 443.

LIEN.

Persons standing by and allowing others to purchase property on which they have a lien, which upon enquiry they do not disclose, as an unencumbered property, cannot assert their lien. 2 N. W. P. 315.

576. The act of one of two holders of a bond cannot destroy the lien of the other on property pledged to both as security for a joint debt. 3 W. R. 130.

577. A bond contained a clause that the obligors would not dispose of any of the property, moveable or immoveable, in their possession, until the debt was paid: Held, that such a clause did not give the obligee of the bond a lien on such property, though he might sue for damages in respect of breach of contract. 1 N. W. P. 65.

578. Where a form of mortgage or charge created by a bond does not vest any estate in the mortgage, but only establishes a lien as incident to the money debt, such lien continues when the debt passes from a contract into a judgment-debt and when such judgment-debt is assigned to another by sale of the decree. 19 W. R. 255.

579. In 1864 C gave H a lien on his property, by a deposit of title deeds. In 1867 B purchased the same property *bona fide*, and without notice of H's lien. Held that B took the property free of the lien. 1 N. W. P. 24.

580. Where a party having a lien on account of a debt upon certain property belonging to another, and holding also a money decree for the same debt which she could satisfy by attachment and sale of other property belonging to her judgment-debtor, entered into a *kistbunde* with the latter, in which, in consideration of other properties pledged by its terms, she gave up her right of executing the decree against any of the judgment-debtor's property. Held, that the *kistbunde* did not extinguish the original debt, or do away with the lien. 11 W. R. 481.

581. The question in this case was whether a right of lien and power of sale by virtue of power of attorney over certain shares pledged with plaintiffs by defendant as security for the repayment of a loan originally secured by a first promissory note, was lost by the plaintiffs subsequently taking from defendant a second promissory note in lieu of the first which was receipted and returned. Held that the original debt continued to exist; that the first promissory note and the shares were given as a security for that loan; that the second promissory note was also given as a security for the loan, no new debt being created; that the plaintiffs had a right to exercise the power given to them of selling the securities; that the act of the defendant in trying to prevent such exercise of power by revoking the power of attorney was unjustifiable; and that therefore the plaintiffs were right in coming to the Court to have that proceeding of the defendant set aside and declared inoperative. 17 W. R. 201.

582. M chartered a ship to load a cargo at Cardiff and proceed therewith to Madras, the freight to be paid in London on unloading and right delivery of the cargo, one-third by M's acceptance at three months from the sailing of the ship (the same to be returned if the cargo were not duly delivered) and the remainder by like bill at three months from the date of delivery in London of the certificate of right delivery of the cargo. The Charter-party provided for payment of a commission on the contract, ship lost or not lost, and that £ 150 should be advanced in cash at the port of discharge on account of the freight against the Captain's draft on M.

The cargo was loaded accordingly, a bill of lading was given for the same, and the ship sailed from Cardiff on the 8th October 1863. M having consigned the cargo to A and Co. who carried on business at Madras. On the same day the owners drew a bill on M at three months for £ 261-1-10 being one-third of the freight.

On the 10th October 1863, the General Agents in London of A and Co. advanced to M on A and Co's account, and out of their funds £. 700, received as security for such advance, the bill of lading blank-endorsed and forwarded the same bill to A and Co.

On the 29th October 1863, M accepted the bill for £. 261-1-10 and in the following December he suspended payment and the bill was protested.

On the 14th January 1864, the ship arrived at Madras and thereupon A and Co., as holders of the bill of lading applied for the delivery of the cargo and offered to advance the £. 150 in cash pursuant to the Charter-party, but the Captain claimed to retain the cargo for the value of the dishonoured bill and the balance of freight due.

Held:—That the terms of the contract were at variance with the right of lien so claimed, and that it was not suspended by the bill nor received by the freighter's insolvency. 2 M. H. R.

LIEN (Equitable).

583. Suit for value of timber from an alleged fraudulent purchaser, with full knowledge of plaintiff's lien on the timber under certain *Tainzas* or Revenue certificates granted by the Conservator of Forests to the owners of timber. Held that, though the *Tainzas* were unendorsed, and therefore, by the custom of the country, did not entitle the holder to sell the property they represented, they still were a lien which prevented the owner from parting with it to third parties, except on the understanding that it was so burthened; and that consequently the defendant's purchase was burthened with plaintiff's previous lien and might be brought to sale for the same. 5 W. R. 189.

LIEN (Of Assignee).

584. A party with whose money a mortgage has been satisfied may bring a suit for the enforcement of his lien as assignee of such mortgage; but not for obtaining possession of the mortgaged property in the capacity of an absolute owner. 18 W. R. 404.

LIEN [Of Attorney for Costs].

585. Where the parties to a suit came to a compromise between themselves without the knowledge of the plaintiff's attorney, when the suit was at such a stage that it did not appear that the plaintiff was entitled to recover anything, and there was no proof that he was to receive anything from the defendant on the compromise, or that the compromise was not a *bona fide* one: Held, the plaintiff's attorney was not entitled to have the compromise set aside on the ground that he might thereby be deprived of his costs.

A clear case of fraud and collusion must be made out to entitle the attorney to the interference of the Court. 12 B. L. R. 110.

LIEN (Of Creditor).

586. Under the Imperial Statute, 11th and 12th Vict. c. 21 relating to Insolvent debtors in India, the Assignees have a right to subsequently acquired property of an Insolvent, unless the Insolvent has obtained a certificate and discharge, but this title of the Assignees is subject to two qualifications—*first*, when the Insolvent has acquired property subject to liens and obligations; in such a case the property taken is subject to the equities and charges which effect it in the hands of the Insolvent; and, *secondly*, when the Insolvent carries on trade at a subsequent period, with the assent of the Assignees, the property which is acquired in the subsequent trade will be subject in equity to the charge of creditors in that trade, in priority to the claim of the Assignees.

An uncertificated Insolvent borrowed money for the purpose of purchasing goods to carry on a business, and in order to secure the advances made, gave a bond, and agreed in writing, to execute a mortgage of the goods so purchased to the lender to secure repayment. He afterwards executed an assignment of the goods for that purpose. The business was

LIEN (ON MORTGAGED

carried on with the knowledge of, and without any objection by, the Official Assignee. The lender never had possession of the goods assigned to him by the Insolvent, and the same remained in possession of the Insolvent until his death. Held (reversing the decree of the Supreme Court at Madras) that the Insolvent's after-acquired property was subject to the lien of the lender, and that such lien was paramount to any claim of the Official Assignee under the insolvency. 8 M. I. A. 339; 4 W. R.

LIEN (Of Vendor for unpaid Purchase-money).

587. In a suit claiming possession of land, purchased by the plaintiff from the defendant, the Moonsiff threw out the claim for want of consideration; but the District Judge found that the plaintiff was entitled to have the land, and that the defendant might sue him for the purchase-money:—Held that the equitable doctrine of the vendor's lien for unpaid purchase-money applied to the case; but, as the District Judge had not decided whether the defendant had succeeded in proving that the purchase-money had not been paid, that the suit should be remanded for a finding by him on that issue. 3 B. H. R. A. J. 102.

LIEN (On Goods.)

588. The mere letter of boats for hire has not a lien for his hire upon goods which may be placed in the boats, and should he cause loss to the owner of the goods by wrongfully opposing their removal, he will be liable for the same. 5 N. W. P. 160.

LIEN (On Mortgaged Property).

589. The fact that property is sold under a decree obtained by a plaintiff in respect of a debt due to him does not of itself prevent such plaintiff from insisting upon the lien to which he is entitled under a prior hypothecation to him, for another debt of the same property. 3 N. W. P. 123.

590. A suit will not lie against the purchaser of property subject to lien to recover from him personally the amount of the lien, but the lien is not lost by the sale, and a suit may be brought against the purchaser with the object of obtaining a decree for the realization of the lien by the sale of the hypothecated property. 3 N. W. P. 207.

591. When a mortgagee sues to enforce his lien on property which has intermediately passed by sale into other hands, he is bound to bring his action not against the mortgagor alone but also against the parties in possession. 16 W. R. 98.

592. Where plaintiff, suing to obtain certain property unencumbered by a previous mortgage, pays into Court the amount due under the lien of defendant as mortgagee, and states that he has no objection to the sum being appropriated to the payment of that lien, he has no cause of action as against defendant. 9 W. R. 332.

533. When mortgaged lands are sold for arrears of Government revenue, not accrued through default of the mortgagee, any proceeds which may arise from the sale in excess of the arrears belong to the mortgagor, and he has a right of action for their recovery. 16 W. R. 140.

A suit to enforce a lien on land which has been mortgaged will lie, and the land as it stood at the time of the mortgage free from subsequent incumbrances may be sold, although a decree for money due upon the mortgage has been obtained, and the right, title, and interest of the mortgagor thereto has under such been once sold. 3 B. L. R. 140.

... executed a bond in favor of B, hypothecating certain immoveable property. B, recovered a money-decree against A., and caused the mortgaged property to be sold, B, became the purchaser at the sale in execution, and was put in possession. C., who held possession of the property under a decree for foreclosure under a subsequent mortgage of the same property to him by A., brought a suit against B, for recovery of possession, and obtained a decree. B. then brought a suit against C, to enforce his lien under the mortgage bond, but it was held that the suit was not maintainable. 7 B. L. R. App. 8; 10 W. R. 468.

596. Plaintiff obtained a decree under Act XX of 1866, section 53 on a specially registered bond, and in execution attached and sold the property which had been mortgaged thereunder. As this property, however, had been previously attached by defendant, the Court ordered the proceeds to be paid to defendant. Plaintiff sued defendant to recover these proceeds: Held that Act VIII of 1859 section 70 lays down a mere rule of procedure of determining questions between rival decree-holders, which was never intended to alter or limit rights secured by contract independently of the Code of Civil Procedure. Held also, that, in selling the mortgaged property, plaintiff sold the whole interest of his debtor and his lien was transferred from the property to the purchase-money. Plaintiff was accordingly declared to be entitled to the sale proceeds sued for. 22 W. R. 98.

597. The plaintiffs advanced a sum of money on the security of a simple mortgage of a share in four talooks and obtained a simple money decree. They then caused the mortgaged premises to be attached, but did not proceed to sale. Afterwards they negotiated a loan to their judgment-debtors from a third party, the present appellant, upon a simple mortgage of one of the same talooks, concealing the existence of their prior lien, and appropriated the money so obtained, in discharge of other debts due to themselves from their judgment-debtors.

The appellant obtained a simple money-decree, and caused the premises to be attached and sold. Before the sale, the plaintiffs gave notice of their lien, and, in consequence, the appellant purchased for a trifle.

The plaintiffs brought the present suit for a declaration of their prior lien and for a re-sale of the premises, in satisfaction of their mortgage.

appellant contended in his defence that, as fraud was perpetrated by the plaintiffs in inducing him to make the loan without disclosing their prior lien, his mortgage should have priority over them.

Held, that the appellant must be considered as having the first incumbrance.

That the notice of the plaintiffs' mortgage, given at the sale, could only affect the appellant's title as purchaser. Priority as between the appellant and the plaintiffs in respect of incumbrances already existing could not be affected by such notice. 3 B. L. R. A. J. 1.

598. A, on the 16th November 1868, executed a mortgage bond, by which he charged certain property worth Rs. 1,000 in favor of B and C. On the 17th he executed another bond, by which he charged the same property in favor of D and E. After this B and C sued the mortgagor on the first bond and obtained a decree, according to which the property was sold and was brought by themselves. Somewhat later, D and E also brought a suit against the mortgagor and obtained a decree for the sale of the property. In attempting to sell it they were opposed by B and C, who were in possession, and their application for execution was refused. D and E then sued B and C to obtain a declaration of their right to sell the property in execution of the decree which they had obtained on their bond of 17th November. The Lower Courts gave them a decree: Held, that the Courts were not right in depriving B and C of the benefit of the decree which they obtained on their bond of 16th November, and giving priority to D and E for their charge of a later date. The sale effected by B and C was subject to all valid liens (if any) of prior date subsisting upon the same property at the time of the sale; but later liens could not but be postponed to that of B and C. 22 W. R. 322.

LIEN (On other Property).

599. In a suit on the basis of a deed of conditional sale to recover property which had been obtained by mortgagor (in the course of a hutwarrah after the sale) in lien of property contained in the deed, but which defendant had purchased in execution of a decree against the mortgagor: Held, that plaintiff had no lien on this property which he did not purchase. 10 W. R. 475.

LIEN (Priority of).

600. The plaintiff had lent money to a Court Amin, who mortgaged, as security for the re-payment of the amount, certain fees due to him then in deposit, and certain fees which might thereafter be deposited on his account. Those fees were subsequently attached by the defendant who had obtained a decree for rent against the Amin. After that the plaintiff obtained a simple money-decree against the Amin, and applied, in execution of his decree, to have the fees paid out to him, but his application was refused on the ground of the defendant's attachment.

In a suit to recover the sums in deposit, and to have it declared that the plaintiff's lien on them was prior to that of the defendant, held, that

the plaintiff's mortgage gave him priority, and that he was not barred from bringing the present suit by his having already sued to recover the amount, and obtained a mere money-decree. 2 B. L. R. A. J. 230.

LIEN (Unpaid purchase-money creates no—on Property sold against third Parties).

601 Persons who allow a property to leave their possession before the purchase-money is complete, cannot recover from third parties who are purchasers in good faith and for valuable consideration, even those persons had notice of the amount of the consideration-money remaining unpaid. 3 R. W. 139.

LOAN.

602. A party admitting the receipt of a note for Rs. 1,000 on loan, becomes primarily responsible for it to the lender, and it is for him to show that the advance was made, not on his credit, but on that of some other person. 2 N. W. P. 264.

603. A mere recommendation by one party to another to lend money to a third party, does not render the first party liable to repay the loan 24. W. R. 446.

LOAN [On Security of Lease of Land].

604. A lent money to B on the security of a lease of certain villages subject to an extension of the term of the lease in the event of any partial deficiency in the assets. Held that A could not sue to set aside the agreement unless he showed that there was such a gross and excessive deficiency of the assets as to amount to a failure of the consideration, and to deprive A of the security for his money—also that the deficiency was caused by B's misrepresentations, and that it had occurred notwithstanding the use of due diligence on the part of A. 4 W. R. 70.

LOTTERY.

605. A transaction is not necessarily a lottery within Act V of 1844, simply because a matter of whatever kind is agreed to be decided by lot.

Where twenty persons agreed that each should subscribe 200 rupees by monthly instalments of ten rupees, and that each in his turn as determined by lot should take the whole of the subscriptions for one month :—Held that the agreement was not illegal, and that a suit might be brought on a bond given by one of the subscribers, who had received one month's subscriptions, to secure the payment of his subsequent monthly instalments. 1 M. H. R. 448.

M.

MANAGER.

606. The estate, and not the manager thereof, held liable for the costs of a suit instituted in perfect good faith by the manager for the benefit of the property. 1 W. R. Mis. 1.

MASTER AND SERVANT.

607. A manager has no authority to borrow money on a bond which does not recite for what purpose it is required, and the greater portion of which is said to have been previously borrowed by the principal. 5 W. R. 43.

608. Where a manager had not filed accounts and the Judge found that the management could not be continued with any prospect of the debt being paid within three years, he was held to have done right in removing the manager and ordering the property to be sold. 22 W. R. 220.

MANAGER [Bank].

609. A, being in uncontrolled management of the National Bank in Calcutta, and purporting to act under a power of attorney, intended to be given to him in his private capacity, but addressed to him as "acting manager of the National Bank," by B, a constituent of the National Bank, without drawing any cheque on B's account, and simply by means of transferring in the books of the Bank Rs. 13,000 from B's deposit account with the Bank to the account of one C, who was indebted to the National Bank, purported to make an advance of Rs. 15,000 from B to C, whereas, in fact, the real transaction amounted only to transferring the liability of C to that extent from the Bank to B:—

Held that, so far as this transaction was concerned, A could not divest himself of his character of Bank manager, and that acting as the agent for both parties he acted to the prejudice of B and to the advantage of the Bank, and that there was in fact a breach of his duty to B to which the Bank was a party.

Held, also, that A was not able under the power of attorney to bind B by consenting to any dealings by the Bank or C with goods in the Bank's godowns which would prejudice B. 19 W. R. 68.

MASTER AND SERVANT.

610. A master cannot be compelled to keep in his service, and to continue to employ, a servant whose honesty he thinks he has reason to doubt. 4 W. R. 86.

611. *Seemle.*—If a master usually instructed his servant to buy goods upon credit, he will be bound by his acts even when he has prohibited him specially from buying upon credit. 6 W. R. 309.

612. A master is responsible for the act of his servant done within the scope of his duties, and for the master's benefit. 1 N. W. P. 107.

613. The appellant, having obtained a decree for *khas* possession of a share in a *Zemindari*, had refused to recognize the ryots whom the farmers under her co-shares had settled in the estate; and her servants cut and carried off the crops of these ryots. Held, by Glover, J., that the appellant was liable for the acts of her servants which were done in furtherance of her known wishes, and for her benefit.

Held, by Loch. J, that those acts were beyond the ordinary scope of the servants' duty; and that, unless it could be shown that the appellant ordered or ratified the acts, she was not liable. In the present case the circumstances gave rise to a strong presumption that the acts were done with her knowledge, which presumption had not been rebutted, and therefore she was liable. 2 B. L. R. A. J. 227,228.

614. Every master and employer has an undoubted right to dismiss his servant or agent at any time. After the dismissal, whether wrongful or not, the servant cannot claim wages. The remedy for wrongful dismissal is by action for the damages sustained by the servant in consequence of the breach of the master's contract to employ him. 2 W. R. 307.

615. A master cannot plead in justification of the summary dismissal of his servant a cause the existence of which was unknown to him at the time of such dismissal.

At the same time subsequent knowledge that the servant had all along in his service been guilty of dishonest or fraudulent conduct might be pleaded as a good reason why a servant should not be allowed any more than his wages up to the day of dismissal. 6 N. W. P. 130.

616. An action will not lie for the mere harbouring or sheltering a person who is under a contract of service to another, even with notice of such contract of service. 6 B. L. R. 107.

MINOR.

617. Minors have a qualified power of contracting, and an implied or express contract for necessaries is binding absolutely on a minor. 5 W. R. 2.

618. The privileges and disabilities of minority, so far as they are not removed by express enactment, attach to European British subjects in this country until they have attained the age of 21 years.

The same rule ought on principles of justice, equity, and good conscience, to be observed in the Non-Regulation as in the Regulation Provinces. 3 N. W. P. 338.

MOOKTEARNAMAH.

619. It is necessary that a plaintiff who sets up a *mooktearnamah*, purporting to have been executed by a Hindu widow, appointing a *mooktear* to do certain acts on her behalf, should establish such instrument by strict legal proof of its due execution. The absence of such proof is not compensated by any legitimate conclusions to be drawn from the other facts and circumstances in the case. 11 M. I. A. 268; 8 W. R. P. C. 22.

620. No special power is necessary when a general power conveys authority to an agent to borrow money in his principal's name. When a special power for a sale of land exist, proof of motive of sale is not necessary. 1 W. R. 33.

621. The *mooktearnamah*, upon the authority of which this suit was brought, being impugned by the defendant as a forgery and as not executed by the party alleged to have granted it, the Court held that, notwithstanding its attestation in due form by the Moonsiff of Muttra, the parties charged were bound to prove its genuineness; and as they failed to do so, the suit was dismissed, and the parties in whose favour it was drawn and who declined to appear in Court to prevent, were directed to be sent to the Magistrate to be placed on their trial for forgery. 6 W. R. F. B. 2.

MORTGAGE.

622. Where a sum of money is advanced, and the person making the advance is put in receipt of the rents and profits of land by way of payment of interest on the loan, this is not a mere licence or permission to the lender of the money to receive the rents revocable at the will of the borrower, but is in the nature of a mortgage transaction. 2 N. W. P. 9.

623. In creating a mortgage it is sufficient if it appears from the deed that it was the intention of the parties to create a charge upon the land. If the intention can be collected from the instrument, the form of expression is not material. The particular instrument in this case construed (Markby J. dubitante) to indicate an intention of creating a mortgage. 13. W. R. F. B. 82.

624. Where a mortgage is found to be genuine, and the receipt of consideration admitted, the Court is bound to assume, unless it be shown to the contrary that the transaction was a real one, and that the consideration-money was paid. 7 W. R. 441.

625. Indulgence or waiver of rights between a mortgagee and mortgagor cannot be carried beyond those parties. W. R. S. N. 190.

626. Total payment sufficient to cover all due on three mortgages, is payment sufficient to cover what may be due on each or any of them. 6 W. R. 127.

627. Where a mortgage is a charge on the whole of an estate, before the mortgage can be removed from any part of the estate, the whole mortgage-debt must be paid off. 3 W. R. Mis. 4.

628. Conveyance by lease and release in fee, in the circumstances, held to be subject to a parol defeazance, and to be in the nature of a mortgage, with a power of re-purchase on the footing of redemption; and a re-conveyance decreed. 5 M. I. A. 72.

629. The rule, that if the owner of different estates mortgage them to one person separately for distinct debts or successfully to secure the same debt the mortgagee may insist that one security shall not redeemed alone, applied to a Mahomedan mortgage.

In mortgage transactions in which the mortgage contracts have been entered into before Act XXVIII of 1855 came into operation and to which Regulation V of 1827 sections 11 and 12 applies, and in which an account of principal and interest on the one side and of rents and profits on the other side is not directed, the arrears of interest must be limited to six years. 6 B. H. R. A. J. 90.

A *mootah* being advertized for sale by order of the Collector, for arrears due to the Government, the proprietor applied to a party to become security for the payment thereof by certain instalments; and thereupon deposited *sunnud* and *Arzee* in the hands of a third party, and executed a *kararnamah* or agreement, by which the transfer of a *mootah* to the guarantee was made absolute, in case of default by the proprietor in payment of the instalments. The party becoming security at the same time executed a counter *kararnamah*, or deed of defeazance, agreeing to give up the *mootah* when satisfied out of the rents, &c., the principal sum, and interest, which he might advance on account of the security. Default having been made in payment of the first instalment by the proprietor, the guarantee obtained possession of the *sunnud* and *Arzee*; and upon a further default by the proprietor procured himself to be registered as owner and obtained possession of the *mootah*, insisting, notwithstanding the counter *kararnamah* that his title was absolute. On a suit brought by the original proprietor for possession of the *mootah*, and payment of the surplus, after satisfying the advances made on account of the arrears, it was held by the Judicial Committee affirming the judgment of the Sudder Court, that the transaction was in the nature of a mortgage, and that the party to whom the *kararnamah* was executed was only entitled to retain possession of the *mootah* until he had reimbursed himself, out of the rents and profits, the sums advanced by him on account of his security: the counter *kararnamah* though not registered, being a valid instrument, and operating as a deed of defeazance to the title acquired under the first agreement. 2 M. I. A. 1, 2; 5 W. R. P. C. 117.

631. A party suing for possession of a share of mortgaged property (after its release has been effected by an arrangement made between the mortgagees and mortgagor) on the ground that he has an interest in the mortgage and in the funds advanced by the mortgagees, must show that the mortgagor had notice of such interest. 10 W. R. 476.

632. The plaintiff had a lien on three estates belonging to his debtor, and a third party having obtained a decree for money due from the same debtor, recovered his money by the sale of one of the plaintiff's three mortgaged estates: Held that the sale did not release that estate from the mortgage, but that it forced the plaintiff to take measures in the first place to recover the amount due to him from the remaining estates included in his mortgage deed, and that, if any balance remained after he had realized all he could from these two remaining estates, he could then return to the third estate to recover the balance. W. R. S. N. 374.

633. Defendant advanced a sum of money to R and T, who granted him, as security for repayment, an *ijara* lease of a *mouzah* (representing that they were entitled to 16 annas), in which lease a *junma* was reserved, a portion whereof was to be applied to the discharge of interest to the defendant and a small sum to go to the mortgagors as *huq-i-ijara*. After execution of the *ijara*, the defendant was dispossessed of 8 annas by a third party who claimed to be a sharer, and he had to sue and obtain a partition of the remaining 8 annas, which he retained for what it was worth as security. Plaintiffs bought the mortgagor's share, and now sue for the *huq-i-ijara* originally reserved.

Held that the mortgagors could not claim any benefit under the *ijara* lease until all the benefits which it pretended to secure to the defendant were realized by him. 20 W. R. 128.

634. A mortgage made by way of security for money advanced remains a mortgage until the debt is satisfied, and the mortgage-creditor has every right to sue to obtain a decree and sell that which is held by him as security for his money without any regard to the proceeding to any other subsequent mortgagee or purchaser. A purchaser at a sale in execution of such a decree under a prior mortgage, as well as the original holder of a prior mortgage, have rights far superior to those of any other mortgagee or purchaser of a subsequent date. A subsequent purchaser, by payment of an earlier mortgage and obtaining a decree for the money so paid, does not acquire any rights belonging to that mortgage. His payment was a voluntary act, and his decree against his vendor was a personal one for a simple debt not secured by any security connected with any portion of the land in dispute. W. R. S. N. 345.

635. The Courts of this country being Courts both of law and equity, it is immaterial for the determination of claims to attached property whether a mortgage is a legal or an equitable one. Where goods are mortgaged and left in the possession of the original owner, the circumstance that they are so left is not to be held as a fraud *per se* rendering the mortgage liable to be defeated as between the mortgagee and third parties such as *bona fide* purchasers or judgment-creditors.

But when possession is left with the mortgagor, this is a circumstance of which the Court should take notice when determining whether the mortgage is *bona fide* or fraudulent.

A mortgagee is not bound to take possession immediately default is made. 5 N. W. P. 54.

636. D having obtained a decree against his debtors J.P. and others, took out execution and attached certain property which had been pledged by them as security. He then brought part of it to sale exempting the share of P. (which he purchased without notice to the other tenants), and realized his dues.—J. paying the amount in order to save the property from sale. J then sued P for contribution and obtained a decree making her (P's) share liable which he attached and put up for sale. D objected under Act VIII of 1859 section 246, but his objection was

disallowed and he paid up P's contribution. He now sues to recover the amount so paid: Held that D's claim was unjust, for when he was paid up by J. he was bound to give up his lien on P's share which became vested in J. Accordingly in buying that share he took it burdened with his own lien, and when J. paid off the entire liability he succeeded to the right of contribution from P by buying it from her share. If, therefore, D wished to retain that share he was bound to make good P's defalcation. 22 W. R. 430.

637. This was a dispute, which arose in 1823, between two branches of a family respecting a *Mahratta* village. The plaintiffs (appellants) claimed the property on the allegation that the respondents held it as mortgagees, and that they (appellants) were entitled to redeem. The respondents claimed to have held the village in question as an *Inam* free from the payment of Government revenue; and as they had held it on this title since 1824 up to the commencement of the suit, the Privy Council refused to disturb their title, thus fortified by long enjoyment, without clear and unmistakable proof of the alleged mortgage. 17 W. R. P. C. 8.

638. In the year 1839 the defendants' ancestor had mortgaged a share in a *mouzah* to the ancestor of the plaintiffs. The mortgagee sued to foreclose the mortgage and obtained a decree, in execution of which he obtained possession of the share. After this, some prior mortgagees obtained a decree in the Sudder Court in 1847, to the effect that the disputed property should be taken away from the plaintiffs' ancestor and given to the prior mortgagees till their lien was satisfied, when he should obtain possession as before. The lien of the prior mortgagees was satisfied in 1870, when the defendants obtained possession. The plaintiffs sued to recover possession. Held, that no right of action accrued to the plaintiffs by reason of the satisfaction of the decree of the prior mortgagees, and the recovery of the possession of the estate by the defendants. 5 N. W. P.

639. This case turned upon the construction of an agreement by which (according to appellants contention) the mortgagee was entitled to the payment of the principal and interest on the debt, but that the payments of interest carried no interest themselves. The Privy Council according to their construction of the agreement, were of opinion that the parties intended that the interest might be set off from time to time against the rents and profits, and that the mortgagee was only to account to the mortgagor for any rents and profits and interest on the same which he might have received over and above the interest due to him upon the debt; and held that section 7 Regulation XV of 1793 did not apply to transactions of this kind. 17 W. R. P. C. 262.

640. The decree in a former suit declared the present plaintiff's *putnee* valid, and upheld him in possession. Subsequent to the creation of the *putnee* and to the above decision, the plaintiff in that suit gave a mortgage of the same property to the defendant who ousted the *putneedar*. The *putneedar* now sues for recovery of possession. Held, that

the decree in the former case was sufficient evidence of the *putneedar's* possession, unless rebutted, to meet the plea of limitation now set up against him, that the mortgagor had no power to make the mortgage, and that the mortgagee cannot set up a plea which the mortgagor could not raise herself. 1 W. R. 61.

641. A mortgagor granted a *ticca* lease of the mortgaged lands for ten years to B. R., and under an assignment executed by the mortgagor it was arranged between him and the mortgagee that the latter should pay himself off from the *ticca* rents at a certain rate annually until the realization of the mortgage-debt with principal and interest. Held that, until mortgagee could prove that something had happened to disturb the arrangement made between him and mortgagor under the terms of the deed of assignment, he could not either according to law or the terms of the contract call upon the mortgagor or his representatives to pay the balance of the mortgage-debt or to have that balance realized from the sale of the mortgaged property. 17 W. R. 263.

642. In a suit, two of the defendants, in their answer, made a statement in respect of an alleged mortgage transaction with the object of defeating the plaintiff's claim, which was false. A foreclosure suit was afterwards brought by one of these defendants against the other founded on such alleged mortgage. Held, that it was competent to the defendant to plead that the statement in the joint answer in the former suit was false and intended as a fraud on a third party, and that the admission in the answer did not amount to an estoppel as between the parties to the second suit. 13 M. I. A. 551 ; 15 W. R. P. C. 14.

643. Defendant in consideration of money advanced by *Shoshee Bhoosun*, chose to enter into a mortgage with plaintiff, who now sues for possession, after foreclosure of mortgage. Held that it did not lie in defendant's mouth to object to the suit being brought by *Shoshee Bhoosun* in the plaintiff's name. 17 W. R. 192.

644. Where money-lenders, dealing with ignorant, illiterate peasants, made use of the necessities of the position of those peasants, who were seeking to raise a sum of money for the purpose of stocking and tilling their lands, to impose upon them a contract, in the form of a mortgage, by which they agreed, in default of punctuality of payment of the half produce, and in other events, to sell their land at a gross under-value, *viz.*, one third of the amount of the mortgage-debt, which in itself was not more than equal to half the value of the annual produce of the land, and to remain liable to the remaining two-thirds of that debt with interest ; and, even if no default should occur on their parts in payments of a moiety of the annual produce, or the performance of their other covenants, and notwithstanding full payment of the principal, to continue for fifteen years to pay the half produce of the lands to the mortgagees :—Held (reversing the decrees of both the Courts below) that the deed of mortgage should only stand as security for the payment of the principal sum of Rs. 300 and interest at nine per cent and in all other

respects should be set aside as inequitable, fraudulent, and grossly oppressive.

Held also, that if, in execution of the reversed decrees, the lands had been made over to the mortgagees as purchasers they should be restored to the mortgagors, and that the rents, profits and produce, received by the mortgagees while in possession, should be set off in account against the said principal sum and interest, and the balance should be paid by the party against whom the same might be found.

Mere inadequacy of consideration unless it be so great as to amount to evidence of fraud is not sufficient ground for setting aside a contract, or refusing to decree specific performance of it. But inadequacy of consideration, when found in conjunction with any such other circumstances as suppression of true value of property, misrepresentation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding or even ignorance, is an ingredient which weighs powerfully with a Court of Equity in considering whether it should set aside contracts, or refuse to decree specific performance of them.

Quere. As to the validity of a mortgage of future crops. 3 B. H. R. A. J. 11, 12.

645. The ancestor of the defendants held as mortgagee a ten *biswa* share of a *mouzah*; of this share 5 *biswas* were recovered and held by the plaintiff as proprietors. Of the remaining *biswas*, 3 *biswas* $6\frac{3}{4}$ *biswansees* belonged to D. and 1 *biswa*, $13\frac{1}{4}$ *biswansees* to H. These 5 *biswas* were in the defendants' possession. The plaintiffs sued to recover possession of them alleging that the mortgage had been redeemed out of the usufruct, and that they had acquired D's rights by auction-purchase in the year 1848, and H's rights by private purchase from his sons, in 1873. They also sued for mesne profits. The defendants pleaded that they held the five *biswas* in suit as proprietors, having acquired D's rights by private purchase in 1847, and H's rights similarly in 1851. They also pleaded that, inasmuch as the plaintiffs had brought a suit to establish the sale alleged to have been made to them by H's sons, and that suit was still pending, the claim for possession of H's share could not be maintained, and they lastly pleaded that inasmuch as the plaintiffs admitted that the rights of D and H, were acquired by them under separate sales, their claims to those rights could not be joined in one suit. The plaintiffs replied that, assuming the claim to H's share could not be maintained on the basis of the alleged sale to them they were nevertheless entitled to possession of H's share in virtue of their right to D's share, both shares having been jointly mortgaged:—

Held, that the plaintiffs were entitled to ask in one suit for a determination of their claim to the possession of the shares, and to any surplus mesne profits, which might be found due in respect of them on taking account, and that the pendency of the suit to establish their purchase of H's share did not deprive them of the right to sue to recover possession from the mortgagees, although it might have been necessary to determine incidentally in the suit the question at issue in the suit respecting the purchase.

Held also, that if the plaintiffs established their rights to the share of D but failed to prove their title as purchasers of H's share, they could not obtain possession of the share on the ground that it was mortgaged jointly with the shares they already held, and with the share of D, for, according to their own allegation, the mortgage-debt had been redeemed, and there was no longer any common liability which they were acquired to discharge. 6. N. W. P. 246,247.

646. Where a plaintiff's bond gives him a separate lien on each and all of several *mouzahs* pledged as security, he is free to elect for sale whichever of the *mouzahs* he thinks most likely to satisfy his claim.

When a portion of property pledged as security in a bond is sold in satisfaction, there is nothing to prevent the obligee from purchasing such portion. 8 W. R. 379.

647. In an action on a bond and mortgage, which was not registered, and the *factum* of which was denied, the Principal Sudder Ameen decided in favour of the plaintiffs; but such judgment being reversed by the High Court, the Judicial Committee considering that too much weight had been given to the fact of non-registration, reversed that finding and after a careful analysis of the evidence, found the bond to be genuine. 9 B. L. R. P. C. 426.

MORTGAGE (Ambiguous description in).

648. An ambiguous description in a mortgage must be taken most strongly against the mortgagor, the party who conveys the property. 18 W. R. 63.

MORTGAGE (Application of English Law of--to this Country).

649. The principle of the English Law of mortgage which enables a mortgagee to take on, to the amount of his mortgage, any further liability of the mortgagor to him, has never been recognized or adopted in the decision of the Court of this country. 11 W. R. 310.

MORTGAGE (Benami).

650. In a suit for possession after foreclosure, defendants urged that C, (and not A and B the plaintiffs) was the actual mortgagee. This was denied by A. and B., who obtained a decree. In a subsequent suit, brought by the representatives of A. and B. for mesne profits, they, in conjunction with C., alleged that C. was the real mortgagee, and C was made a co-plaintiff, but he did not verify the plaint. A decree was given for mesne profits in favour of C the plaintiff. *Held*, the fact that C had not verified the plaint was no sufficient ground for dismissing the suit. Decree affirmed. 1 B. L. R. A. J. 100.

MORTGAGE (By Co-parcener).

651. A., one of the share-holders of a *talook* consisting of several *mouzas* mortgaged his share in one of the *mouzas* named *Kishoopore* to B. Upon a partition being made under Regulation XIX of 1814, the

Kishoopore was allotted to C. and D., co-parceners in the *talook*, and other *moutas* were allotted to A.

In a suit by C against B for obtaining possession of his share in *Kishoopore*: Held that there was no cause of action. That upon a partition of a joint property a co-parcener is bound, by the incumbrances created by another co-parcener in respect of a portion of the property, if such portion be allotted to him upon a partition between the co-parceners. 4 B. L. R. App. 97.

MORTGAGE (By Deposit of Title-deeds).

652. A lien created by verbal contract and deposit of title-deeds of immoveable property in the Island of Bombay by a Hindu in favor of a Hindu upheld.

Where such a lien was created before the 1st of January 1865, when the first general Registration Act XVI of 1864, came into force, and a *Gujarati* document (unregistered) was subsequently (on the 13th of June 1865) executed by the giver of the lien which set out its particulars, and acknowledged the receipt of the loan on account of which the lien was given: it was held that the original oral contract of lien being in itself a perfected transaction, was not merged in or invalidated by the subsequent document, and that, therefore, the fact of the latter not being registered did not affect the validity of the prior transaction. 7 B. H. R. O. J. 45.

MORTGAGE (By Executor).

653. Where, in order to save an estate from sale in execution of a decree against the testator, his executor raised a loan from the plaintiff giving him a mortgage of the testator's property:—Held that, even if the executor had funds to pay plaintiff of the debt without raising a loan, that fact would not invalidate the plaintiff's claim against the estate, unless there was good reason to infer that he knew of those funds, or might have known of them if he had exercised ordinary diligence in making enquiries on the point. W. R. S. N. 99.

Where a plaintiff fails to show that a mortgagee, created by certain persons as executrix and executors of a Hindu will, has been validly created by them in that capacity, the Court will unless it is manifestly inequitable to do so, allow him to raise an issue that the mortgage was validly created by the parties in another character. Held, per Markby, J., that the executors of the will of a Hindu cannot, by virtue only of their character of executors, mortgage the estate of the testator, in the absence of any power, express or implied, contained in the will. Held, on appeal, a creditor, who purchases under an execution against the general assets of a testator's estate, takes subject to a mortgage created in pursuance of a power contained in the will and in a suit to foreclose the purchaser is rightly made a party. Though the payment of debt is a charge on the property of a testator, it is not a charge on any specific portion of that property. 3 B. L. R. O. J. 7.

MORTGAGE (By Guardian).

655. Where a party after attaining full age allowed his mother to give him out to the world as a minor, and as his guardian to mortgage his ancestral property, and permitted the mortgagee to retain possession for five years : Held, that he could not afterwards turn round and repudiate arrangements which were made for his benefit and for which an innocent party had given valuable consideration. 11 W. R. 446.

MORTGAGE (By Minor).

656. Where, in a suit to make absolute a conditional sale, and to obtain a share in a certain village mortgaged to plaintiffs (the usual year of grace having been given, and money been paid into Court in satisfaction considerably after the term allowed by law) there is no issue respecting the minority of some of the mortgagors, the case will not be sent back to the Appellate Court for enquiry whether certain of the mortgagors were minors, or whether the others mortgaged for such purposes as would bind the minors, notwithstanding one of the Lower Courts has found the fact of the minority of one of the mortgagors. 2 N. W. P. 23.

MORTGAGE [By Sebait].

657. A mortgage of *dewutter* property by a *sebait* is *ultra vires*. 14 W. R. 101.

MORTGAGE (By Tenant).

658. Where tenants after mortgaging their land agree to pay an increased rent to their landlord who is ignorant of the mortgage, and the property is afterwards sold in satisfaction of the mortgage-debt, the Zemindar is entitled to recover the increased rent from the tenants or from the party who has succeeded to their rights and interests. 15 W. R. 449.

MORTGAGE [By Wife].

659. R. and G. allowed their wives to appear as owners of a certain property ; and the wives having mortgaged it to the plaintiff, the husbands subsequently ratified what they had done and undertook the responsibility as securities for the mortgage-debt. Held that, as R. and G. could not succeed if they brought a suit to recover the property on the ground that the wives had no authority to pledge it, so neither could the defendant, who claimed under an attachment against them, attach the property, nor had the auction-purchaser any title as against the plaintiff. 8 W. R. 67,68.

660. Certain property standing in the name of a wife was mortgaged by her to one B. The mortgage-debt was paid off. The mortgagee having a decree against the husband, attached and sold the property. Held that, though payment of the mortgage-debt by the wife might have given her a lien on the property to the extent of any money paid by her out of her own fund, the mortgagee's acting on the wife's assertion of title did not prevent him, when he subsequently discovered that the

property was really the deceased husband's, from making it available for the satisfaction of his decree against the husband. 2 W. R. 29.

MORTGAGE (Collusive).

661. Suit by a purchaser from a mortgagee against a *Durmokurureedar* for the cancellation of his *mokururee* lease granted without authority by the mortgagor. In a former suit brought by the mortgagee for possession, the mortgagor admitted the mortgage. Held that, although that admission was conclusive as between the mortgagor and the mortgagee the colluding parties, yet that, in the present case brought to avoid the defendant's title on the strength of an alleged collusive mortgage, it was quite competent to him to contest its *bona fide* nature. 5 W. R. 280.

662. Suit by mortgagee (respondent) after foreclosure of mortgage against mortgagors' incumbrancers, and present appellant who was in possession of part of the mortgaged property as purchaser at an execution sale. Mortgagors admitted plaintiff's title. Appellant pleaded that the mortgage was a collusive transaction between mortgagors and mortgagee in fraud of creditors. The principal Suddar Ameen found that the mortgage was not a *bona fide* transaction, but the High Court reversed his decision; and the Privy Council, upon a consideration of the evidence, came to the conclusion that the Principal Suddar Ameen was right, because it was not only necessary for, but also in the power of, the respondent to adduce better evidence than he had given in this case in order to make out the reality and *bona fides* of the transaction on which he relied. 17 W. R. P. C. 9.

MORTGAGE (Double).

663. The Court cannot accede to the prayer of an appellant interested in one of three properties against which a claim is sought to be established, who asks that plaintiff may be compelled to resort first to the two other properties for the satisfaction of his demand, but does not show that he is a *bona fide* subsequent mortgagee. 12 W. R. 114.

MORTGAGE (Equitable).

664. When mortgaged property is sold at auction subject to mortgagor's right to redeem, the mortgagor's equities follow the property even when it turns out that the purchaser bought as agent, and not as principal. 8 W. R. 399.

665. If a person mortgages property, of which he has no present ownership, and subsequently becomes the owner of the mortgaged property, the lien created by the mortgage attaches to such ownership and subsequent purchasers from the mortgagor take subject to the equities which affected the property in the hands of the mortgagor. 4 N. W. P. 11.

666. Madras Regulation II. of 1802 section 17 enacts, that in the absence of any positive law to the contrary, in force in the Presidency of Madras, that the decision of the Court is to be according to justice, equity and good faith.

The plaintiff was an *Armenian* and the defendants, Hindus, Mahomedans, and Christians. The plaintiff sought by the plaint to establish a lien on land, created by an equitable mortgage by deposit of title-deeds. Held (in the absence of any agreement that the transaction was to be governed by any particular local law), that under Madras Regulation II of 1802 section 17, the principles of English law respecting equitable mortgages applied. 9 M. I. A. 303.

667. A petition having been presented to prevent the sale of a house and premises under attachment in satisfaction of a decree, on the ground that the owner was an infant, and unrepresented in Court; and an order made thereon for the production of the evidence in support of those facts: the petitioner, not having produced such evidence, and the sale being about to take place, filed a plaint, claiming the premises in question on his own account, as equitable mortgagee; but having failed in proving either the transfer or payment of the alleged mortgage, the Sudder Court dismissed his suit, and their decree was affirmed, but without costs, upon appeal to his Majesty in Council. 2 M. I. A. 60; 5 W. R. P. C. 124.

668. S purchased the *muttah* of E, and paid part of the consideration-money. When the parties came to complete, the vendors had not the title-deeds, but they promised to deliver them in a few days, and arranged that the remaining part of the purchase-money should be retained by the purchaser, and they handed over to him the title-deeds of another *muttah* called T to be held as security for their delivering to the purchaser the title-deeds of *muttah* E in order to perfect his title. The purchaser on the faith of this advanced large sums, and paid off a mortgage on *muttah* T this latter *muttah* having been sold, S brought a suit to recover the amount advanced by him on account of that *muttah*, claiming to be equitable mortgagee, and to have a charge on that estate for the advances made by him in respect thereof. Held, that the transaction created a lien, and bound the *muttah* T for the advances made by S. 9 M. I. A. 303, 304.

669. The prohibition contained in section 30 of Act IV of 1862, which regulates the Bank of Bengal, against making loans and advances on the security of land, is no prohibition against the Bank taking land as security for a past loan and an existing debt.

Where title-deeds of land had been deposited by a debtor with the Bank of Bengal, and a letter was given authorizing the Bank to sell the land and apply the proceeds in liquidation of a debt then existing and due to the Bank, it was held that a valid equitable mortgage was thereby created in favour of the Bank as a security for the money due.

The Court declined to entertain the question whether the document relied on was one requiring a stamp, as being a matter not affecting the merits of the case or the jurisdiction of the Court. 7 B. L. R. 653.

670. The defendant deposited certain title-deeds with the plaintiff as security for the repayment of Rs. 1,200 lent him by the plaintiff

at the time when the deposit was made. On the evening of the same day, the defendant by way of further security, gave to the plaintiff a promissory note for the amount of the loan, and endorsed thereon the following memorandum:—"For the repayment of the loan, of Rs. 1,200 and the interest due thereon of the written note of hand, I hereby deposit with "the plaintiff" as a collateral security by way of equitable mortgage, title-deeds of my property &c." Held that the memorandum did not require registration.

The equitable mortgage was complete without the memorandum; the memorandum was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred. 11 B. L. R. 405, 406; 20 W. R. 150.

671. Per Seton Karr J.—Case remanded to the Lower Court to find whether, when property hypothecated for a bond has passed to a *bona fide* purchaser, the same can be declared liable to satisfy such part of a money-decree on the bond as cannot be satisfied from any other source.

Per Norman J.—If A has a mortgage on two different estates for the same debt, and B has a mortgage on one only of the estates for another debt due from the same party, B has a right in equity to throw A in the first instance for satisfaction upon the security which he, B cannot touch, where it will not prejudice A's rights or improperly control his remedies.

A purchaser of one of the estates has the same equity as a mortgagee. 7 W. R. 483.

672. Two properties were mortgaged by G to R. subsequently, a judgment-creditor, in executing his decree against G attached the properties and sold them separately; plaintiff becoming the purchaser of one, and defendant of the other. After the purchasers had got into possession, R sued them and the mortgagor G for the purpose of enforcing his lien on the properties. His suit was decreed in appeal. Defendant then on getting a discharge from R surrendered a portion of the property he had purchased. Plaintiff objected, representing that the defendant and himself were not liable in equal shares, and he paid into Court what he represented to be the amount of his liability. Notwithstanding this the sale was ordered to take place, and plaintiff paid a further sum to get his property released. He then sued to recover that sum from the defendant on the ground that both were liable in proportion to the value of their respective properties. Held that the effect of joining these properties together in one mortgage-bond was to make every portion of them equally liable for the debt, as if they had been one single property, and the case was analogous to that of a suit for contribution between the several holders of a single lot, one of whom has paid the whole revenue. Plaintiff, having been compelled to pay a sum of money in discharge of a burden which defendant was legally compellable to discharge, was entitled to recover it from defendant.

Held, that in determining their liabilities no other proportion would

so equitable in this case as that of the respective values of the properties at the date of the auction-sale. 12 W. R. 291.

673. A purchased certain villages in the name of his son, B. A. being indebted to C executed a mortgage-bond, and deposited the title deeds of these villages with C as security for the debt. C afterwards sued A for recovery of the mortgage-debt, and ultimately obtained a decree in his favour, pending this suit A died, and was succeeded by B his heir, against whom the suit was revived. B became a defaulter to Government, when the Government authorities seized the villages, and took steps for bringing them to sale to satisfy the Government demands. C informed the Government officer of his claim, and petitioned to have the sale stayed, but the Collector sold the villages as the property of B, suppressing the notice of the equitable charge of C upon the villages. C then sued B, the Collector, and the auction-purchasers, claiming to be entitled to the sale-proceeds of the villages in the hands of the Government, in satisfaction of his mortgage-debt. The *Sudder Dewanny* Court dismissed the claim of the plaintiff on the ground, that the decree made in the suit against A was against the effects of A, and only applied to such property as B was in possession of at that time; that as it had been sold to realize the demands of Government, the decree did not apply to the villages.

Such judgment on appeal reversed, the Judicial Committee holding:—*First.* That the suit was properly instituted for recovery of the sale-proceeds in possession of Government, as the decree obtained by C against B operated as a conversion of the estate of A., making it assets in B's hands, which C had a right to follow. *Secondly.* That, as the Government had notice of C's equitable charge upon the villages, and suppressed that fact at the auction-sale to the purchasers, there was a clear equity in C to call upon the Government for payment out of the auction-proceeds received by them, and an account directed of the amount received by the Collector from the sale of the villages with interest, so far as the amount received would extend to the payment of his mortgage-debt. 5 M. I. A. 271.

MORTGAGE (Foreclosure of).

674. A mortgagee has the right of foreclosure. 2 M. H. R. 289.

675. The power of foreclosure is incidental to a mortgage in the form of a conditional sale, and the mortgagees by availing themselves of that power do not forfeit the priority they possess. 2 N. W. P. 311.

676. No suit lies for the recovery of possession of lands which have passed in execution of a decree for possession after foreclosure of mortgage. 2 W. R. 300.

677. The effect of a stipulation as to repayment at a specified time is to entitle the mortgagee, if so minded, to foreclose at that time in the event of repayment not being then made. 16 W. R. 251.

A foreclosure decree only affects the interests of the parties to the suit. 14 M. I. A. 101.

679. The effect of a foreclosure decree in the Supreme Court in a mortgage suit between Hindus, is equivalent to a decree establishing proprietary right in the Mofussil Courts, on similar suits on the like instruments. 5 W. R. P. C. 83 ; 10 M. I. A. 111

687. In order to obtain a decree for foreclosure against a mortgagor, the *perwanah* to be issued by the Judge under section 8 of Regulation XVI of 1806 must distinctly notify to the mortgagor, that if he shall not redeem the property mortgaged in the manner provided for by the preceding section within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive. 3 N. W. P. 35.

681. A mortgagee by conditional sale has a right of entry immediately after default, and the Regulations do not debar him from the stipulated possession. Limitation runs from the date of such default ; no new cause of action arising upon foreclosure. 22 W. R. 90.

682. Where a mortgagee, after obtaining a decree for foreclosure, sued for possession and mesne profits, and the mortgagor did not prove that he had given plaintiff possession or directed his lessee to pay rent to the plaintiff : Held, that the mortgagor (defendant) was liable for *wasilat* from the date of foreclosure, so far as it was not barred by limitation. 22 W. R. 117

683. In the case of a mortgaged *Zemindari*, partly situated in two separate districts. Held that an order, made by the Judge of the Civil Court of one district, for foreclosure of the whole of the mortgaged property, was a sufficient compliance with the provisions of Bengal Regulation XVII of 1806 section 8, as to give the Civil Court of that district jurisdiction to entertain a suit relating to the whole property comprised in the mortgage, and to decree a foreclosure. 4 M. I. A. 392 ; 7 W. R. P. C. 66.

684. A mortgagee failing to fulfil one of the two conditions prescribed by Regulation XVII of 1806 section 8, *i. e.* furnishing the mortgagor or his legal representative with a copy of his application to foreclosure, cannot be said to be in a position to foreclose. 20 W. R. 363.

The "stipulated period" referred to in section 2 Regulation I of 1828 and section 12 Regulation XXXIV of 1803, is the whole period prescribed by the mortgage contract for the performance of the conditions upon the fulfilment of which the mortgagor is entitled to a reconveyance : and whether the mortgagor performs all those conditions or not, the application for foreclosure cannot be made before the expiration of such period. 13 W. R. 365.

686. Where a mortgagee extended the time for payment to the 25th November, and the mortgagor was prevented by the closing of the Court from depositing the mortgage-money in the Judge's Court on that day. Held that the mortgagor saved his estate from foreclosure by de-

MORTGAGE (FORECLOSURE OE).

positing the money in Court on the first day after the 25th November on which the Court was open. 8 W. R. 223.

687. The decree of the first Court having been wrong in not defining with sufficient certainty what was the property or the share of the property in respect of which the mortgagee was entitled to foreclose. Held that the Lower Appellate Court, instead of dismissing the suit by reason of this defect, should have remedied the defect itself, or (if it had not the means to do so) remanded the case to the first Court for that purpose. W. R. S. N. 215.

688. The mortgagors of certain landed property not having paid the money due on the mortgage within the stipulated period, the mortgagees considering it unnecessary to proceed under section 8 Regulation XVII of 1806 *i. e.* without waiting to foreclose the mortgage, brought a suit, obtained a decree, and took possession. Held, that as the mortgagees took possession before final foreclosure, the mortgagors were in a position to redeem, and might do so by payment of the advance made on the mortgage, whether such payment was made in cash or realized by the mortgagees from the usufruct of the estate. 13 W. R. 44.

689. Held by *Markby J.*, that where a plaintiff, a mortgagee seeking to foreclose, sets up in his plaint and written statement that his mortgagors created the mortgage in their character as executors under a will, he could, in the absence of *mala fides* and concealment, show during the trial of the cause that the mortgagors created the mortgage in some other character.

Held by the Appellate Court, that where three persons, who were executors under a will, executed a mortgage, and two of them were devisees under the same will, the mortgage, was a valid one and could not be resisted by a purchaser under a Sheriff's sale of the property mortgaged, who had only the right to redeem. 11 W. R. O. J. 21.

690. A suit for possession after notice of foreclosure having been decreed in favour of the parties who appeared as mortgagees in the mortgage deed, though it was contested that the ostensible plaintiffs were not really interested, an action was brought to recover the mesne profits of the land decreed in the above suit. While the case was under trial, L, whose guardian had brought the action, filed a petition, stating that he had nothing to do with the property, and that the real owner was C, who was in possession. A petition to the same purport was filed by C, and the Court directed that his name should be entered as a joint plaintiff to the suit. Held, that as the defendants were in no wise prejudiced by the disclosure made by L and C, and had not been ignorant of the real party with whom they had been dealing; and as the money claimed, was justly due by them to the party who had foreclosed the mortgage and taken possession, and it was not denied that that person was C, the parties in whose name the suit was brought might be considered in the light of trustees for the person beneficially interested.

Held too, that the suit could not be dismissed and justice denied, on

the technical ground that C had failed to verify his plaint as required by law. 10 W. R.

691. After appellant (mortgagee) had upon foreclosure of mortgage become absolute owner of certain *talooks* and obtained a decree for possession and been put into symbolical possession by the Zillah Court, the *Zemindar* brought a summary suit for rent in the Collector's Court against the heirs of the mortgagor, who allowed judgment to go by default, and an *ex-parte* decree was made against them. In execution of that decree, the *talooks* were sold to the *Zemindar's mooktear* at a grossly inadequate price. Both the *Zemindar* and his *mooktear* had the fullest notice of the appellant's title and claim to possession before the decree for sale. Held by the Privy Council that, under the Regulations in force at the time, and under the circumstances of this case such a sale against the real owner was clearly invalid, and that no authority had been shown to satisfy their Lordships that, by any known law or usage, *Zemindars* had the power to sell tenures of this kind for arrears of rent as a right inherent in or incident to the tenure, or that any such power rightfully exists, unless by special stipulation, independently of the Regulations. 17 W. R. P. C. 197.

692. The plaintiff sues for possession of property mortgaged to him after foreclosure. He in good faith advanced the consideration-money to discharge a debt contracted by the original owner, and his security was either wholly or in part, a substitution for the original valid mortgage by the said owner. The mortgagor was not a stranger, but a nephew of the original owner, and one who produced an apparently valid will, who had obtained a certificate of Court authorising him to collect the debts of the deceased, who was actually in possession of the property, and to whom the mortgaged property belonged, if not as devisee, at least as one of the heirs.

Held, under these circumstances, that the plaintiff had a valid title as mortgagee, and having foreclosed his mortgage, was now entitled to sue for possession.

Held also, that the principal defendant now in possession having purchased, at a sale in execution subsequent to the foreclosure proceedings (*i. e.* after the year of grace) the rights and interests of the original owner and of the mortgagor as his representative, and having by such purchase acquired only such rights and interests as then remained in the judgment-debtor (*i. e. nil*) is not entitled to withhold the estate from the plaintiff. 1 W. R. 92.

693. The interests of a Hindu widow (R. D.) in certain estates having been mortgaged, the mortgagees in due course foreclosed the mortgage and obtained a decree for possession. Intermediately R. D. committed default in the payment of the Government revenue, and her share was paid in by her co-sharers who brought a suit against R. D. to recover the amount and obtained a decree. This decree proving infructuous, they brought the present suit against the mortgagees: Held that plaintiffs were entitled to recover against the defendants who had

completed their legal title to R D's share, and were entitled, had they chosen, to make the payment which she omitted to make. 21 W. R. 255.

694. A suit by a mortgagee for foreclosure must be brought in the district where the land is.

In like manner a suit by a mortgagee who is entitled, not to a foreclosure, but to a decree to establish his charge, and for the sale of the specific property charged must be brought in the Court within the legal limits of whose jurisdiction the property is.

The remedy against the borrower personally under a mortgage-deed must be pursued in the district in which the cause of action arose.

But when the object of the lender is to proceed to enforce his charge against the property (such property being immoveable), his suit must be brought in the district where the property is situated. 2 N. W. P. 19.

695. Where several parties have an interest in a mortgage, it is not competent for one of them to foreclose in respect of his fractional share. 10 W. R. 476.

696. K and R. sued the Court of Wards as guardian of one P, an idiot, to foreclose a mortgage and obtain possession, that claim, being based upon a deed of *byebil-wufa* executed by L, the idiot's mother and guardian to provide means to meet an ancestral debt. The Sub Judge gave plaintiff a decree, holding that the lunatic as such had no *locus standi*; that his mother was sole heir; and that though she executed the deed as if on behalf of her son, yet it was not vitiated on that account, because it was executed in her proprietary and not her fiduciary character: Held that if the lunatic was not the owner, the suit was worthless for the purpose of foreclosing the equity of redemption of the real owner, who was no party to the suit. 19 W. R. 164.

697. A certain property was mortgaged to S who disposed of a portion to R. Both parties sued to recover possession after foreclosure. The Lower Appellate Court dismissed the claim as regards R's portion because R had not been a party to the foreclosure proceeding.

Held, that as the foreclosure was duly carried out by "the receiver" of the deed of mortgage (section 8 Regulation XVII of 1806), that is, the original mortgagee it was good as regards the whole property. 12 W. R. 353.

698. Where, in proceedings held before the issue of Circular Order of 22nd July 1813, a mortgagor had the opportunity, in a Court competent to decide the matter, to contest as against the mortgagees, all questions of fact necessary to give a good and absolute title to the mortgagees, and though called upon did not show that the mortgage was a bad one, but admitted that the mortgagees were not paid off and that an extension of the year of grace had elapsed without his per-

forming any of the conditions which would have saved the property from being foreclosed, it was held, that even if the proceedings did not possess the character of a regular suit, they were sufficient in themselves to effect a foreclosure, if such was their purpose. 10 W. R. 478.

699. Where a plaint prayed for foreclosure of mortgage, in the English form, of certain land, situated partly in Calcutta, and partly in the mofussil and for an account, held that leave to sue having been obtained under cl. 12 of the Letters Patent, the Court had power to make a decree with respect to the whole of the property.

The Court in such a case has no power to follow the procedure prescribed by Regulation XVII of 1806, which relates to the foreclosure of property in the mofussil, but it is bound to see that the defendant is not, by reason of the suit being brought in the High Court, deprived of any substantial advantage which he would have had if the suit had been instituted in the mofussil Court. 11 B. L. R. 301.

700. A, by a Bengali deed of conditional sale dated the 10th August 1853, mortgaged two estates, the deed providing that the mortgage-debt should be repaid on the 9th July 1855, and that, on default of payment the deed of conditional sale should become one of absolute sale, and that the mortgagee should thereupon acquire the absolute proprietary right, and might enter upon and retain possession of the mortgaged property. A failed to pay at the time stipulated, and on the 18th of December 1856 her right, title, and interest in the estates were sold in execution, and purchased by the defendants without notice of the mortgage. On the 3rd of April 1866, the plaintiff bought the mortgagee's interest, and in August 1867 he instituted foreclosure proceedings under Regulation XVII of 1806 against the defendants, the auction-purchasers. In a suit instituted by the plaintiff on the 22nd January 1874, against the auction-purchaser to recover possession of the mortgaged property: Held, that the cause of action arose on the 9th July 1865, when default was made in payment of the mortgage-debt, and the suit not having been instituted within twelve years from that date, was barred by section 1 cl. 12 Act XIV of 1859. No new cause of action arose by reason of foreclosure proceedings on the expiry of the year of grace in August 1868. 14 B. L. R. 87.

701. Where a party *bona fide* purchased from another, as his own property, land in fact mortgaged, and obtained possession and mutation of names, his title was held to be adverse to that of the mortgagee.

Foreclosure proceedings in the Supreme Court as to mofussil property, to which a purchaser from the mortgagor is not made a party, cannot effect that purchaser.

After a *bona fide* purchaser had been in open possession more than twelve years, and after the lapse of more than twelve years from the accrual to the mortgagee of the right of entry under the mortgage-deed (which was in the English form), the mortgagor sued the purchaser to obtain possession of the property, held, the suit was barred.

Quere.—Whether in cases in the mofussil where the mortgagor continues in possession paying rent to the mortgagee, the law of Limitation begins to run from the date of the right of entry. 8 B. L. R. P. C. 104, 105.

MORTGAGE (Kanam).

702. A *Kanam* mortgagee does not forfeit his right to hold for twelve years, from the date of the *Kanam* by allowing the *porapad* to fall into arrear. 1 M. H. R. 112.

703. Where a first *Kanam-holder* in his answer to a redemption-suit by a second *Kanam-holder*, for the first time denied his own *Kanam* and alleged an independent *janmam* right; held that he had not thereby forfeited his right to rely upon the option to make a further advance, to which as *Kanam-holder* he was entitled; though the denial and allegation were false, and though his documents in support of such allegation were forged. 1 M. H. R. 13. (Followed 1 M. H. R. 445.)

704. A *Kanam-holder* who denies his *janmi's* title forfeits his right to hold for twelve years. 1 M. H. R. 445. (1 M. H. R. 13) followed.

705. A *Kanamdar's* right to hold for twelve years depends on his acting conformably to usage and the *janmi's* interest, and is lost if he repudiates the *janmi's* title. It makes no difference when this is first done in his answer. 2 M. H. R. 109.

706. When the demisor of land under a *Kanam* agreement is unable to give possession, the demisee may repudiate the contract and recover the amount advanced. 2 M. H. R. 315.

707. A *Melkanamdar* cannot eject a *Kanamdar* or his assignee before the expiration of twelve years from the date of the *Kanam*. 1 M. H. R. 296.

MORTGAGE (Notice of Foreclosure of).

708. A notice of foreclosure, bearing the seal of the Court issuing it but signed only by a Moonserim, is not a sufficient compliance with the law, which requires that the notice be given under the seal and official signature of the Judge. 3 N. W. P. 176.

709. A mortgagee, under a conditional sale, caused notice of foreclosure to be issued, and subsequently by an agreement securing certain advantages to him, he extended the term of grace. The terms of that agreement not having been complied with, the mortgagee was, held to be entitled to revert to the foreclosure proceedings before instituted. 1 N. W. P. 22.

710. Per Phear. J.,—The passage and cases cited in pages 212 and 213 of Mr. Macpherson's work (3rd edition) on mortgages, seems to leave the matter one of some doubt and conflict. But, on the whole I think, that the greater preponderance of authority is to be given to the view that, unless the mortgagor gave notice of a private sale of equity of

redemption, or unless otherwise cognizance on the part of the mortgagee of the transfer by such sale is fully shewn, the mortgagee is not bound to give notice to private purchasers of a mortgagor's equity of redemption. This view is to some extent supported by the decision of Justices Kemp and Shumbhoonath Pundit in this case (1 Marshall's Reports 292).

But at the same time I conceive that, if the notice shall have been served on the mortgagor before his assignment, the notice has been sufficiently served and no further notice to the assignee is necessary. 3 W. R. 231, 232.

711. The notice of foreclosure under section 8 Regulation XVII of 1806 is not merely a preliminary proceeding leading up to a judgment of foreclosure to be subsequently pronounced in Court. It not only fixes the date from which the period, during which the mortgagor is to retain the right to redeem, is to be computed, but it is of itself the operative act in the foreclosure proceeding. The service of the notice, therefore, should be evidenced by the clearest proof, and be in all cases, if not personal at least such as to leave no doubt in the mind of the Court that the notice itself must have reached the hands or come to the knowledge of the mortgagors. W. R. S. N. 49.

712. Regulation XVII of 1806, giving no special direction as to the person on whom notice of foreclosure is to be served, when the person for the time being entitled to the equity of redemption is a minor, and no guardian of such minor has been appointed under Act XL of 1858, service of such notice of foreclosure upon the minor and on his mother will be deemed sufficient service. 2 N. W. P. 444.

713. The notice which the law requires to be served previous to foreclosure is to be served on the mortgagor or his legal representative.

Where a portion of the mortgaged property is sold in execution of a decree, if the decree-holder has a priority of right over the mortgagee, the balance, if any, of the sale-proceeds will go in diminution of the mortgagee's claim. W. R. S. N. 298.

714. The legal representative of a mortgagor is entitled to redeem the mortgaged property, and, as such, is entitled to notice of foreclosure. 23 W. R. 25.

715. The words "legal representative" in Regulation XVII of 1806 are not used in the sense of a *universal* legal representative, such as an heir. A purchaser of mortgaged property is included within the meaning of the term, and, as such, is entitled to notice of foreclosure whether he be a purchaser of the whole property or of a distinct and definite portion only, and whether the mortgagee has or has not consented to the assignment. 11 W. R. 548; 3 B. L. R. A. J. 172.

716. The purchaser from a mortgagor comes within the category of legal representatives under Regulation XVII of 1806. 10 W. R. 86.

717. The purchaser from a mortgagor is his legal representative and when the mortgagee takes out foreclosure proceedings, the notice enjoined by section 8 Regulation XVII of 1806 must be served on such purchaser if it issued after the sale; fresh notice to the purchaser would not be necessary if the sale took place after notice to the mortgagor.

Certain words in a mortgage deed stipulating that in the event of the property mortgaged being sold in execution of a decree or otherwise alienated, the mortgagee should recover from any other property in the possession of the mortgagor whose person should also be liable for debt, were construed as merely intended to give some supposed further security to the mortgagee, but not to take away his right to issue notice of foreclosure and obtain possession by suit, even though the mortgaged property were sold away. 11 W. R.

718. Proceedings in foreclosure are irregular and invalid unless a copy of the application accompanies the notice, as required by Regulation XVII of 1806. 22 W. R. 90.

719. The regulation as to service of a notice of foreclosure does not provide for any mode of service in substitution for personal service, though in some cases it has been held that personal service is not absolutely necessary; but to justify resort to any other mode of service it must be shown that in spite of efforts made for that purpose, the notice cannot for some reason be personally served.

A copy of the report of the Nazir of the Civil Court, copies of the depositions of witnesses not taken in the presence of the parties to the suit, and a copy of the final foreclosure proceeding, are not legal evidence to prove the service of a notice of foreclosure. 3 N. W. P. 325.

720. If the interest of the mortgagor in the mortgage estate has been sold under a decree, and the sale takes place before the notice to foreclose was filed, such notice, to be effectual, must be served on the purchaser, or decree-holder. 10 M. I. A. 2.

721. It cannot be said that, if a notice of foreclosure addressed to a deceased mortgagor has reached the hands of his representatives, they have not had notice, nor that they were debarred from paying or were not required to pay the amount of the mortgage upon receiving that notice. 17 W. R. 230,

722. A second mortgagee under a mortgage-bond is entitled to notice of foreclosure under Regulation XVII of 1806. 22 W. R. 475.

723. Where notice of foreclosure was shown to have been served according to the usual course of business in the Sheriff's office, the Court presumed that a copy of the application had been duly served therewith; but where it appeared that, according to the practice of the High Court, mention of the application would have been made in the

order if it had accompanied the notice, and no such mention was made, the Court refused to make such presumption. 14 B. L. R. 87.

724. After notice of foreclosure, and shortly before the expiry of the year of grace, a mortgagee allowed the mortgagor 6 months to redeem the mortgage. The mortgagor subsequently died, and the mortgagee sued his legal representative to recover the property. Held that it was not necessary that fresh notice of foreclosure should be issued. 10 W. R. 360.

725. A mortgage-debt not having been paid off on the date on which it was payable, notice of foreclosure was issued and served. During the currency of the year of grace, the mortgagor and mortgagee having come to an arrangement, filed petitions in Court in the foreclosure proceedings, setting forth that part-payment had been accepted, and that the rest of the debt would be paid with interest on the date of the expiry of the year of grace, failing which the sale should become absolute. Held that it was not the intention of the parties to substitute a new contract for the one under which the notice of foreclosure issued, or that the proceedings should be allowed to drop. 10 W. R. 326.

726. The period of one year allowed by section 8 Regulation XVII of 1806 to a mortgagor to deposit the amount of the mortgage-debt before the mortgage can be finally foreclosed, is to be reckoned from the date of the service upon him of the notice to redeem, and not from the date of the issue of such notice. 10 W. R. F. B. 27. ; 1 B. L. R. F. B. 14.

727. The service of notice of foreclosure on the occupant of the mortgaged property (a party who claimed as purchaser from the mortgagor, but who had not established his title), does not estop the mortgagee from disputing the occupant's title to redeem the mortgaged premises. 7 M. I. A. 323.

728. An extension of the time for payment, allowed by the mortgage through the Court, does not necessitate proceedings being taken *novi*, or a fresh notice of foreclosure being served. 1 W. R. 44.

729. Where a mortgage becomes foreclosed, and the mortgagee abstains from enforcing his right and allows the mortgagor an extension of time, it is not necessary that a fresh notice should be served. 20 W. R. 176.

730. The omission of the Court to send with a notice of foreclosure a copy of the mortgagee's petition, as required by section 8 Regulation XVII of 1806, was held to be not such an irregularity as made void the foreclosure, in a case where, subsequent to the issue of the notice, the mortgagor continued to live in the neighbourhood of the property, and the mortgagee erected buildings on it and used it as his own without objection or claim on the part of the mortgagor. W. R. S. N. 36.

731. Two persons jointly held a mortgage, each having an equal share in it. The equity of redemption having subsequently become vested solely in one of these persons ;—Held that, under the circumstances, a notice of foreclosure confined to a one-half share only of the mortgage (issued by the mortgagee who had no interest in the equity of redemption) was sufficient, and then the foreclosure proceedings were not bad, although they related only to a part and not to the whole of the mortgaged property. W. R. S. N. 285.

732. U obtained from G a mortgage on a *putnee talook*, previously pledged to P by G's father C as security for the rents of another property leased to A. U's mortgage-debt not having been paid, notice of foreclosure was issued, and U was about to take possession, when the property was sold in execution by P with notice of U's mortgage, and purchased by B. U now sues to set aside the sale. Held that the lien on the property obtained by P and, though his sale in execution, by B had a legal priority over U's mortgage, and that the sale was not in execution of a mere money-decree. 3 W. R. 110.

733. In a suit by a mortgagee for possession after foreclosure proceedings under Regulation XVII of 1806, on the ground that the mortgagor had failed to pay the money within one year from the notice, the defence was that the notice had been issued before the lapse of the time stipulated for re-payment. The question then became what was the stipulated period? It was found that the period stipulated for the payment of the principal sum was 3rd July 1866; but the deed contained a proviso that if the mortgagor paid the interest every half year up to 3rd January 1871, the mortgagee would not enforce his security on the date which had been fixed. As, however, the mortgagor had not performed his part of the engagement, it was held that the time for redemption expired with the period stipulated for the payment of the principal sum, i. e., the 3rd July 1866. 21 W. R. 274.

734. Property in the Mofussil which had been mortgaged in 1862 to C by a deed in the English form containing the usual power of sale on default of payment, and again in 1864 to F by deed of conditional sale, was sold by C under the power of sale and purchased by N. Previously to the sale F had foreclosed. In a suit for possession of the property brought by the widow of F against N and the mortgagor, it appeared that no notice of foreclosure had been served on N: Held that N was entitled to such notice by the fact of his purchase whether he had obtained possession or not, and that no notice having been served upon him, the suit was not maintainable against him. 15 B. L. R. 28.

735. By a mortgage in the English form, the defendants conveyed certain property to the plaintiff, subject to the proviso that, in the event of the defendants paying to the plaintiff the principal sum on the 4th September 1868, and in the meantime paying interest on that sum half-yearly, with annual rests, in case of default of such payment, then the plaintiff should reconvey the property. The defendants failed to pay interest; and on the 4th December 1866, the plaintiff applied to the

Judge of Chittagong for foreclosure; thereupon notice under section 8 of Regulation XVII of 1806 was issued, and served on the defendants. On the 15th April 1868, this suit was instituted by the plaintiff for the establishment and confirmation of absolute purchase, and to obtain possession of the mortgaged premises. Held, that the suit was not maintainable. Regulation XVII of 1806 applied to this mortgage; and, under that Regulation, the mortgagee could not apply for foreclosure, until the time agreed upon for re-payment by the mortgagor, that is, the "stipulated period" referred to in section 7, and the mortgagee is entitled to one year's grace from notification of the application for foreclosure made after that date. 5 B. L. R. 339.

736. The mortgagor, by deed, authorized his widow to adopt a son. After his death his widow exercised the power, and adopted a boy, a minor, who became by the Hindoo law, the legal representative of the deceased. The order for foreclosure was served on the widow only. Held, further, that, as the widow had a life interest, and was also guardian of the minor, such service was sufficient. 4 M. I. A. 392; 7 W. R. P. C. 66.

737. The prior foreclosure of a subsequent mortgagee does not relieve the property of the lien upon it under the first mortgagee.

Quere.—Whether the second mortgagee is the mortgagor's legal representative for the purpose of the notice of foreclosure under section 8 Regulation XVII of 1806.

Where the first mortgagee had no knowledge or cognizance of the second mortgage or of the foreclosure proceedings taken under it, the second mortgagee has no just ground of complaint that the notice of foreclosure was served, not on him, but on the mortgagor. 4 W. R. 1.

MORTGAGE (Of Undivided Share in joint-Estate).

738. A mortgage of an undivided share in land may be enforced against lands which, under a *butwara* or revenue partition, have been allotted in lieu of such share, whether such lands be in the possession of the mortgagor or of one who has purchased his right, title, and interest.

Lands allotted in severalty by the *butwara* to the co-sharers of the mortgagor are not subject to the mortgage. 1 L. R. I. A. 106.

739. Where the owner of an undivided share in a joint and undivided estate mortgages his undivided share, he cannot by so doing affect the interest of the other sharers, and the persons who take the security, *i. e.*, the mortgagees, take it subject to the right of those sharers to enforce a partition, and thereby convert what is an undivided share of the whole into a defined portion held in severalty.

Where such a partition is effected under the provisions of Regulation XIX of 1814 before the mortgagees have completed their title by foreclosure, and the consequential decree for possession, the mortgagees of

the undivided share of one co-sharer who has no privity of contract with the other co-sharers would have no recourse against the lands allotted to such co-sharers ; but must pursue their remedy against the lands allotted to the mortgagor, and, as against him, would have a charge on the whole of such lands. 21 W. R. P. C. 233.

740. A member of a joint Hindu family granted a usufructuary mortgage ; he subsequently, without the knowledge of the co-partners, released the equity of redemption ; on hearing of this the co-partners contested the validity of the release ; held, that the parties claiming from the person to whom the release was made took, so far as the co-partners were concerned, a title only as mortgagees.

Act XIV of 1859, section 1, clause 13 is intended to apply to suits between members of a joint family, not to a case where a mortgage having been made by one member on behalf of all to a stranger, that member afterwards, against the will of his co-partners, releases the equity of redemption.

To entitle a purchaser to claim the benefit of Act XIV of 1859 section 5, he must prove, 1st, that he is a purchaser of what is represented to him and what he fully believes to be not a mortgage but an absolute title ; 2nd, that he purchased *bona fide*, that is to say, without a knowledge of the title having been originally a mortgage and of a doubt existing as to the mortgage having ceased ; and 3rd, that he is a purchaser for valuable consideration.

A pleading setting up as a defence a purchase for valuable consideration should aver the seisin of the vendor, and the sale of his absolute title for good consideration.

Where an estate having been originally mortgaged by K., a member of a joint Hindu family, he subsequently, without the knowledge of the other members, released the equity of redemption to R., who afterwards sold to H., the owner of a factory, who afterwards sold to G. and Co. the factory with the lands appertaining thereto, amongst which was the property so released, and proceedings had for many years being taken by the other members to assert their rights,—Held, reversing the decision of the High Court that G and Co. were not purchasers entitled to the protection of Act XIV of 1859 section 5 : Held also, that section 10 does not apply in such a case, although K acted fraudulently. G B. L. R. P. C. 530, 5 1.

MORTGAGE (Of Village without specification of Boundaries).

741. Where a village ; without specification of boundaries, is mortgaged as a whole, the mortgagee is, on the one hand, entitled to it as a security with any casual increase or decrease which may occur to it ; and is, on the other hand, subject to its redemption by the mortgagor to the same extent. 11 B. H. R. 32.

MORTGAGE [Otti].

742. An *otti*-holder, like a *kanamdar*, forfeits his right to hold for twelve years, by denying the *janmi's* title. 2 M. H. R. 161.

743. An *otti*, like a *kanam*, mortgage cannot be redeemed before lapse of twelve years from its date.

An *otti* differs from a *kanam* mortgage, first, in respect of the right of pre-emption which the *otti*-holder possesses; secondly, in being for so large a sum that, practically, the *janmi*'s right is merely to receive a pepper-corn rent. 1 M. H. R. 261.

744. A *karavanan* singly may make an *otti* mortgage.

Semble.—An *otti* mortgage cannot be redeemed until after the lapse of twelve years from its date. 1 M. H. R. 122.

745. Where a *janmi* made an *otti* mortgage and more than twelve years after made a second *otti* mortgage to a stranger without having given notice to the first mortgagees so as to admit of the exercise of their option to advance the further sum required by the *janmi*: Held, that the second mortgagee could not redeem the lands comprised in the first mortgage. 1 M. H. R. 356.

746. During the continuance of a first *otti* mortgage the *janmi* is in the same possession as regards his right to make a second *otti* mortgage to a stranger after, as he was before, the lapse of twelve years from the date of the mortgage. 1 M. H. R. 356.

MORTGAGE (Pendente lite).

747. A sale or mortgage *pendente lite* is invalid as against the plaintiff and the vendor or mortgagor is under a disability to give any valid possession as against the plaintiff in the pending suit, to the party who becomes a purchaser or mortgagee during the pendency of the suit whether or not the purchaser or mortgagee *pendente lite* has knowledge of the prior sale or mortgage as to which the litigation is pending or of the litigation itself. 11 B. H. R. 24, 25.

748. The rule *pendente lite nihil innovetur* is in force in British India. Therefore, where the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale, mortgaged the same house by a registered mortgage to another person, it was held that the last mentioned mortgagee had no title as against the purchaser under a decree for sale in the suit, although such purchaser was the plaintiff in the suit.

A grantee or vendee of the defendant, becoming such during the pendency of the suit, need not to be made a party to the suit, and, inasmuch as the first above mentioned rule does not rest upon the equitable doctrine as to notice, it is a matter of indifference whether or not, at the time of his becoming grantee or vendee, he had actual notice of the existence of the suit. 11 B. H. R. 64.

MORTGAGE (Prior to Registration Act).

749. Where a complete title as mortgagee was acquired before the Registration Act of 1864, the mortgage though not registered was held to be good against a registered deed of sale executed after Act XX of 1864, came into operation. 22 W. R. 3.

MORTGAGE (Prior to Regulation XVII of 1806).

750. Where the time fixed for payment of a mortgage in the nature of a *bye-bil wuffa* was the end of 1802 and there was no allegation of tender or deposit of the money prior to that date: Held that the mortgagor had, under Regulation I of 1798, lost his right of redemption, and that the benefit of Regulation XVII of 1806 could not be applied to mortgages made prior to the passing of that enactment. W. R. S. N. 183.

MORTGAGE (Priority in case of).

751. A prior mortgage established (as made *bona fide* against a purchaser of the Insolvent's rights from the Official Assignee. 1 W. R. 137.

752. A prior mortgagee, having purchased, may still use his mortgage as a shield against the claims of subsequent mortgagees. 7 M. H. R. 229.

753. A prior security by unregistered contract does not give a preferential title over a second mortgagee who obtained a conveyance of the land for valuable consideration and without notice, and has foreclosed the mortgage. 2 W. R. 286.

754. Where, when Act XIX of 1843 was in force, a purchaser bought land with notice of a prior unregistered mortgage which was referred to in the purchase-deed, the purchaser agreeing to pay off the mortgage, it was held that the purchaser took subject to the mortgage, notwithstanding it not being registered. 7 B. H. R. A. J. 56.

755. Held that a mortgagee in possession, who also became purchaser of the property for the amount secured by the mortgage, under a deed of sale which was neither stamped nor registered, could fall back upon his mortgage, and recover the amount thereof, in preference to a subsequent purchaser of the same property whose deed of sale was both stamped and registered. 2 B. H. R. 198.

756. Where a plaint asks for the realization of a mortgage, and the judgment, although it does not in terms order the sale of the mortgaged property, yet directs that the plaintiff's claim should be granted, the sale which follows in execution of the decree passes to the plaintiff the actual property which was mortgaged. 4 W. R. 32.

757. Plaintiff had a first mortgage in 1866 of 8 annas of a certain *mouzah*, and a second mortgage in 1868 of the whole 16 annas of the same *mouzah*. In 1869 the *mouzah* was sold in execution of a decree obtained by her under section 53 Act XX of 1866, upon her first mortgage, and purchased by defendant with notice of plaintiff's second mortgage. Prior to the first mortgage, the *mouzah* in question had been attached in 1864 in execution of decree by R and G, who, on the strength of their attachment, were declared by the Lower Court entitled

to be first paid out of the proceeds under section 270 Act VIII of 1859. Held that the defendant was not entitled to have the second mortgage held void as against him, the words "null and void" in section 240 having been ruled to mean, not null and void as against every body, but null and void as against the attaching creditor; but that the defendant, as purchaser under the sale of 8 annas of the *mouzah*, was entitled to have priority over the second mortgage, it not being just and equitable that the plaintiff should be allowed to set aside her own act in getting the property sold under the first mortgage, and to set up the second mortgage against the first. 18 W. R. 280.

758. A mortgagor, a few days after hypothecating a *mouzah* as security to the Government, mortgaged it with other property to the plaintiff. The deed of mortgage was immediately registered. The security deed was not registered till long afterwards. The *mouzah* having been sold by the Collector on account of a sum due under the security deed, it was held that, though the purchaser took the *mouzah* subject to the prior registered mortgage, yet the mode in which the property had been dealt with by the mortgagor, entitled the purchaser to require that the other property should first be applied in satisfaction of the mortgage-debt. 1 W. R. 353.

759. On the 31st August 1863, A mortgaged his house to B, who brought a foreclosure suit, and, on the 7th July 1866, obtained a decree against A for the sale of the house, if the mortgage-debt was not paid on or before the 24th March 1868. The debt not having been paid, the house was sold at a Court's sale on the 15th July 1870, and purchased by C. In an action brought by the plaintiff to recover possession of the house on the ground that he had purchased it on the 2nd August 1868 at an execution sale under a common money-decree against A: Held that the plaintiff's sale was subject, not only to the mortgage of 1863, but also to the decree upon it under which the right, title, and interest of the mortgagor A, passed in 1870 to C, whose purchase was entitled to preference to the plaintiff's purchase in 1868.

Held, further, that if there had been no decree in the mortgage suit, the fact that that suit had been instituted in 1866, and was pending in 1868, would have been sufficient to defeat the plaintiff's suit; his purchase in 1868 having been made *pendente lite*, was completely subject to any decree which might be made in the mortgage suit. 11 B. H. R.

760. A suit to redeem a prior mortgage is maintainable by a second incumbrancer. 5 N. W. P. 145.

MORTGAGE (Purchaser of Equity of Redemption of).

761. The purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the mortgagor: he cannot set up against such subsequent incumbrances either a prior mort-

of his own or a mortgage which he or the mortgagor may have got in. 11 B. H. R. 41.

The only payments which purchasers of the equity of redemption can claim to deduct from the mortgage-debt, are sums actually received by the mortgagee in reduction thereof, not money owed by the mortgagee to the mortgagor on some other account. 24 R. 460.

763. A purchaser of the equity of redemption, who had obtained a decree against his vendor's mortgagee for possession in satisfaction of the debt, was held to be bound to such mortgagee alone, and not to be bound to see whether the mortgagee had made any subsequent transfer of his interests or effected any other mortgage. 11 W. R.

764. A purchaser of the right of redemption of a mortgagor may sue without tender out of Court of the mortgage-debt to the mortgagee. The tender of the money out of Court only affects the purchaser's right to recover his costs. 3 W. R. 128.

The purchaser of an equity of redemption sued to redeem and obtain possession of the land: Held, that he was entitled to possession if, on taking the accounts, it appeared the mortgage-debt had been liquidated before the plaint was filed,—or upon paying into Court within one month the balance remaining due, if, on taking the accounts, it should appear that any thing still remained due. 10 W. R. 167.

666. Where one of several mortgagees has purchased the equity of redemption as to a part of the mortgaged property, the purchaser of another part is not thereby entitled to redeem, unless he discharges the whole mortgage-debt. 5 N. W. P. 148.

767. Where a mortgagee sues upon his mortgage-bond and his claim is decreed, the decree should be satisfied out of the mortgaged property, and not out of the right, title, and interest which remain in the mortgagor. The purchaser at the execution-sale acquires all the interest which passed by the mortgage to the mortgagee and any interest which remained in the mortgagor, i. e., his equity of redemption.

If there was a second mortgage, all that it could pass from the mortgagor was his equity of redemption, and the decree in a suit on such mortgage could only authorize the sale of the equity of redemption unless the first mortgagee was made a party and his mortgage shown to be invalid and the second mortgage to have priority. 22 W. R. 360.

768. Plaintiff and defendant No. 5 mortgaged over the same property, the mortgage of the latter being prior to that of the former.

Defendant sued for the money covered by the *kisthunde* and obtained a money-decree, in execution of which the rights and interests of the mortgagor were purchased, after notice of plaintiff's lien, by defendant No. 5 who entered into possession.

Held that under the circumstances, the mortgagor's, rights and interests, sold as above, amounted only to the equity of redemption, and the sale did not extinguish plaintiff's right under the subsequent mortgage, and that the purchaser could be entitled to retain possession only in case of his paying off plaintiff's lien. 14 W. R. 238.

769. In 1840, A mortgaged certain lands to B., which he had granted in *patni* at a rent of Rs. 145. Subsequently in September 1844, A granted a fresh *patni* at a reduced rent of Rs. 90; and on the 9th 1844 A mortgaged the same lands to C. In 1856, C obtained a decree for the redemption of the mortgage to B., and he paid off the to B., but it did not appear that he took an assignment of the for the purpose of keeping it on foot as a security against ones created by A subsequently to the date of that mortgage, and prior to that of the mortgage to himself; and in 1862, he obtained a final decree for foreclosure against A. In a suit by C to set aside the lease of September 1844, held that it was valid and binding upon him. 3 B. L. R. 463.

770. A mortgaged to his brother B his twelfth-share in the immovable estate of the family. C, at B's request, became surety for A to Government. A having become a defaulter, C, became liable to Government in respect of his defalcations. B, with a view to indemnify C, transferred to him A's mortgage; C, at the same time, assigning to B a debt due by D to A, which had been previously assigned by A to C. Government sold A's interest in the twelfth-share, which was purchased at the sale by B's son, E.

In a suit brought by C against B to obtain possession of A's share: Held that the assignment by C to B of D's debt was a sufficient consideration for the transfer by B to C of A's mortgage; that the sale by Government of A's share was subject to such pre-existing valid charge; and that E, to whom the equity of redemption only passed by the purchase at the Government sale, was a necessary party to the suit, which was accordingly, remitted to the Court below, in order that he might be made a defendant, and a new decree passed upon the merits. B. H. R. 94.

771. Purchasers of the equity of redemption of a portion of certain *Mouzas*—held, entitled to redeem, on payment of a proportion of the mortgage-debt.

Principles upon which the mortgage-debt chargeable on each separate village, ought to be apportioned.

When a creditor sues for his principal and interest, the latter being equal or more than equal at the time of the commencement of the suit to the amount of the principal, he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his debtor's resistance to the demand.

Such a rule, with respect to interest, does not apply to a case in which a mortgagee in possession under a usufructuary mortgage is not a

party suing for the money, but resisting a claim for redemption and settlement of the account. 13 M. I. A. 404; 14 W. R. P. C. 17. D.

772. G borrowed money from S. He then borrowed money D mortgaging as security the property in suit. After that he borrowed from plaintiffs, executing a bond by which he again mortgaged the same property. Subsequently plaintiffs obtained a decree by which the mortgaged property was declared liable to sale for the amount decreed, sold the property in execution, and purchased it themselves.

They were disturbed from possession by defendants in execution of a rent decree under which they ousted plaintiffs and got their own names registered as proprietors. Plaintiffs now sue for declaration and enforcement of their rights as purchasers at the above sale.

Defendants claimed as purchasers in execution of a money decree obtained against G by the first creditor S, alleging that they paid off the money due to the second creditor D and were entitled to hold possession, their purchase having been previous to that of the plaintiffs.

Held that in purchasing the rights and interests of G, defendants purchased his right to redeem property already subject to two mortgages, and as they purchased with full notice they could only retain possession by paying of both mortgages.

Held that plaintiff purchased not merely the equity of redemption, but G's rights and interests as they were when the mortgage was created subject to the mortgage held by D, but free from subsequent encumbrances. 14 W. R. 233, 234.

773. The doctrine of the English law with respect to the equity of redemption, after default of payment of the mortgage-money, is unknown to the ancient law of India prevailing in Madras, which, in the absence of any Regulation or Act of the Legislature, altering such law, determines the interest of a mortgagor, in favour of the mortgagee under a conditional sale made absolute by failure of the mortgagee to redeem at the time specified in the deed.

The provisions of Bengal Regulation XVII of 1806, allowing, in respect of *bye-bil-wuffa*, the mortgagor, or his representatives to redeem at any time before foreclosure has not been extended to Madras.

A *bye-bil-wuffa*, or mortgage and conditional sale usufructuary, was executed in 1808 and the mortgagees were put in possession. The deed contained a condition that if the mortgagor failed to redeem, within five years, the conditional sale was to be absolute. The mortgagor failed to redeem within the stipulated period, and the mortgagee afterwards, without having foreclosed, sold the mortgaged premises. In 1853 the mortgagor's representative brought a suit against the purchaser, under Madras Regulation XXXIV of 1802, section 8, to redeem the estate. Held, that the interest of the mortgagee, after the expiry

of two years, became absolute. 13 M. I. A. 560; 15 W. R. P. C. 35.

MORTGAGE (Redemption of).

774. A *bye-bil-wuffa*, or *kutkabala* (mortgage or conditional sale), is redeemable like an ordinary mortgage, and is subject to foreclosure.

When a mortgagee seeks to foreclose, he must effect that object according to the mode prescribed by Bengal Regulation III of 1793 section 14; II of 1803, section 3; and XVII of 1806 sections 7 and 8. 7 M. I. A. 323.

775. A mortgagor is not entitled to a decree for redemption so long as anything is due upon the mortgage. W. R. S. N. 349.

776. Where a document is, on its face, a mortgage, the right to redeem is so much an essential as not to be variable by agreement. The question of intention *extra* the document does not, therefore, arise. 7 M. H. R. 395.

777. The payment, by order of the Judge, into the Collector's treasury before the expiration of the year of grace, of a debt due to a mortgagee, was held to be a deposit in Court entitling the borrower to redeem. W. R. S. N. 184.

778. A mortgagor stipulated by an instrument in writing that if he failed to repay the sum lent on mortgage within three years, the property mortgaged was to be held on absolute sale. Held, that the mortgagor was entitled to redeem although the amount lent had not been repaid within the three years. 2 M. H. R. 420.

779. Where a mortgage has not legally been put an end to, the mortgagor (or his representatives) is entitled to come into Court and ask to be allowed to redeem, provided 60 years have not elapsed since the last recognition by the mortgagee of the plaintiff's title to the mortgaged property. 10 W. R. 478.

780. In a suit for redemption, in the absence of any proof of a mortgage by the plaintiff, the existence of such a transaction between the parties cannot be assumed, in consequence of the failure of the defendant to establish an alleged sale.

Very slight *prima facie* proof on the part of the plaintiff would suffice to shift the entire burden of proof on the defendant, but in its absence a plaintiff seeking to redeem cannot be relieved of the burden. 5 B. H. R. A. J.

781. In a suit to redeem a mortgage, A, to avoid an objection taken as to parties, filed a petition disclaiming all interest in the estate. A had then only an expectant right to the estate, but to which she afterwards became absolutely entitled. Held, in the circumstances,

and in the absence of any consideration given to A, that the petition did not (1) operate as a conveyance of A's rights, or (2) as an estoppel to a suit by her for possession of the estate. 13 M. I. A. 4
15 W. R. P. C. 16.

782. Where a suit for redemption was brought, not on the ground that the plaintiff succeeded as heir to her husband the mortgagor, but on the ground that she held in right of dower, and the plaintiff in the Lower Courts never based her claim by right of heirship, she was not allowed in special appeal to urge her claim to redeem on the ground of heirship. W. R. S. N. 327.

783. An agreement reciting that, in consideration of the care which the plaintiff took of the defendant and her property during her infancy and of the instruction given to her, for which the plaintiff expended her own money, the defendant had mortgaged her house to the plaintiff; and stipulating that, in the event of the defendant going to live with any man, and similarly after her death, the house should become the plaintiff's property: Held good in law, and in substance an account stated, with a mortgage to secure the amount due; and the usual decree for redemption made: reversing the decrees of the Courts below, which threw out the plaintiff's claim. 2 B. H. R. 337.

784. Where a mortgagee had assigned his interest, and agreed to pay rent to the assignee, and subsequently permitted the mortgagor to redeem:—Held that a suit for rent could not be maintained in the Revenue Courts by the assignee against the mortgagor, as the relation of landlord and tenant never existed between them, nor against the representatives of the mortgagee after they ceased to be in occupation of the land; but that the assignee should proceed under the law in the Adalat Courts. 2 B. H. R. 183.

785. Certain property, purchased in the name of B, was mortgaged by him to the defendant, to whom a further charge was subsequently executed by D E and F. In a suit for redemption by plaintiff claiming title as heir of B.—Held that the defendant was at liberty to show that B was only a trustee for D E and F. 2 W. R. 70.

786. In a suit to recover possession of land with surplus collections by redemption of a mortgage created by a *Zur-i-peshjee* lease, which was executed before the usury law of 1855 was passed, where the lessee claimed the surplus collections as his profits: Held that the question should be decided on the principle of the Privy Council ruling in the case of Hoonooman Pershad, *viz.*, that the mortgagee should be charged in the account for actual rents and profits, and receive interest at the highest rate sanctioned by the law then existing.

Finding, on adjustment of the account between the parties, that there was a balance in favor of the mortgagee, and that therefore plaintiff was not entitled to a decree for re-entry, the Court determined to

declare the state of the account between the parties up to the end of the year to which the evidence extended. 24 W. R. 275.

787. The holder of a field, on the survey tenure, mortgages it with possession, secured by a registry of the mortgagæ's name as occupant. Certain fruit trees, coming under the operation of No. 3 of the Revised Survey Rules, are sold, by the Government, to the mortgagee as occupant:—Held that the trees, by the sale, become a portion of the mortgaged estate, and such, liable to redemption, on payment of the amount of the mortgage money with interest, of the money laid out in purchasing the trees, and of other reasonable expenses. 10 B. H. R. 369.

788. Where a decree under which mortgagors obtained possession of mortgaged property is reversed, the mortgagees are entitled to be replaced in possession and to get complete restitution, and to be placed in the same position as they were in before the erroneous decree was made—even if the decree reversing the erroneous decree does not provide that the mortgagees should recover possession. 14 W. R. 465.

789. Where a mortgage-bond contained an agreement to repay the money with the interest by certain day, and proceeded thus "If I (the mortgagor) fail to pay the amount, then I will put you in possession of the bond, and you may enjoy it; and when I have the means I will redeem the land and pay the debt with interest and take back the bond":—Held that on the mortgagor's default the mortgagee might sue for the money, and that he was not bound to accept the land and forego his right of action. 1 M. H. R. 114.

790. Where monies were advanced to several mortgagors, who owned the mortgaged land in certain defined shares, and the mortgagee by purchasing the interest of some of the mortgagors in such land, broke up the joint security, the remaining mortgagors are entitled to redeem on payment of a just proportion of the moneys advanced. 2 N. W. P. 4.

791. A mortgagor of *lakheraj* land subsequently assessed with Government Revenue is not entitled to redeem except on payment of the amount paid by the mortgagee to Government for revenue, with interest in addition to the money due under the mortgage. But in a suit for redemption in which the mortgagor deposited before suit the amount of the principal sum borrowed by him, he is entitled to a decree on payment into Court of the further sum paid for Government revenue. 3 W. R. F. B. 174.

792. In September 1840, R by a deed in the English form mortgaged his Zemindary with other property to S. In October 1844, he mortgaged the same lands to plaintiff who after obtaining a decree for the redemption of the former mortgage and paying it off, obtained a final decree in 1862 for foreclosure as against R. He now sues to set aside a *putnee* granted by R subsequent to the date of the first mortgage and before the date of the mortgage to himself.

Held that as plaintiff had not kept on foot the first mortgage to S as a distinct and distinguishable security, the debt to S must be treated as

paid off and extinguished and the defendant's *putnee* lease was valid and binding on plaintiff. 14 W. R. 491.

793. Where a certain quantity of land was the subject of one *Zur-i-peshgee* mortgage, redeemable on payment of Rs. 225 to K and Rs. 215 to M, the mortgagees taking possession in moieties, it was held that the mortgagor could not recover any portion of the land until he had paid up all the money due upon the mortgage, *e. g.*, as long as he had not paid up the amount due to M, he could not claim even the land allotted to K, whose portion had been liquidated. 22 W. R. 262.

794. On a mortgage of land, with a proviso that, in default of repayment of the money advanced, the mortgage should be turned into a sale, a third party joined as surety undertaking to repay the amount advanced, if the mortgagor made default in payment at the stipulated time. Default was made, and the surety paid the money, and took an assignment of the land from the mortgagee. Held, that the heir of the mortgagor was entitled to redeem, and that as against him the surety could not claim to hold the lands as purchaser. 1 B. H. R. 135.

795. The purchaser of a share in an estate which had been jointly mortgaged by the several shareholders, and subsequently further charged by all by deeds to which one or more were parties, sued for the redemption of the whole estate by payment of the original mortgage-debt. Held that representing the whole of the co-sharers, he must if he desired to redeem, discharge all the debts with which they had jointly or severally charged the property.

An agreement in a bond, executed by a mortgagor subsequently to a mortgage, in the following words, *viz.*, "after the expiry of the mortgage, when the time comes for payment of the mortgage-money, first I will pay the amount of the mortgage," is sufficient to create a charge on the mortgaged estate. 4 N. W. P. 161, 162.

796. Where money was paid into Court by a person alleged to be a mortgagor of certain property after notice of foreclosure, without any actual restriction being placed on its being paid over to the alleged mortgagee, but the payment was made with a notice in these words: "I have shown the mortgage to be false and fraudulent, and to set aside the *kabala* and to get back the money I shall here after institute a regular suit;" It was held that Regulations I of 1798 and XVII of 1806, section 7, do not apply to such a case. Such payment gave no right to redeem. B. L. R. S. V. F. B. 598.

797. A mortgagee cannot grant a title to any one in excess of the duration of his own interest in the estate.

Mortgagors not being entitled to possession until redemption, their right of action as against the grantee of the mortgagee, runs from the date when redemption was effected.

No such relation as that of landlord and tenant exists between a mortgagor (after redemption) and the grantee of the mortgagee, and such

mortgagor must establish his right to collect rent before he can sue to have the amount thereof ascertained. 2 N. W. P.

798. In 1819 A mortgaged lands in the Mofussil to B and, as a collateral security, gave B a bond and warrant of attorney to enter up judgment in the Supreme Court. In 1821 execution issued on this judgment, and under a *fifa*, the property was seized and sold by the plaintiff, B was declared the purchaser and got a bill of sale and was put in possession. B having remained ever since in possession, A's representatives in 1865 sued to redeem on the ground that the mortgage debt was more than satisfied by the usufruct:—Held that the right of redemption still subsisted: that at the time of the Sheriff's sale in 1821, an equity of redemption could not be seized and sold under a *fifa*., and therefore no title passed to B when he purchased; and that as B had no right to possession save as mortgagee, he must be deemed to have obtained and to have remained in possession in that capacity. 8 W. R. 210.

799. The estate in dispute was mortgaged to the defendant in the form of a *Zur-i-peshgen* lease to continue so long as the mortgage-money remained unpaid. The mortgagee having been evicted by the mortgagor, sued and obtained a decree for possession and *wasilat* (the latter to be assessed in execution). He never obtained possession under the decree but recovered *wasilat* by execution. Two persons (the plaintiff's in these suits) claiming separate shares in the entire estate by purchases from the mortgagor subsequent to the mortgage, sued separately each to redeem his own share upon payment of a proportional share of the mortgage-money. Held that the plaintiffs, as representing the original mortgagor, were entitled to redeem, but that as the mortgage was an entire estate, neither to them could redeem upon payment of less than the full amount of the mortgage-money.

Held also that the defendant having been wrongfully dispossessed, was not found to account for the *wasilat* recovered under his decree, the *wasilat* or damages so recovered being different from the usufruct enjoyed by a mortgagee. 6 W. R. F. B. 240.

Anterior to the year 1806, the rights of a holder of a *wuffa* (conditional sale), were enforceable according to the strict terms of the agreement. It was then necessary to pay the amount when due. By *Bengal Regulation XVII* of 1806, a modification of this strict rule of the rights given to the holder of such a contract was introduced. The 7th section gives the mortgagor a right of redemption within one year after an application by the mortgagee to the Court under the 8th section of that Regulation. After such an application the mortgagor must either pay or tender the money lent, or the balance then due, if any part of the principal has been discharged, and if the mortgagee has not been in possession, any interest that may be due, or he must make a deposit pursuant to *Bengal Regulation 1* of 1798 section 2.

The general effect of these Regulations is, that if anything be due on

the mortgage, and the mortgagor make no deposit, or an insufficient one, the right of redemption is gone at the expiration of the year of grace. But the title of the mortgagee is not completed, he must bring a suit to recover possession, if he is out of possession, or obtain a declaration by the Court of his title if he is in possession, and in that suit the mortgagor may contest the validity of the conditional sale, or the regularity of the proceedings taken under Regulation XVII of 1806, in order to make it absolute, or he may prove that nothing is due, or that the deposit is sufficient to cover what is due; but the issue, so far as the right of redemption is concerned, will be whether anything remained due to the mortgagee at the end of the year of grace, and if so, whether the necessary deposit had been made. If that is found against the mortgagor, the right of redemption is gone. 10 M. I. A. 340.

801. The plaintiff sued, on the 31st of December 1861 to redeem a mortgage of lands in Sarun, dated the 30th of November 1801. The mortgage-money was payable on the 28th September 1806. If not paid, the property was to vest absolutely in the mortgagee without foreclosure. The defendant admitted that he had not foreclosed; but stated that Regulation XVII of 1806 was promulgated in Sarun on the 7th January 1807, and, consequently, that the money became due before the Regulation was promulgated. Held, the *onus* was on the plaintiff to prove that the Regulation was promulgated before 28th September 1806. B. L. R. S. V. F. B. 415; 5 W. R. F. B. 88.

802. In a suit brought by a second mortgage against first mortgagees (admittedly overpaid) to compel the first mortgagees to convey to him the mortgaged premises, the heir or legal representative of the deceased mortgagor is, according to the balance of authority, a necessary party.

Where it was uncertain who was the heir or legal representative of the deceased mortgagor, and the circumstances attending the execution of the second mortgage were not free from doubt, the cause was allowed to stand over, for the purpose of enabling the plaintiff to apply for an order to the Administrator General (under section 17 of Act XXIV of 1867) directing him to apply for letters of administration to the estate and effects of the mortgagor; and the plaintiff was allowed (in the event of letters of administration being granted to the Administrator General) to amend his plaint by making the Administrator General a party to represent the deceased mortgagor. The plaintiff was, however ordered to give security for the probable costs of the Administrator General in the suit. 5 B. H. R. O. J. 76.

803. By a bond, dated 10th February 1857, a certain village was mortgaged by one G. to the appellants and their father as security for a loan; the bond providing that "if I fail to pay the money as stipulated, I and my heirs shall without objection cause the settlement of the said village to be made with you." The interest of G. in the village was described as that of a *malguzar* and his proprietary right therein was declared by the Revenue Authorities shortly after the execution of

the mortgage ; but his payments of revenue being in arrear, the Board of Revenue granted a lease of the village for ten years to the appellants' father. The mortgages in a suit on the bond obtained the following decree on 3rd November 1860 :— " As the defendant acknowledges the plaintiff's claim, it is ordered that a decree be given to the plaintiffs for principal and interest and costs against the defendant and the mortgaged property." In proceedings in the Civil Court taken under this decree, the mortgagees asked for possession of the village, and obtained on 17th July 1862, an order, in pursuance of which they were put in possession an appeal by G being rejected. G took various steps to recover possession of the mortgaged property, or a declaration of his proprietary interest therein, but failed in his endeavours ; an application for a grant of the proprietary right in the village, and an appeal from an order cancelling his *potta*, being rejected by the Revenue Authorities on 8th December 1864, and 27th July 1865 respectively and on 12th August 1867 conveyed the village by deed of sale to the respondents. In a suit brought by them to redeem the mortgage and obtain possession of the property.

Held, the suit was not barred by the order of the Civil Court of 17th July 1862, nor had the orders of the Revenue Officers of 8th December 1864 and 27th July 1865 effected such a transfer of any right which G might have had to the appellants to render the sale to the respondents invalid.

Held also that the effect of the bond was to create a simple mortgage and not a conditional deed of sale ; and that the proceedings taken under the decree of 3rd November 1860 and the order made therein of 17th July 1862, by virtue of which the mortgagees obtained possession of the mortgaged property, did not operate so as to extinguish the right of redemption.

The rule that a *bai-bil-wafa* does not become absolute upon breach of the condition as to payment, without proceedings for foreclosure, obtains in the Central Provinces of India. 13 B. L. R. 205.

MORTGAGE (Redemption of a Portion of).

804. A mortgagor cannot redeem a share of the mortgaged property.

This rule is not affected by the sale of part of the mortgaged lands for arrears of revenue. W. R. S. N. 217.

805. A mortgagee is entitled to hold possession till every piece of the mortgage-debt has been fully paid ; and no person representing the original mortgagor, and claiming any fractional portion in the mortgaged property, can sue to redeem his separate share without proof of the satisfaction of the entire debt. W. R. S. N. 75.

806. Persons succeeding to a mortgagor's interest are not entitled to redeem a part of the property on payment of part of the debt. Nor is a mortgagee, who has purchased a part of the mortgagor's rights and interests, entitled to throw the whole burden of the mortgage-debt on

the remaining portion of the equity of redemption in the hands of a purchaser at a sale in execution of a decree against the mortgagor. Each buys subject to a proportionate share of the burden. 24 W. R. 24.

807. R mortgaged to N certain property, of which N caused a moiety to be sold in execution of a money-decree against R, and himself became the purchaser. The other moiety was sold subject to N's mortgage in satisfaction of another decree, and purchased by L. N. in exercise of his rights as mortgagee, attached and proceeded to sell the share of L in the portion purchased by him, and L thereupon, with a view to stay the sale, deposited an amount proportionate to the share held by him. The sale however, was allowed to proceed. Held in a suit brought by L. against N to set aside the sale, he was entitled to a decree. 15 B. L. R. 303.

808. Where the contract between a mortgagor and a mortgagee provides for the payment of the principal sum on a specified date, and for the payment in the meantime of interest thereon, the mortgagor cannot have a partial redemption of the property under Regulation I of 1798 which was not intended (section 5) to alter the terms of a contract settled between the parties except as regards illegal interest. Should the mortgagee consent to allow the principal sum, or part of it, to be paid off before the time fixed, he would be entitled when agreeing to this to make the payment of interest a condition of such redemption. 20 W. R. F. B. 387.

MORTGAGE (Redemption of—after fixed time has expired).

809. The rule of Courts of Equity in England as to allowances to a mortgagee in possession not applied; because the mortgagee was led into a belief, by the course of decisions in the late Sadar Adalat, and the general understanding caused by those decisions that upon the non-payment, by the mortgagor, of the money at the time fixed, he had, according to the terms of the mortgage instrument, become the absolute owner of the property. 2 B. H. R. 214.

810. The pendency of litigation as to the ownership of the equity of redemption, between the heirs of the mortgagor and a party claiming as purchaser, is a "good and sufficient cause" within the exception to the operation of the Bengal Regulation of limitation, III of 1793, section 14 why a mortgagee should not have instituted proceedings, for foreclosure, within twelve years, the time prescribed by that Regulation. 7 M. I. A. 323.

811. Since the decision of the case of *Ramji v. Chinto* it has been the practice of the High Court on its appellate side and of the inferior Courts in the Bombay Presidency to treat *gahan lahan* mortgages (mortgages containing a proviso that if not redeemed within a certain fixed time they will be considered as converted into absolute sales) as redeemable, notwithstanding that such fixed time has expired—such practice has proved beneficial and should be adhered to. 9 B. H. R. 69.

812. In a suit instituted in 1853 to redeem a mortgage containing a clause making it an absolute sale in default of redemption by a certain date,—Held, that in the Madras Presidency, effect must be given to that clause, the Regulation XVII of 1806 not being applicable. 7 B. R. P. C. 136.

813. Redemption by the mortgagor of mortgaged premises held by a mortgagee under a *gahan luan* mortgage is not barred by the mortgagee's possession of the premises for the period of twelve years after the date on which according to the terms of the mortgage deed, the mortgage is to be converted into a sale. Such a case is governed by the provisions of Act XIV of 1859 section 1 cl. 15. 9 B. H. R. 79.

814. A mortgaged land to B, the mortgage-instrument providing that B should be entitled to purchase the land if it were not redeemed by 12th July 1843. In 1845, B accepted from A one *pagoda* in part-payment of the mortgage-money: Held that this was a waiver by B of his right to purchase. 1 M. H. R. 69.

815. A *drishtabandhaka*, or Hindu instrument by which visible property is mortgaged, which named a time for payment of the money borrowed and stipulates that on default the mortgagee shall be put into exclusive possession and enjoyment of the property, will not be treated strictly as a conditional sale, even though the instrument expressly provide that on default the transaction shall be deemed an outright sale; and in a suit by the mortgagee for possession, the Court, in decreeing thereto, will give the mortgagor a day for redeeming. 1 M. R. R. 460.

816. Certain property was mortgaged for a term of years, and possession given to the mortgagee. The mortgagor covenanted in the mortgage-deed that he would redeem the property after the term had expired, and that the mortgagee should take the profits in lieu of interest until redemption. After the expiry of the term the mortgagee sued to recover the mortgage-money. Held, that the mortgage was security for the re-payment of the mortgage-money after the term had expired, and that during the term the mortgagor could not redeem nor could the mortgagee recover his money but that when the term had expired either party could bring the transaction to a close. 5 N. W. P. 128.

817. A mortgage deed which was executed in March 1858, provided for the redemption of the mortgaged property after the expiration of fifteen years from date. In a suit brought in 1867 to recover part of this property, the Appellate Court held the plaintiff entitled to recover, because on the 29th November 1873, when that Court passed its decision, the time fixed for redemption in the mortgage deed had already expired.

Held in special appeal in reversal of the decree of the Lower Court that in 1867, when the suit was brought, the right even to redeem the mortgaged property even as a whole had not accrued, and that, therefore, the action was premature. 11 B. H. R. 283.

MORTGAGE (Redemption of—before Expiration of Period).

818. Held that, by Hindu, as well as by English, law, in the absence of circumstances or language indicating a contrary intention, the mortgagor cannot, without the consent of the mortgagee, redeem before the expiration of the period named in the proviso for redemption; the principle being that, in the absence of stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose must be regarded as co-extensive. 2 B. H. R. 225.

819. A judgment-debtor made over certain plots of land to the decree-holder, covenanting that the land should remain in the possession of the latter, in order that the decretal money might be realized from the usufruct for a period of 8 years; the deed stipulating further that at the end of that period, if any thing should still be found due, the mortgagee should recover the same from the mortgagor, neither the latter nor any one claiming through him being allowed to make any objection. The mortgagor then sold his rights and interests in the land, and the purchaser sued the mortgagee asking to have the land released on payment of what might still be due of the original debt. Held that plaintiff could not re-enter on the land before the expiration of the 8 years. 14 W. R. 455.

820. In this case the original plaintiffs, the mortgagors (Sings), sued the representatives of the original mortgagees (Lalls) to cancel, on redemption, a mortgage deed, lease, and agreement, alleged to be one mortgage security. All the defendants asserted, as to the lease and agreement, a different title and interest, conferring a separate interest on their *gomastah*. The lease bore date 16th May 1837, was for 20 years, and reserved a rent of 24,853 sicca rupees payable to the *gomastah*, who granted sub-leases to certain nominees of the mortgagors at rents aggregating 35,067 sicca rupees, yielding on annual profits to him of 10,200 sicca rupees. The agreement was executed by the Sings to the *gomastah* on 29th August 1836, as security to cover certain losses for the due payments of their rents, by the sub-lessees and for a further advance of 7,000 sicca rupees at 12-per-cent interest. The mortgage deed, dated 5th June 1836, pledged the same property for 20 years to the Lalls for a loan of 1½ lakhs of sicca rupees to the Sings. The interest reserved was 9 per-cent, *i. e.*, 13,510 which was exactly covered by the surplus rent after deducting Government Revenue. The plaintiffs sought to recover possession, alleging the Lalls to be satisfied from the usufruct, and claiming a surplus. The claim of the plaintiffs to redeem before expiration of 20 years was denied.

Held that section 10 is the only section of Regulation XV of 1793 at all applicable to the present suit, which is brought to set aside plaintiff's contract and have restitution of the pledge on terms of redemption, and that interest should be calculated at the higher rate of 12 per-cent.

A mortgagee is not an assurer of the continuation of the same rate of profit which his mortgagor was able to raise; therefore an estimate of a proceeding rental does not suffice to show actual
11 W. R. P. C. 19.

-in Equity.

821. Where an instrument of mortgage, though in terms it transfers an estate on failure to repay the mortgage-money on a fixed day, yet appears clearly to have been entered into by parties for securing the repayment of a loan, the mortgagor, making the security subservient for the purpose for which it was created, may in equity and good conscience redeem the property by paying off the principal debt and the interest, though the stipulated time for payment has been allowed to pass by. 1 B. H. R. 199.

822. Suit for possession of property mortgaged under a *guz* lease, instituted by a purchaser of the rights of the heirs of A to whom the rights of the original owner alleged to have been transferred several years ago by a sale in execution of a decree. Held that before the plaintiff was entitled to a decree, he was bound to prove that the mortgage still existed, and that he was entitled (as representative of A's heirs) to the equity of redemption, and to possession on payment of what remained due. 2 W. R. 268.

823. Under Regulation I of 1798 and Regulation XVII of 1806 taken together, a mortgagor preserves his right of redemption, if he deposits in Court the whole amount due to the mortgagee within the time when the final foreclosure may be effected under section 8 of the Regulation last cited.

In cases in which the mortgagee has held possession of the land and therefore has receipts and profits to account for, only the principal sum borrowed need be deposited as the 'amount due. 14 W. R. 278.

824. In a suit brought by a Mahamodan to redeem from the defendant, who was a *Parsi*, certain property that had been conveyed by the ancestor of the former to the ancestor of the latter by a *by-bil-wafa* (deed of conditional sale): Held that the law to be applied was, under section 26 of Regulation IV of 1827, that of the defendant. That, in the absence of any specific law for *Parsi* in the Mofussil, the rule of justice, equity, and good conscience should be observed, and the Court should follow with certain necessary modifications the practice of the Courts of Equity in England. 5 B. H. R. A. J. 109.

825. Suit for redemption of mortgage. The *zilla* Courts declared the mortgagors (appellants) entitled to redemption, the mortgagees in possession (respondents) having fully paid themselves by receipt of rents and profits. On special appeal the Sudder Court reversed the *zilla* Decisions on the ground that certain proceedings taken by the mortgagees with a view to foreclosure had effectually barred the equity of redemption. Held, by the Privy Council, that the Sudder Court ought not to have decided the case on the question of foreclosure, because that question though raised upon the pleadings, had not been made one of the issues settled in the Court of first instance where alone evidence could be taken; that the Court was wrong in treating the proceedings as an effectual bar to the appellant's right of redemption; and that the

of foreclosure ought therefore, to be further fully tried upon issue to be regularly settled. 1 W. R. P. C.

826. The provisions of Bengal Regulation XXVI of 1814, section 10, cl. 3 directing the Court to record the points at issue, are imperative and must be strictly observed.

Where, therefore, in a suit to recover lands in possession, as the plaintiff alleged, of the usufructuary mortgagees under a conditional sale, the substantial question raised by the answer was, whether certain foreclosure proceedings under Bengal Regulation XVII of 1806, section 8, taken by the mortgagees effectually barred the equity of redemption, but the Judge of the Court of first Instance did not record that point: upon appeal the case was remitted by the Judicial Committee to India with direction that the question of foreclosure should be tried upon an issue regularly settled. 10 M. I. A. 1 (see 1 W. R. P. C. 19, *Ante No.* 825).

627. Claim by a mortgagee to remove an attachment from certain property placed on it by a judgment-creditor of the mortgagor, on the ground that the entire ownership of the property had passed to him at the date of the attachment. The mortgagee had never had possession of the mortgage property, and by the stipulations of the deed the mortgagor had a power of sale after the expiration of the time fixed for the payment of the debt, and it was only on the failure to exercise this power that the proprietary title would pass to the mortgagee. Held, that, under a condition of this character, a reasonable time must be allowed for the exercise of the power of sale, and that the fact that no sale had taken place within an interval of 23 days from the date fixed for payment could not equitably be held to divest the mortgagor of the equity of redemption. That consequently at the time of attachment, the defendant was only a mortgagee, and the suit to remove the attachment could not be maintained. 1 B. H. R. 167, 168.

828. R, died leaving a will, under which he gave certain legacies and left the remainder of his property to two sons, A and P, whom he appointed executors. P died leaving his brother A, and his widows executors to his will, under which his adopted sons, M and S, became entitled to his property. In consequence of some alleged management on the part of A, M, and S filed a bill in the late Supreme Court and obtained a decree ordering the Master of the Court to take an account of the rents and profits which had come into the hands of P's executors. While these accounts were being taken, A died, leaving a will by which he appointed his widow and his grandsons executors, and after certain devises, not comprising a property in Tumlook, gave the residue of his immoveable property to the said grandsons, who took it subject to payment (1) of such of the legacies as remained unpaid under R's will, and (2) of what might be due by A to P's estate. After A's death, the above suit in equity was revived against his executors.

The said executors borrowed money from one Mackintosh on the security of a bond and a mortgage of certain property which he obtained

(including the Tumlook property) by an indenture, which recited that the said executors were still accountable in respect of the above legacies and debts, and provided that in the event of any default, or of any sale by Mackintosh, the said debts and legacies were to be paid out of the proceeds in the first instance before either mortgage-money, or interest, or costs, or expenses.

After this a decree in the above suit was made against A's executors for Rs. 1,32,000, and this not being paid, a writ of *feri facias* was issued, under which the Sheriff sold to M (benami) the equity of redemption in the Tumlook property subject to Mackintosh's mortgage. The latter then obtained a decree of foreclosure and commenced another suit against M, which was compromised and a decree made by consent in favor of Mackintosh, who then sold his interest in the mortgaged property to M. Under these circumstances M, claims the right of proving the whole amount of the sum due to him in the equity proceedings without taking into account the Tumlook property: on the other hand, the creditors of A insist that M is bound to treat the Tumlook property as an asset of A's estate, and contend that the sale under the *feri facias* was without jurisdiction.

Held, that M was bound to hold the property on the same terms as those on which he acquired it, *viz.*, that it was subject to a trust in his own favor for the payment of his own debt.

In an ordinary suit commenced in the High Court, a writ of *feri facias* cannot issue except within the limits of the Court's original jurisdiction; but in a suit originally commenced in the Supreme Court, the High Court has power, under 24 and 25 Vic. c. 4, section 12 to issue a *feri facias* beyond the limits of its original jurisdiction, and to sell under it property situated there. 24 W. R. 366, 367.

MORTGAGE (Sale of Equity of Redemption of).

829. In a sale of the equity of redemption, if the debtors are duly warned by notice that their property will be put up to sell in satisfaction of a decree, and they do not appear or take steps to satisfy the debt and retain their equity of redemption, their equity of redemption is liable to be extinguished when there is no proof of fraud. 4 W. R. 5.

MORTGAGE (Simple).

830. If the holder of a simple mortgage obtains a mere money decree for the amount due to him (without any declaration that the mortgaged property is liable for the debt), he cannot attach and sell the property to the prejudice of a *bona fide* purchaser for valuable consideration. In such a case the mortgagee must enforce his lien by a separate suit against those in possession of the property. 6 W. R. 312.

831. A purchaser under a decree for sale obtained by a mortgagee under a simple mortgage, does not purchase, subject to a conditional sale executed by the mortgagor, after the prior mortgagee had obtained a decree of sale, but before the property was actually sold. 7 W. R. 67.

MORTGAGE (Usufructuary).

832. A party who, by paying off a mortgage debt becomes an usufructuary mortgagee in place of the original *zuri-peshgeedar* does not need to sue for the amount due, but is entitled to remain in possession until the whole debt has been discharged by the usufruct. 14 W. R. 29.

833. A *zuri-peshgeedar* is entitled to retain the whole property pledged to him until the whole debt has been paid to him. It is optional with him to relinquish any portion either on receiving a proportionate amount of what is due to him, or otherwise. W. R. S. N. 260.

834. A plaintiff in possession under an usufructuary mortgage, and suing for the balance due, is bound to prove that he has not realized the amount due under the conditions of the lease from the usufruct. 1 W. R. 28.

835. The mortgagor under a *zuri-peshgee* is entitled, under section 2 Regulation I of 1798 to demand back his land immediately after making his deposit. If by mistake or otherwise he demands more land than is comprised in the mortgage, that is not a matter which can justify the mortgagee in keeping possession of land which is in fact comprised in it. W. R. S. N. 219.

836. If the usufruct of mortgaged property was to be enjoyed in lieu of interest, the mortgagees having had possession, is no ground for the inference that any portion of the debt, save the interest, was paid off from the usufruct. 10 W. R. 301.

837. Where a deed is essentially in the nature of an usufructuary mortgage, the reservation of *huk ajiri* to the proprietor, and any other arrangement between him and his lessee, cannot alter the essential character of the deed, or relieve the mortgagee from the liability of rendering an account. 4 W. R. 103.

838. An usufructuary mortgage of lands was executed in 1846, but the mortgagee did not enter into possession. In 1852 his representative, the plaintiff, commenced a suit to obtain possession, but allowed it to drop. In 1854 he commenced the present suit for the same object: Held that laches could not be imputed to the plaintiff from the date of presenting the plaint in 1852, and that the produce from that date should be accordingly awarded him. 1 M. H. R. 70.

839. In the case of a usufructuary mortgage executed prior to Act XXVIII of 1855, where the mortgagor sues for redemption on the ground that the usufruct has paid off the debt and claims mesne profits on the allegation that the mortgagee in possession has already collected more than his legal dues, the mortgagee is bound to produce the accounts of actual collections made by him during his possession. On the failure of the mortgagee in this respect, the mortgagor is expected to adduce some proof to justify a decree in his favour for redemption, as well as for mesne profits. 7 W. R. 82.

840. In an usufructuary mortgage where there is no stipulation for interest, the mortgagee is not entitled to it, the usufruct going in lieu of interest. 16 W. R.

841. Where a mortgagee under an usufructuary mortgage has realized a sum of money in excess of the amount due to him, it is an equitable practice to allow to the mortgagor interest on such sum at the same rate at which interest has been allowed to the mortgagee on his mortgage-debt. 1 N. W. P. 10.

842. A executed an *ikrar* by way of mortgage, whereby it was stipulated that B, the mortgagee, was to remain in possession of the mortgaged premises for a period of eight years; that the amount due was to be paid off from the usufruct; and that if, at the expiry of that period, any sum should remain due under the *ikrar*. A was to pay the same. In a suit for redemption brought before the expiry of the period mentioned in the *ikrar* on deposit of the amount due thereunder, held, that the suit would not lie. 6 B. L. R. 562.

843. The words in a *zuri-peshgee* lease "after the expiry of the term, it will be competent to me (the mortgagor) in the month of *Jeith* of any year I can to pay the *zuri-peshgee* and cancel the lease" were held to do no more than bar mortgagors re-entering in the middle of any year, in the event of the mortgagee's occupation continuing after the expiry of the lease owing to mortgagor's default to pay off the loan, and that it contained no undertaking by the mortgagee to hold on until it suited the mortgagor to pay him off. 17 W. R. 212.

844. In a suit to recover money lent upon a *zuri-peshgee* lease, and for the sale of the property leased, of which plaintiff had been forcibly dispossessed by defendant.

Held that, as by the terms of the deed the only lien which plaintiff had acquired over the property was to retain possession as lessee until the money lent was paid off, he had no right to sue for the sale of the property.

Held that the suit being for money lent, and the lease not being a registered document, the limitation of three years applied. 24 W. R. 426.

845. Defendant lent plaintiff a sum of money to be paid off on the expiry of a *zuri-peshgee* lease which he took from plaintiff, it being stipulated that the lessee (the lender) was to clear off principal and interest from the assets of the property leased, and that on the borrower paying a trifle expected to remain due after the period of the lease, the lender was to surrender possession without objection. Plaintiff came into Court with an allegation that he had tendered the money still due under the arrangement, and he asked for immediate possession although the term of the lease has not expired. Held, that he was not entitled to possession until that term expired. 12 W. R. 527.

846. A suit to cancel a *zur-i-peshgee*, by which the lessee was to receive the usufruct as interest for his advance and to repay the principal by the rent reserved, is of the nature of an usufructuary mortgage, and as such cannot be brought under Act X of 1859, but is cognizable only by the Civil Courts. 8 W. R. 311.

847. Where property granted in *zur-i-peshgee* lease was originally rent-free, but subsequently resumed and assessed by Government, the mortgagee was held bound either to make a fresh agreement to take the profit, *minus* the Government revenue as his security, or to call in his money. His not adopting either course for a long period was construed into assent on his part to receive the profits, *minus* the Government revenue as security. W. R. S. N. 227.

848. Where, in consideration of a loan received, a party agreed that his property should remain in the hands of the lender for a term of years, by which time it was understood the whole amount borrowed would be liquidated, the transaction was held to be not a lease, but a *bhog-bundhuk* or usufructuary mortgage. 15 W. R. 332.

849. In a suit for possession under an usufructuary mortgage, plaintiff obtained a decree which was afterwards authoritatively interpreted to mean that he was to get possession of the property in order to repay himself out of the profits, keeping the usual accounts, and after satisfaction of his claim, restore the property:—Held that, under the terms of the decree, he was in effect required to certify for the information both of the Court and of the judgment-debtor, the amounts received and outstanding, and that the Court executing the decree was bound to require from him, from time to time, a statement of the amount received, and to deal with the matter under Act XXIII of 1861 section 11. 23 W. R. 156.

850. Plaintiff for a consideration obtained from defendant a *zur-i-peshgee* lease which contained an undertaking that, in the event of plaintiff's possession being interfered with by defendant, or defendant's previous ticcadar, defendant would pay back to plaintiff his money with interest and profits. The Lower Appellate Court finding that plaintiff, after enjoyment for three years, had been turned out of possession by the previous ticcadar, gave plaintiff a decree for the original money advanced with interest and mesne profits for the unexpired portion of the lease. Held, that mesne profits should not have been awarded. 19 W. R. 424.

851. H. S. executed a deed of sale in favor of N and R, in respect of several properties, some of which had been mortgaged to N under a *zur-i-peshgee* deed. Notwithstanding this sale, H S, again sold the same properties to B. Upon this N and R brought a suit to have their rights upheld against B, which was eventually decided by arbitrators whose award was that the property should be equally divided between R and B. After this R paid off half the *zur-i-peshgee* debt due to N; but B refused to do so. Upon which N sued H S and B to recover the moiety still due with interest. B pleaded that plaintiff was not entitled

to maintain the suit inasmuch as he had, while in possession of all the *mouzahs* mortgaged to him, allowed some of them to be sold for arrears of Government revenue, and as he was still in possession of the rest.

Held that if the *mouzahs* when sold were in possession of B, and were so sold on account of his laches, then N would be entitled to maintain the action notwithstanding his possession of the remainder, because it would be clear that by B's act the value of the security had been diminished. 24 W. R. 17.

852. Plaintiff borrowed a sum of money from defendant and executed what he called an "usufructuary mortgage," taking from defendant a lease for 9 years under which the lessee, after paying the Government revenue and a certain rent (claiming no abatement), was to retain the rest of the *jumma* as interest and principal of the loan until the term of the lease expired, when the balance was to be re-paid in a lump sum, the lessor not being at liberty to alienate the property until the debt was paid. The present suit was brought to redeem the property by payment of the principal and interest due, although the term of the lease had not expired. Held, that the document leasing the property was partly "ticca" and partly *zur-i-peshgee*, and the plaintiff was not entitled to enter into possession before the expiry of the term of the lease, nor could he then enter even if the transaction were viewed as a *zur-i-peshgee*. 11 W. R. 408.

853. An estate was mortgaged for 100 Rs.; the mortgagee was put in possession, and it was stipulated that he was to enjoy the usufruct in lieu of interest, the mortgagor being entitled to redeem at any time on re-payment of the principal.

When the mortgagor deposited the principal, the mortgagee set up a false claim upon absolute sale and forced the plaintiffs into a regular suit, on which possession was decreed to them on payment of the principal. Held that they were entitled to mesne profits for such period as may not be barred by the statute of limitation. Held also that plaintiffs were entitled to interest from the date of suit. 8 W. R. 322.

854. An usufructuary mortgagee, who has no power of sale under his lease even for the purpose of realizing the money due to him from the mortgagor, cannot give a third party a power of sale over the property in respect to his own debt. The utmost he can do is to assign his rights and remedies against the mortgagor; but, whatever the character or extent of those rights and remedies, they cannot be pursued in a suit to which the mortgagor is no party. 21 W. R. 185.

855. In a former suit an usufructuary mortgagee sued his mortgagor and the Government as having taken the management of the latter's estates into its own hands for the mesne profits of his mortgaged property during the period of his dispossession by the mortgagor. That suit was compromised by a money payment by Government in lieu of all rent actually collected, and by the transfer to the mortgagee of the right to the outstanding arrears. The mortgagor now sues his lessee for the

rent paid by him to the Government: Held that the lessee was not liable in respect of rents the mortgagor's claim to which had already been satisfied by Government. W. R. S. N. 65.

856. In a former suit plaintiff, mortgagor, under a usufructuary mortgage claimed recovery of the mortgaged property on the allegation that there had been a satisfaction of the principal sum by reason of the profits of the estate exceeding 12 per cent interest, but having failed to prove that allegation, his suit was dismissed. He now sues for the recovery of the property under an *ekrarnamah* which did not stipulate for payment of interest. Held (1) that, though possibly plaintiff ought to have deposited the amount of the principal money in Court when he filed his plaint, yet as no objection on that score was taken at the first hearing it must now be considered to have been waived: (2) that the case put forward by plaintiff in the former suit did not amount to an admission that there was an agreement to pay 12 per cent; and (3) that even if it did, as the *ekrarnamah* upon which plaintiff now sued did not stipulate for payment of interest, plaintiff was entitled to restoration of the property on payment of the principal alone—18 W. R. 62.

857. In a suit to recover possession of land in the possession of the mortgagor under a usufructuary mortgage (which is in reality a suit between the mortgagor and mortgagee for an adjustment of the account between them), if upon taking an account it appears that the mortgagee has been fully satisfied, the mortgagor is not only entitled to have the property back, but (the decision in *Marshalla's Rep.* 112 being overruled) the Court is bound as a Court of Equity, and acting upon the principle that it is always the aim of a Court of Equity to finally determine as far as possible all questions concerning the subject of the suit, to cause an account to be taken up to the time of the decree, the account so taken being considered binding and the parties not being at liberty, except under peculiar circumstances, to re-open it in another suit.

In seeking to have the account taken and to have it ascertained whether the mortgagee has by means of the usufructuary mortgage obtained more than 12 per cent interest, and if so, that the surplus may be applied in reduction of the principal, the mortgagee is not asking the Court to authorize a departure from the agreement of the parties (where there is one) that the mortgage-debt should bear no interest during a certain period.

The *onus* is on the mortgagor to prove that the principal sum has been paid or satisfied; and on the mortgagee to show what, if anything, is due to him for interest.

Failure of the mortgagee in his duty, as trustee for the mortgagor, to keep accounts, and to produce proper accounts, is to be regarded as misconduct which ought to be taken into consideration upon the question of costs. 18 W. R.

858. A usufructuary mortgage to run over a certain number of years

was executed in 1828 by a member of a joint Hindu family, with the consent of the other members, to R, who afterwards sold the mortgaged estate to H and H whose agent R was, H and H subsequently, in 1841 and 1851, conveyed the estate to G and Co. as an absolute purchase in fee. In a suit for redemption of the mortgage brought in 1864 G and Co. set up as a defence their title as *bona fide* purchasers without notice, and, having been in possession more than 12 years, pleaded the limitation of suits Act XIV of 1859 section 5 as a bar to the suit. Held *First* that the *onus* was on G and Co. to establish by clear and satisfactory evidence the termination of the mortgage and the absolute sale by the mortgagees to R the root of their title; and, in the absence of such proof, that the transaction in 1841 and 1851 was merely an assignment of the mortgage, and, *secondly*, in the circumstances, that G and Co. were not "purchasers" within the true construction of section 5 Act XIV of 1859, to entitle them to the benefit of the 12 years' limitation as a bar to the suit for redemption. 14 M. I. A. 1; 15 W. R. P. C. 24.

859. The acts of a minor are only voidable, and not absolutely void. The purchasers of the right, title, and interest of a judgment-debtor sued to obtain immediate possession of the property purchased at a sale held in execution of a decree, after setting aside an usufructuary mortgage executed by the judgment-debtor while a minor. Held, that the sale in execution merely transferred to the purchaser the reversionary right of the judgment-debtor in the property, after the satisfaction of the usufructuary mortgage, and not the right to set aside an act done during minority.

Held, that until a transaction by a minor was avoided by some distinct act on attaining majority, it must be considered valid. 3 B. L. R. A. J. 426, 427.

860. The principle that a party cannot both approbate and reprobate the same transaction, is applicable to Indian cases.

Where a mortgage deed stipulates for interest at 9 per cent, but other and collateral deeds, forming part of the same transaction, provide for further profits to the mortgagee, held, that the mortgagor cannot, unless there be a positive legal enactment to that effect, be heard to plead that the written engagement, though not extending to the whole profit stipulated, must be adhered to as against the mortgagee, though the mortgagor may go beyond it to show the full extent of the profit, and so to be relieved from the consequences of his actual contract.

Interference with the rate of interest in India was a thing of positive law, and cannot be extended beyond the provisions of the Regulation (XV of 1793). section 9 of the Regulation does not declare that where an attempt has been made to elude the usury laws, the contract is itself void, nor does it direct the return of the pledge without redemption. The mortgagee may retain his pledge until he has received out of it his debt with interest at 12 per cent, the maximum allowed by section 10 of the Regulation.

In a suit for redemption, on the ground that the debt has been satisfied with interest, the *onus* is on the plaintiff. A mortgagee is not an assurer of the continuation of the same rate of profit as his mortgagor was able to raise. Hence an estimate of the rental preceding mortgagor's possession is not sufficient proof of the profits in his time.

The mortgagee need not personally attest the accounts if by personal knowledge of them.

Presumptions against mortgagees for non-production of must have reasonable limits, and not be mere conjectures or based on in exact data. 2 B. L. R. P. C. 44; 12 M. I. A.

By a deed purporting to be one of usufructuary mortgage, of July, 1815, the mortgagors agreed to pay to the mortgagee, who was put in possession, 2500, pons and interest, stipulating that the rents of the mortgaged lands should be applied, *first*, in payment of Government revenue; *second*, in payment of the salary of a manager; *third*, in reduction of the mortgage-debt. It was then provided that 2,000 pons shall be re-paid by instalments; namely, on the 9th April, 1816, 500 pons; on the 10th of April, 1817, 500 pons; and on two subsequent dates two several sums of 500 pons. The mortgagors, in reference to the balance then remaining, covenanted as follows: "And in the year 1819-20 a settlement of the accounts of the receipts and disbursements shall be made, and any amount that may be due, after deducting payments out of the principal and interest as aforesaid, we undertake to pay in cash in full" on a particular day named, and to "redeem the mortgage." In default whereof the land should be valued, and the mortgagee should buy at that valuation so much thereof as would satisfy the balance due to him, the mortgagors remaining liable for any unpaid balance of debt which might remain due after the whole of the said land was purchased as aforesaid.

None of the instalments were paid and no settlement of accounts was come to. The debt, however, was admitted, assuming the transaction to be one of mortgage only, to have been liquidated in 1866-7.

Held, that this mortgage was not one by conditional sale, and that the mortgagors were entitled to the lands with mesne profits from 1866-67. No presumption arises that the agreement for absolute sale in certain events was ever carried out between the parties according to its terms, the contemplated settlement of accounts being a necessary preliminary to the performance of that contract.

13 M. I. A. 560 (*see Ante No. 773*) explained and approved. It refers exclusively to mortgages by conditional sale, and rules that on breach of the condition the sale becomes absolute.

But *Quere*, whether in case of mortgages by conditional sale executed since 1858 the parties must not be held to have contracted in reference to an erroneous cause of decisions then commenced in *Madras* (and subsequently followed in *Bombay*) to the effect that no such sale can ever become absolute, not even by foreclosing the equity to redeem. 2 L. R. I. A. 241, 242.

862. A mortgagor may give his usufructuary mortgagee the power to him personally, to sell the land, or both, at any moment. 6 W. R.

863. A suit brought on a contract of the nature of a common usufructuary mortgage, does not lie in the Revenue Courts, but must be instituted in the Civil Court. 8 W. R. 392.

MORTGAGES (Successive).

864. A property was mortgaged in succession to two different persons. Under the later of the two deeds, a money-decree was obtained and the property sold. Subsequently the earlier mortgagee obtained a money-decree and caused the mortgagor's rights and interests to be again sold. Held that the purchaser at the second sale purchased, not the estate, but the mortgagor's (extinct) right, title, and interest, and could not for possession of the property itself. 11 W. R.

MORTGAGE-DEBT.

865. Mortgage-debts are indivisible except where there is a distinct notice on the face of the mortgage-deed of the separate shares of the mortgagors. 7 W. R. 314.

866. In a suit by a mortgagee, the prayer of the plaintiff was for a decree for Rs. 307 with interest, and for foreclosure or sale in default of payment. Held, that it was an action within section 9 of Act XXVI of 1864, and, therefore, the plaintiff was not entitled to costs. 1 B. O. J. 27.

867. G borrowed money on a mortgage bond, on which the mortgagees sued for and obtained a money decree which did not declare the mortgaged property liable to be sold in satisfaction. While the proceeding in the case were pending, G sold the property. Held, that the property was virtually unburdened at the date of the sale, the mortgage lien having been rendered infructuous by the action of the mortgagees in waiving their right of sale and receiving the money-decree. 12 W. R. 522.

MORTGAGE-DEBT (Insufficient Tender of).

868. Though it would have been more satisfactory if the Lower Appellate Court, instead of declining to give plaintiff a decree for possession of certain mortgaged lands on the ground that the sum tendered by them was insufficient to liquidate the mortgage debt, had made a decree in favor of plaintiff contingent upon their paying such sum as should be found due, yet the plaintiffs had no strict right to such a decree, and it cannot be said that the Lower Appellate Court had committed an error in law in refusing to make such a decree. 17 W. R. 409.

MORTGAGE-DECREE

869. Certain property, covered by two mortgage bond upon which de-

crees had been obtained, was sold by the mortgagor (J) to S J under an arrangement that Rs. 12,000 out of the consideration-money should be applied to the satisfaction of one of the decrees (D's) and the residue, Rs. 8,000 retained for the purpose of being applied in satisfaction of L's decree. The former sum was applied as agreed, and S J received possession from L (who had been in possession), retaining the Rs. 8,000 to be paid to L. Subsequently S J and J presented separate petitions to the Subordinate Judge for leave to pay in the Rs. 8,000 and certain mesne profits, so that the money might be applied in satisfaction of L's decree, and asked for a challan for that purpose. The Subordinate Judge made an order that on the money being brought into Court, the challan would be issued; but on the same day D and another decree-holder petitioned claiming to attach the money in question, upon which S J and J did not bring the money into Court. Subsequently, among other petitions the Subordinate Judge was asked for a challan in the name, of L decree-holder. This prayer he rejected.

Held that the Subordinate Judge was right in refusing this challan; but that he ought not to have made the former order.

Held that if the sale to S J was valid, S J was entitled, under its terms, to have the Rs. 8,000 applied to the payment of L's decree.

Held, as regards the amount of mesne profits, that until attachment proceedings were taken out against it, J entitled to pay it to whichever decree-holder he pleased. 24 W. R. 415.

870. P L brought a suit against H, and while it was pending executed a bond in favor of R C hypothecating the property in dispute. The suit was dismissed with costs; and another suit was brought by one M upon the bond, and while it was pending the property in was sold in execution of H's decree for costs, and purchased by S. The day after this, *i. e.*, on 10th November 1868, P M obtained a mortgage decree, which he transferred to R B, who executed it and attached the property in dispute, when S intervened, objecting that the mortgage, the mortgage decree, and the transfer of the decree were all fictitious and collusive, and brought about by P L. This objection having been rejected, a suit was brought on the same ground against R B, P M and the widow of P L to establish S's rights and to stop the sale. The property was, however, sold and purchased by D, who was then made a defendant in the suit.

After this D instituted a suit for confirmation of possession.

Both the Lower Courts found that R B was a *benamidar* for P L and upheld the title of S in preference to that of D.

Held, that if D had not been made a defendant, he would have been by the doctrine of *lis pendens* by the decree passed in the suit.

, that although S by virtue of his auction-purchase was not entitled to the property in dispute, yet he was entitled to a declaration that, so far as the amount of his purchase-money went to satisfy the de-

case of November 1868, it should be considered a charge on the property. 24 W. R. 353; 360.

871. Where a deed of mortgage is silent as to interest, payment of the bare principal within the year of grace is sufficient to bar foreclosure. W. R. S. N. 157.

872. A finding by a Court that a mortgage deed has been attested by the Registrar of Deeds, and proved by witnesses, is a sufficient distinct finding on the *bona fides* of the deed. 9 W. R. 167.

873. A mortgage-deed contained a condition that if the principal were not repaid by a certain day, the mortgage should only be redeemed by payment of one *mira* of rice for each rupee of the mortgage-money. The mortgagee was in possession under a prior *iladarawara* mortgage, and rice rose in the market:—Held that the condition was unreasonable and such as should not be enforced in equity. 1 M. II.

874. Held that the term "satisfied" as used in section 2 Act XIX of 1843, does not merely signify that the mortgage money may be realized by sale, but that all the stipulations of the mortgage deed are to be performed, and its terms and conditions fulfilled. 1 N. W. P. 38.

875. A lent money to B on a mortgage bond in which it was stipulated that if the amount lent was not re-paid on a date specified, the lender was to cause the mortgaged land to be sold and to pay himself out of the proceeds accounting for any difference to the borrower, who was responsible for any portion of the debt not covered by the pro-

Held that the right which accrued to the lender under that contract was to have his mortgage lien on the land declared, and to have the property sold in satisfaction; and, if after sale the debt was not satisfied, to proceed against the debtor for the balance.

Held accordingly that a suit to recover on the bond in question was not cognizable by the Small Cause Court, which could not give plaintiff such a decree as the above or the remedy to which alone he was en-

876. Suit to set aside a *zur-i-peshgee* (usufructuary mortgage) of certain *mouzas*, part of the Raj of the mortgagor, for securing repayment of Rs. 49,453, under which the mortgagees had been put in possession. The plaintiff admitted his execution of the deed, but alleged, that it was executed to secure the amount of a bond previously executed in favour of the mortgagees as a further security to indemnify a third party, and security for him for advances in the prosecution of his claim to the Raj; that the conditions of the bond to the mortgagees not having been complied with, there was no sufficient consideration for the bond and deed which he had been fraudulently induced to execute. Held,

that, in the first instance, it lay on the plaintiff, who sought to set a deed executed by him and perfected by possession, to make out the case alleged by him, and that the *onus probandi* was upon him to establish; at least, a good *prima facie* title to the relief prayed for, so as to cast on the defendants the burthen of proving the consideration for the deed.

In the absence of clear and consistent evidence on the plaintiff's part, establishing that the deed was obtained fraudulently and without consideration, such deed sustained. 12 M. I. A. 282.

877. *Case.*—Plaintiff sues to recover money due on a mortgage bond alleged to have been executed by defendant's late husband E, and by his brother J who however is relieved by plaintiff from the debt. The conditions of the bond are that plaintiff's father should possess the mortgaged property in consideration of interest only accruing upon the principal sum lent, and that the mortgagor should take back the property whenever he should pay the principal sum to the mortgagee. The present suit is brought by reason of plaintiff having been dispossessed of the property by the share-holder brothers J and A: Held, that the money lent is recoverable notwithstanding there is no express condition in the bond to the effect that it would be recoverable in the event of dispossession by a third party. But as the money is found to have been borrowed by defendant's husband on behalf of the family with the tacit consent of the other members, the plaintiff can recover from the present defendant only her share of the debt. 20 W. R. 484.

MORTGAGE-MONEY (Deposit of).

878. The mortgagor having the option either of depositing the money in the Judge's Court, or of tendering it, if there is sufficient excuse for not depositing in the Judge's Court, he is not bound to tender the money and prove that tender. 8 W. R. 223.

879. Where a mortgagor allows the amount of his loan to remain in the hands of the mortgagee, taking a receipt for it. Held, that the transaction should be regarded as a deposit of money with a banker or agent, repayable on demand without interest.

A suit to recover the balance of such moneys is in the nature of a suit to recover the amount of a deposit. 2 N. W. P. 409.

880. If a mortgagor deposits money in Court without placing any actual restriction on its being paid over to the mortgagee, but with express notice that the mortgagor denies the existence of any mortgage, and intends to sue to recover back the money so deposited:—Held that this is not such a deposit, within the meaning of Regulations I of 1798 and XVII of 1806, as will say the right of redemption. 6 W. R. F.

881. A mortgagee who once takes the mortgage-money, as deposited by the mortgagor within time cannot afterwards sue for possession on the ground that the deposit was made after the expiry of the year of

, and that he had applied for the money under wrong information from his agent. 6 W. R. 249.

882. A deposit of the mortgage-money by a mortgagor, accompanied by a protest against the validity of the mortgage itself, and a threat to sue for its cancellation, imposes no condition upon the acceptance of the money so as to render the tender invalid. A deposit being once duly made, the mortgagor's equity of redemption is saved quite irrespective of whether the mortgagee has received notice of the deposit or not :

Quære.—Whether, if the mortgagee's delay in taking the money out of Court is due to the negligence of the mortgagor in not doing his best towards ensuring prompt notice of the deposit being given to the mortgagee, the latter is entitled to hold the deed against the accruing interest. 3 W. R. 185.

MORTGAGE-MONEY (Tender of).

883. Payment into Court of the mortgage-money by the occupant of the mortgaged property, accompanied with a protest and a threat of legal proceedings to recover the amount paid into Court, is not a good tender, or such a tender, as is contemplated by the Bengal Regulation XVII of 1806, sections 7 and 8.

Section 7 of Bengal Regulation XVII of 1806, provides for the equitable right of redemption "to the mortgagor and the owner of such property, or his legal representative." Whether a tender of the mortgage-money and interest by a stranger, though in possession of the mortgaged property, is a good tender. *Quære?* 7 M. I. A. 323; 4 W. R. P. C. 37.

MORTGAGE-PROPERTY (Agreement not to Alienate).

884. By an agreement reciting that A had executed a bond in favor of B, for a certain sum of money, A, "in order to repay the bond-money in the terms in the bond contained," declared that, "until the repayment of the money covered by the bond, he should not, from the date of the agreement, convey the property mentioned therein to any one, by deed of sale, or deed of conditional sale, or *mokurari pottah*, or deed of mortgage, or *zuri-peshqea ticca pottah*. Should he make all these transactions in respect of the said lands, the instrument relating thereto shall be deemed invalid and as executed in favour of nominal parties for evading payment of the money covered by the said lands."

Held (Markby, J. doubting), that the instrument operated as a mortgage to A of the lands comprised therein.

No precise form is required to create a mortgage. 5 B. L. R. F. B. 20

885. A, indebted to B, binds himself to B by deed not to alienate his rights in certain property until his debt to B had been satisfied. A subsequently gives a *putnee* of that property to C. After the creation of such *putnee*, B sales to D the rights and interests of A under A's deed to B. Held that D has no right in a suit against C to set aside

putnee, as such *putnee* had been created prior to D's purchase, and as the lien which B, possessed had not passed to D. 8 W. R. 291.

886. The following terms in a deed "that, for the security of the payment of this debt the lands mentioned in this deed are pledged by me; and that until the principal money and the interest recited in this deed are paid off, I would not on any account transfer the property pledged to any body by sale or *hibabilawaz*, or gift or mortgage in any other way" were held to amount to a mortgage. 6 B. L. R. App. 14. (see 5 B. L. R. 264. Ante No. 884.)

887. The lands in suit having been mortgaged to plaintiff under a bond which covenanted that, until the whole debt due under the bond was not paid off, the mortgagor should not create any new incumbrance upon the mortgaged property: Held that the mortgagor had no right under the terms of the mortgage-deed, to grant a subsequent lease to the defendant in consideration of a loan upon a bond, the rents being assigned over in liquidation of the debt, and that plaintiff's prior mortgage must prevail over defendant's lease. 17 W. R. 560.

888. A gave a mortgage to B of certain property as a security for money lent, and covenanted not to alienate the property by gift, *ijara putnee*, or otherwise by which loss might be caused to the existing actual assets of the property. A subsequently granted a *putnee* to C. B obtained a decree against A for the amount of the loan, and the property was sold in default of payment. D was the purchaser at the auction-sale. Held, that D could maintain his suit against C to aside the *putnee* and for possession. 1 B. L. R. A. J.

889. A mortgage bond provided that the mortgage debt should be paid in instalments, and that no transfer by the mortgagor of the property mortgaged so long as the debt was undischarged, should be made or should be valid. Subsequently the mortgagor transferred the mortgaged property, the sale-deed providing that the unpaid balance of the mortgage debt should be paid to the original mortgagees by instalments, and that any further sum should be paid by the mortgagor. The Court of first instance decreed possession to the purchaser, whose possession was resisted by the mortgagees on payment of the unpaid balance of the mortgage-debt in full. On the appeal of the purchaser, who claimed to pay off the mortgage by instalments, the Court declined to interfere with the decree. 1 N. W. P. 37.

MORTGAGE PROPERTY (Alienation of--while Foreclosure suit is Pending).

890. Where a mortgagee alienates the mortgaged property while the foreclosure suit brought by him is pending, such alienation cannot be allowed to stand between the mortgagor and those rights to redeem which that suit in its ultimate issue may have left open and affirmed to him. 8 W. R. 399.

MORTGAGE-PROPERTY (Conveyance of--by Mortgagee with power to sell)

891. B and Co. mortgagees, with power to sell, sold the mortgaged

property to the defendants. No deed was executed until some years afterwards when the mortgagor was dead. The deed was in the form followed when a mortgagor is the vendor and the mortgagees join in the conveyance, but the words of conveyance were by the mortgagees alone and without any confirmation by the mortgagor. Held that the purchaser did not, by the deed, acquire an indefeasible estate. 3

(Destruction of).

892. By the Hindu, as well as by the English Law, a creditor in whose hands a pledge has accidentally perished, is notwithstanding entitled to recover his debt, in the absence of an agreement to the contrary. 7 B. H. R. A. J. 116.

MORTGAGE-PROPERTY (Equitable Rule as to Repairs to).

893. Held that a suit for redemption of land, without specification of details, includes a claim for restoration of all accretions and improvements which it may have received while in the hands of the mortgagee; and if the Court omits to adjudicate upon part of the claim, the mortgagor is not precluded, by section 7 of Act VIII of 1859, from bringing a second suit in respect of that part. 10 B. H. R. 369.

894. Mortgagee allowed benefit for buildings erected, or permanent improvements made, by him upon the mortgaged premises. 2 B. H. R. 214.

895. That the *By-al-wafa* amounted in effect to a mortgage of the property, and that, according to the practice of the Courts of Equity, a mortgagee in possession ought to be allowed for proper and necessary repairs to the estate.

Where portion of the mortgaged premises was accidentally burned, and portion of them fell down, and the mortgagee rebuilt them, it was held that the mortgagor was not entitled to redeem, unless upon payment of the sum so expended by the mortgagee, though such sum amounted to more than double the price for which the premises had been conditionally sold to the mortgagee. 5 B. H. R. A. J. 129.

896. Claims made by a mortgagee in respect of money laid out in improvements after the expiry of the day fixed for repayment must for some time to come depend on an equitable consideration of all the circumstances of the case.

Ultimately the English rule should be adopted, under which the mortgagee is only allowed to claim for such outlay as has been required in order to keep the mortgaged premises in a good state of repair, and to protect title. 1 B. H. R. 199.

897. When in a redemption suit the lower Courts refused to allow to the mortgagee the expenses of repairs made by him on the mortgaged property (there being no provision as to repairs contained in the mortgage deed), the case was remanded by the High Court, that it might be determined what sums had been expended by the mortgagee in the proper and necessary repairs of the mortgaged property, and that the

MORTGAGE-DECREE (SALE OF—IN EXECUTION).

mortgagee might be allowed in the decree such sums with interest. 5
B. H. R. A. J. 116.

MORTGAGE-PROPERTY (Purchaser of).

898. The purchaser of a property after the mortgage has been foreclosed and a decree for possession obtained, is entitled to get the property free from the lease. 12 W. R. 19.

899. A party purchasing mortgaged property, after a suit has been instituted to enforce the mortgage, takes nothing as against the mortgagee, or as against one who claims under a decree which directs the sale of the property in satisfaction of the mortgage, even though the deed of sale is registered, and the mortgage (which was for less than Rs. 100) was not registered. 23 W. R. 382.

MORTGAGE-PROPERTY (Purchaser of--at Revenue Sale).

900. Where land, in the possession of a mortgagee, is sold by the Mamlatdar, for arrears of Government land revenue: Held that as the land revenue is the paramount charge on the land, whoever derives title from the occupants takes it subject to that charge and that, therefore, the purchaser at the sale was entitled to the land, free from any mortgage lien. 10 B. H. R. 416.

MORTGAGE-PROPERTY (Purchaser of Share of).

901. A mortgagee sold part of the mortgaged property and then foreclosed, his purchaser being no party to the foreclosure proceedings. The mortgagee and purchaser afterwards sued for recovery of possession of the mortgaged property, after foreclosure. Held, the purchaser could maintain his suit, although he had not been a party to the foreclosure proceedings for the recovery of the mortgaged property, which had been purchased by him. The foreclosure conferred absolute title to the whole property mortgaged on the mortgagee, and any body claiming under him. 3 B. L. R. App. 148.

MORTGAGE-PROPERTY (Sale of--by Mortgagee).

902. Where money is lent upon the security of immovable property of a nature incapable of division, and the mortgagee, on one of the instalments becoming due, has to sell the entire property, he does not thereby lose all lien over the surplus proceeds. 16 W. R. 246.

903. The sale of mortgaged property by the heirs of a mortgagee after it has been held and enjoyed by them upwards of 60 years, does not give a fresh cause of action to the representatives of the mortgagor. 16 W. R. 96.

MORTGAGE-PROPERTY (Sale of—in Execution).

904. Where property is sold under a decree obtained on a mortgage-bond, the purchaser does not purchase merely the rights and interest of the debtor, but the right which the mortgagee brings to sell by virtue of the decree. 10 W. R. 291.

905. Where the rights and interests of a mortgagor were sold in execution of a decree declaring the mortgaged property liable for the mortgaged debt, it was held that a *putneedar*, who had obtained a *pottah* from the mortgagor subsequent to the mortgage and in violation of its conditions, had no right or title to hold possession against the purchaser. 10 W. R. 151.

906. Where a decree-holder brings to sale in execution of his decree property on which he holds a mortgage without notifying his incumbrance upon it, and on being asked by an intending bidder at the time of the sale whether there is any incumbrance on the property, gives an evasive answer which misleads the bidder and induces him to purchase the property as unencumbered, he cannot subsequently claim as against such bidder to enforce his mortgage. 2 N. W. P. 315.

907. When a creditor who holds a bond whereby property is mortgaged, elects to take a money decree, and in execution thereof brings the mortgaged property to sale, he by that sale transfers to the purchaser the benefit of his own lien and also the right of redemption of his debtor. When, therefore, the decree-holder is himself the auction-purchaser, he obtains the right to have his lien on the mortgaged land satisfied. 23 W. R. 460, 461.

908. Where money is lent on a bond under which property is hypothecated to the obligee, and the latter obtains a money decree against the obligor, not making the property liable for the claim, he is not entitled, except by regular suit against the party in possession, to follow the property, if it has meantime been mortgaged and sold in execution of a decree obtained by the mortgagee. 10 W. R. 27.

909. Where a mortgagee sues on his bond and takes a money-decree, in execution of which he attaches and sells the mortgaged property, he transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor; but the transfer does not include *ticcadaree* rights, if the *ticcadar* was not made a party to the suit on the bond. 24 W. R. 210.

910. Defendant No 1 (G. C.) on 9th August 1863, borrowed money from plaintiff upon a bond, hypothecating property by way of simple-mortgage, On 27th August 1867, he executed a similar instrument in favor of defendant No. 2 (G B) on a further loan. On 13th May 1867, he executed a second bond in favor of plaintiff for the amount (principal and interest) due under the first bond. On 29th May 1869, plaintiff obtained a decree against defendant No 1 for the money due under the bond of 13th May 1867; and on 13th July 1870, defendant No 2 (G B) also obtained a decree upon his bond against the said debtor. In execution of plaintiff's decree, the property was sold and purchased by decree-holder on 25th August 1870. After this (G B) also executed his decree and attached the property which, notwithstanding plaintiff's objection, was put up to sale and purchased by (G B), who obtained possession, plaintiff sues to have the sale to the latter set aside, and his own purchase upheld: Held, that plaintiff, on purchasing at the

sale in execution, took subject to the defendant's security to this extent that the defendant by paying off the prior debt might establish his own security.

Held, that the question whether plaintiff's first security was extinguished by his taking a second security, covering the original debt with interest, would depend upon the intention of the parties which, in this case, was shown by the original bond having remained in the possession of the creditor. 23 W. R. 338.

MORTGAGE-PROPERTY (Saving---from Sale).

911. An objector who wishes to save mortgaged property from sale, is bound to pay whatever the mortgagor is liable to pay under the decree. 7 W. R. 493.

912. Section 9 of Act I of 1845, enacts, that Collectors shall, at any time before sunset of the latest day of payment, receive as a deposit from any party, not being a proprietor of the estate in arrear, the amount of the arrear of revenue due from it, to be carried to the credit of the said estate at sunset aforesaid, unless before that time the arrear shall have been liquidated by a proprietor of the estate. And in case the party depositing, whose money shall have been credited to the estate as aforesaid, shall prove, before a competent Civil Court, that the deposit was made in order to protect an interest of the said party, which would have been endangered or damaged by the sale of the estate, he shall be entitled to recover the amount of the deposit, with interest, from the proprietor of the said estate. Held, upon a construction of this section, that it only gave a personal right of action against the proprietor, and did not create a lien on the estate.

A mortgaged his estate to B. The mortgagor died, leaving a childless widow his heir. A. had children, living, at his death, by a former deceased wife. The widow of the mortgagor, who was in possession, let the estate fall into arrears for Government revenue, when the representative of the mortgagee, in order to save the estate from public sale, paid the arrears. The mortgagee's representatives afterwards brought a suit against the widow to recover the amount so paid which suit did not raise any claim against the estate itself, but sought only to make the widow personally liable, and a decree was obtained against her to that effect. When execution of the decree was sought to be enforced against the widow, by sale of the estate, the mortgagor's contingent reversioners intervened, and the Court held that execution could not issue against the estate of the mortgagor, which was not liable. A supplemental suit was then brought by the mortgagee's representative, to recover the amount of the decree so obtained, with interest, and for sale of the estate: The High Court held, upon the construction of the 9th section of the Act I of 1845, that the action to enforce the decree was confined to the widow's interest in her husband's estate, which estate could not be sold.

Upon appeal the Judicial Committee, in affirming the judgment, held, that the decree so obtained against the widow in possession, could

only be enforced against her property in respect of such interest in her deceased husband's estate as she possessed. Held, further, that there were two courses open to the mortgagee's representative, *first*, to have instituted a suit to enforce the mortgage, and to tack to the mortgage the amount of the arrears of revenue paid to save the estate, and for a sale, or, *secondly*, to have proceeded under the 9th section of the Act I of 1845, in a personal action. 11 M. I. A. 241, 242; 8 W. R. P. C. 17.

MORTGAGEE.

913. A mortgagee is entitled to interest on account of the balance of *putnee* rents paid by him. 1 W. R. 133.

914. The proper sum to be allowed a mortgagee for *surinjamee* is what he has actually spent as expenses of his management. 1 W. R. 133.

915. No decree to be given against a person as being the real mortgagee, without evidence of the *benamee* holding. 1 W. R. 133.

916. A *bona fide* mortgagee without notice, who has foreclosed, is not affected by any arrangement between the mortgagor and other parties. 2 W. R. 64.

916. A mortgagee who does not take possession of the mortgaged property at the expiration of the period of grace, but elects to give the mortgagor time to pay his debt, cannot complain if the latter sells the property to other parties, who are willing to pay off the mortgage debt. 24 W. R. 429.

918. A mortgagee cannot be bound by a decision relating to the property mortgaged in a suit instituted long after the date of his mortgage, to which he was not a party; nor can he be deprived of his right to enforce his lien by a subsequent sale of the mortgagor's right, title, and interest. 12 W. R. 362.

919. Where a mortgagee becomes the purchaser of property sold, under a decree for sale obtained by him on his mortgage; it is not necessary that the mortgagor should join in the conveyance of the property to the mortgagee. 12 B. L. R. App. 7.

920. Where a mortgagee, having the option of selling the mortgaged property or suing the mortgagor, elected the latter alternative and obtained a decree, his costs were disallowed by the Appellate Court. The defendant having committed further default as to instalments, the plaintiff sued him again and the first Court decreed the suit without costs:—Held that the first Court could not do otherwise than follow the rule previously laid down by the Appellate Court as to costs; but that should the defendant default again, it would be well to consider the whole circumstances of the case. 23 W. R. 84.

921. A mortgagee who executes a lease in favour of a mortgagor stipulating to pay him a certain amount annually as rent, is, as far as

the payment of that sum is concerned, a tenant of the mortgagor, and must be sued for any arrears of such rent under Act X of 1859. W. R. S. N. 93.

922. The mortgagee of the property sold subject to his mortgage is not entitled to have the surplus proceeds paid to him in satisfaction of the decree which he had obtained upon his mortgage, and upon which he had issued execution. 6 W. R. Mis. 13.

923. Plaintiff having asked for and obtained the residue of the sale proceeds after all the judgment-creditors had been fully satisfied, was held not to have abandoned his right as mortgagee. 7 W. R. 309.

MORTGAGEE (After Foreclosure).

924. A mortgagee after foreclosure is entitled only to so much of the property as belongs to those members of the family with whom he is dealing. 1 W. R. 334.

MORTGAGEE (Duty of).

925. A mortgagee in possession of mortgaged premises is bound to keep them in necessary repair, and is at liberty to charge for the same with interest. 9. W. R. 488.

MORTGAGEE (First and Second).

926. Where a person mortgages his property first to A, and then to B, B takes the mortgage subject to A's lien. A is not bound to warn B that he has a previous lien; it is the duty of the borrower to give all information to the lender. If A stood by while the borrower was negotiating a loan with B and kept silence though he knew that the borrower had again pledged his property to B, such silence could not be construed into a waiver of his claim, or in any way affect his rights. 4 W. R. 45.

927. Second mortgagees, failing to preserve their lien on the estate by paying off the debt due on the prior mortgagee, cannot complain against the first mortgagee for taking advantage of the right which the law gives him of enforcing his claim against the mortgaged property. 1 W. R. 20.

MORTGAGEE (Fraud of).

928. The mortgagee in possession and another having sought to deprive the mortgagor of his title to redeem by means of a secret purchase of the mortgaged estate between them including the fraudulent device of a sale by auction for arrears of revenue, such arrears being designedly incurred by the mortgagee in possession, it was held that a suit for redemption and for possession instituted many years after the sale for arrears was not barred by section 24 of Act I of 1845.

If a mortgagee in possession fraudulently allows the Government Revenue to fall into arrears with a view to the land being put up to sale

and his buying it in for himself, and he does in fact become the purchaser of it at the Government sale for arrears, such a purchase will not defeat the equity of redemption. 5 W. R. P. C. 83.

929. J M and M *pundahs* borrowed money from R and G, *bhuguts* on the security of a simple mortgage of a share of 4 *talooks* including one called *kalleangha*. In the following year, R and G obtained a simple money decree against the *pundahs* and attached their share in the *talooks*, but did not proceed to sale. The year after, one B L *bhugut* advanced a sum upon a simple mortgage of the same share of *kalleangha*, which money was immediately handed to R and G in satisfaction of another advance which they had made to the *pundahs*; the sum advanced by B S was procured through the agency of R. Subsequently B L obtained a simple-money decree for his debt and attached and sold the share of *talook kalleangha* comprised in his security and purchased the property himself at a small price, notice of R and G's claim having been given prior to the sale. R and G then brought a suit against the *pundahs* B L and others with the object of determining plaintiffs' mortgage lien and obtaining an order for the re-sale of the 2 annas share of 3 out of the 4 *talooks* including *kalleangha*.

Held that as plaintiffs had fraudulently concealed the fact that they had themselves made a prior advance upon the same property, they could not set up their rights as mortgagees in opposition to B L. The effect of their fraudulent statements was that B L must be considered the first mortgagee, and the fact of his having purchased the property himself at a sale in execution, after notice of plaintiffs' mortgage, did not affect his rights as mortgagee. 11 W. R. 286.

MORTGAGEE (In Possession).

930. There is no law restricting a mortgagee to the receipt, by way of interest, of the amount of principal lent. The mode of calculation to be followed in such cases is every year to add the amount of interest to the principal sum, and then deduct the value of the usufruct. 2 W. R. 289.

931. Under an English deed a mortgagee is entitled to possession before foreclosure immediately upon default, and he would hold possession subject to his own right to foreclose and to the mortgagor's right to redeem.

The decree in the foreclosure suit would not be binding on a party who purchased *bona fide* the rights of the mortgagor, or a portion of them, before the pendency of any suit against the mortgagor. 6 W. R. 269.

932. Possession by mortgagees cannot be adverse to the heir of the deceased mortgagor so as to make limitation apply. W. R. S. N. 58.

933. Held that a mortgagee in possession of land was bound to cultivate the best crop which it was ordinarily capable of yielding. 2 H. R. 211.

934. A mortgagee (if unable to obtain, or if deprived of possession of the property mortgaged) may sue for the consideration-money. 1 W. R. 366.

935. In a suit by a mortgagee for possession of the mortgaged property, on the allegation that some of the defendants under subsequent mortgages and purchases had opposed him in obtaining possession, and to have it declared that the said mortgages and purchases were inoperative. Held, that the plaintiff had but one cause of action upon his mortgage-deed, and was right in joining all the defendants in this suit. 22 W. R. 5.

936. Held that a mortgagee whose bond was registered was entitled under section 230 Act VIII of 1859, to recover possession of the mortgaged land, of which he had been dispossessed, under a decree obtained against his mortgagor, by another mortgagee, whose mortgage bond had been subsequently registered, on condition that he satisfied the claim of the decree-holder: otherwise the defendant to be entitled to possession on his satisfying the plaintiff's mortgage claim. 2 B. H. R. 209.

937 It is not necessary before instituting a suit against a third party to obtain possession as mortgagee, to first establish title under the deed of mortgage in a suit against the mortgagor. It is necessary that the mortgagee should show the extent of the rights and interests of the mortgagor in the property sued for.

But it is sufficient for this purpose to make the mortgagor a defendant in the suit, and there is no necessity for a separate suit against such mortgagor. 2 N. W. P. 72.

938. A deed of mortgage, and conditional sale, contained a covenant for possession by the mortgagee during the mortgage term. Possession was withheld, though the mortgagor received the mortgage-money. Held, that an action would lie by the mortgagee against the mortgagor for recovery of the principal and interest, money advanced. 4 M. I. A. 444.

939. A mortgagee in possession of the mortgaged land, who, instead of letting it to ryots and realizing the rent in the ordinary way cultivates it himself, is not responsible or liable to account for the whole of the profits arising to him by farming the land, but only for such profits as he would have realized had he let it to a tenant, or as the mortgagor, would have realized had he let it. 7 W. R. 244.

940. Held that a mortgagee in possession was entitled to be allowed for expenses incurred in connection with the Revenue Survey of land mortgaged to him. 2 B. H. R. 220.

941. On a question of the right of a mortgagor to redeem by deposit of the principal sum due only, the length of possession by the mortgagee is immaterial. 6 B. L. R. App. 53.

942. Suit for Government revenue paid by mortgagee in possession

of property mortgaged for a debt secured by an instalment bond executed in his favor by the mortgagor through a *mooktear*. Although the plaintiff could not prove the execution by the defendant of the power of attorney in the name of the person alleged to have signed the bond for the defendant, yet as the plaintiff had paid the arrears of revenue due on the mortgaged property in the *bona fide* belief that he had a rightful interest in it, and would thereby save the property from sale, and be entitled to recover the money so paid, such payment was held to be not officious and the suit was decreed. 5 W. R. 127

943. Mortgage of a village which was partnership property, made by some of the partners for the benefit of the firm, held binding on a member of the firm, though not executed by him.

In pursuance of a stipulation contained in a mortgage-deed, that the mortgagees should be at liberty to place a *Metha* (or clerk) of their own to receive the collections, to be paid a weekly salary by the mortgagor, such officer was appointed, who received the collections for the first few years, and paid them over to the mortgagees, but afterwards discontinued such payments, and handed over the amount of the collections to the mortgagors. An attachment having issued against the estate at the suit of a late partner for the amount of his share of the property upon a dissolution of the partnership, held by the Judicial Committee (overruling the judgment of the Sudder Court), that the appointment of a *mehta* by the mortgagees was a possession by them only so long as he continued to pay the collections over to the account of their mortgage, and that the subsequent payment by him of the collections to the mortgagors did not create a forfeiture by the mortgagees; the effect of the power to appoint a *Mehta* being merely equivalent to the mortgagees' right to receive the rents and profits if they should think fit, and would not operate so as to postpone their security to the attachment subsequently obtained, unless they permitted the payments to be made to the mortgagors after notice of such attachment. 2 M. I. A. 487; 6 W. R. P. C. 10, 11.

944. A mortgagee in possession occupies a fiduciary position towards all the persons interested as proprietors in the mortgaged estate, and to all he is answerable for whatever mesne profits he may receive in excess of the amount which he is entitled to receive by law or agreement.

And when some of the proprietors assert claims, and assert such claims on behalf of themselves alone, he is entitled to require the claimants to establish the extent of their claims.

It is the practice of the Courts to accept the *Jummabundee* papers which are filed by the *putwarees* under the Zamindar's supervision as *prima facie* evidence of the profits of the estate, it being open to the mortgagee in possession to show that the amounts entered could not with due diligence be collected. 2 N. W. P. 217.

945. Where an auction-purchaser at a sale in execution of a mortgagor's rights, forcibly dispossesses the mortgagee, the mortgagor is

not liable for the purchaser's illegal acts. The mortgagee should have retained possession and taken measures to prevent forcible dispossession or to recover possession against the purchaser. W. R. S. N. 348.

946. A mortgagee in possession, in paying the Government revenue to save the estate mortgaged to him, has a claim on the mortgagor for his *laches* in not paying that revenue which, under the mortgage deed, he was bound to pay. W. R. S. N. 210.

947. In a suit for possession of property which plaintiff's vendor (K) had purchased from one A. R. K, the defendant in possession, claimed to be entitled to retain possession as purchaser under a sale in execution of a decree against A, which had been obtained on bonds which pledged the property although the mortgage was not declared in the decree: Held that, if R. K could prove that by the bonds in question this property was pledged as security for the debts covered by them he would be entitled to remain in possession. 24 W. R. 94.

948. A loan transaction in 1837 was effected by two deeds *first* a *Kabala*, an absolute deed of sale, and *secondly*, an *Ikrarnamah*, or deed of agreement, constituting a mortgage.

The *Ikrarnamah* provided, that if the mortgagor paid, within ten years, a lump sum at the rate of 12 *per cent.* interest, he was to recover back the estate and the balance of collections less charges. The mortgagee entered into possession, No interest on the principal sum was paid at the time stipulated, and in 1859, a redemption suit was brought by the mortgagor's heir and for possession. Held, (1) that the *Ikrarnamah* did not take the case out of an ordinary mortgage transaction; (2) that Bengal Reg. XV of 1793 did not apply, and an account directed to be taken of what had been received by the mortgagee, upon the footing, that the interest which accrued from time to time, was to be set off against the rents and profits received, and the mortgagee only to account to the mortgagor, for the rents, profits, and interest which he might have received, over and above the interest then due to him on the mortgage.

Semble.—Section 6 of that Regulation is repealed by section 7 Act XXVIII of 1855. 14 M. I. A. 443.

MORTGAGEE, IN POSSESSION (Account by).

949. Exposition of the nature of the accounts to be kept by a mortgagee in possession. W. R. S. N. 177.

950. Since the repeal of the usury laws, a mortgagor, and mortgagee may make what contract they please with reference to the profits of the mortgaged estate, and the mortgagor may by contract deprive himself of the right to compel the mortgagee in possession to account for the profits. 6 W. R. 283.

951. In a suit to recover possession of mortgaged property on the allegation that the usufruct had liquidated principal and interest, the production of accounts is necessary. 6 W. R. 84.

952. In the case of a mortgage by a *zuri-peshgee* lease, the mortgagor is entitled to an account from the mortgagee notwithstanding an express stipulation in the lease that the latter shall not be liable to account. 6 W. R. 6. .

i. A mortgagee in possession is required to account to the mortgagor, previously to being allowed to foreclose. 1 W. R. 366.

954. To enable a Court to ascertain the amount received by the mortgagee whilst in possession, the mortgagee should file his *jumma-wassil-bakee* papers, and proceed generally in accordance with section 11 Regulation XV of 1793. 5 W. R. 53.

955. According to section 10 Regulation XV of 1793, it is the duty of the Court to take an account of the receipts of the mortgagee in possession, and then to adjust the mortgage account of principal and interest. W. R. S. N. 109.

956. In a suit for redemption of mortgaged lands, accounts must be made up before a decree is passed, that it may be ascertained whether or not the mortgagee has been paid off, &c. 2 N. W. P. 207.

957. In a redemption suit under the old law for the possession of land the subject of an usufructuary mortgage, the plaintiff is entitled to an account, even though the terms of the original agreement exempt the defendant from his liability to an account, and although the principal sum advanced is very small. 10 W. R. 367.

958. The duty to which mortgagees are bound by section 11 Regulation XV of 1793 is to keep an account of gross receipts from the property mortgaged, and also the expenses of management and preservation. The gross receipts must be such as the mortgagor himself would have been entitled to; and if he could not, by reason of an intervening lease, call for an account of the collections, neither can his mortgagee; and if a valid engagement is made, qualifying the usufructuary possession, the account of the receipts must be subject to that modification.

The verification required by section 11, of the mortgagee's accounts need not be by his personal oath in all cases. The Legislature never intended that a man should swear positively to knowledge of that of which he can have no personal knowledge. 11 W. R. P. C. 19.

959. It is the duty of a mortgagee of fractional share of an estate held in joint tenancy to see that he receives out of the estate all that the mortgagor ought to have received, not only that all assets are realized and brought to account, but that the expenses are regulated with care.

One of several joint mortgagors can sue alone to redeem, there being no necessity to determine the extent of his share in the mortgaged property. 2 W. R. 150.

960. Held (by Phear J) that mortgagees are bound to exhibit the detailed items of all their actual receipts and disbursements to the

time of accounting, verified by themselves and accompanied by all vouchers. 9 W. R. 572.

961. A mortgagee in possession is bound to give an account of all payments made towards the liquidation of his mortgage. On his refusal or neglect to furnish such account, every presumption will be made against him. 6 W. R. 127.

962. Where a mortgage lease was granted, and whilst the term was running, the mortgage account could not be taken; but where the lease had expired the account to be taken on the ordinary footing of the receipt of rents and profits of the mortgaged estate. 6 M. I. A. 423.

963. Though a mortgage be not an usufructuary mortgage, the mortgagee in possession is bound to give an account of the profits realized by him from the mortgaged property so long as it was in his possession, whether he took possession with or without the consent of the mortgagor. 7 W. R. 30.

964. Mortgagees in actual possession should under section 11 Regulation XV of 1793 be examined as to the truth of mortgage accounts, excluding persons who according to the manners and customs of the country are unable to appear in Court, or others who from their position are not likely to be acquainted with the actual state of the facts. Where one of the co-sharers has a competent knowledge of the facts, his deposition is sufficient to prove the truth of the accounts. 14 W. R. 66, 67.

965. In a suit to recover from the mortgagor the sum advanced to him by the plaintiffs, he having unlawfully dispossessed them from the land, the Lower Court found that the mortgagor was lawfully in possession, and that the money advanced had all been satisfied out of the proceeds of the land received by the plaintiffs. Held, that in such a suit the plaintiffs who were really the accounting parties, could not complain that no account had been required from the mortgagor. 1 W. R. 11.

966. When the account of the mesne profits and expenditure by the mortgagees in possession are unsatisfactory, an account, whether as incidental to the question of foreclosure, or redemption, is to be taken, as provided by Bengal Regulations XV of 1793, section 11, and I of 1798, section 3. 10 M. I. A. 1.

967. The Zilla Courts, in coming to a conclusion as to the state of the mortgage accounts having proceeded not upon proof of the actual collections which were or ought to have been made by the mortgagees, but upon materials which were in great measure speculative and conjectural, their decision was set aside. 1 W. R. P. C. 19.

968. In taking the accounts, as between a mortgagor and a mortgagee in possession, the interest may be set off from time to time against the rents and profits, the mortgagee only accounting to the mortgagor for any rents, profits, and interest on the same which he may have received over and above the interest due to him upon the debt. 10 B. L. R. P. C. 386.

969. Held, upon the construction of section 11, Bengal Regulation XV of 1793, that the production of accounts by a mortgagee in possession seeking to foreclose cannot be called for when there is neither plea nor proof that the usufruct had liquidated the principal and interest, and where no deposit had been made to cover the balance admitted to be due.

The necessity for a mortgagee in possession to produce his accounts arises :—

First, when the mortgagor has deposited the principal money, leaving the question of interest to be settled by an adjustment of the account.

Secondly, when the mortgagor has deposited all that he admits, or alleges, to be due ; and

Thirdly, when he pleads and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the mortgaged premises. 10 M. I. A. 341 ; 5 W. R. P. C. 47.

MORTGAGEE (Prior and Puisne).

970. The rule of Hindu law that a mortgage with possession takes precedence of a mortgage of a prior date, but unaccompanied by possession does not apply to *Guzrat*.

Where in *Guzrat* the defendant, a puisne mortgagee in possession, had notice of plaintiff's prior mortgage, the defendant was held not entitled to claim the benefit of the above rule of Hindu law.

Registration could not of itself alter this rule of Hindu law except so far as effect may be given to it by Statute, and registration secures the same object which the Hindu law intended to secure by requiring possession, *viz.*, notice to subsequent incumbrances of the existence of a prior incumbrancer. 11 B. H. R. 41.

971. The security to which a mortgagee becomes entitled under the ordinary form of mortgage in the mofussil is the right to sell the entire estate of the mortgagor as the same existed at the date of the mortgage, and he cannot be deprived of this security by any subsequent charges on the property or prior unregistered charges which the mortgagor may create or have created. When he brings the property to sale, the sale is an out-and-out sale of the estate of the debtor, and the purchaser takes the property subject only to those encumbrances which were in existence at that date, though such of the subsequent encumbrancers as may, at the time of the sale, have taken out execution, may have a right to satisfy their claims from the surplus proceeds of the sale.

In applying section 259 of the Code of Civil Procedure to cases of the above description the words "the right, title, and interest of the defendant in the property sold" must be understood as meaning the right, title and interest which the decree ordered to be sold, *i. e.*, the right, title, and interest which the judgment-debtor had in the property at the time of the mortgage. 7 B. H. R. A. J. 146.

MORTGAGEE (Suit by—to raise

972. A mortgagee claiming title otherwise than from the execution debtor is competent, on behalf of himself and his mortgagor, to sue to raise an attachment on the property of which he is.

The Court of first instance found against the defendant on a matter of fact, but decreed in his favour on a point of law; and, on appeal by the plaintiff, the defendant omitted to file a memorandum of objections to the adverse finding of fact of the Court of first instance. The Appellate Court, without going into the question of fact, confirmed the decree of the Court of first instance on the point of law.

Held that the High Court, in special appeal, could under these circumstances, give judgment in favour of the plaintiff without a remand. 5 B. R. A. J. 194.

MORTGAGEE (Without Possession).

973. A mortgage without possession is not, in Hindu law, absolutely invalid but is binding as between the mortgagor and mortgagee.

A purchaser with possession at a Court's sale, whose certificate of sale is registered, buys the right, title and interest of the debtor, burdened with the lien of a prior mortgagee, without possession, whose deed of mortgage is registered. 9 B. H. R. 304.

974. In order that a Hindu mortgagee may successfully maintain an action of ejectment against third persons wrongfully in possession of the mortgaged property, it is not necessary that such mortgagee should have been put in possession by his mortgagor. He can bring his action based upon the title of his mortgagor, if the mortgagor had a good title to the land, and was in possession of it within twelve years before the suit was brought.

A mortgagee is not affected by a *Mamlatdars'* order, made under Bombay Act V of 1864, on the application of the mortgagor for possession subsequent to the date of the mortgage. 9 B. H. R. 275.

975. A mortgage in the *konkan* without possession is invalid as against a subsequent mortgagee with possession, but the registration of such a mortgage cures any defect or imperfection arising from the non-completion of the transaction by delivery of possession; and a deed so registered is good against a non-registered mortgage though accompanied by possession. 8 B. H. R. A. J. 50.

976. The right of a mortgagee without possession to foreclose does not cease 12 years after his alleged mortgage. The possession of the mortgagor is not to be presumed to be adverse to, but may be perfectly reconcilable with the subsisting lien of the mortgagee. The question of limitation depends on whether there is a mortgage actually ing and acknowledged by the acts and conduct of the parties within years before suit. 1 W. R. 240.

977. The mortgagee without possession of certain lands in

(under a mortgage-deed of the 1st of August 1864) on the 16th of April 1867, obtained a decree awarding to him possession of the mortgaged premises. On the 11th of July following, the mortgagor sold the premises to a third party who had distinct notice of the deed of sale was duly registered. The plaintiff thereupon claimed to hold the premises free from the mortgage.

Held that, though a mortgage in the *Dekhan* must be accompanied by possession to give it validity against third parties, it is not absolutely void for want of such possession, and that the plaintiff, having notice of it, should not be allowed to hold the premises free from the mortgage. 7 B. H. R. A. J. 60.

978. A mortgagor is not bound to give notice to his mortgagee of a transfer of his rights. 12 W. R. 105.

979. A mortgagor creating an encumbrance subsequent to the mortgage must show that it has not injured the out-turn of the property. 12 W. R. 19.

The acknowledgment in writing of the title of a mortgagor need not be made directly to the party entitled. 3 N. W. P. 78.

981. A suit for redemption does not bar the mortgagor from afterwards suing the mortgagee in possession for mesne profits payable between the date of suit and the execution of decrees. 7 W. R. 364.

982. Where a mortgagor omitted to plead in the foreclosure suit that he did not obtain the whole of the consideration-money, he was not permitted to set up that plea for the first time in the subsequent suit for possession. W. R. S. N. 206.

983. A mortgagor cannot ask for a decree for possession without tendering the whole of the mortgage-debt. 17 W. R. 342.

A Judge has no discretion to extend the time allowed to a mortgagor under section 8 Regulation XVII of 1806. 5 W. R. Mis. 31.

985. The mortgagor's legal representative is the person who either by law or by contract between the parties succeeds the mortgagor in the position which he holds relative to the mortgagee, in respect of the property: and a succession of this kind may occur either by the death of the mortgagor or by assignment of the equity of redemption. 23 W. R.

986. Where the mortgagor represents himself as the owner of the property mortgaged, though another party in another suit alleged himself to be the real owner and afterwards denied the allegation, yet as the mortgagor dealt with the mortgagee as principal, he is bound to the mortgage. 11 W. R. 366.

937. Where a mortgagor sues to recover possession of the mortgaged

property on the ground that the loan has been paid off from the assets of the estate, and that he is entitled to recover surplus collections, and the Court finds that a large balance in favor of the mortgagee still exists, plaintiff is not entitled to conditional decree, and the suit should be dismissed. 8 W. R. 369.

MORTGAGOR (In Possession).

988. If a mortgagor in possession who is entrusted with the dominion over the mortgaged property by the mortgagee in whom the property is in a mortgage in the English form, wilfully defaults and causes the property to be sold for arrears of Government Revenue for the purpose of defrauding the mortgagee and purchases it *benamée*, he is liable to be punished for criminal misappropriation under section 405 of the Penal Code. 5 W. R. 230.

989. A dealing between the *ticcadar* of the mortgagee and the mortgagor, by which the former becomes the purchaser of the mortgagor's rights, does not of itself necessarily change the relative positions of the *ticcadar* and the mortgagee, and convert the former into mortgagor in possession. 1 W. R. 201.

990. The defendant mortgaged certain premises to the plaintiff by a deed of mortgage which contained a condition that the mortgagor should remain in possession so long as the interest was regularly paid. Default in payment of the interest was made, and the mortgagee sued for possession of the mortgaged premises.

Held, that the mortgagor was entitled to equitable relief against the entry of the mortgagee on payment of all arrears of interest, together with interest upon each instalment and costs; and three months' time was allowed to the mortgagor to make such payment. 6 B. H. R. A. J. 121.

991. The transaction of mortgage effected by a *bye-bil-wafa* is, under the Regulations, essentially the same in regard to the relation between the mortgagor and the mortgagee as an English mortgage.

Although the mortgagee has, on the occurrence of the default named in the deed, a cause of action to recover possession, if withheld from him adversely, he has no cause of suit if possession by the mortgagor is from that time held and continued with his permission. And so long as the relation created by the *bye-bil-wafa* can be said to be subsisting, it would probably be right to infer that the possession of the mortgaged property by the mortgagor was held with the permission of the mortgagee, unless some act was done, or claim advanced, by the mortgagor inconsistent with the subsistence of such a relation.

It would be reasonable to infer from the payment of interest that the mortgagor's possession was permissive, but such possession ought not to be treated as adverse so long as the mortgagor asserts a title to redeem and advances no other title inconsistent with it. 22 W. R. 543.

992. The defendant mortgaged certain immovable property to the

plaintiff by a *bye-bil-wafa*, or deed of conditional sale, dated 27th January 1851. The deed stipulated that the mortgage-debt should be repaid on the expiration of three years from the date of the execution. The money was not repaid at the stipulated period, and the mortgagor remained in possession of the property, but there was some evidence to show that he had made payments of interest on the mortgage-debt to the plaintiff. In February 1870 the plaintiff took proceedings to foreclose the mortgage, and on 16th February 1872 he instituted a suit for possession of the property. The defence was that the suit was barred, the plaintiff having been out of possession for more than twelve years previous to the institution of the suit. Held, that payment and acceptance of interest was evidence of the continuance of the relation between the parties created by the mortgage-deed, and until the mortgagor advanced any rights adverse to the mortgagee, the possession of the mortgagor was permissive, and no cause of action accrued to the mortgagee. 14 B. L. R. 315.

993. A mortgage made in 1845 in the English form, contained a proviso for redemption, and for the mortgagor continuing in possession until default in payment, in which event the mortgage deed gave a right of entry to the mortgagee. Default was made in payment of the mortgage money by the mortgagor, but, no steps were taken by the mortgagee to obtain possession. In 1849 the mortgagor sold part of the mortgaged estate, and the purchaser entered into possession and registered his title. The assignee of the mortgagee afterwards brought a suit for foreclosure to which the purchaser was not made a party, and in the year 1862 obtained a decree for foreclosure. In a suit brought by the assignee of the mortgagee against the purchaser for possession of that part of the estate so purchased by him from the mortgagor, held, by the Judicial Committee, affirming the judgment of the High Court at Calcutta, that as the mortgagor after default, and the purchaser under him had been in possession for more than 12 years before the suit for possession was instituted, the Limitation of Suits Acts XIV of 1859, section 1, cl. 12, was a bar to the suit. 14 M. I. A. 144.

MORTGAGOR, RIGHTS OF (Purchaser of).

994. Where property, with legal encumbrances upon it, is sold in execution of a decree obtained on a mortgage-bond, it is sold subject to the encumbrances, and the purchaser can only recover possession on off those encumbrances. 24 W. R. 348.

995. The purchaser of the rights of a mortgagor who obtained possession of the property, cannot be ousted summarily by a subsequent purchaser of a money decree against the mortgagor. 9 W. R. 150.

MORTGAGOR (Tender by).

996. A tender by one or more of several mortgagors is not such as a mortgagee is bound to accept, unless it is made conjointly by the whole of the mortgagors, or on their behalf and with their consent. 21 W. R. 428.

Where a decree declared plaintiffs' right to redeem a mortgage

whenever within the month of *Jeth* they paid the mortgage money, but did not direct that the money should be paid into Court, and plaintiffs brought the money into Court on the 1st day of the following month, the last day of *Jeth* falling on a Sunday, but did not, however, take out execution for some months, nor apprise the defendant that they had paid the money into Court. Held, that such payment was not a proper tender, and that to make it a proper tender the plaintiffs should not only have paid the money into Court in the month of *Jeth*, but were bound to see that the mortgagee in possession had due notice of such payment. 3 N. W. P. 80.

998. The year of grace allowed to a mortgagor by Regulation XVII of 1806 to tender or deposit the amount due to the mortgagee, includes authorized holidays, the mortgagor not being entitled to the deduction of any holidays which may occur when that year expires. 9 W. R. 583.

MORTGAGORS [Joint].

999. Where a mortgagee comes to an arrangement with three out of five joint mortgagors by which he consents to take, as payment a money decree against three of them, the amount of the decree must be considered as a sum paid in reduction of the liability of the five. 22 W. R. 310.

MUTUALITY.

1000. An agreement whereby the defendant undertook to pay to the plaintiff and two other co-creditors of an insolvent a share in any sums which he might recover from the insolvent, in consideration of receiving a share in any sums which might be recovered by the other creditors is not, though the plaintiff has passed no similar agreement in favor of the defendant, invalid for want of consideration or mutuality of obligation.

Where, however, one of the persons in whose favor the agreement was passed, without making the others parties sued the person who executed it to recover his share, it was held that the suit was not maintainable, as it could only be brought as a suit between partners for an account, and the result of all the partnership transactions must be brought at once under the view of the Court. 9 B. H. R. 418.

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NEGOTIABLE INSTRUMENT.

1001. The rule laid down in the cases of *Gill v. Cubitt* (3 B & C. 466) and *Down v. Halling* (4 B & C 330), that the negligence of a party taking a negotiable instrument fixes him with the defective title of the party passing it, observed upon, and those cases declared to be no longer law. 5 M. I. A. 2.

1002. A bill of sale, though signed and registered, was never delivered by the vendor. The plaintiff's case was that he had paid a part only of the purchase-money. Held that no question could arise as to *onus* of proving payment of the consideration-money, and that the Lower Court having found as a fact that no part of the purchase-money had been paid, the vendor could not be compelled to complete the transfer. 5 W. R. 248.

NON-ACCEPTANCE.

1003. The plaintiff entered into a contract with the defendant to sulphur, to be imported by the ship *Michael Angelo*. No sulphur by the *Michael Angelo* consigned to the plaintiff, and he procured it elsewhere, but the defendant refused to accept it. In an action for non-acceptance, held, that the defendant was not bound to accept sulphur not imported by the *Michael Angelo*. 2 B. L. R. O. J. 154.

NON-DELIVERY (Of Goods).

1004. A sent cotton to B's screw-house, to be screwed. It was placed in B's godowns, in charge of which was servant of B's who kept entries of cotton received and given out. B's durwan kept the key of the godowns. B proved damage, no rent was paid for godown room, but it was shown that, on several occasions, when cotton had been left by owners for some time in the godowns, and removed unscrewed, rent had been paid; it was allowed that it was for the mutual interest of both parties the cotton should be so kept. The custom was that the screwing be paid by the purchasers of cotton, to whom it was the direction of the vendors. In an action by A, for some of his cotton. Held, per Norman, J., that a gratuitous bailee of the goods, and that he was only bound to the account for the manner in which they had been kept, which he had satisfactorily done. A's suit must be dismissed.

is affirmed on appeal; but per Peacock O. J. *Quere*:—Was B a bailee at all?—per Markby J. B was a bailee for custody, but not a bailee for hire. 1 B. L. R. O. J. 68.

(Of Contract).

1005. By a contract entered into between the plaintiffs and defendant, the plaintiff agreed to sell certain goods *ex a* specific ship to the defendant, the goods to be taken delivery of within 45 days, and 10 days to be allowed for inspection, and claiming allowance for any damaged-goods; the defendant to take the risk of damage from the date of the contract. The period for taking delivery and for inspection date from the 13th of May. The plaintiffs did not receive the whole of the goods until the 10th of June, and therefore were not ready to perform their contract by submitting them for inspection within the specified time; the defendant did not call upon them to do so. In a suit for breach of the contract by the defendant in not accepting the goods, held

that the plaintiffs not being in a position to complete the contract, no cause of action had arisen. Held on appeal, the goods ought to have been ready for inspection within the 10 days stipulated, and the plaintiffs not having shown that they were ready and willing so to perform the contract, had no right to action, notwithstanding that the defendant never, in fact, called on them to deliver the goods for inspection.

The words " *ex a certain ship* " must be taken to mean that the goods are really landed, and not in course of being landed, and therefore, independently of the question of the necessity on the part of the plaintiffs to show their readiness to perform their part of the contract, the defendant was not bound to take goods on boardship, in respect of which if the contract were binding upon him, he would have been found to take the risk of any damage or loss to the goods on boardship, or in the course of landing. 3 B. L. R. O. J. 183.

NOTES (Bought and sold).

1006. The defendant, a Hindu, entered into a contract of with the plaintiff through the medium of a broker. The broker made no entry of the contract in his book, and there was a material variance in the bought and sold notes delivered by him. The notes were accepted and retained by the plaintiff and defendant respectively. In an action for non-delivery under the contract, held that the contract was made before the notes were written; the notes were sent by the broker to his principals merely by way of information; and the Statute of Frauds not applying, the plaintiff was at liberty to give parol evidence of the terms of the contract. 9 B. L. R. 245.

1007. C. & Co. and H. & Co. were merchants at *Calcutta*. H. & Co. sold to C. & Co. a large quantity of indigo, through the medium of a broker, who drew up a sold note addressed to H. & Co., and submitted it to H. for his approval, when H. having objected to a particular word remaining, the broker took the sold note to C., and informed him of H's objection. C. struck his pen through the word objected to by H., placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H. & Co. The broker delivered to C. & Co., on the following day, a bought note, which differed in certain material terms from the sold note. In an action brought by H. & Co. against C. & Co. for non-performance of the contract contained in the sold note, the Supreme Court at *Calcutta* was of opinion, that the sold note alone formed the contract, and found for the plaintiffs. Upon appeal, held by the Judicial Committee, reversing such finding, that the transaction was one of bought and sold notes and that the circumstances attending C's alteration of the sold note and affixing his initials, were not sufficient to make that note, alone, a binding contract; and that there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract. 3 M. I. A. 448.

NOTICE.

1008. A person bound to make an enquiry and failing to do so, will

be held to have notice of all such facts as that enquiry, if made, would have brought to his knowledge. 1 M. H. R. 298.

1009. Notice to a purchaser's agent is held to be constructive notice to his principal so as to fix the latter with a trust or a burden relative to the subject of purchase which without notice he would have escaped. 8 W. R. 399.

O.

OBLIGEE.

1010. Where money was lent on a bond to "the *Malik* and *Mooktear*" of a factory on his personal credit and the security of the entire factory, and it was afterwards discovered that other parties had a share in the factory, it was held that the lender was not entitled to go beyond his contract and recover from those other parties personally. 9 W. R. 355.

P.

PARTNER (Dormant).

1011. The doctrine that a dormant partner, when discovered, is liable for every debt incurred for the partnership by the active partner, is not absolute in the Courts in England, and is not to be followed by the Courts of this country, unless found, in particular cases, to be consonant with justice, equity, and good conscience. 9 W. R. 355.

PARTNER (Managing).

1012. Where a bond is executed by the managing partner in a firm, within the ordinary scope of a manager's authority, to raise money for the joint purpose of the firm, it binds the remaining partners. 24 W. R. 60.

PARTNERSHIP.

1013. To constitute a partnership, the parties must have agreed to carry on business and to share profits in some way in common. 18 W. R. P. C. 384.

1014. Participation in profits does not of itself constitute a partnership. In deciding whether or no a man was a partner, it is right to consider whether or no he was interested in the profits, and very great weight would attach to that circumstance; yet the true question is not—did the person sought to be made liable participate in the profits? but—has the trade been carried on by persons acting on his behalf?

No rule of law exists prohibiting a man, when he advances money to others to enable them to carry on business, (provided he commits no fraud and misleads no one) from securing to himself a share of the profits which may arise from the employment of the money. 12 W. R.

1015. Although a right to participate in the profits of trade is a strong test of partnership, and there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be inferred, yet whether that relation does or does not exist must depend on the real intention and contract of the parties.

To constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common; but where a contract is entered into between partners and a third person for the protection of that person as a creditor, whereby it is agreed that he shall receive in consideration of advances commission on the net profits of the partnership business, and large powers of control over the business are given to him, but no power to direct transactions, the Court, if satisfied that the contract was one of loan and security, will not interpret it as constituting a partnership.

In applying the English law of partnership to cases in India the usages of trade and habits of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind. 10 B. L. R. P. C. 312; 18 W. R. P. C. 384.

1016. The parties had entered into a contract of partnership to work certain supposed mines: plaintiff to receive a *bonus* and also six monthly payments as "rent" for the land, both parties to share the profits and bear the losses; it being stipulated that in case coal should not be discovered, the *bonus* and any sum paid as rent would be refunded.

Held, that this was a partnership arrangement, and the payment of the money which went by the name of rent was not as by a tenant to a landlord, but as consideration-money for land forming a portion of the capital. 9 W. R. 499.

1017. C, the managing member in Calcutta of a firm of which B the other partner was absent in England made, unknown to B and without authority from him, various purchases from the plaintiff of articles not within the scope of the partnership business. The purchases were made as for the first, and were delivered on the partnership premises by the plaintiff. Subsequently the goods were taken to C's house, and, together with certain private property belonging to C, were sold by auction, and the whole proceeds of the sale were paid by C to a Bank in Calcutta, to the partnership account with that Bank, and were eventually remitted to B in England as from the partnership funds, and applied in payment of certain bills of the firm then due. B, on coming to Calcutta, took over the management of the business from C. In a suit brought against B and C for the price of the goods purchased from the plaintiff, held both in the Court below and on appeal that B was not liable. 15 B. L. R. 372.

1018. Mortgage of a village which was partnership property, made by some of the partners for the benefit of the firm, held binding on a member of the firm, though not executed by him. 2 M. L. A. 487.

1019. The plaintiff became *banian* to the defendants, under an agreement by which he had a lien upon all goods "belonging to" them in their godowns, for all balances that might be due by them. Sometime after the date of the agreement, while there was a balance due, the defendants' firm took in a new partner. Held, that the words "belonging to" included all goods in the possession of the new firm that came to them in the way of business.

Held also, that the new firm not having given notice to the contrary, must be taken to have engaged the plaintiff as *banian*, by the old firm, upon the terms expressed in the agreement with the old firm and to be liable for the balance due. 3 B. L. R. O. J. 80.

1020. A contract entered into by a Railway Company and P to supply the Company with Railway Sleepers, was partly performed by P before he entered into a partnership with R, under the name of firm of P. and Co., after which it was completed. P before the partnership had entered into a sub-contract with H and M to supply the Sleeper, and after the partnership drew Bills in the name of P and Co., payable at Calcutta, in favor of H M in part payment of their account. The Bills were dishonored. Upon an action brought against P. and Co., the evidence showed that R was aware of P's contract, which was subsisting and completed after the partnership. Held, that R, as a member of the firm of P and Co., was liable, and that in order to take the case out of the principle, that every partner in a mercantile or ordinary trading partnership is liable upon Bills, drawn by a partner in the recognized trading business of the firm, for a transaction incident to the business of the firm, although such partner's name does not appear upon the face of the instrument, and although he be a sleeping and secret partner; it must be established that the holder of the Bills knew at the time he received them, that the transaction was a private contract of P, not one within the scope of the partnership. 13 M. I. A. 358; 3 W. R. P. C. 29.

1021. M., M., & Co., merchants in London, carrying on business with W. N. W. & Co., merchants in Calcutta, sought to make the defendant liable as a partner in the latter firm, under a particular memorandum of agreement between the members of the firm of W. N. W. & Co., and the defendant. Held, that the agreement above referred to did not constitute the Raja a partner in or with the said firm. Participation in profits does not constitute a partnership.

The question is not whether the person sought to be made liable participated in the profits; but whether the trade has been carried on by persons acting on his behalf?

There is no rule of law which imposes partnership liability upon a man who advances to others money for the purpose of carrying on their business, and in return secures to himself a share of the profits which may arise from the employment in the business of the money so advanced by him. 3 B L. R. A. J. 238.

PARTNERSHIP (Between Husband and Wife).

1022. When a husband and wife are trading in partnership, it is only reasonable to presume that an authority from the husband on matters connected with the partnership is binding on the wife. 6 W. R. 254.

PARTNERSHIP (Dissolution of).

1023. When a partnership is wound up by the Court, all questions arising between the partners out of the partnership transactions should be disposed of in the winding-up suit. 8 B. H. R. O. J. 209.

1024. Suit for shares of assets and property of a trading firm in *Behar*; defendants pleading dissolution of partnership. Held that, in such trading cases, evidence that some members of a joint firm at some time traded also on their own and sole account is not material; but the books of the firm should be produced, and evidence to a formal and complete dissolution adduced. 3 W. R. 223.

1025. Adultery of one partner with the wife of his co-partner, is a sufficient ground for dissolution of the partnership. 5 B. L. R. 109.

1026. In a suit of the nature of one for dissolution of partnership, it is incorrect to make an absolute decree for a specific sum of outstanding balances, without anything to guide the Court in fixing that amount. No amount ought to be decreed without satisfactory proof of its having been realized and misappropriated. 15 W. R. 352.

1027. When parties carry on business together and open current accounts with customers, they must, on dissolution of partnership, give full and fair notice of their dissolution to their customers, or otherwise be liable to them for all payments made by them in the partnership account to one partner in the belief that he represented the firm. W. R. S. N. 94, 95.

PARTNERSHIP ACCOUNT:

1028. A member of a subsisting partnership is not in a position to sue his partner still less one of his alleged partners, for the profits which had up to a particular time accrued, but he must if he desires relief, sue in the ordinary way for an account. 16 W. R. 141.

1029. Failure to prove an allegation of a settlement of accounts subsequent to determination of a partnership does not necessarily preclude a plaintiff from claiming a decision respecting the partnership accounts at any time within six years from determination thereof. 1 N. W. P. 28.

1030. Suit to recover balance due on account taken on the winding-up of a partnership transaction between two firms for the purchase and sale of Opium. The books of the firms which were kept at different places where the partners traded, were not satisfactory; but the Courts in *India* allowed certain items to be due to the plaintiffs. On appeal, held by the Judicial Committee, that although it was not clear, whether

those items in taking the account, ought to have been allowed, yet as the plaintiffs, who had had every means of proving their case, had failed to establish their claim against the defendant, the Court of last resort would not on that ground, after twenty-one years' litigation, remit the case to *India* for further enquiry and investigation to enable the plaintiffs to amend their case. 13 M. I. A. 365; 13 W. R. P. C. 36.

PARTNERSHIP ASSETS.

1031. A partnership property consisted in part of Company's paper, which was indorsed in blank by the deceased son of the testator shortly before his death, and handed over by him to his brothers: Held, that it was a mere ordinary partnership transaction, for the purpose of carrying on the business, and that they formed part of the partnership assets, in which the deceased son was entitled to share after the expenses of the partnership were discharged. 12 M. I. A. 41.

PAYMENT (By Mistake).

1032. If A without B's authority pays B's creditor, he cannot recover back from the creditor the amount so paid. 3 N. W. P. 162.

1033. Where plaintiff purchased property and discharged a debt for which the property was hypothecated, believing that certain persons were liable to contribute, of whom one was subsequently declared not to be liable to contribute: Held not to be such a payment by mistake as to give him a right of suit. 3 N. W. P. 136.

PENALTY.

1034. Where a promissory note payable by instalments stipulated for interest at two per cent, per mensem, and, in default of punctual payment, that interest should be charged at one anna per rupee per mensem from the date of the note, it was held that this increased rate of interest was a penalty which might be relieved from on payment of the lower rate. 6 B. H. R. A. J. 7.

1035. Where a promissory note payable by instalments stipulated that, in default of payment of any one instalment, interest should run at one anna per rupee per mensem, this rate of interest was relieved from on payment of interest being made at 9 per cent per annum from the time when each instalment became payable until the time of payment. 6 B. H. R. A. J. 8.

1036. Where two co-sharers in a property bound themselves not to sell to a stranger, and one of them in violation of the secret arrangement did so sell, but cancelled the sale before the present suit was brought to recover the penalty. Hold that, where the sale had been cancelled or not, the plaintiff could have no claim to a specific penalty, but that his only remedy was an action for damages for any injury which he might have sustained. W. R. S. N. 337.

1037. In a suit for damages, on the ground that defendants, after executing an agreement, by which they stipulated to sell

fish every day in plaintiff's bazar and to pay a fee per diem, and bound themselves to pay "damages" to a specified extent, in the event of their leaving his bazar and restoring to any other bazar, had left his for another bazar, where they were vending fish.

Held that the suit could be maintained, being an action upon a contract, in which there was nothing illegal, but that the sum stipulated to be paid was merely a penalty. 9 W. R. 212.

1038. Third defendant, purchaser of the interest of 1st and 2nd defendants, held certain lands under the terms of a permanent *kanam* (A) which contained the following condition "and (I have also agreed) that on failure to pay the said quantity of paddy the *kanam* amount of 550 *fanams* shall be received by me, and the land restored". In a suit by the *kanamdar* to recover possession for non-payment of rent: Held that this condition of redemption was intended as a penalty to secure regular payment of the rent, and that, such being the original intention of the parties, the penalty was one which ought to be relieved against. 6 M. H. R. 258.

1039. R L S borrowed Rs. 600, agreeing to pay interest at 8 annas per cent per mensem and to repay the principal within three years: and executed a bond pledging as security a one anna four pie share of an estate bearing a *sudder jumma* of Rs. 380, and containing a stipulation that, if he failed to pay principal and interest as agreed upon, he would pay interest at 4 per cent per mensem from date of the bond. Default was made in the payment of the principal at the end of three years, and the mortgagee sued upon the bond claiming the higher rate of interest. Both the Lower Courts treated the stipulation as in the nature of a penalty, and the Lower Appellate Court gave judgment for the principal amount with interest at 12 per cent per annum in satisfaction of such penalty. Held, that Act XXVIII of 1855 section 2 did not affect the question of penalty, or no penalty, but left it open for the Court to decide whether the 4 per cent was agreed upon as interest, or whether it was intended as a penalty. 19 W. R. 271.

1040. Defendant entered into a bond agreeing to pay a specified rate of interest in instalments on a sum borrowed, and to repay the principal in 12 years; the obligee not being bound to accept payment earlier. A Zemindaree was mortgaged as surety; and it was provided that if any obstacles were caused by the defendant in respect of any of the conditions of the bond, the mortgagee would be competent, after two months' notice, to sell the property, or portions thereof, and pay himself the principal and the interest thereon for the unexpired portion of the 12 years.

A portion of the interest having come into arrear, plaintiff gave notice of sale; but defendant disputed his right to sell on the alleged ground as not being an "obstruction" within the bond. The parties not being able to come to a final agreement as to the conditions of sale, plaintiff brought this suit claiming the full amount of the mortgage-money with interest for 12 years. He obtained a decree, which

was modified by the High Court, who gave him principal and interest at the stipulated rate: Held, that the clause relating to sale was in the nature of a penalty, and plaintiff was not entitled to enforce it only upon default in the payment of interest.

Held, that the suit was not maintainable, either as an action for damages for the amount which plaintiff could have obtained by the sale, or on the bond itself. 23 W. R. P. C. 91.

PLEDGE.

1041. A obtained a decree in the Small Cause Court against B. In execution of the decree, goods belonging to B, but in the possession of a pledgee, were seized by a bailiff of the Small Cause Court. The pledgee brought an interpleader suit under section 88 of Act IX of 1850 to recover the goods, held, the pledgee was entitled to have the goods released to him, and to have the costs of his suit paid by the execution-creditor. 5 B. L. R. App. 31.

POST MASTER GENERAL.

1042. The Indian Government, like the Post Master General, is not responsible for loss or damage occurring to any thing entrusted to the Post Office for conveyance. 1 M. H. R. 200.

POWER (Coupled with an Interest).

1043. Joseph Matchett executed in favour of *Pestanji* an instrument (authorizing *Pestanji* to recover, by suit or otherwise, from Messrs. Windle and Nowell, a sum of Rs. 22,500 or thereabouts) which contained this clause:—"From whatever sum *Pestanji* may recover from Messrs. Windle and Nowell, he is to pay himself the sum of Rs. 8,640, which is due to himself, and also the expenses he may incur in making recovery, and he is to hand over the surplus to me."

Held that the above instrument was made upon a good consideration; that it was irrevocable; and that, operating as a power of attorney, and not as an assignment, it was properly stamped, under Act X of 1862, with a stamp of Rs. 4.

Matchett, ignoring the above instrument, sued Nowell for the Rs. 22,500 mentioned in it, *Pestanji* thereupon applied to be made a party to the suit, under section 73 of the Code. His application was granted, and he was joined as a co-plaintiff.

Held that *Pestanji* was properly made a party, but as the validity of the instrument was disputed by Matchett, that *Pestanji* should rather have been joined as a defendant than as a plaintiff. 7 B. H. R. A. J. 10.

POWER OF ATTORNEY.

1044. In construing Powers of Attorney the special purpose for which the power is given is first to be regarded, and the not general words following the declaration of that special purpose will be construed to be merely all such powers as are needed for its effectuation.

Where the owner of a ship, by Power of Attorney, constituted the master his agent and authorised him to raise or borrow upon the ship's papers such sums of money as he should deem necessary for the repair of the ship "and to act in the premises as fully and effectually to all intents and purposes as I might or could do if personally present," in a suit for the amount of a mortgage bond upon the ship executed by the master: Held that the master had no authority to sell or mortgage the ship. 2 M. H. R. 177.

1045. The Court cannot import into a Power of Attorney a limitation which the deed does not contain; but the principal, and those who purchase from him, are bound by the acts of the agent done under such general power. 6 W. R. 42.

1046. A Power of Attorney authorising an agent to bid for a particular estate on a particular date does not limit him as to time of purchase. The power not being limited to a particular date is good whether the sale be held on one date or another. 3 W. R. 51.

1047. The defendant, on behalf of her minor son, gave to S M a power of attorney by which she authorized S M "for her and in her name and on her behalf to appear in or sue or defend * * * any suit, appeal, or special appeal, * * * and to act in all such proceedings in any way in which she might, if present, be permitted or called on to act." Held that the above power did not authorize S M to enter into a special agreement with a vakil, under which the vakil (in an appeal which he was employed to conduct for the defendant on behalf of her minor son) was to receive for his services a *minimum* reward of Rs. 4,000, and, in case of success, a reward proportional to the amount awarded by the Appellate Court.

Quære.—Whether such a special agreement as the above is one that the Court would enforce. 10 B. H. R. 26.

POTTAH.

1048. Where the construction of a *potta* is treated as a question of law, the Court must look to the surrounding circumstances, one of which is the possession given by the grantor and accepted by the grantees. 22 W. R. 286.

PRE-EMPTION.

1049. In the absence of sufficient ground for refusing to take the whole of the lands to be sold, the right of pre-emption cannot be asserted as to a portion only. 2 W. R. 285.

1050. A claim to right of pre-emption on the ground of the vicinage alone, will not lie in the case of large estates, but only when either houses or small holdings of land make parties such near neighbours as to give a claim on the ground of convenience and mutual servience. 2 W. R. 261.

PRINCIPAL AND AGENT.

1051. The relation of Principal and Agent ought not to be implied, any more than that of partnership, from the fact of a commission on profits and powers of control being given, when such relation is opposed to the real agreement and intention of the parties. 18 W. R. 384.

1052. Where the evidence goes to show that a particular person said to be the agent of the defendant was really his general agent, and did transact business of various kinds for his principal, it is unnecessary to prove any special power enabling him to enter into a particular contract of bargain and sale.

Per Macpherson, J.—The extent and nature of the powers vested in an agent or not so much matter of law as matter of fact. If it be proved that a person acted ordinarily as an agent for the defendant in buying and selling articles of merchandise, the fact of his not being proved to have previously purchased a particular kind of article would not necessarily operate against the plaintiff's case. The Court in deciding the question of agency must look to the general evidence on the record.

A Court of first instance decreed a case *ex-parte* in favor of the plaintiff, and at a rehearing, did not recall the plaintiff's witnesses, whom therefore the defendant had no opportunity to cross-examine, and again gave a decree for the plaintiff. The Lower Appellate Court rejected the evidence of plaintiff's witnesses, and reversed the decree.

Held, that the Court of first instance should have recalled the plaintiff's witnesses and given the defendant an opportunity of cross-examination. Case remanded accordingly. 3 B. L. R. A. J. 273 ; 12 W. R. 130.

1053. The mere fact of a man being known to be a person who usually acts for another, will not exonerate him if he deals in his own name.

If a man, even stating himself to be an agent, does not name the principal, the other party is at liberty to treat him as making the transaction his own. 7 M. H. R. 82.

1054. A suit against agent is bad in law ; it should be brought against the principal. 14 W. R. 248.

1055. The partners of a concern are bound by the acknowledgments of their manager, as their avowed agent. 24 W. R. 34.

1056. An agent retaining his principal's money, which he has not been required to pay should not ordinarily be required to pay interest ; but if his conduct has been fraudulent, he should be charged with interest. 23 W. R. 325.

1057. The assent by an agent to be bound by the statement of a particular witness is not an assent to arbitration, but is an act entirely within the scope of his general authority as agent to carry on his principal's suits and to do all acts necessary to that end. W. R. S. N. 143.

1058. Statements fraudulently made by an agent for his own benefit are not binding on the principal. 6 W. R. 252.

1059. An agreement to let premises may be made by an agent, there is no law that it shall be signed by the principal. 22 W. R. 68.

1060. Without special powers the ordinary agent of a Zemindar, who cannot grant a lease, cannot authorize the *quasi-transferee* of a lease by a tenant to some other party. 4 N. W. P. 122.

1061. If a principal adopts the acts of an agent in respect of the purchase of a property, he must take the property subject to the conditions with which the agent encumbered it, notwithstanding any secret arrangement between them not known to third parties. W. R. S. N. 3.

1062. An authority granted to an agent to purchase does not imply authority to sell; and the mere fact of the principal not questioning his agent's right to sell is no proof that he consents to the latter's exercising such right. 15 W. R. 3.

An agent who has sold goods for his principal and received the price is bound to pay it over to his principal, although the contract of sale is illegal and void. 18 W. R. 424.

1064. An agent who deals with another man's goods, as if they belonged to his principal may be answerable to the true owner, notwithstanding that he acts by the command or direction of his principal. 4 W. R. R. R. 1.

1065. A mere admission of an agency to sell will not necessarily raise a presumption of an authority to buy on credit, or otherwise to pledge the credit of the principal. 2 W. R. 231.

1066. Suit for money lent to an agent to a guardian mother. Held that the agent exceeded his authority in mixing up his private transactions with those of his principal, by borrowing money both for himself and his principal; and as he had failed to prove that the money was borrowed for the benefit of the estate, and as the transaction on the part of the lender was not *bona fide*, inasmuch as he did not use proper diligence to satisfy himself that the agent was borrowing for the legal necessities of the estate, a decree was passed against the agent personally. 2 W. R. 156.

1067. A native lady, possessing an estate in a district in which she did not reside, opened an account with a banker, through her son as her agent, to provide for the punctual payment of Government revenue and to meet current expenses. Held, that such a course of dealing did not of itself warrant the banker in advancing to the son as the accredited agent of his mother large sums of money on bonds. 10 W. R. 376.

1068. Agents buying indigo seed in arising market under an order to purchase on the most favorable terms cannot experiment by sowing

a sample and waiting before they purchase to see whether it will germinate. They are only bound to act to the best of their judgment, and to use proper care and skill as agents in purchasing what they are ordered to purchase, and their action cannot be repudiated unless they are shown to have been guilty of negligence. 19 W. R. P. C. 65.

1069. An agent, or person in a fiduciary position towards the owner of property purchased by him, is bound to prove, that the sale was made for good and sufficient consideration, and must not only prove that the agent had authority to sell, and that the consideration alleged was in fact paid, but also that the consideration paid was a fair price for the property.

If the purchase be made by a stranger, such a purchaser need not show that the consideration paid by him is a consideration equal to the value of the property; it will be sufficient for the purchaser to show that the sale was made by a person who had authority from the owner to sell; and unless the seller can establish a fraudulent connivance between the agent employed to sell and the purchaser, the sale will be binding on the seller on proof of authority of the agent to sell. 2 N. W. P. 153, 154.

1070. Upon the following facts referred:—"Defendants contracted with plaintiffs as agents of the Captain and owners of a certain ship then in the Madras roads. The plaintiffs were aware of this at the time when the contract was made. The Captain was at the time in charge of his ship. At the time of the contract nothing was said by either party as to the person or persons on whose credit the contract was made—All that occurred being that defendants, known by plaintiffs to be acting as agents for the Captain and owners of the ship, agreed with plaintiffs to carry certain of their goods on board the ship to Calcutta. The defendant did not at the time of the contract in terms say that they contracted only as agents. The plaintiffs did not know the names of the owners, nor of the Captain; nor had they any further or other knowledge of the latter than that which his designation by his office of master of the ship conveyed."—Held, that in the absence of anything more than knowledge that the defendants were acting as agents of the master and owners of a ship in the roads, a decision declaring the agents liable was strictly in accordance with English law. 7 M. H. R. 82.

1071. The defendant requested the plaintiff to sell for him a plot of ground on the Esplanade in Bombay, at any rate exceeding the price at which the defendant himself had purchased it; and agreed to give him as remuneration half the net profit realized on the sale. The defendant subsequently revoked this authority; and the plaintiff shortly afterwards found a purchaser, whose offer the defendant did not accept. Held that the defendant could not recover on the agreement, which had not been performed on his part; that there was no ground for holding that the plaintiff and the defendant were partners in the transaction as between themselves; and that the plaintiff was not en-

titled to recover for work done as a broker, or for commission, the nature of the agreement being that the plaintiff took the risk of the authority being revoked. 2 B. H. R. 400.

1072. *Quere.*—Is not knowledge on the part of an agent who collects rent for the owner, and is entrusted with the authority of fixing the amount, constructive knowledge on the part of the owner sufficient to satisfy the exigence, of proof on the part of the plaintiffs in such a case? 19 W. R. P. C. 194.

1073. It does not lie within the ordinary scope of a *gomastah's* authority to grant *pottahs*. Special authority to grant them is necessary. 3 W. R. Act X. 1.

1074. In a suit by a Zemindar against a *gomastah* where fraud is not alleged, the Court cannot assume it merely on the ground that the accounts were not filed till the close of the year of the determination of the agency. 22 W. R. 398.

1075. An agent employed in collecting rent cannot question the title of his principal to receive the rent, but must pay him all that he collects. 3 W. R. Act X. 3.

1076. In a suit for rent where plaintiff was well aware that the principal was a third party, and that the defendants were the agents of such third party, defendants having successfully pleaded payment, it was held that plaintiff could not proceed against the principal. 11 W. R. 247.

1077. A principal can determine at his mere pleasure the authority given to an Agent. So one shareholder cannot resist the revocation by another shareholder of the authority given to manager, there being no stipulation in the deed providing for the appointment of a manager, that the authority should continue for any definite time. 3 W. R. 41.

1078. The defendant a servant of Government, having given orders for bricks, and the plaintiff being aware that the defendant was a servant of Government and that the bricks were required for building bridges on account of Government. Held that the Government was liable, and not the defendant personally. 4 W. R. S. C. C. 13.

1079. If a man send an agent, with direct authority and positive directions to bid at an auction and to purchase an estate, and the agent accordingly goes to the auction and bids for the estate which is knocked down to him, but collaterally and in a bye manner enters into a distinct and separate contract with an individual that, in consequence of something to be done or to be forborne, he will pledge his principal to pay to that individual a certain sum the principal cannot be bound by this bye transaction on the part of the agent. 6 W. R. P. C. 57.

1080. Where a man steps in during an auction sale and assumes the character of a principal agent, and deposing another who is really

acting as agent purchases the property, he cannot afterwards be allowed, in equity, to turn round and claim to have purchased not for the principal but for himself, and to obtain a profit out of his purchase. 23 W. R. P. C. 358.

1081. If an agent signs a promissory note without disclosing the names of his principals, the latter are not liable and no parol evidence is admissible with a view to establish their liability. 3 W. R. 140.

1082. The payee of promissory notes of the East India Company, by a power of attorney, authorised his agents at Calcutta to "sell, endorse, and assign" the notes. These notes were transferable by endorsement, payable to bearer. The agents, in their character of private bankers, borrowed money of the Bank of Bengal, offering, as security these promissory notes. The Bank made the advances, and the agents endorsed the notes, such endorsement purporting to be as attorney for their principal, and deposited them with the Bank, by way of collateral security for their personal liability, at the same time authorizing the Bank, in default of payment, to sell the notes in reimbursement of the advances. The agents afterwards became insolvent, and default having been made in payment, the Bank sold the notes, and realized the amount of their loan. Held, that the endorsement of the notes by the agents of the payee to the Bank was within the scope of the authority given to them by the power of attorney, and that the payee could not recover in detinue against the Bank. 5 M. I. A. 1, 2.

1083. The fact of an agent being employed cannot affect the right of the principal to receive money due to him.

A person, choosing to act as *mooktear* or legal agent, must submit to the rules by which the dealings of such persons with their clients are regulated.

The fact that a third party is interposed between a *mooktear* and his client does not necessarily affect the fiduciary relation between the legal adviser and his client. 4 W. R. 86.

1084. The manager of a factory, who had executed a bond in respect of sums owed by him on account of factory expenses, having left the service of the proprietor of the factory, an *ex-parte* decree was obtained on the bond against another manager. But as there was nothing in the decree to connect the judgment-debtor (the manager) with his principal (the proprietor), it was held that the decree could not be executed against the property of the proprietor. 12 W. R. 208.

1085. Defendant having required his agent to procure certain articles, the latter borrowed money for the purpose, giving a bond to which plaintiff, as a pleader employed by defendants, also put his name. The articles were purchased with the money and sent to defendant. The lender subsequently obtained a decree, with interest, against the agent and his principal; but (in spite of plaintiff's applications to de-

defendant) realized the whole amount from the plaintiff who now sues defendant to recover the money.

Held (by Loch J., whose opinion prevailed) that there was an implied contract between the parties, the breach of which took place when defendant refused to pay the amount on plaintiff's applying to him for it.

Held (by Jackson, J.) that plaintiff's cause of action arose when he was forced to pay up the money which he had borrowed for defendant.
 1 W. R. 174.

1086. The defendant, through a broker, purchased from the plaintiffs certain goods, to be paid for by cash on delivery, and before removal. Both the defendant and his broker knew that the plaintiffs had a separate cash office where payments for goods of the description purchased were usually made, and the broker knew that the delivery clerk, whose duty it was to deliver the goods, had no authority to do so without a special order from the plaintiffs. A portion of the goods was paid for at the cash office, and delivery thereof obtained from the delivery clerk in the usual way. For the remainder of the goods, the broker, on behalf, but without the knowledge, of the defendant, paid the delivery clerk and obtained delivery from him of the goods without any order for delivery having been given by the plaintiffs. The plaintiffs, a year subsequently, discovered that the delivery clerk had embezzled the money so paid to him. Held, that they were entitled to recover the balance of the price of the goods from the defendant in an action for goods sold and delivered. 12 B. L. R. 360, 361.

1087. Where a husband allowed his wife to have control over certain property and to mortgage it. Held that she must be considered in fact to be his agent if he was really the principal, and that he was bound by her act. W. R. S. N. 318.

1088. Suit by principal against his agent to recover properties purchased by the latter out of the former's funds. Held that the fact of the defendant being the plaintiff's agent, having no means to purchase out of his own funds, was not *per se* sufficient to establish even a *prima facie* case of constructive purchase. To make out a case of constructive purchase the plaintiff must prove not only that the defendant was his agent, but that, at the time he made the purchase, he had in his hands funds of the plaintiff sufficient to make the purchase. 3 W. R. 232.

1089. Held by the majority (Glover, J., dissenting) that it is not within the reasonable scope of the authority of an assistant in an indigo factory to purchase any amount of indigo seed for his master, and to make his master liable, particularly where the seed was not purchased or used for the factory; and that though the assistant, in writing to the vendor for the seed, styled himself in the body of the letter as the manager of the Concern, yet his signing himself for another person, and not for the owner of the factory, disclosed to the vendor that the other

person and not the owner of the factory was his principal. 8 W. R. F. B. 123.

1090. Suit to set aside a lease, as granted without authority by an agent to the defendant who was the *naib* of the estate and as procured by fraud by the defendant in collusion with the agent, the latter charge of collusion having been withdrawn at the hearing before the Subordinate Judge. The High Court remarked on the impropriety of presenting a plaint charging collusion between the agent and defendant without good grounds for such imputation, and on the withdrawal of such charge at the hearing if there were grounds for it; and agreed with the Subordinate Judge in thinking that the owner of the estate in issue must be presumed to know what was being done on her behalf by her agent. The presumption is that a man acts rightly and not fraudulently. The mere circumstance that rents were low does not give rise to the presumption that there had been fraudulent conduct on the part of the *naib* or that he did not state the circumstance to the agent before obtaining the lease from him.

There is also this difference between this case and other cases in which contracts between principals and agents are sought to be set aside on the ground of want of good faith that here another agent is interposed, and it is not the case of the defendant (the *naib*) making a report to the owner in England. Even supposing the original transaction liable to be set aside, the ratification by a person having authority from the owner to make enquiries and ratify what had been done would render it valid. 17 W. R. 301, 302.

1091. There is a presumption in Calcutta that where a vendor of goods deals with a banian of an European firm, *qua banian*, he can only look to the *banian* for the price. 2 B. L. R. O. J. 7.

1092. Action by a firm against an agent of the firm, who received a *puckah* or *del credere* commission on the goods of the principals sold by their agent. The last item in the account between the principals and agent, in their dealings, accrued more than three years from the commencement of the suit. Held, on the construction of the Limitations of suits Act XIV of 1859, that as the action was for breach of contract, it fell within the words "for breach of contract" in cl. 9 section 1, and that, section 8 of that Act, which related to suits for balances of accounts current, did not apply. 14 M. I. A. 134.

1093. A firm of carriers authorize one of their partners to draw bills on the firm to the extent of Rs. 200 each. The partner, acting in excess of his authority, and without the knowledge of the firm, made two promissory notes, in the name of the firm, for Rs. 1,000 each. The plaintiff knew the partner was limited to a particular sum, but also knew that two of his bills for Rs. 300 each had been previously accepted by the firm. In an action on the notes: Held, 1st, that the firm was not liable for the whole amount drawn; and 2ndly, that the contract, whereon the action was founded, was not capable of division,

, therefore, the firm was not liable to the extent of Rs. 200. 10 B. H. R. 319.

1094. An ordinary mercantile firm is responsible for frauds committed by one of its members, or by a gumastah or other similar agent, while acting for and in the business of the firm; and innocent partners, cannot divest themselves of responsibility on the ground that they never authorised the commission of the fraud. When such a person, acting within the scope of his authority as evidenced by the business of the firm, obtains money and misapplies it, the firm will be responsible. 2 W. R. 187.

1095. The Factors' Act 5th & 6th Vict. c. 39, is extended to by the Act of the Indian Legislature No. XX. of 1844.

A *Banian*, or agent, was entrusted by his principals with a bill of lading for a particular purpose, and he pledged the same, *mala fide*, without the consent of his principals to a native Banker, for advances made to himself. Held, that in order to invalidate a pledge so made, under the third section of the Act 5th and 6th Vict. c. 39, it is necessary that the Court, or jury, should find that the lender had notice of the agent's *mala fides*, or want of authority to pledge the goods.

To establish such notice, it is sufficient to show that the circumstances attending the transaction were such as that a reasonable man of business applying his understanding to them, would certainly know that the agent had not authority to make the pledge, even if the agent was not also acting *mala fide* towards his principals. 9 M. I. A. 140; 1 W. R. P. C. 43.

1096. Factors having an interest, by reason of their advances, in their principal's goods, are justified in shipping those goods for sale either "on account of those concerned," or "on account of themselves," unless their general authority was controlled by instructions from their principal or by contract.

The evidence failing to show that any particular usage or custom qualifying the Law of England as between principal and factor prevails in Calcutta—Held that the powers and duties of the factors in making consignees of their principal's goods must be determined by the general Mercantile Law.

Factors entrusted with possession of their principal's goods, and having advanced upon them, shipped the goods to London, drawing bills against them in their own names, and selling the bills with the shipping documents in the market. The acceptance of the factors' bills by the consignees and the delivery of the shipping documents to them, made them the pledgees but did not alter the character of the transaction, which was one whereby the factors had pledged the goods for the payment of bills on which they (and not the principal) were liable as drawers for an amount exceeding the value of goods.

In such a case no priority exists between the consignees and the undisclosed principal. Held, therefore, that, a loss having occurred on the

1097. The Scinde Railway Company was incorporated by 18 and 19 Vict, c. 115, for the purpose of making and maintaining railways in India, and for other purposes. This was repealed by 20 & 21 Vict., c. 160, which authorized the Company to extend their operations, and extend their capital, &c. This Act, by section 3, declared the Companies clauses consolidation Act, 1845, to be incorporated with it. By section 18, the Company have "a seal for use in India in lieu of the common seal of the Company, and from time to time may vary and renew it, and make regulations for its use ; and except, as by this Act otherwise expressly provided, every document sealed with such seal, in conformity with such Regulations, or in pursuance of any order of the directors, or of any authority given by the Company under their common seal, shall be as valid and effectual as if the common seal were affixed thereto". By section 54, "the Company, from time to time, may appoint and remove such committees, persons, or person, as the Company think fit to act on behalf of the Company in India or elsewhere, with respect to the making, maintaining, managing, working, and using of the railways and other works of the Company, and the control and conduct of any of the affairs in India or elsewhere of the Company; and may delegate to any such committee, persons, and person respectively all or any of the powers of the Company and of the directors and officers thereof which the Company thinks it expedient that such committee, persons, and person respectively should possess for the purposes of his or their respective appointment." In January 1867, E, was the agent of the Company in India, and he entered, it was alleged, on their behalf into a contract with the plaintiffs, for 60 sets of iron-work for low sided waggans. The plaintiffs' firm did not deal in iron-work, and they had to get the good manufactured for them in England. The Board of Directors were at the time supplying iron work for the Company. There was nothing to show that E had been appointed under the provisions of section 54 of the Act 20 & 21 Vict., c. 160, nor was there any evidence of the extent of his power or authority. A specification of the contract differed from it, in that it stated the waggans to be covered waggans, and not low sided waggons. The contract was not made under seal of the Company, nor was the iron-work, the subject of the contract, ever accepted by the Company. The defendants admitted that at the date of the alleged contract, E was the agent of the Company in India, but denied that his power extended to the making of such contract ; they further stated that the contract if entered into had been afterwards cancelled. Held by Phear J, that there was no evidence to show that E, had authority to make the contract. The contract was one which E would have had power to make in writing only, under section 97 of the Companies' clauses consolidation Act, had he been appointed under section 54, 20 & 21 Vict, c. 160, but there was no proof of such appointment.

Held, on appeal that, assuming that E had been appointed under section 54 with powers as large as in the ordinary course could be conferred upon him under that section, the contract was not one by which, acting as such agent, he had power to bind the Company. 5 B. L. R. 195, 196.

1098. By an agreement made on 22nd July 1862 between C and T (since deceased) and the defendants P and S, C agreed to sell, and T, P, and S to purchase, a half share in the lands, plantation, and estate belonging to C, known as the Laojan Tea Estates and Grants. The agreement provided that C was to conduct and manage all matters and affairs of the estates, but nothing was said as to its being done in his own name or in that of the partners of any firm. Money to carry on the business was provided by means of bills drawn by the local manager upon C in the same manner as if he (C) had been the sole owner, defendants being fully aware of this, and finding the funds. This mode of dealing continued down to the time of the transaction which is the subject of this suit.

The only act in the way of notice to the public on the part of the defendants was a notification in a Directory published by them in Calcutta. (T, S and Co., being booksellers and publishers), in which, in the list of tea estates, the Laojan Concern is mentioned, and C, T, P, and S are named as proprietors. In the Directory for 1870 and 1872, C is also described as Calcutta agent. This suit was brought to recover a balance due in respect of monies alleged to have been advanced by the plaintiffs on the tea to be manufactured in the season 1872; plaintiffs being tea-brokers who made the advances on the security of tea-invoices and bills of lading. The terms on which the required advances were to be made were arranged by an agreement dated 9th February 1872 between C and plaintiffs, who were under the belief that C was the proprietor of the Laojan Concern, and not merely manager. By reason of C's death, and the non-delivery of a portion of a season's tea, plaintiffs were unable to reimburse themselves for their latter advances, and brought the present suit against defendants, who, they contended were bound by all C's acts and dealings.

Held by Couch, C. J., that, assuming that plaintiffs knew what was in the Directory, it cannot be considered as a notice to them that the authority which C had been exercising, and which he continued to exercise with, so far as it related to bills and drafts drawn by the local manager, the knowledge of his partners, the defendants, had been determined, and that he had only the authority of an ordinary Calcutta agent.

Held by Couch, C. J., that the question in the case was whether the transaction between C and the plaintiffs was within the scope of the authority which C had, or was allowed by his partners to appear to have, in managing and conducting the affairs and business of the partnership. It was a question of actual or apparent authority, and whether the transaction was one which the owner of a tea garden carrying on the cultivation of it would in the ordinary course of business enter into.

Held by Couch, C. J., that the transaction would have been according to usage if C had been the sole owner of the gardens, and the defendants by allowing him to manage ostensibly as sole owner, clothed him with every authority incidental to a sole owner in that business. The defendants were therefore bound by the agreement of the 9th February 1872. 21 W. R. 161.

1099. A deposited certain moneys with B, a banker, and drew against them, but not to the full extent, the residue was employed on A's account by B; according to an agreement between them. Held that, besides the ordinary, relation of banker and customer, there subsisted also between them that of principal and agent; that, therefore, the right of action arose at the time of demand. Held also that a three years' limitation applied under Act XIV of 1859 section 1 cl. 9. 10 B. H. R. 300.

PRINCIPAL AND SURETY.

1100. A, and his surety B. executed a bond to C, for the faithful discharge of A's duties as a gomasta. In September 1866, upon accounts being rendered, A, was found indebted to C in a certain sum of money. A thereupon executed an *ikrar* to C., which was accepted by C., agreeing thereby to pay the amount due in February following. On default being made, C, sued A and B, for the amount due. Held, that the acceptance of the *ikrar* without the knowledge or consent of B., giving time for payment, was a discharge to the surety. 7 B. L. R. App. 10.

1101. In an action against a surety for principal and interest payable on a promissory note, held, overruling the decision of the Court below (Macpherson J,) that the creditor, by the mere acceptance, without the knowledge or consent of the surety, of interest in excess of what was due on the note, bound himself to give time to the principal debtor, and thereby discharged the surety. 9 B. L. R. 261.

1102. In a suit against D and K on a promissory note, where K raised the defence that he was only a surety for D, and that the plaintiff having given time, D was released from liability. Held that it was necessary to show that the fact that K signed the note only as surety for D was known to the plaintiff at the time when the note was made. Held also that a binding contract to give time to the principal cannot be inferred from the mere receipt by the creditor of interest in advance on the note. 15 B. L. R. 331.

1103. Where two parties are jointly and severally liable under the terms of a bond, the principal may be sued for the amount due with interest, notwithstanding that a decree has been obtained for the same sum against the other party.

The creditor is not bound to bring his action to suit the convenience of the debtor, and may, in such a case as the above, defer bringing his suit to the last moment the law allows. 12 W. R. 192.

1104. A drew five Bills in favour of B on Fergusson & Co., who accepted the same, and got them discounted by the Bank of Bengal,

and on their becoming due procured their renewal. Fergusson & Co., subsequently drew three Bills on the Bank of Bengal ; and, for securing, as well the repayment of the principal sum due on these Bills and interest, as of all and every sum or sums which the Bank had already advanced or should advance on account of the drawers, deposited as collateral securities various quantities of *chili* copper of a larger amount in value than the advances then made. By a condition in these Bills, the Bank were authorized, in default of payment within the time stipulated, to dispose of the copper by public or private sale, and to reimburse themselves the principal and interest due thereon. Shortly afterwards Fergusson & Co., failed, and Assignees of their estate and effects were appointed under the Indian Insolvent Act. On presentation to A of the first of the renewed Bills, he served notice on the Bank not to part with the securities so deposited with them, alleging that the Bills drawn and renewed by him, were accommodation bills, for which he had not received any consideration, and were renewed on the faith of the securities being applicable to their discharge. The Assignees of Fergusson & Co., redeemed the copper by paying to the Bank the amount of the principal and interest due upon the Bills drawn by Fergusson & Co., All the Bills drawn by A were dishonoured, and the Bank of Bengal brought an action against A for their amount. On a Bill filed by A., the Bank were restrained by injunction from proceeding with the action at law. Held on appeal by the Judicial Committee, discharging the injunction and reversing the decree of the Supreme Court, that, under the circumstances, the redemption of the securities was a sale within the meaning of the condition contained in the deposit Bills, and that such sale was not a release to A as surety for the previous Bills, the condition not being that the copper or the proceeds thereof should be applied preferentially or *pari passu* with the other debts, but simply in reimbursement to the Bank, of the principal and interest due upon the Bills. 3 M. I. A. 19,20.

PROMISE.

1105. Where, by reason of a promise, the promisee refrains from bringing a suit, which, but for the promise, he may have brought, there is good consideration for the promise ; but, if at the time of the promise, no remedy remained to the promisee by reason of limitation, there is no valid consideration, and the promise cannot be enforced at law. 23 W. R. 62.

PROMISSORY NOTE.

1106. The making of a promissory note is altogether the act of the maker, and delivery to the promisee is required to render it complete. 1 M. H. R. 202.

1107. A promissory note, payable two months after date, given for money lent and interest in advance at the rate of 12½ per cent per mensem, contained an agreement to continue to pay that rate of interest after the due date if the money was not then repaid.

Held that the high rate of interest so agreed to be paid did not con-

stitute a penalty, against which the Courts could relieve. 7 B. H. R. O. J. 19.

1108. A promissory note, payable on demand, given for interest due on a mortgage-deed, with interest on such interest, cannot be enforced by suit, there being no consideration for the making of such a note. 7 B. H. R. O. J. 9.

1109. An instrument to the following effect:—"on the 14th December 1861, we A. and Co. bind ourselves to pay with interest to you B and C rupees 566-10-0, being the balance of dealings held with your firm, and the amount received this day from you in cash on account of stamp"—Held, to be neither a bond nor a hundi, but to be in the nature of a promissory note, and to come within the description in clause 4 schedule A of Act XXXVI of 1860. 1 M. H. R. 152.

1110. In a suit by indorsee against the maker of a promissory note payable on demand the defence was there were dealings in skins between the defendant and the payee, and an agreement was made by which the payee was to pay the defendant Rs. 4,500 as an advance upon goods to be supplied by the defendant to the payee; that the money was paid and the promissory note sued on was made and delivered as an acknowledgment of the receipt of the money and as a security for what should be due to the maker in respect of the dealings. The defendant stated that the state of the accounts between him and the maker showed a balance in favor of the defendant, and notice to the plaintiff of these facts was alleged. The note was indorsed to the plaintiff 2 years and 11 months after date. Held, though the evidence failed to make out notice to the plaintiff, the note when endorsed was an overdue note, and that the plaintiff took it subject to the then state of the accounts between the payee and the defendant. 7 M. H. R. 271.

1111. Where a promissory note is payable by monthly instalments, it is incumbent on the plaintiff when two or more instalments are due at the time he brings his suit, to sue for them in one action, and he is not at liberty to sue separately for each instalment or for some of them.

The plaintiff in this action sued to recover the fifth instalment due on a promissory note, but it appeared that he had on the 4th October 1872 sued and recovered a judgment for the fourth instalment only, when he could have sued for the entire amount of the bond which had then fallen due.

Held that the judgment which plaintiff recovered on the 4th October was a bar to the present suit. 20 W. R. 358.

1112. A promissory note upon a one anna stamp dated in August 1870 provided for the repayment of the amount mentioned in it on or before the 12th July 1871. In a suit upon the promissory note, Held that it was not receivable in evidence upon payment of a penalty. 7 M. H. R. 361.

1113. In a suit under Act V of 1866 on a promissory note part of the consideration for which was legal and part illegal. Held (per Couch C. J.

that plaintiff could not sue on the note, but that he might amend his plaint and recover so much of the consideration as was not illegal. 18 W. R. 424.

1114. A promissory note is a "contract or obligation" under section 16 Act XVI of 1864, and as such might have been registered under that Act; consequently the period of limitation prescribed by section 1 clause 10 of Act XIV of 1859, viz., three years, applies to it. 6 B. L. R. App. 40.

1115. The defendant agreed with the plaintiff to take the plaintiff's mare "Brides maid" on "racing terms" all winnings to be divided equally between them, and the plaintiff to have the option of claiming a one-fourth share of any lottery in which she might be bought by or on account of the defendant; the plaintiff to keep and train "Brides maid" for Rs. 60 a month. Subsequently the plaintiff agreed to keep and train, for a like sum for each horse, five horses belonging to the defendant. The defendant having been posted as a defaulter, the plaintiff at the defendants' request advanced certain sums to the secretary of the Calcutta Races to enable the defendants horses to run. As security for the repayment of such advances, and of a sum of Rs. 44 56,6 which had become due to the plaintiff, and which included an item of Rs. 1149, for "balance of bets and lotteries" and a smaller sum in respect of certain tickets in the "Secundra Raffle," the defendant gave to the plaintiff a letter of hypothecation of his five horses, whereby it was agreed that in case of the defendant's default, and the plaintiff advertized the horses for sale. On the same day the defendant wrote and gave to the plaintiff a letter stating that, in consideration of the plaintiff's withdrawing the advertisement, and withholding the sale for a certain period, he would give the plaintiff a promissory note for the balance of his claim. A note for Rs. 7,000 was accordingly given by the defendant to the plaintiff. In the account delivered by the plaintiff to the defendant, he had by mistake over credited the defendant with Rs. 744 in an item-headed, "cash received from the secretary of the Calcutta Races, balance of racing account," and under which was included the following item "I O, U, deducted from lottery account Rs. 48." On receiving information of the error, the defendant gave the plaintiff another promissory note for Rs. 744. In an action on the notes brought under Act V of 1866, the plaintiff obtained a decree, which was set aside on the defendant's application, and leave was given to him to appear and defend. Written statements were then filed on the plaintiff's application: Held by Macpherson J., that the two promissory notes were given as a security for the whole of the plaintiff's claim; that the items for "balance of bets and lotteries," and for the "Secundra Raffle" being rendered illegal by the lottery, Act V of 1844 part of the consideration for the notes was illegal, and no action was maintainable upon them. His Lordship, therefore dismissed the plaintiff's suit. On appeal held by Couch, C. J. that the promissory note for Rs. 7,000 was not vitiated by the Rs. 1,149 being part of the consideration for it, although that portion of the latter sum which was own by lotteries was obtained by an illegal transaction, it

was not illegal for the defendant to receive the money, and, having done so, to pay the plaintiff his share or to promise to do so. But the money paid in respect of the "Secundra Raffle," being money paid in execution of an illegal purpose, was an illegal consideration which disentitled the plaintiff to recover on the note: Held further, that the note for Rs. 744 was given upon good consideration. All the facts of the case being stated in the plaintiff's written statement, the Court might allow the plaint to be amended, and frame an issue as to what amount was due to the plaintiff in respect of the consideration for the note for Rs. 7,000.

Held by Markby J. that both notes were good, inasmuch as the promise, contained in them did not spring from, nor was it the creature of, the original illegal agreement but was a separate agreement. 9 B. L. R. 441,442.

PROMISSORY NOTE (Government).

1116. A Government Promissory Note is not a "corody" or consequently immoveable. 5 W. R. 141.

1117. A person who receives a forged currency note in payment is not (in order to entitle himself to be paid a second time), upon discovering the forgery, bound to give immediate notice of it to the person from whom he receives the forged note. The rule relating to forged acceptances on bills of exchange not applying.

Semble.—That if the delay in communicating the fact of the forgery of the note were so great as to damnify the payer of it in his remedy against, or in his power of tracing, the person from whom he received the note, such delay would be a good defence in an action brought upon the original consideration. 7 B. H. R. O. J. 1.

1118. The holder of a Government promissory note cannot arbitrarily insist upon having the note renewed; but when the back of the note has become covered with endorsements of the receipt of interest so that there is not room to write an endorsement of the note distinctly, the holder is entitled to have it renewed.

Where the legal holder of a Government promissory note transfers the note, the Government is bound to act in accordance with such transfer, unless it has notice of an order of Court restraining the holder from parting with the note.

An *allonge* is a slip of paper annexed to a bill on which the supernumerary endorsements may be written when there is not room to write them all distinctly on the back of the bill. The term does not legally or properly apply to a paper annexed by the officers of Government to a Government promissory note, on which further endorsements of the receipt of interest may be made after the note itself is covered by such endorsement. 22 W. R. 106.

1119. In a suit by a Hindu widow as the holder and last endorsee of a Government promissory note of the 5½ per cent loan, 1859-60, to en-

PURCHASE (BY

force renewal of the note, it appeared that, in the advertisement of the loan in the Gazette, it was stated that "the practice and rules heretofore in use in regard to the renewal, &c., of promissory notes will be adhered to in respect of the promissory notes of this loan"; that it was the practice of the Government of insist on the production of the promissory note when the interest due on it was applied for, and to endorse the payment of such interest on the back of the note; that the note of which renewal was sought had in consequence become so covered with endorsement that a slip of paper had been attached to it by the Government for the purpose of allowing further endorsements on payment of interests to be made; and that in consequence of having this paper attached, and being covered with endorsements, the note was practically unnegotiable. The defence was that the Government had a discretion as to granting or refusing renewal, and had, on objection made by the reversioners, exercised that discretion in refusing to renew the note. The Lower Court dismissed the suit on the ground that the plaintiff had failed to show any legal right to renewal against the Government. Held on appeal that the practice of insisting on endorsement of payment of interest on the note as preliminary to receipt of interest thereon having rendered it practically unnegotiable, the Government were bound on renewing the note. 13 B. L. R. 359.

PROFITS.

1120. Where certain sharers took in lieu of their proportion of profits a piece of land rent-free, with an agreement that on relinquishing the land they might claim their share of the profits, it was held that they could not be said to have been at any time out of possession of their shares so long as they held the land, and that on relinquishing the land they might sue for profits. 3 N. W. P. 23, 21.

PROSTITUTE.

1121. A landlord cannot recover rent of lodgings knowingly let to a prostitute who also carries on her vocation there; the principles of English law being applicable to this country in such a case. 18 W. R. 445.

PURCHASE.

1122. No time being fixed for payment or delivery by a contract for the purchase and sale of certain goods, the construction of law is, that the seller will deliver on payment of the price, and that the buyer will pay the price on receiving the good; and either party is competent to call upon the other within a reasonable time, to fulfil his part of the agreement, if ready to fulfil his own. 2 N. W. P. 60.

PURCHASE (By Trustee).

1123. J C M, as executor of his father, obtained a decree for Rs. 170,000, and held the same in trust as respects one-fifth thereof for the plaintiffs. Subsequently he took an assignment for the joint benefit of himself and his brother S of the beneficial interest in the plain-

tiffs' share for Rs. 5,000, from M, one of the executors of the plaintiffs' father. The plaintiffs had derived title to their one-fifth share under the will of their father, and subsequently obtained a decree for the said Rs. 5,000, against M in an administration suit J C M was co-executor with M of the plaintiffs' father, though he was said to have renounced. In a suit against J C M to declare the said assignment invalid except as a security for the said Rs. 5,000, and any other sums justly due (M and S being made party defendants):—

Held, that the purchase being for inadequate consideration was invalid, and that the share must be restored to the plaintiffs on the purchase-money being returned inasmuch as J C M holding the decree in a fiduciary position for the plaintiffs could not purchase the same either for his own benefit, or that of himself and his brother jointly.

Such a suit being against J C M as a purchaser in his own right, is not in the nature of a review of the decree against M, who had been sued as executor of the plaintiff's father. 2 L. R. I. A. 18; 23 W. R. P. C. 6.

PURCHASE (In name of third parties).

1124. Act I of 1845 section 21 does not protect purchases made in the name of third parties from the operation of decrees against the persons beneficially entitled to the purchased property. 2 W. R. 29.

PURCHASE (Of Hypothecated Property).

1125. Plaintiff in purchasing at the instance of a first incumbrancer becomes owner, and *prima facie* entitled to the possession of the hypothecated property, and the lien of defendant who purchases at the instance of the second incumbrancer cannot protect him in possession. 19 W. R. 83.

PURCHASE (Ultra Vires).

1126. The purchase by the Directors of a Joint Stock Company, on behalf of the Company, of shares in other Joint Stock Companies, unless expressly authorised by the Memorandum of Association, is *ultra vires*.

A Joint Stock Company, even though it be empowered by its Memorandum of Association to deal in the shares of other Companies, is not thereby empowered to deal in its own shares, and a purchase by the Directors of the Company of its own shares on behalf of the Company is, therefore, under such circumstances, *ultra vires*.

A shareholder in a Joint Stock Company can maintain an action against the Directors of such Company to compel them to restore to the Company funds of the Company that have by them been employed in transactions that the Directors have no authority to enter into, without making the Company a party to the suit.

Where a shareholder purchased shares in a Joint Stock Company knowing at the time that similar Companies were in the habit of dealing in their own shares and those of other Companies, and believing

that the Company in question adopted the same practice, but made no inquiry to ascertain whether or not such was the case, nor made any objection to such dealings of the Company until it was discovered they had resulted in loss, it was held that he had by his own conduct lost his right to hold the Directors personally liable in respect of such dealing and the result was held to be the same whether the said shareholder was beneficially entitled to his shares, or merely a trustee of them for others. 4 B. H. R. O. J. 185.

PURCHASER (Bona fide).

1127. A person is not a *bona fide* purchaser for value who has obtained neither title nor possession. 1 W. R.

1128. A purchase from an ostensible owner, who knew that one of the beneficial owners was a minor at the time of the transaction, and who took the precaution to obtain the consent of the other beneficial owner who was of age, was held not to be a *bona fide* purchaser. 1 W. R. 324.

1129. A *bona fide* purchaser is entitled to refund of purchase-money in a case where, some dispute having arisen as to the purchase, the matter was referred to arbitration, and it was held that the vendor had no authority to sell. The principle of *careat emptor* does not apply to such a case. 3 W. R. 28.

1130. The rights of *bona fide* purchasers and mortgagees are not to be defeated by earlier obligations in the hands of third parties never in possession of the land in dispute. W. R. S. N. 225.

PURCHASER (Bona fide—with Notice).

1131. A party purchasing with notice that his vendor's title is contested, must take his chance if that title turns out invalid. 9 W. R. 86.

1132. If the purchaser of an estate for value takes with notice, actual or constructive, of a trust, he is bound by such trust to the same extent and in the same manner as the person from whom he purchased. 6 B. H. R. O. J. 59.

1133. A purchaser at a sale in execution of a decree held under Act VIII of 1865 (B.C.) cannot be ousted from the property purchased by him without proof that the decree and sale were fraudulent, and that he (the purchaser) was a party to, or had notice of, the fraud. 7 B. L. R. App. 1.

PURCHASER [Bona fide—without Notice].

1134. An unenquiring purchaser from a Hindu wife, whose husband is living at the time, is in no sense a *bona fide* purchaser without notice. 6 W. R. 312.

It is not a legal sequitur that because the sale to A's vendors was fraudulent, A's purchase must be null and void. If A was a *bona*

vide purchaser for valuable consideration without notice of the fraud, there is no reason why he should be deprived of the benefit of an honest purchase. W. R. S. N. 225.

1136. The mere possession of the title-deeds by a second mortgagee, though a purchaser for value without notice, will not give him priority. There must be some act or default of the first mortgagee to have this effect. 4 M. H. R. 369.

1137. The plaintiff brought a suit on an instrument, dated 1861, described as a mortgage bond, to recover the amount due by a decree against the first defendant personally and against the mortgaged property which was in the possession of the 2nd defendant under a registered deed of sale by first defendant to him in 1866. The Civil Judge gave a decree against the first defendant, but refused the prayer against the 2nd defendant on the ground that he was a *bona fide* purchaser for valuable consideration without notice.

Held, by the High Court, that the plaintiff was entitled to a decree against the property in the possession of the 2nd defendant for satisfaction of the debt, whether the instrument sued on was a mortgage, or whether its effect was merely to create a lien. 4 M. H. R.

1138. In order that a purchaser of immovable property from a Hindu in the Island of Bombay may be entitled, as against the beneficial owner of such property, to set up the defence of being a *bona fide* purchaser without notice, he must show that he has made all proper inquiries into the title and as to the state of the family of his vendor, and of his vendor's predecessors in title for a period of twelve years at least before the date of his purchase.

Where a purchaser claims to hold land which he has purchased from a third person on the ground that the owner of such land has acquiesced in the sale, the purchaser must show clearly that the real owner was aware of the sale at the time it took place.

Where the owner of land was not aware of its being sold by his father to a third person, but, having heard of such sale, subsequently stood by and allowed the purchaser to build upon the land, it was held that the owner could not recover the land without compensating the purchaser for the building erected by him upon the land, and three months were allowed to the owner within which to pay such compensation. 8 B. H. R. O. J. 77.

1139. The plaintiff in 1866 obtained a decree against one Ramzan Mohidin for payment of a debt by him personally, or in default entitling the plaintiff to recover the amount from the sale of certain immovable property situated in Gujarat on which the debt had been secured under a *Sankhat** on the attachment of the immovable property in execution of that decree, the defendant objected under section 246 of the Civil

* Note—The word *Sankhat* means in Gujarat a mortgage unaccompanied with possession.

Procedure Code, and alleged that he had purchased the property in 1865. The attachment having, accordingly, been raised, the plaintiff sued for a declaration of his right to sell the mortgaged property. Both the Lower Courts threw out the plaintiff's claim.

On special appeal, the decrees of the Lower Courts were reversed, and the case remanded for the trial of the issue whether the defendant was a *bona fide* purchaser for valuable consideration without notice of the plaintiff's *Sankhat* or lien on the property in dispute at or before the time of his purchase. 8 B. H. R. A. J. 75.

PURCHASER (Difference between Innocent--and one tainted with fraud).

1140. The case of *Ali Hoosum vs. Badel Khan* (19th May 1863, S.D. A., N. W. P.), where it was held, that there is no difference to be made between the innocent purchaser and one tainted with fraud, which had brought about an execution sale observed upon and dissented from. 10 M. I. A. 454, 455.

PURCHASER (Duty of).

1141. If a person has notice that another has or claims an interest in property for which he is dealing, he is bound to enquire what that interest is; and, if he omits to do so, he will be bound, although the notice was inaccurate as to the particulars, or the extent, of such interest. 22 W. R. 248.

1142. The first duty of a purchaser from a Hindoo childless widow, is to satisfy himself, as an ordinary prudent man would do, as to her right to sell. If he does not do so, he does not act with due care or attention in the matter, and, therefore, cannot be said to have acted legally in good faith, although he may, in fact, fully believe or take it for granted that all is right. 2 W. R. 123.

1143. A person purchasing an estate where there is a tenant in possession is bound to inquire into the title of such tenant, and if he neglects to do so he takes subject to such rights as the tenant may have.

The equities are the same where there is a person in possession as the object of a charitable trust and under the trust. 6 B. H. R. O. J. 59.

PURCHASER [From Judgment-debtor].

1144. A purchaser from the judgment-debtors was held entitled to recover the amount paid by him on account of previous mortgages, when, in making those payments, he merely acted for the debtor who had borrowed the money from him, and what he did was to see that that money so borrowed was properly applied in clearing off those debts which rendered his own purchase unsafe, and of the existence of which he was at that time cognizant. 17 W. R. 480.

PURCHASER (Innocent).

1145. A party purchasing what he knows to be the right and title of some one else than his vendor cannot claim the character of an

innocent purchaser; and is not entitled to compensation for improvements to the property so purchased by him. 16 W. R. 169.

PURCHASER (Pendente lite).

1146. Three brothers, M, L, B, P, K, B., and G. D. B., being jointly entitled in equal shares to an undivided one-third share in certain property, mortgaged their shares by three deeds bearing different dates to one R, N. Between the dates of the two last mortgages, the brothers instituted a suit for partition of the property, and for certain other objects; and, on 2nd February 1864, a decree was made in the suit, declaring the brothers entitled to a one-third share of the property, and ordering a partition and the taking of accounts, and reserving the question of costs. R, N. was not made a party to this suit. On 6th September 1864, the brothers covenanted to mortgage certain property to the plaintiff, including that previously mortgaged to R. N; on 8th and 9th December, the agreement was performed by conveyances in which R. N. joined, and which recited that he had been paid off., and on 28th November 1866, and 27 March 1867, the three brothers conveyed their equities of redemption to the plaintiff. On 15th June 1868, an order was made in the partition suit for the sale of a sufficient portion of the property to pay the costs of the parties to the suit, and under this order the property which the plaintiff sought to recover in the present suit was sold on 1st May 1869, and purchased by the defendant, who at the time had full notice of the plaintiff's claim: Held the doctrine of *lis pendens* did not apply, and the plaintiff was entitled to recover possession. 8 B. L. R. 474.

PURCHASERS (Misconduct of one of Several).

1147. Where the whole of a property was sold in execution, and the purchasers agreed among themselves what shares they were to take in the property, the Court was unable, because of the apparent misconduct of one of the purchasers who, after having acted as pleader for the other party, had now become one of the purchasers of the property which he knew had been previously sold to his clients, to limit the extent of that sale, or to declare that the said pleader was not entitled with the other purchasers to the whole 16 annas. 17 W. R. 180.

R.

RATIFICATION.

1148. Where the act of the agent has been communicated to, and ratified by, the principal, it becomes the act of the principal in point of law. 7 M. H. R. 369.

READINESS AND WILLINGNESS (To Deliver).

1149. A contract for the delivery of shares at a future day is a contract that can be assigned in Equity, and the assignee of such a contract can, in his own name, maintain a suit to recover damages for its in the Civil Courts in India.

REDEMPTION.

In such a suit the plaintiff would be subject to any equities that might subsist between his assignor and the defendant.

In order to support an allegation of readiness and willingness to deliver, an actual tender is not in all cases necessary: *e. g.*, a tender will be dispensed with where the defendant has refused to perform the contract, or where on the day for the performance of it he has absconded, and, having closed his place of business, has left no agent or other person to represent him. 8 B. H. R. A. J. 133.

- 1150. Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day, gives notice to the vendor that he (the purchaser) will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares.

- *Semble.*—The mere fact that such shares are pledged to a third person is not sufficient to show that the vendor is not ready and willing to deliver them, if there is nothing to show that the pledgee is not willing to assist the vendor in carrying out his contract, and it being apparently for the advantage of the pledgee that he should do so. 8 B. H. R. A. J. 123.

REDEMPTION.*

1151. The lapse of more than 12 years from the year of grace bars the right of redemption. 8 W. R. 476.

1152. A suit for the redemption of mortgaged property cannot go on to a due determination until all the mortgagors are made parties. 21 W. R. 428.

- 1153. In a redemption suit against the auction-purchaser from a mortgagee, it is necessary to determine whether defendant obtained the land under such circumstances that he is bound by the mortgage bond. 21 W. R. 13.

1154. Where a mortgagor brings a suit to redeem mortgaged land on payment of such sum as shall be found due to the mortgagee, the Court is not justified in decreeing possession *without payment* in favor of the mortgagor, merely because the mortgagee denies the existence of the mortgage. 6 B. H. R. A. J. 9.

1155. In 1841 A established her proprietary right to lands as against B, and an otti mortgagee then in possession. In 1844 B obtained a decree against the mortgagee in a suit to which A was not a party, and assigned his rights under the mortgage to C, who continued to hold as B's assignee down to 1860:—Held, that unless A was aware, or might by ordinary diligence have been aware, of the suit of 1844, his right to redeem the lands was not barred by the lapse of twelve years from the decree in that suit. 1 M. H. R. 116.

1156. In a suit to redeem a mortgage and to obtain possession, held

plaintiff had no right to redeem as being a mere *mokurusedar* or a person holding under the mortgagor, and because the mortgage an end before the institution of the suit; and that he was not to possession as a *mokurusedar* because he was bound by limitation inasmuch as according to his *pottah* he was entitled to possession at once and he never got possession, and certain statements made by the Zemindar in petitions filed in Court are not admissions under Act XIV of 1859 to take a case out of the ordinary rules of limitation. 17 W. R. 272.

1157. The plaintiff executed an usufructuary mortgage of certain land for a term of 22 years to the 1st defendant, for the considerations stated in a written instrument of mortgage, dated the 21st January 1863. The mortgage instrument contained a stipulation that possession should be given to the plaintiff upon his paying the principal and interest due to the 1st defendant within two months from the date of the execution. Held, that the plaintiff was entitled to redeem although the amount of principal and interest had not been paid or tendered within two months. 3 M. H. R. 363.

1158. A granted a *zur-i-peshgee* lease of certain lands to the defendants for a fixed term of years, which was to continue after the expiry of the term so long as the money advanced remained unpaid. Shortly afterwards A evicted the defendants, and sold the land to C and D in the proportion of 12 annas and 4 annas. The defendants sued all the three and obtained a decree for possession and mesne profits. They never got back possession, but recovered the mesne profits from A. On the expiry of the term of the lease, C and D each brought a suit to redeem his own share of the estate after payment into Court of the money advanced in amounts proportionate to the share of the land purchased by each. The two suits were heard together. Held, they were entitled to redeem. Held, also, that the defendants were not liable under Regulation XV of 1793 or Regulation I of 1798 to account for the mesne profits which they had recovered. B. L. R. S. V. F. B. 613.

REDEMPTION (Equity of).*

1159. The claimant entered into an agreement for the purchase of certain property; and on the execution of the agreement, deposited rupees 15,000, as earnest money of the contract, and in part payment of the purchase-money. The claimant was not satisfied at that time with the title-deeds supplied by the vendor, but afterwards entered into fresh negotiations for the purchase upon different terms. The vendor died, and the present claim was filed in a suit to administer his estate. Held, that the claimant was entitled to be paid in full the rupees 15,000 in priority to all other creditors; and that his lien was not lost by the failure either of the original contract or the subsequent negotiations. 3 B. L. R. O. J. 75.

1160. The defendants mortgaged certain property in the mofussil

* See mortgage, Ante Nos. 821 to 828.

REDEMPTION (EQUITY OF).

to the plaintiffs in April 1863, and at the same time, as a collateral security to the mortgage, executed a bond in favor of the plaintiffs, and a warrant of attorney to enter up judgment on the bond. Judgment was entered up, and a decree obtained thereon, soon after the bond was executed. In accordance with covenant in the mortgage-deed, the mortgagees entered into possession and receipt of the rents and profits of the estates which they were authorized to receive for five years, from the date of the mortgage. They remained in possession for six years, and then, more than one year having elapsed since any proceedings in execution had been taken, they applied for execution of their decree against the mortgaged property. The property was out of the jurisdiction of the Court. Held that, if the application were granted, the execution of the decree must be limited to property other than that which was the subject of the mortgage. There being evidence to show that the parties had entered into an agreement for a fresh mortgage of the property for twenty two years, the application for execution was refused.

—An equity of redemption cannot be taken in execution of a decree for a money-debt under the attachment clauses of Act VIII of 1859. 4 B. L. R. O. J. 83.

1161. K D, a Hindu widow, by deed appointed R S to be her general mooktear, for the conduct of certain suits in her name, which were pending in respect of the estate of her deceased husband. By this deed dated 25th September 1858, she covenanted to repay him, within two months of the successful termination of the suit "all moneys properly disbursed by him on her account, &c."; and also to pay him an additional sum as remuneration to himself. R S entered on the conduct of her business, and advanced certain moneys on her account, and in October 1859, K D executed in his favor a second deed by which she mortgaged to him her share in the estate of R H, deceased, which was in the hands of his executors, "and my decrees 24 and 25 in the Zillah Court, and the decree in the Supreme Court, and the right and interest of all the said decrees and all other real and personal properties belonging to the said estate." By a decree of the High Court of 28th July 1862, in one of the suits brought by K D, the estate of R H was declared to consist of a share of a certain talook, of a share of a house in Calcutta, and of a certain sum of money; and K D was declared to be entitled to one moiety thereof. K D afterwards obtained an order for possession, and held possession of the said talook until August 1866. R S continued the conduct of K D's business, and advanced more money on her account, in respect of which, on 31st May 1865, he brought a suit against her, and on 21st September 1865, obtained a decree in his favour. Under this decree he attached the right, title, and interest of K D in the estate of R H; and on 25th June 1866, it was put up for sale, and purchased by R S himself. In a suit brought by K D against R S, among other things, for an account, held, that R S was a trustee for K D in respect of her share in the estate of R H, which he had in execution of his decree.

A mortgagee, cannot, properly, in execution of a simple decree for money the repayment of which is secured by mortgage, attach and sell the mortgagor's equity of redemption in the property mortgaged: but if he do so, and purchase it himself, he becomes a trustee for the mortgagor, against whom he cannot acquire an irredeemable title. 5 B. L. R. 450, 451.

1162. R mortgaged certain land to A in 1844, stipulating that if he (R) failed to pay a moiety of the mortgage-money within three years, or wholly redeem within five years, from the date of the mortgage, the property mortgaged should be considered as sold to A. The property remained in the possession of R till 1847, at the end of which he gave it into the possession of A, R then believing that he had thereby lost all right to the property. Subsequently to 1847, the property changed hands. The absolute right was first sold in 1855, and then on two occasions in 1862. At this time R did not raise any objection to the property being sold, although he was fully aware of the fact.

R had also admitted, in a suit brought against him in 1850 by A, that he had sold the land to A.

In a suit brought by R against A in 1867 to redeem the mortgaged property—

Held (following the decision in 1 B. H. R. 199 *See Ante* No. 821) that R was entitled to redeem the property.

Held also that, under the peculiar circumstances of this case, the Court would not be justified in calling upon the mortgagees to furnish accounts of the rents and profits on the one hand, and of the principal interest on the other.

Interest on the value of improvements made since the time the property came into the hands of A disallowed. 8 B. H. R. A. J. 236.

RELEASE.

1163. A letter in the nature of a guarantee, wholly in the handwriting of A, written upon stamped paper, sealed, but not signed or attested by witnesses, or registered, to B, a co-plaintiff with A, undertaking to indemnify B from costs, if he would join as a co-appellant with A in an appeal to England, established, and held to operate as a release in an action brought by A's heirs against B to recover his *pro rata* share of the costs of the appeal. 7 M. I. A. 148.

1164. Case dismissed, because the Privy Council upon the evidence considered that the general release set up by the defendants could never have been contemplated by the parties to operate as a release of all demands. 5 W. R. P. C. 112.

1165. Plaintiff sued to recover rupees 21,650-5-1, balance of principal and interest due. He alleged in his plaint that, between the 16th February and 23rd July 1867, he paid, at the request of defendant's father, the late G F. Fischer, rupees 25,600 on account of the shivaganga Zamindari; that the defendant having assumed the management

of the Zamindari under an assignment from his father, gave plaintiff a receipt for the said sum of rupees 25,000 under date the 7th August 1867; that in October and December 1867, defendant paid the sums of rupees 5,000 and 3,000 respectively, in part liquidation of the debt, but since 29th December 1867 refused any further payment. Defendant answered that this debt due by the late G F. Fischer had been validly released by the terms of an assignment, dated 29th July 1871; that the receipt given by the defendant was a mere acknowledgment of the payment of rupees 25,000 by the plaintiff to the late G F. Fischer and imposed no obligation on defendant to pay the said amount; that there was no consideration for defendants' promise to pay rupees 25,000; that when defendant executed the receipt he was not aware of the effect of the release, and that the part payments were made under a mistaken idea of liability. At the hearing it was not disputed that a release was executed, and that this claim was embodied and was intended to be embodied in that written release, but it was attempted to set up a contemporaneous oral agreement, leaving this claim as a subsisting demand. The Civil Judge dismissed the suit, holding that this oral evidence could not be adduced to contradict the written release. Held, on Regular Appeal, that the Civil Judge was right. The principle is—Is the matter of the contemporaneous oral agreement so outside the scope of the written one that they can logically subsist together, so that the oral shall neither contradict nor modify the written?

In the present case, to set up an oral agreement that the sum released should, in fact, be paid, as to deal with an object already embodied in the written agreement in a manner antagonistic to its provisions. It is not only to vary what the words mean, but what they were intended to mean. The subsequent receipt for the money did not create a debt, for the release had already extinguished it. 6 M. H.R. 393.

1166. In a written promise to pay "when I am able" those words are not to be treated as mere surplusage, but a binding part of the contract. The promisee's cause of action does not accrue until the promiser is in circumstances to pay. 1 W. R. 368.

RELIEF (Equitable).

1167. Where a *putnee* lease of certain properties was to be in plaintiff's favor in case certain money borrowed from him was re-paid by a given date, the money in that case being considered as *bonus* for the lease, and where the deed embodying this stipulation to be counted as a *putnee pottah* if the lease was not executed. Held that the plaintiff is entitled to relief even though he may ask for something he is not strictly entitled to; and if the *bonus* is inadequate, the Court may equitably relieve defendant on payment of the original sum with interest from the date of advance. 19 W. R. 274.

RE-PURCHASE.

1168. A sold land to B and continued in possession as B's tenant. More than two years after the sale A and B agreed that A should have the

right to re-purchase within a fixed time, but that such right should be forfeited if the conditions of the lease were not kept. At the date of this agreement A was in arrear with his rent: Held that his right to re-purchase was not forfeited by his having incurred further arrears. 1 M. H. R. 63.

REVOCAATION.

1169. If a revocation by deed can set aside a deed, by which a person binds himself to abide by the decision of arbitrators, revocation by parol may set aside a parol agreement. Notice is not necessary. 3 M. H. R. 82.

S.

SALE.

1170. Wilful misrepresentation by a vendor regarding property sold, practised in a matter within his knowledge, and concerning which the purchaser had no adequate means of knowledge, held to vitiate a sale and to entitle the purchaser to recover the purchase-money actually paid by him. 1 N. W. P. 25.

1171. The notion that a sale or transfer cannot be made or proved without a deed of sale or some written agreement is a misconception and erroneous. 1 N. W. P.

1172. A sale might be complete, and it still might be a condition of the contract that the purchase-money was to be paid afterwards, and the deed in evidence of the contract may not be completed. The bare fact of the deed not being registered would not annul a sale if, by mutual agreement, a sale had already been made. 7. W. R. 317.

1173. A mere agreement to sell a certain property without any consideration passing, cannot bar the right of the vendor on the same day to sell a portion of the property to a third party or invalidate the third party's purchase. 7 W. R. 38.

1174. The defendants had sold certain property to the plaintiff. They afterwards refused to effect mutation of names in favour of the plaintiff on the ground that he had not paid off a certain mortgage on the property, which he had promised in the contract of sale to do. They did not repudiate the sale or the plaintiff's title under it. Held, that the refusal was not tantamount to a rescission of the sale, and that a suit for the recovery of the purchase-money would not lie. 5 N. W. P. 194.

1175. Where a *Mooktearnamah* was duly executed by A authorizing B to sign her name to a deed of sale, notwithstanding that the *Mooktearnamah* was not verified until after A's death, the sale under that deed made after A's death was held to be valid as regards the right of the purchaser to recover the purchase-money. 6 W. R. 174.

Where a plaintiff sued for recovery of possession of property

SALE (BILL OF).

which he said he purchased from two defendants, and it found as a fact that one of the defendants did not sell but that the other sised fraud in effecting the sale ; it was held that the decision below, which gave plaintiff a decree for the entire property against the defendant who acted fraudulently, was erroneous and that the decree should have absolved from liability the share of the defendant who did not join in or know any thing of the sale. 8 W. R. 182.

1177. D, a Hindu, died, leaving three sons, S, S. C, and R, who on his death made a partition of his estate, and S covenanted with S C to discharge all claims made against the estate of D in 1828, B, who claimed a portion of the share taken by S C on partition with mesne profits, filed a bill in the Supreme Court against S C and other as representatives of D, and obtained a decree for Rs. 2,00,000. Pending this litigation S C died, leaving six sons, J, M, H, P, C, and S M, and a will made before the birth of S M, by which he left all his property to his sons other than S M. On the death of S C, J, as one of the executors of his will, compromised B's suit so far as it related to the estate of S C, for Rs. 80,000 ; and afterwards, in the same capacity, sued the representatives of S to recover that amount and the costs in the suit brought by B, and obtained a decree for Rs. 1,70,000. In the meantime H died, leaving the plaintiffs his sons and heirs, and his brother J and M, his executors, J renounced the executorship. M, on 3rd June 1854, as executor of H, executed a deed of assignment, by which he conveyed to J and S M, for Rs. 5000, the interest of the plaintiffs in the decree obtained by J, and subsequently at a sale of property belonging to the representatives of S in execution of the decree, J himself become the purchaser. In 1857, in an administration suit, which had been brought by the plaintiffs to compel M to account for the assets received by him from the estate of H, the Master was directed to take an account, which was accordingly done. In a suit brought by the plaintiffs, the sons of H, against J, M, and S M, to set aside the deed of 3rd June 1854,—*Held*, that notwithstanding the renunciation of executorship by J, he stood in a fiduciary relation to the plaintiffs, and the assignment being found to have been made for an inadequate consideration, was ordered to be set aside on the plaintiffs paying the purchaser, J, the amount of the purchase-money.

A decree in an administration suit brought by the parties whose interest had been sold against the executor of their father's will, by whom the sale had been made, held to be no bar to the maintenance of a suit against the purchaser to have the sale set aside. 14 B. L. R. 276,277.

SALE (Bill of).

1178. In a suit for possession under a bill of sale, the defendant pleaded that a large portion of the purchase-money still remained unpaid. Held that the mere fact of a decree having been subsequently passed in another suit could not affect the validity of the defence relied upon in this case. 8 W. R. 218.

1179. Suit for possession of a four-anna share of a *Raj* and

dary under a *Kowalu*, or a Bill of sale, purporting to be an absolute sale for the sum of Rs. 75,000, executed at a time when the alleged vendor was not in possession or had established his title to the *Raj* and *Zemindary*. The vendor who established his title to the *Raj*, and was in possession, by his answer set up this case; that being in want of money to carry on suits to recover the *Raj* and *Zemindary*, he applied to one K (whose rights had become vested by purchase, in the plaintiff), who agreed to make advances to him on condition of his executing the Bill of sale, and that no part of the consideration-money there expressed was paid on execution of the Bill of sale, though some inconsiderable advances were made to him; that he was afterwards pressed to execute a bond to secure the same sum of Rs. 75,000, hypothecating the whole *Raj* and *Zemindary* in substitution of the Bill of sale, but that no consideration was paid on that occasion; the real contract being one to secure moneys already advanced, and future advances, which contract had not been complied with by K's Assignee:—Held, by the Judicial Committee, upon the evidence, that the real arrangement between the parties was for K to make advances, from time to time, and that the form of the contract was a device adopted to evade the effect of the transaction being stamped with the character of champerty, and the Bill of sale set aside.

In a suit so framed to obtain possession, the Appellate Court will not impose terms upon the defendant to repay the advances made by K as the plaintiff, his Assignee, had his remedy, and could sue on the bond.

Whether the effect of the execution of a Bill of sale by a Hindu vendor is to pass the estate irrespective of actual delivery of possession, giving to the instrument the effect by English Law of a conveyance operating under the statute of uses. *Quære*. 12 M. I. A. 275, 276.

SALE (By Government).

1180. *Semble*. Where property is sold by Government for general debts, and not for arrears of revenue, they sell only the interest of the debtor, and do not guarantee the vendee a title. 5 M. I. A. 271.

SALE (By Husband to Wife).

1181. Held by the majority of the Court that, a sale by a husband to his wife may be collusive and a fraud upon his creditors notwithstanding the payment of the purchase-money by the wife out of her funds. (*Trevor J., dissentiente*). 1 W. R. F. B. 319.

SALE (By Minor).

1182. A purchase from a minor is not *ipso facto* invalid. 3 W. R. 10.

SALE (By Mortgagee).

1183. *Semble*.—That a private sale effected by a mortgagee in the *mofussil* without the intervention of a Court, in pursuance of a power of sale given to him under his instrument of mortgage, is invalid. 8 B. H. R. A. J. 142.

SALE (By Mother to Daughter).

1184. Where a mother conveyed her property to her daughter, and the property was afterwards attached in execution of a decree against the daughter,—Held that the mother could not obtain a reconveyance of the property, on the ground that the conveyance to the daughter was for the purpose of defrauding the mother's creditors, and that the *onus* was on the mother to prove that the decree against the daughter was a fraudulent contrivance to deprive the mother of possession of the property. 7 W. R. 118.

SALE (By Vendors not in Possession).

1185. Alleged purchasers, whose vendors were not in possession and who pay nothing for what is said to have been sold to them, are not competent to maintain a suit for possession of the property in dispute. 23 W. R. 165.

SALE (Conditional).

1186. A conditional sale may become absolute by agreement and acts of the parties to it, without proceedings under section 8, Regulation XVII of 1806. 5 N. W. P. 29.

1187. The decisions of the late Sudar Court of Madras have carried the doctrine of relief after the time named in the conveyance so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule and have held the question one of construction, admitting however, for the purposes of the construction, other documents and oral evidence. 7 M. H. R. 6.

1188. A party who had advanced certain monies on a deed of conditional sale, *bye-bil-wuffa* not being able to get possession of the mortgaged property, sued his debtor for the return of his money and obtained a decree. While the suit was pending the defendant died. Held, that while the decree (which was a simple money-decree) would enable the decrec-holder to follow any assets left by his debtor, it could not give any particular lien on the land which had once formed the subject of the *bye-bil-wufa*. 11 W. R. 225.

Plaintiff executed to defendant a document of which the following is a translation.—“ The *Muddata Kriyam* executed on the 10th April 1835 by the Madugula Zemindar to the Zemindar of Bobbili. As I have conveyed to you as sale for Rs. 6,000 the Papuchetti Seri adjoining the land of Kasbah Jaggananthapuram in the Zemindari of Madugula, they are given you for absolute sale : so the said sale money has been received at the time of sale. In the event of my paying you the principal Rs. 6,000 within six months from this date, you must give back the said land Papuchetti Seri to me. In the event of our not being able to pay according to the said stipulation, you should hereditarily from son to grandson enjoy the produce of the said land, yourself paying to Government the assessment fixed

on a sub-division, reckoning this sale money to be a pure sale. This *Muddata Kriyam* has been executed with my consent." Held, that this document was a sale with a condition for re-purchase. 7 M. H. R. G.

SALE [Deed of].

1190. In construing a deed of sale where the terms are ambiguous, the conduct of the parties immediately after, and acting upon the deed is very important ; such conduct being some times (as in this instance) the only means by which the Court can know how the price of land was fixed. 19 W. R. 432.

1191. A deed of sale is complete on the date when it is signed and attested by the Cazeer, and consideration is paid for it. Delay in the delivery of the deed does not invalidate it. W. R. S. N. 62.

1192. The mere non-recital in a deed of sale by a mother during her son's minority of the legal necessity for the sale does not vitiate the deed. The necessity may be proved by other evidence. 3 W. R. 154.

1193. A suit based on a deed of sale to H is materially affected by his son T accepting a deed substituting another agreement and transaction in lieu of his father's deed of sale. 3 W. R. 228.

1194. A deed of sale, though not strictly of a complete and final character, yet if genuine and duly attested, may be sufficient to bind the property and to give the purchaser the right to demand a specific performance of the contract and the execution of such further assurances as might be deemed necessary to invest him with a complete title to the property. Such a deed would necessarily prevail over any intermediate attachment of the property for debts due from the original proprietor. 5 W. R. P. C. 111.

1195. The delivery of a deed of sale to A the vendor, after the making by the vendor of a fresh bond in respect of the same property in favor of B, will not render the deed inoperative, or subject to A to fresh liens not within his knowledge and not existing at the time of his purchase. 5 W. R. 110.

1196. A Court is not bound to consider a deed of sale to be a deed of absolute sale, and not take into consideration the acts and conduct of the parties in their own view and dealing in regard to the transaction. Thus where the parties treat a transaction as a deed of conditional sale, the Court must not necessarily hold it to be a sale. 5. W. R. 104.

1197. Where several properties are comprised in one deed of sale, the purchaser runs the risk of having his title in all the properties shaken, should the purchase as to one of them be called in question in a regular suit. 8 W. R. 483.

1198. Where a *kobalah* is not executed within the stipulated date, an intending purchaser is not entitled to compensation under the con-

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tract Act section 74, unless he can show that he tendered the purchase money, and the bond, together with a draft of the *kobalah*, to the opposite party, who then refused to execute. 20 W. R. 481.

1199. Where property belonging to three brothers, one of whom was a minor, was sold for an ancestral debt on which execution proceedings had been taken, the rights and interests of the two elder alone being advertised for sale, and the deed of sale making no mention of the minor's rights and interests: Held, that the minor's rights and interests were not conveyed to the purchaser. 10 W. R. 241.

1200. A, who was entitled to certain property, but had not the means to institute a suit for the recovery of the same, agreed to sell B a moiety thereof in consideration of a sum of money was to pay for the purpose of carrying on the suit in the names of A and B as plaintiffs. Shortly afterwards A entered into a deed of compromise with C, who was the claimant and in actual possession of the greater part of the property in question, by which a portion of the property was divided between them. Held, in a suit brought by B, against A and C, that the first deed did not operate as a present transfer of the property, but only as an agreement to transfer it upon certain contingencies which had not happened. 18 W. R. P. C. 140.

1201. The plaintiff executed a deed of sale of a moiety and a lease of the other moiety of certain property to B. B instituted a suit under section 15 Act XIV of 1859, which was dismissed. B then returned the deed of sale and lease to A, with the following endorsement under his signature, *viz.*, "returned, no claim." A instituted the present suit for recovery of possession of the said property, and the defendant set up in his defence that A had no right to sue for a moiety of the property, as the same has been conveyed to B; and that the endorsement of the deed of sale, "returned, no claim" was not admissible to evidence, as the same had not been registered. Held, that the entry was only of evidence that the transaction was inchoate, and not final, so as to require a reconveyance.

Held, that as the plea as to the inadmissibility of the evidence for want of registration was not specifically taken in the Court below, it could not be allowed in special appeal.

Held, that the *onus* was upon the defendant to prove his purchase 3 B. L. R. Ap. 125.

SALE [For Valuable Consideration].

1202. A purchaser for valuable consideration of an estate from the owner who is in possession of it, is not bound by an unregistered mortgage of which the purchaser had no notice. 4 W. R. 67.

SALE (Fraudulent).

1203. The mere non-payment of a debt does not necessarily prove collusion between the debtor and his vendor to defraud the creditor. 6 W. R. 235.

1204. Where a mortgagor executes a deed of sale for the purpose of defrauding and defeating his creditors, it is void against any of the creditors who may obtain a decree against him, although the deed may have been executed before execution was taken out on the decree. 6 W. R. 91.

1205. Where a transaction was originally a sale, temporarily converted into a mortgage for some fraudulent purpose, but subsequently, as between the parties to the fraud, voluntarily restored to its original state of a sale; Held, under the circumstances, that the sale should stand good, and consequently that there was no necessity for foreclosure, and no equity of redemption to sue for. 6 W. R. 293.

1206. Where a vendor, knowing that he had no right or title to property, or being cognizant of the existence of incumbrances or of latent defects materially lowering its value, sold it and neglected to disclose such defects to the purchaser. Held that there was a fraudulent concealment vitiating the contract. 7 W. R. 258.

1207. Where goods have been obtained by means of a fraudulent purchase, the vendor has a right to disaffirm the contract so as to re-vest the property in himself, and this even if the property had passed to vendee with the consent of the vendor.

Where a vendee purchased cotton with the pre-conceived design of not paying for it, the sale did not pass the property, and although the cotton may have been, with the vendor's consent, allowed to be placed on the vendee's boat, still the vendee must be considered as the agent of the vendor, and his possession as that of the vendor's and the cotton as still the property of the vendor, as long as the price was not paid. 6 W. R. 81.

SALE (Of Goods).

1208. In the absence of any agreement as to delivery, goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement for sale, or, if not then in existence at the place at which they are to be produced. 5 B. H. R. A. J. 126.

1209. R G G and Co. entered into a contract to sell certain goods to A. S., N S., both Calcutta firms. The contract, which was in a printed English form was taken on the 18th December 1868 by one M., on behalf of the firm of R G G and Co., to obtain the signature of the vendees' firm. It was signed on their behalf by A S. Neither M nor A S understood English, and no explanation was given of the terms of the contract to A S at the time he signed it, but there had been negotiations between M and A S as to these goods prior to the time when A S's signature was obtained. It did not appear that the goods had been identified in any way by the purchasers who had merely seen a sample. After his signature, A S wrote in Nagri "goods fresh, grenadines five cases, at 2 annas 3 pie per yard." A S, N S, afterwards, on the 9th February 1869, paid rupees 1,000 as earnest money, which was accepted by R G G and Co., who then allowed further time for taking delivery of

SALE (OF GOODS).

the goods, which, however, A S, N S finding some of the goods were stained, declined to do. R G G and Co. thereupon brought an action for breach of contract in not taking delivery, and a cross-suit was brought by A S, N S to recover the rupees 1,000 paid as earnest-money : Held that the words "fresh goods" after the signature of A S constituted part of the contract into which the parties entered, and by which they were bound. 5 B. L. R. 111.

1210. The defendants contracted to purchase from the plaintiffs "2,000 maunds of fresh, clean, and good up country indigo seed, guaranteed growth of season 1870-71, at rupees 11 per maund to be delivered to the defendants' agent at Hajipur in all February next." In part performance of this contract, the plaintiffs delivered, and the defendants' agent at Hajipur accepted, 865 maunds of seed, no objection as to quality being then taken. But when the remainder of the seed was tendered in February, the defendants refused to accept it on the ground that it was not according to contract. At the same time and upon the same grounds, they refused to pay the contract price for the seed already accepted, and tendered instead the market price at the time of the delivery. In an action to recover the contract price of the 865 maunds delivered, and damages for loss on re-sale of the remainder of the seed, the Judge of the Court below found on the facts that the seed was not "seed of the growth of 1870-71" as far as it was reasonably possible to procure it; and that, though there was evidence to show that seed of the previous season, if of good quality and in good preservation was occasionally mixed with the new seed, and that seed so mixed had been accepted as a performance of contracts for 1870-71, yet there was no evidence that, under such contracts as the present, the seller was by custom at liberty to mix seeds of two crops so as to bring the sample up to an average quality; and, further, that a custom, so directly at variance with the express terms of the contract, could not, if proved, be allowed to prevail. Held also that the defendants had waived any objection to the 865 maunds, which must therefore be taken as a good delivery *pro tont* under the contract and must be paid for accordingly.

Held, on appeal (affirming the decision of the Court below) that the plaintiffs had not delivered seed according to the contract; but (reversing the decision of the Court below) that the contract was a contract for the delivery of the entire quantity of 2,000 maunds, and that the plaintiffs could only recover for the 865 maunds as on a new contract arising at the time when the seed was accepted; such contract being to pay for the seed according to its value, and not according to the rate stipulated for the 2,000 maunds. (see Act IX of 1872 s. 89) 8 B. L. R. 459, 460.

1211. The plaintiffs in London and the defendant in Calcutta had dealings, which consisted in the defendant shipping jute cuttings and rejections to the plaintiffs in certain quantities and within certain limits as to price; the defendant drawing bills on the plaintiffs in respect of such goods, which the plaintiffs accepted. The plaintiffs alleged that

there was an agreement between them and the defendant, that in case of shipments in excess of the limits given by the plaintiffs, they should at their option receive the goods on their own account, or treat them as consignments on account of the defendant, but the defendant denied there was any such arrangement. The defendant made several shipments in excess of the plaintiffs' limits, and the plaintiffs treated them as consignments on the defendant's account, selling them on defendant's account and forwarding him account sales, and drawing bills on the defendant for any balance due to them in the transactions, which bills the defendant refused to pay. The plaintiffs forwarded accounts current to the defendant, in which appeared an item of £ 188-5-6 as the balance of account current down to December 1866. It appeared to have been due, however, in respect of an account for 1863. The defendant sent a letter, dated 22nd December 1865, to the plaintiffs which contained the following postscript :—"P S.—Enclosed a remittance of £ 40 to old account". In an action brought by the plaintiffs for the balance due to them from the defendant in respect of the shipments which had been treated by the plaintiffs as consignments on the defendant's account, the plaintiffs included the sum of £ 188-5-6. The suit was brought in November 1868. The defendant admitted he had sold the bills and received the money for them; they were produced by the plaintiffs, the acceptors.

Held, that the bills being produced by the acceptors after due date, and the defendant having received no notice of dishonor, and no demand for payment of the bills, the presumption was that they had been paid by the plaintiffs.

In exercising their option of treating shipments in excess of their limits as on their own account, or as consignments on account of the defendant, the plaintiffs were entitled to treat each shipment separately, and were not compelled to decide on an average of the shipments taken altogether.

The account sales furnished by the plaintiffs to the defendant were *prima facie* evidence of the amount realized by the sale of the goods.

Held also (on appeal, reversing the decision of Norman J.), the words "remittance of £ 40 to old account" were ambiguous, and did not necessarily import that a further sum was due, so as to constitute an acknowledgment of a debt, which would give new period of limitation. 5 B. L. R. 619.

1212. In 1862, the plaintiff's former firm of J. S. B. and B., of Manchester, entered into an agreement with S. and Co., of London, and B. and Co., of Calcutta, to purchase and ship, on the joint account of the three firms, certain goods to B. and Co., each firm taking one-third share of the profit or loss in the transaction; and by the agreement, it was stipulated as follows :—

J. S. B. and B. to draw at six months on S. and Co., for cost of goods, including packing charges; said bills to be discounted (and domiciled) at Overend, Gurney and Co's at $1\frac{1}{2}$ per cent in, excess of Bank minimum rate. B. and Co. to remit their three months' or six months' drafts as

may appear most desirable on S. and Co., in favour of J. S. B. and B., which Overend, Gurney and Co. agree to take at $1\frac{1}{2}$ above Bank minimum rate for three months, and $1\frac{1}{2}$ per cent for six months, as provision for said six months' drafts. B. and Co., on sale of goods, to specially remit proceeds to Overend, Gurney and Co. in first class bills drawn in favor of Overend, Gurney and Co., Overend, Gurney and Co., agree to give up B. and Co.'s drafts on S. and Co., on receipt of the said remittances under rebate. In the event of S. and Co., being brought under cash advances, J. S. B., and B. agree to find cash to the extent of one-third the amount." In 1863, J. S. B. one of the members of the firm of J. S. B. and B., retired from the firm, which was carried on under the name of T. B. and Bro. and the agreement of 1862 was continued by that firm with the two other firms of S. and Co. and B. and Co. Under it certain goods were, in September, October, and November 1866, purchased by the plaintiff, and shipped to B. and Co., on triplicate account, and bills were drawn by the plaintiff on S. and Co. as agreed, and were deposited with A. C. and Co. not with O. G. and Co. On the second of January 1867, in consideration of the plaintiff taking on himself all the risk attaching to the said goods, S. and Co. and B. and Co. transferred all their right, title, and interest in the said goods to the plaintiff. This agreement was signed on behalf of B. and Co. by L. B. in his own name, one of the members of the firm then in London, who stated that he had the authority of his partners for so doing. On this agreement being made, B. and Co. by the direction of the plaintiff, handed over the goods and documents relating thereto to B. B. and Co., of Calcutta, on the 16th January 1867. B. and Co., stopped payment on the 27th December 1866, and J. H. R., the only partner of that firm then in Calcutta, filed his petition in the Insolvent Court there on the 7th February 1867. L. B. filed his petition in the said Court on the 18th May 1867. S. and Co. stopped payment in December 1866. On the 16th March 1867, an order of the Insolvent Court was made in the matter of the petition of J. H. R., and in pursuance of this order, B. B. and Co. delivered to the defendant, as official assignee and assignee of the estate of the said J. H. R., the unsold goods in their hands, which had been transferred to them by B. and Co., and the net proceeds of those which they had sold.

Held, by Norman, J.—That the agreement of January 2nd was fraudulent and void against the creditors of B and Co., under 13 Eliz. c. 5, if not void under section 24 of the Indian Insolvent Act.

On appeal, *held* by Peacock, C. J.—That the goods were sent to B and Co. on a special trust, and there was a specific appropriation of the proceeds by them in the case either of insolvency or bankruptcy; that the agreement of January 2nd was valid and binding on the assignee of B. and Co. and that by it the property in the goods passed to T. B. and Bro., but if it did not, the proceeds were specifically appropriated to taking up the bills of B. and Co. on S. and Co., and until they were paid, B. and Co. had no interest in the goods which could justify their assignee in stopping the remittance of the proceeds, or of taking the property out of the possession of B B. and Co.; that the plaintiff was

entitled to the proceeds with interest from the time the proceeds and goods were handed over to the assignee ; and that the goods were not in the order and disposition of J, H, R., at the time of his filing his petition within section 23 of the Indian Insolvent Act.

Per Markby, J.—Each of the two firms and Barlow were in the out set part owners of these goods, and each became liable to the others to contribute his share towards the cost price thereof. In November 1866, there ceased to be a binding agreement to remit the proceeds to O. G. and Co., and no new agreement was substituted. The agreement of 2nd January did not renew the right to have the proceeds remitted for special appropriation ; and it was moreover a fraudulent preference and void, so far as B. and Co. were concerned. On 16th January, when the goods were transferred to plaintiff, he was merely a creditor ; and, therefore, a transfer for his benefit, within two months of filing petition of insolvency, was void under section 24 of the Insolvent Act.

Per Peacock, C. J., and Markby, J.—That an order, under section 26 of the Indian Insolvent Act, does not prevent the owner of the property, which is the subject of the order, from suing the assignee to establish his right to it. 2 B. L. R. O. J. 56, 57.

SALE (Of Land).

1213. In England the law gives to the purchaser of land a right to have a good title to it shown by the vendor. No such rule appears to exist in the Hindoo law ; and in a contract between Hindus for the purchase and sale of land in Bombay, the intention of the parties must be ascertained from the terms of the agreement, without regard to any implication. 2 B. H. R. 406.

1214. In a suit for recovery of a sum of money alleged to be due under an agreement for the sale of land dated 26th January 1851, the Lower Court decided that on the construction of the agreement the plaintiff was to put the defendants in possession of the lands besides assigning over the title-deeds to them :—Held, that the terms of the original (Telugu) agreement did not warrant such a construction.

Where there is a contract of sale of land, an action can ordinarily be brought by the vendor for the purchase-money, whether or not the Court in which the action is brought has jurisdiction over the land sold. The question is whether the Court has jurisdiction over the seat of the obligation which it is sought to enforce. 3 M. H. 125.

1215. A bill of sale, though duly executed, was delivered to the purchaser, but was deposited with a third party to be held by him until the purchaser should perform certain acts, the performance of which was the consideration for the sale. The purchaser subsequently by a trick got possession of the bill of sale before he had performed all the acts in question. Held that, under such circumstances, no effect could be given to the bill of sale as against the vendor, so that a

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suit for possession of the lands covered by it would not lie. W. R. S. N. 222.

1216. In a suit upon a contract in which defendant, after an advance of purchase-money, had promised to convey certain land plaintiff on payment of the balance, the alternative being that if he did not execute the conveyance the contract would itself operate as a conveyance. Held that the document between the parties, though in form a contract for sale, was in fact a conveyance under which plaintiff could hold against subsequent purchasers. Held also that against one who has such a contract unregistered, a purchaser who has a registered conveyance must prevail. 15 W. R. 239.

1217. In suits arising out of default on both sides to complete a contract for the purchase and sale of land in the Mofussil, the Court should proceed as a Court of Equity, and should look to the acts and conduct of the parties subsequent to the making of the contract, as well as to the language of the contract itself; and where the contract has been partially performed, and the purchaser put into possession of a portion of the land, and allowed by the vendor so to continue long after the period fixed for completion of the contract has elapsed, further time should be given by the Court for the performance of the contract in specie (*Tucker J, dissentiente*).

The Court should not, by its decree, make for the parties a different contract from that which they themselves had entered into. 2 B. H. R. 168.

1218. The defendant who for twelve years had occupied land as tenant, purchased the land at a sale by the Receiver, but refused to complete the purchase on the ground of material misdescription in the advertisement of sale, in that a road and ghat, comprised within the boundaries mentioned in the advertisement, were not the property of the parties whose land the Receiver purported to sell, and also that, to make up the quantity of land as stated in the advertisement, viz., twenty bigas by estimation, that lying between high and low water mark had been taken into calculation. The owners of the property sold having brought a suit against the defendant for specific performance, the defendant contended that the Receiver was a necessary party to the suit, and that the sale had been rescinded by a statement of the Receiver that he would forfeit the deposit in the event of the defendant not carrying out his contract. In support of his objection to quantity, the defendant relied on a collectorate chitta however, in giving the eastern boundary of the property, described it as lying on the west of the low water of the Ganga:—Held, that there had been no rescission of the contract; that the plaintiffs, being owners of the land down to low water mark, were entitled to all subsequent accretions, and were, therefore entitled to include in their measurement all land down to low-water mark, and having regard to the fact that the defendant was personally acquainted with the property sold, it was not open to him as showing that the area of the land sold was only 9 bigas 8 katas,

10½ chittakas ; the same chitta, to repudiate the contract on the ground of the misdescription. The plaintiffs were entitled, therefore, to a decree for specific performance. 9 B. L. R. 128, 129.

SALE (Of Minor's Property).

1219. It is not for the public benefit that, where two parties knowingly deal with the sale and purchase of property of infants who have not by law the power of sale, one of the parties (the purchasers) who obtain possession of the property in a manner calculated to injure the infants should be able to sue the other party (the vendors) for damages. The Privy Council even refused to give costs to either party, considering them both *in pari delicto*. 18 W. R. 230.

1220. Although purchasers are not bound to look to the application of the purchase-money, or to enquire whether there were goods sufficient to redeem the mortgage, and so to obviate the necessity of a sale of a minor's property, yet the purchaser's not proving necessity, or not satisfying himself of the existence of necessity, and the unwillingness of the minor's mother to dispose of the property in his minority, or sufficient legal grounds for reversal of the sale. 1 W. R. 14.

1221. In a suit to set aside a sell effected by a plaintiff's mother during his minority, it appearing that plaintiff, eleven months after attaining his majority, signed for his mother a written statement in another suit to the effect that the property had been sold by her to the defendant, and that he in that suit conducted his mother's defence, which was that the purchaser from her was entitled to what he claimed, it was held that he must be considered to have acquiesced in, and ratified, the sale. 9 W. R. 571.

SALE (Of Mortgaged Property).

1222. A suit for the sale of mortgaged property in satisfaction of the mortgage-debt is a " suit for land " within the meaning of section 5 Act VIII of 1859. A decree in a suit in the Mofussil for the recovery of a mortgage-debt with interest, and in default for sale of the mortgaged property, enables the plaintiff to sell the mortgaged property as it stood at the time of the mortgage and clear of all subsequent incumbrances. Such a sale completely bars redemption. 18 W. R. 269.

1223. Certain Mouzahs were granted in *zur-i-peshgee* lease by G to plaintiff's ancestor. After G's death his heir F pledged one of the mouzahs, Becharampore, with others as collateral security, in a bond in favor of plaintiff ; and some years later executed a *zur-i-peshgee pattah* in favour of defendant, who obtained possession by paying to plaintiff the money due under the first *zur-i-peshgee* lease. Plaintiff then sued F alone on his bond and obtained a decree, in execution of which he sold a share in Becharampore and purchased it himself. He now sues for possession and to have the superiority of his lien declared over defendant's *zur-i-peshgee*. Held that plaintiff is not entitled to possession until he pays off the whole of the amount advanced by the defendant to clear off the debt due under the first *zur-i-peshgee* lease.

Held that the holder of a subsequent encumbrance, by paying off a prior encumbrancer, acquires all the rights of the latter, so far as the amount actually paid by him for that purpose is concerned. 24 W. R. 47.

SALE (Of Pledged Property).

1224. A, a judgment-debtor, and others, executed a bond to B, the judgment-creditor, pledging as security a 4 annas share of an estate belonging to A, which A afterward sold to C. B, subsequently, in satisfaction of the unpaid balance of his decree, brought to sale a 2 annas share of the pledged property, which was purchased by D, who, in taking possession, was opposed by C's son on the ground on the prior sale of the entire 4 annas to C. In the suit between C and D the sale to C having been pronounced to be valid, it was held that that decree of competent Court (which had never been set aside) disposed of the question of ownership in favor of C even if it were proved that C was A's wife. 1 W. R. 64.

SALE (Of Rebel's Property).

1225. Where a sale of landed property which has been escheated by the Government was made by Government without any restriction being attached to the original notice of sale, which stated that the highest-bidder was to be the purchaser: it was held, that the Government could not, subsequent to the bid and the deposit of the earnest-money, impose any condition, but was bound to make over possession irrespective of the character of the highest-bidder.

In selling the property of rebels which it had confiscated, the Government does not perform an act of State, but stands in the situation of an individual selling his property by auction, and a suit may therefore be properly brought against the Government by the purchaser if the Government refuses to give up possession or transfers the possession to another. 12 W. R. P. C. 4.

SALE (Of Rights and Interest).

1226. Where a plaintiff sued on the alleged purchase by him of the rights and interests of certain parties in an indigo concern, it was held that the rents collected and appropriated, and the indigo manufactured and taken away, before the date of the purchase, could not form part of the stores and assets sold to the plaintiff, unless the sale of the assets &c., had been as from some date prior to the date of purchase. 10 W. R. 311.

SALE (Of Shares).

1227. A contracts with B to sell him three numbered shares, to be transferred, upon payment of the price by B, on or before a certain day:—Held, that the covenants to transfer and to pay the price are concurrent; and that the ability of A to constitute B the legal owner of the shares, contracted to be sold, together with willingness to do so,

amounts to "readiness and willingness" on the part of A to fulfil his part of the contract. 2 B. H. R. 246.

1238. Held that a contract to deliver shares in a public company is sufficiently performed when the vendor places the vendee in such a position as enables him to become the legal owner of them.

A share in a Company signifies a definite portion of its capital; and does not necessarily mean the right of a person whose name is then actually on a register of shareholders. 3 B. H. R. O. J. 69.

1229. In a suit to recover damages for the non-acceptance of shares where the vendor had contracted to execute proper transfers, and do all other things necessary on his part to transfer the shares, and to bear the expense of such transfer:—Held on the issue—whether the plaintiff was ready and willing to perform his part of the contract—that it was sufficient to show that he had in his possession at the time fixed for the performance of the contract on his part, such certificates of shares contracted to be sold as were required by the law, and that he tendered the same with a deed of transfer to the purchaser; and that it was not necessary for the vendor, before handing over the documents to the purchaser, to effect the transfer; but that it was the duty of the purchaser himself in such case, having accepted the shares, to have the transfer made into his name in the books of the company.

The finding of the Court below on the first issue being, therefore, reversed, the suit was remanded for trial of the issue—whether the contract was a wagering one—the Judge having omitted to determine that, and the defendant not having given evidence upon it, in consequence on the first issue being found for him on the evidence given by the plaintiff. 3 B. H. R. O. J. 79.

Plaintiffs contracted with defendants to sell them two numbered shares, on payment of the price by defendants on or before the 1st of July 1865. Plaintiffs were in possession of the shares at the time of the contract, and continued so until they sold them after default made by defendants; and they were registered as holders of the shares on the 1st of July, when the share certificates with transfer deeds in blank were tendered to defendants, who refused to accept them, or to pay the purchase-money. On the issue whether plaintiffs were ready and willing to perform the contract on their part:—Held that the acts necessary to be done on the 1st of July were concurrent; and that plaintiffs, being able and willing on that day to make a valid transfer, if defendants had been ready to pay the price, plaintiffs were not bound to take any further step until the purchase-money was paid by defendants.

There is nothing in the Code of Civil Procedure which imposes upon the Judge the duty of allowing an issue to be raised on a point of law, which he considers to be perfectly clear. 2 B. H. R. 258.

1231. In a suit brought by a Joint Stock Company in liquidation against a former director of the Company for Rs. 27,30,000, on a pro-

note, dated the 1st of March, and purporting to be payable on demand, but with the words in pencil: "Due 4th June," put on it the same day it was signed, in accordance with an understanding between the defendant and the other directors that they would not press him for payment before the latter date, and signed by the defendant some days after the day it bore date:—Held that a one-anna stamp was not sufficient under schedule A, cl. 10 of Act X of 1862.

And, on the plaint being amended by claiming for the price of shares bargained and sold to the defendant, but not accepted by him; and for money found to be due on an account stated:—Held that the plaintiffs could not recover, 1st, because no shares were really bargained and sold as the plaint alleged; and what was done was, according to the intention and understanding of the parties, a mere form gone through, for the purpose of deceiving the public, and making it appear that 10,000 shares had been sold at a certain price; and 2ndly, because the contracts were made for the purpose of defrauding other persons.

Held, also, that the 9th clause of the Articles of Association, providing that the existing shareholders for the time being should have the option of taking and subscribing for the shares in the additional capital, ratably and in proportion to their respective shares in the existing capital of the company, being imperative, and not merely directory, a deviation from it could not be made unless with the assent of every shareholder. 3 B. H. R. O. J. 9.

1232. Plaintiff contracted with defendant to sell him 250 shares in the Alliance Financial Corporation, and 10 shares in the Mazagon Reclamation Company, delivery to be made at defendant's option within six months from date of contract, and cash to be paid on due delivery to defendant or his order. On the last day for delivery, plaintiffs produced allotment receipt papers, all bearing date prior to the date of the contract, for the number of shares contracted to be sold in both companies. The Alliance Financial papers were indorsed by the original allottees; but neither transfers, nor applications for transfers, signed by the original allottees, were offered, nor had any such been executed, although the corporation had opened transfer books long before. Of the Mazagon Reclamation receipts, nine were indorsed by the allottees, one had no indorsement, and over the allottee of it and of another receipt, plaintiffs had no power to enforce delivery. The Mazagon Reclamation Company had not opened transfer books until long after the last day of delivery. On the issue, whether plaintiffs were ready and willing to deliver the shares:—Held, as to the Alliance Financial Shares, that plaintiffs, not being in a position to have constituted defendant owner thereof, must fail in their suit with respect to them; and as to the Mazagon Reclamation shares, that although plaintiffs had done all they were required to do, by the usage of the market, to transfer the interest in eight of them, yet, the contract being an entire one, they must fail in respect to them also.

If a party, bound to do an act upon request, is ready to do it when required, he will perform his part of the contract; although he might

happen not to have been ready, had he been called upon at some anterior period. 2 B. H. R. 253.

1233. A company registered under Act XIX of 1857, and enabled by its Memorandum of Association to purchase its own shares, purchased seven thousand of them which were in scrip, share certificates having never been issued in respect of them. The letters of allotment indorsed by the allottees, and receipts for the first call, were made over, at the time of purchase, to the company. No transfers, however, were executed by the allottees, nor were the shares registered by the company in their own name; but they continued to stand in the names of the allottees. Two thousand of the seven thousand shares had been resold by the company, and the remaining five thousand were mentioned in a list, kept by the company, of shares purchased by them.

On application by the allottees to have their names removed from the list of contributories, as framed by the official liquidator:—Held, that the company, through its directors, having, as well by the act of purchase as by their subsequent conduct, treated themselves as the owners of the shares, could not be permitted to take advantage of their own neglect, or that of their officers, in not registering the shares in the name of the company, and that the name of the company should, therefore, be substituted as holders of the shares. 3 B. H. R. O. J. 125, 126.

1234. In January 1865, the plaintiffs purchased from the defendants 2,070 shares in the defendant's company, at 15 per cent premium, for which they paid in cash Rs. 3,20,000; and the defendants simultaneously agreed to repurchase for future delivery and payment at a fixed time in July the same 2,070 shares at 29½ per cent premium. The contracts for the repurchase were signed by three directors of the defendants' company, and on each was a memorandum, initialed by two of them, referring to a list of the "share receipts" delivered, with the words, "We are duly to examine and receive the same at the fixed time." 190 letters of allotment, in the names of several persons and for various numbers of shares, endorsed by the original allottees, and initialed by one of the three directors, were, together with receipts for the first call, handed over to the persons who acted for the plaintiffs, by the three directors of the defendants' company who made the contracts.

In April the defendants' company made a fresh call payable on the 4th of May. A list of the names and addresses of the original allottees of what were called "shares in the market," (*i. e.* other than those purchased by the company itself for cash, or held by it on mortgage) was made out from the deed of settlement, and notices of forfeiture for non-payment of the call were sent by post. The original holder of the 190 letters of allotment were included in the list; but no notice was sent to the plaintiffs. On the 27th of May all shares upon which the 2nd call was not paid were declared to be forfeited for the benefit of the company. The defendants' company, as stated in the Memorandum of Association, was established, among other objects, for "the purchase and sale of Debeentres, Stocks, Shares of Joint Stock Companies (including

shares of this company), and other securities, the making Loans and Advances on such securities as the Directors of the Company may think fit."

Held that the contractors for the repurchase of the 2,000 shares being within the scope of the authority of the directors, the defendants were bound by them; that the defendants were bound to treat the plaintiffs as the holders of those shares, and to give them the notice required by the Articles of Association, and that they were not at liberty to give that notice to the original allottees, who by the admission of the defendants testified by the acts of their agents in making the contracts, had parted with the shares, that the shares were, consequently, not legally forfeited, and the defendant having refused to accept them, and they being then unsaleable, the plaintiffs were entitled to recover the full price as damages. 3 B. H. R. O. J. 1, 2.

J. S., an allottee of 25 shares in a company registered under Act XIX of 1857 signed the Memorandum and Articles of Association, and paid the first call on the 28th of September 1853, on which day he sold the 25 shares to the B. P., the chairman of the company. The purchase by B. P. was made in pursuance of an agreement entered into between B. P. and P. H., another director of the company, and two other persons, who were members of the firm of B. B., and Co., the then Managers of the company, to buy in partnership 2,800 shares of the company, which they accordingly jointly purchased and subsequently divided among themselves; B. P. taking for himself two-fifths of the whole, including the 25 shares of J. S.

The fact of the joint purchase was not communicated to the other directors of the company; nor was there any evidence to show that their attention had been called to certain entries in the books of the company relating to B. P. having paid the second call on his two-fifths of the joint purchase.

J. S. got no notice to pay the second call, and never applied for or obtained a certificate for the 25 shares; but such a certificate was obtained by B. P., on the 1st of October 1864, certifying that J. S. was the share-holder. J. S. had signed a blank form of transfer, and a blank form of request to the directors to transfer, which were undated and without particulars; but B. P. never executed the transfer as transferee, and the shares never were transferred to his name on the register nor was the sale to him ever brought to the notice of the director as a Board, or any request made to them to sanction the transfer to him, or to any of his partners, of any portion of the 2,800 shares; and the Articles of Association required the consent in writing of the directors to every transfer.

On application by J. S. that his name should be removed from the list of contributories, as framed by the Official Liquidator, and the names of B. P.'s trustees, under Act XXVIII of 1865, substituted therein in respect of the 25 shares:—Held that J. S. was not exonerated, under the circumstances, from the duty of obeying the Articles of Association

and the provisions of Act XIX of 1857; that the act of an individual director in his private capacity ought not to bind the Board, which had never authorised or ratified his conduct; and that the Official Liquidator, as representing the body of share-holders rightly insisted upon keeping J. S.'s name on the list of share-holders. 3 B. H. R. O. J. 113,114.

SALE [To Government Contractor].

1236. Where C entered into a contract with the Government to construct a Railway feeder and purchased coal from a coal Company, and after the coal had been delivered and deposited at a certain place, C absconded,—Held that the Government had no right to detain or claim the coal, or to take the same out of the possession of the coal Company who were entitled to retain possession of the coal against any claimant but C. himself. 7 W. R. 426.

SALE (To near Relative of Debtor).

1237. In a case where a purchaser is a near relative of a debtor it is not sufficient to decide that the deed of sale is proved to have been executed. Proof of the *bona fide* of the transaction is also necessary. 6. W. R. 310.

SECRETARY (Of State and Public Servants).

1238. The Secretary of State is only responsible for the acts of Public Servants done within the scope of their authority. 1 N. W. P. 118.

SECURITY (Conversion of Government—deposited in Court).

1239. Where Government Securities bearing interest at 5 per cent were deposited in Court for payment of interest thereon to certain annuitants, and the Registrar of the Court, in pursuance of notices given by the Government Agent, converted the notes into 4 per cent papers,—Held that, though the conversion of the notes was the act of Government and of the Court, not of the parties, the appellant was liable, under his agreement, to pay the annuitants the sum originally agreed upon. 2 W. R. P. C. 48.

SECURITY (Giving up).

1240. In 1870 the firm of S. M. and Co., of Calcutta, authorized A., of the firm of C. N. and Co., also of Calcutta, to indent for them for iron from England. In pursuance of such authority, C. N. and Co., ordered, through their London agents, P. P and Co., a shipment of iron, which was duly shipped by P, P, and Co., who drew against the said shipment two bills of exchange for Rs, 10,000 and Rs, 1,484,10 respectively on the firm of S. M. and Co., in favour of C. N. and Co. The bills, on presentation, were duly accepted by S. M. and Co., and afterwards discounted by C, N. and Co. with the Chartered Mercantile Bank, C. N. and Co. at the same time depositing with the Bank as collateral security for the payment of the bills, the bill of lading for the iron shipped from England by P. P. and Co. Subsequently both S. M.

and Co, and C, N, and Co, filed their petitions in the Insolvent Court, and were adjudicated insolvents. In the schedule of S. M. and Co. the Bank was inserted as a creditor in respect of this transaction for Rs. 11,484, 10. When the bills of exchange became due, they were duly presented for payment to the acceptors, but were dishonoured, and protested by the Bank for non-payment, and on such non-payment the Bank sold the shipment of iron for which it held the bills of lading, and realized the sum of Rs. 10,073,12,6. The Bank claimed to prove for the whole amount in the schedule against the estate of S. M. and Co. Held, that the Bank was only entitled to prove for so much as was due to it on the bills of exchange after deducting the amount realized by the sale of the iron. In the circumstances of the case, C. N. and Co. were interested in the shipment of iron as well as S. M. and Co., and therefore there was no obligation on the Bank to give up the security before proving its claim, but it might have proved for the whole amount of the debt, and retained the security. 8 B. L. R. 30.

(Lost or Stolen).

1241. Plaintiff's relative borrowed money from defendant on the security of a Government Promissory Note which was stolen from defendant in 1865, and defendant advertised the loss. In 1865 an *ikrar* was executed between the parties, whereby defendant was bound to take steps, assisted by plaintiff, to procure a duplicate. The note was endorsed, not in defendant's, but in plaintiff's name, and no steps whatever were taken by plaintiff until 1869, when the note turned up in the currency office. Defendant being unable therefore to perform his part of the contract. Held that any neglect that had taken place in obtaining a duplicate was entirely owing to plaintiff's laches. 18 W. R. 58.

SECURITY (Marshalling).

1242. *Quere.*—Should the doctrine of marshalling of securities be introduced into this country. 12 W. R. 114.

SECURITY (Sale of).

1243. No Court of Equity ought to direct hypothecated property to be sold, and its proceeds applied to the satisfaction of the debt for which it is security, without first taking care to ascertain that the debt stated to be due in the security bond is really due. 20 W. R. 253.

SERVICE.

1244. A suit for wrongful dismissal by one of its servants will lie against the Government. In a suit by a Subordinate Officer in the P. W. D. for wrongful dismissal, against the Government, in which it was admitted that there was no time of service fixed, and in which the plaintiff put in a memorandum of agreement between himself and the Government stipulating that he should give six months' notice of his intention to leave the service of the Government.

Held, that the hiring was indefinite, and that although the plaintiff had bound himself to give six months' notice prior to leaving their

there was no corresponding obligation on the Government to give notice before dismissing him. The Government, however would not be allowed to exercise this power capriciously, or to the damage of the servant.

An indefinite hiring in India does not mean a hiring for a year. The mere payment of wages monthly is not enough to show that a hiring is a monthly hiring. 7 B. L. R. 688, 689.

The acts of the majority of sharers are not binding on the other sharers as to their own share of the property. 4 W. R. 105.

1246. Where a party takes shares in a trading Company agreeing to forfeit his shares if he does not pay calls upon them at certain stated intervals, the penalty of forfeiture should be enforced against him if the calls are not paid according to agreement. The damages should not be measured by the amount of the call. 24 W. R. 358.

1247. Shares in the National Bank were sold by the allottee, and a transfer in the form required by the Articles of Association of the Bank was executed, but no name was inserted as transferee. The purchaser pledged them with the J. P. L. and China Bank, and deposited with them the blank transfer. This Bank applied to the National Bank, without producing a letter from the pledgor to register their lien, and on its refusal sold the shares to the plaintiff, and delivered to him the transfer also in blank. The plaintiff inserted his own name in the transfer, and requested the National Bank to register the shares in his

In an action against the National Bank, to recover the price of the shares, held that they were justified in refusing to register.

Held also, that the plaintiff, having received back from his vendors the price of his shares had no cause of action. 2 B. L. R. O. J. 158.

SHIPPING.

1248. In an action for breach of contract in not shipping certain goods, the defendants pleaded the unseaworthiness of the vessel. It was found that the ship was unworthy at the time of sailing, and that the defendants had placed part of the goods on board. Held, that is a condition precedent that a vessel shall be in a proper state, to take the goods on board for the purpose of the particular voyage; or in such a state that she may be made fit for the voyage, with the goods on board, without such a delay as to frustrate the object of the merchant in shipping his goods. Held, that the putting part of the goods on board, without knowledge of the unseaworthiness of the vessel, was not a waiver of the performance of the condition.

Semble.—Unseaworthiness at the time of sailing is not a breach of

The warranty of seaworthiness in a time policy, at the con-

mencement of the risk, is not a continuing obligation cast upon the assured while the risk is running. So held by the Judicial Committee, (affirming the judgment of the Supreme Court at Calcutta) in an action brought for a total loss, by stranding, within the time of the running of the policy, after leaving an intermediate port, the defence being, that at the time of the loss the vessel was unseaworthy by reason of an insufficient crew, she having sailed from the intermediate port without sufficient hands to work the vessel, although she had a sufficient crew at the time she started for the voyage.

Semble.—There is no implied warranty of seaworthiness in a time policy. 5 M. I. A. 361.

SHIPPING MASTER.

1250. The Shipping Master of Bombay has a discretion vested in him of refusing to sanction the discharge of a seaman, shipped from a foreign port, whose articles have not expired, though the seaman consents to such discharge. 6 B. H. R. O. J. 42.

SHIPPING ORDER.

1251. The words "ready to receive cargo" inserted in a shipping order mean that the ship, on the day named in the shipping order, shall be ready to receive a full cargo, by whomsoever offered, and not merely ready to receive the *quantum* of cargo mentioned in the shipping order 1 B. H. R. App. 48.

1252. Where a shipping order authorized the receipt of "300 bales of cotton not exceeding 52 cubic feet measurement at the screw-house" the fair meaning of the contract was taken to be, considering that it was a mereantile contract, and looking at the surrounding circumstances, that the measurement by which the parties were to be bound was a measurement at the screw-house; and that if the agent of the defendants was present there and passed the bales as of the proper measurement, or waived the right to measure and did not measure, the defendants could not afterwards insist upon a right to measure or go into an enquiry of what was the size of the bales. 17 W. R. 545.

SOLEHNAMAH.

1253. The defendants by a *solehnamah* agreed to give the plaintiff land for a path. By a subsequent deed of *butwarrah* the *solehnamah* was modified, and it was agreed that the *butwarrah* should be carried out as soon as the defendants had made over the land. The defendants having defaulted to give the land, the plaintiff sued and obtained a decree for the same. Held that the way so decreed to the plaintiff under the *solehnamah* was to be used under the terms of the subsequent deed of *butwarrah* 1 W. R. 286.

SOLICITOR.

1254. There is no such special authority in the High Court as would authorize the striking of a solicitor off the rolls of the Court where such

a step would not be sanctioned by the practice of the Courts in England. 10 W. R. P. C. 43.

1255. The rule that the intentional statement of a falsehood in a solemn deed taken by itself without explanation betokens fraud until the contrary is shown, and that it is the duty of the solicitor who has made such a statement to show convincingly the absence of fraudulent motive can scarcely be applied open a fraudulent motive has not been alleged by any complainant, if the explanation offered be not simply incredible. 10 W. R. P. C. 43.

SPECIALTIES.

1256. The law of British India as administered in the mofussil recognises no distinctions between specialties and other documents. 1 M. H. R. 312.

STOPPAGE (In Transitu).

1257. Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman, employed by the sellers, who handed the same over to them. The sellers apprized the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. In such circumstances, held by the Judicial Committee of the Privy Council (reversing the verdict and judgment of the Supreme-Court at *Bombay*), that trover would not lie for the goods, for that on their delivery on board the vessel, they were no longer *in transitu*, so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser. 3 M. I. A. 442.

SURETY.

1258. The rules governing Courts in England in matters of suretyship cannot be applied to a case where joint and several liability is not found as a fact, and where the sum alleged to be due is not certain but contested. 12 W. R. 462.

1259. There is no rule of law entitling a surety, without question asked, to a disclosure of all material facts known to the creditor which it may be material for him to know.

Without proof of fraudulent misrepresentation or concealment on the part of the creditor or his agent, a surety is not entitled to be discharged from his surety-ship. 3 N. W. P. 264, 265.

1260. Applying the law of England and Scotland and the general law of Europe to this country, it was held that when a surety has paid

off the debt of his principal, not only are all the collateral securities transferred to the surety, but, by what is called subrogation, the right is also transferred to him to stand in the place of the original creditor, and to use against the principal debtor every remedy which the principal creditor himself could have used. Accordingly the surety is not debarred from proceeding against the original debtor upon the instrument itself which created the debt, by reason of the debt having been paid by himself. 21 W. R. 347.

1261. The fact of a surety for the payment of the price of goods purchased signing a voucher for them, cannot make him primarily responsible. 22 W. R. 209.

1262. The liability of a surety will not extend beyond the precise limits of his undertaking; he is not liable for any sum voluntarily paid by his principal to a third party for any purpose of his own. W. R. S. N. 84.

1263. A surety began to perform the duty which the principal had contracted to perform. Held, that this circumstance did not preclude the plaintiffs from suing the defendant as surety. 7 M. H. R. 364.

1264. Money was lent on the security of a third party who died before the loan was re-paid. The lender then took a fresh acknowledgment from the borrower for the sum due. Held, that the subsequent arrangement, which did not contemplate the continuance of the third party's security, cancelled his liability. 12 W. R. 294.

In a case in which a surety was sued by Government for the amount of defalcations committed by the person for whom he was security during the period of 6 years out of a total period of 8 years for which he held office, it appeared that the surety bond was renewed only three times,—the old bond being retained by Government, and that in the other years the Government did not renew the bonds but made an enquiry into the sufficiency of the security. It was contended by the surety that by the renewal of the bond, each bond as it was renewed was in fact a novation, so that no action could any longer be maintained upon the old bond, and the surety was only responsible for the deficiencies which might have taken place subsequently to the giving of the last bond:—Held that in the absence of anything to show that the Government knew of the frauds or that the surety had any idea that he was discharged or had a right to the old bonds, it could not, in this case, be inferred that it was intended to discharge the old bonds, if after the giving of the new bond, a discovery was made, though unknown at the time, that frauds had been committed during the time that the old bond was in existence. 16. W. R. C. P. 27.

1266. Where a surety without taking precautions to see its proper application permits the party for whom he is surety to get possession of money, which by an arrangement with that party and the co-sureties had been placed in his (the surety's) hands for the purpose indemnify-

ing the co-sureties, he loses his remedy against the co-sureties to the extent of the security thus allowed to be withdrawn. 15 W. R. 185.

1267. Where money is permitted to remain in the hands of sureties in order to its being applied to the purpose to secure which they became sureties, it is the duty of each as between himself and co-sureties to see that the money is not misapplied. 15 W. R. 185.

1268. If one of several co-guarantors, on the default of the principal, pays the whole debt or more than his proportion of it, he may recover for such excess above his proper share by contribution from the others. W. R. S. N. 70.

1269. An action by one guarantor against his co-guarantors will lie where a single guarantor has paid the debt; and it is not necessary, in order to maintain such an action, to show that the liquidating guarantor had previously applied to or proceeded against the principal with a view to recover the debt from him. W. R. S. N. 70.

1270. Where a Salt *Darogah* deposited Government Notes as security for the due performance of the duties of his office, and authorized the Government Salt Agent, in case of loss to Government by his (the *Darogah's*) misconduct or by his failure to realize advances made to the *Molungees*, to sell the Notes and apply the proceeds in satisfaction of the Government claim, and the Government, without any consent by him, altered his position and risk, Held, that such alteration relieved him from his engagement as surety. W. R. S. N. 138.

1271. Held, that a creditor is not bound to exhaust his remedy against the principal debtor before suing the surety, and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt. 6 B. H. R. A. J. 241.

1272. Where a creditor, without the knowledge of the surety, accepts from the principal debtor a sum on account of interest in excess of the interest then due on a promissory note, without anything further appearing as to the intention of the parties, and so gives time to the principal debtor, he thereby discharges the surety from liability on the promissory note. 18 W. R. 417.

1273. Where a creditor sued his principal debtor and two sureties upon a mortgage-bond, and in his plaint formally relinquished his claim against part of the mortgaged property, it was held that after such relinquishment the sureties were no longer bound, their position being altered for the worse by reason of such relinquishment. 7 B. H. R. A. J. 118.

1274. H obtained a decree in the High Court against S for certain moveable and immoveable property. S appealed to the Privy Council, while that appeal was pending, H applied for the execution of her decree, and N became her surety for rupees 10,000 the decree, however, was not executed. The Privy Council reversed the decision of the High Court and dismissed the suit of H with costs. S then sought to exe-

cute his decree for costs against N the surety : Held, that N was not liable. 6 B. L. R. App. 126.

1275. Where a person became a surety, in the course of the proceedings on an appeal, to pay all such sums as may be decreed against the plaintiff on appeal, the decree, when passed, can be executed against the surety under section 204 of the Civil Procedure Code, and an appeal will lie from an order made in execution of such decree against the surety.

Where a person became surety, and gave a security-bond undertaking to pay all sums of money that might be decreed against the plaintiff on the defendant's appeal, and the appeal was dismissed for default; and on the application of the plaintiff, the Recorder made an order cancelling the bond, and returned it to the surety, without notice to the defendants, and afterwards the defendant's appeal was on application restored and a decree passed against the plaintiff: Held that the Recorder's order was invalid, and execution could issue against the surety notwithstanding that order. 7 B. L. R. 81, 82.

1276. A became surety for certain judgment-debtors, whose property had been attached in execution of a decree; but who had agreed with the decree-holder to liquidate the amount of the decree by yearly instalments. An agreement between A and the judgment-debtors contained the following condition:—"If any of the instalments be paid by the said A, the obligors shall not be at liberty to liquidate the remaining instalments either from their own funds or by borrowing money; but that A, shall continue to pay the instalments as they fall due and shall hold possession of the estate". The judgment-debtors afterwards satisfied the decree in full. Held, in a suit against them by A, that the above condition was void as contrary to public policy, as it prohibited the discharge of an obligation which by decree of Court the judgment-debtors were ordered to pay. 1 N. W. P. 137.

1277. A Treasurer of a Collectorate was found, on going into his accounts, to have been a party with others in embezzling Government moneys in his collectorate. His defalcations ran over several years. A surety-bond had been given for the Collector's acts, and the bond was renewed three times by the same surety during the period the Treasurer was in office, but the surety never asked for the old bonds to be delivered up when they were renewed. In an action by the Government against the surety to recover the amount embezzled, held, that the renewal of the bonds did not discharge the surety from his liability under the first bond, as the renewed bonds were not in substitution of the first bond. 14 M. I. A. 86.

1278. Plaintiffs became sureties for a Collectorate Treasurer, and bound themselves to make good any loss or deficiencies which might occur in the treasury from whatever cause, A deficit having been discovered in the deposit accounts of certain zemindars, the Collector carried to account the amount then in deposit and attached the property of

the sureties for the balance of the deficit. Plaintiffs now sue the Collector, the zemindars, and the Treasurer for a refund of the money so levied from them. Held that only the Treasurer, but not the Collector or the zemindars were liable. W. R. S. N. 119.

1279. Security of five individuals tendered by a plaintiff on appeal from the Zillah Court, having been reported by the Nazir insufficient, the security-bond of an additional surety was offered, and being reported sufficient, was accepted by the Zillah Court. An appeal having been lodged against the sufficiency of this new security, and the Provincial Court having pronounced it insufficient, it was referred back to the Zillah Court, with directions, that unless sufficient security was given, possession of the property in dispute should be delivered to the Collector. The Zillah Court, upon further investigation, being satisfied with the sufficiency of the additional surety, a security-bond was executed in that Court by the appellant, the additional surety, alone, the other five sureties having failed to perfect their securities. On application after the decision in the cause, and pending an appeal to the King in Council by the appellant, to be discharged from the liability of his suretiship, on the grounds that the rejection of his security by Provincial Court for insufficiency, thenceforth rendered his security null and void; and that the acceptance of his security alone by the Zillah Court, without the other five sureties, was without his knowledge and consent,—it was held by the Privy Council (affirming the judgment of the Court below), that the security-bond being on record, was not voided by the rejection by the Provincial Court on its supposed insufficiency; the Zillah Court having revived the same by their acceptance of the appellant as surety, and he having taken no steps to discharge his liability, by having the security-bond taken off the file. 2 M. I. A. 311, 312; 5 W. R. P. C. 129.

SURETY-BOND.

1280. A surety-bond taken by the Court under section 8 of Act XXIII of 1861, after judgment has been pronounced, can be enforced under section 204 of Act VIII of 1859. 8 B. L. R. 205.

1281. Where a party engaged to be surety for a *gomashta* and to make good all defalcations proved to have been made by him, the engagement was held to refer to defalcations shown to have been made by the *gomashta* during the period of the guarantor's life and not to apply to a time after the guarantor's death, when all power of advising or controlling the *gomashta* had ceased. 20 W. R. 12.

1282. Where two parties executed a surety-bond addressed to J. R., and M, owners of certain property, binding themselves to be answerable for the good conduct and proper discharge of duties of their *gomastah* B, and the property was afterwards transferred to R. alone, it was held that when J and M ceased to have any interest in the property, there was such entire change in the nature of the service that the sureties' liability did not continue, and they were not liable to be sued upon their bond. 23 W. R. 90.

SURETY (For Naib).

1283. The sureties of a Naib are absolved from liability of the Principal takes bonds from the Naib in acknowledgment of the debts, giving him different periods of time for payment, without the knowledge and consent of the sureties. 1 W. R. 1.

SURETY [For Nazir].

1284. A surety for a Nazir, under his obligation to the Government to indemnify the Government for any loss that the latter might incur, is not liable, except to the Government, for any wrongful acts done by him. 18 W. R. 259; 9 B. L. R. App. 26.

T.**TACKING.**

1285. The English law of tacking is not recognized in the Courts of this country. 2 B. L. R. App. 45.

1286. *Semble.*—The English principle of tacking does not apply to mortgages of land in the mofussil. 5 B. L. R. 463.

1287. A purchaser's title to the property purchased is not affected by the mere fact of his being kept out of possession in consequence of the wrongful act of his vendors. 24 W. R. 248.

TRADE (Timber.)

1288. According to the timber trade in *Burmah* the holding of what are called *tainzahs* does not give possession of the timber; and where the parties in a contract use the word "received" and do not think fit to use the word "entered," they must be taken to have intended the word "received" to have the meaning of having obtained possession of the goods and not merely of having entered and got *tainzahs* for them. 17 W. R. 120.

TRANSFER (Fraudulent).

1289. A party succeeding to the possession of the property is not entitled to ask the assistance of the Court either to rectify deeds of transfer fraudulently effected by his predecessor, or to ask that these documents should be treated as void at law. 19 W. R. 370.

TROVER.

1290. Suit in the nature of an action of trover, by the plaintiff, to recover Company's paper, as heir, such notes being part of his deceased Mother's estate, against a purchaser without notice and the Vendor, his brother, alleging *first*, that the dealing with the notes on the part of his brother was illegal and contrary to the plaintiff's rights as heir; and *secondly*, that in a previous suit against his brother, regarding the notes, he had obtained a decree against him in respect of one of the notes sued for, but had not enforced judgment. The suit was dis-

dismissed by the Courts in India on the grounds (1) of limitation, under Act XIV of 1859, and (2) as barred by the previous suit. On appeal, such decree reversed, as it appeared, that the real point in issue, the validity of the transfer of the notes, had not been heard, and the suit remitted back to the Judicial Commissioner at Lucknow, to give directions to the Court of first instance to re-hear the case, with liberty to either party to amend the pleadings. 12 M. I. A. 1290.

1291. A Bill of Sale and assignment of goods, described as being in certain ware-houses belonging to A., was given by him for the loan of a sum expressed to have been paid on the day of the date thereof. Upon an action of trover brought against the assignee of A., who had seized the goods, it appeared, in evidence that a portion only of the goods was in the ware-house specified at the date of the sale, and that no part of the loan was paid on that day, the same being discharged by instalments a few days afterwards whereupon the Judges of the Supreme Court held, that there had been no valid transfer and, consequently, no conversion and gave an interlocutory judgment and verdict in accordance with such view. Held by the Judicial Committee, on appeal from such judgment and verdict and from an order refusing a new trial, that the judgment and verdict were not justified by the evidence, and must be reversed, and new trial granted. 4 M. I. A. 382.

1292. A sold to B certain Logs of Timber, and ninety five Logs were delivered to B in part performance of the contract. C brought a suit against A and B, claiming the Logs under another title. Pending this suit, C entered into an agreement with D., selling him the Logs in the event of being successful in his suit. The judgment of the Court of the First Instance was in C's favour, and under such judgment D obtained possession of the Logs in suit. This judgment was, on appeal, reversed. B then brought a suit, in the nature of an action of trover, against C and D for the Logs and damages. The Court, without entering into the merits, dismissed the suit, on the ground that it was not maintainable, as the same relief could have been obtained under the provisions of section 2 of Act XXIII of 1861:—Held, by the Judicial Committee, reversing such judgment, that there had been a miscarriage, as that section did not apply, the suit by B against C and D being to recover damages for a tort alleged to have been committed by C and D and that the latter was not a party to the original suit, or bound by the judgment in that suit. 13 M. I. A. 69.

1293. The plaintiff, the manager of the Oriental Bank, placed in the hands of D, a broker, thirteen Government Currency Notes for Rs.1,000 each, on D's representation that there was some Company's paper at a certain place which he could procure at a more reasonable rate than in Calcutta market, if the money were given him to purchase it. If the Company's paper was not procurable, the notes were to be returned to the plaintiff. D. did not go to the place stipulated to purchase the Company's paper; but, meeting the defendants and others, he went into a house hired for gambling, and lost at cards and paid away to the defendant some of the notes he had received from the plaintiff. The

plaintiff now sued the defendant to recover the notes so entrusted to D., on the allegation that they had been entrusted by him to D for a specific purpose, and that the defendant was not a *bona fide* holder for value. He (the plaintiff), stated in evidence "that, if the paper had been bought, he would either have taken the papers at the most favourable market price for the Bank or have sold them and given D the profit. Held, the plaintiff was entitled to recover. The defendant was not a *bona fide* holder for value.

Per Paul J., in the Court below, and per Norman J., on appeal. The notes were especially entrusted to D., for the purchase of the Company's paper. Per Phear J.—Upon the case put forward by the plaintiff, the transaction, was a short loan, and not a bailment, and did not bear the character of a trust. But upon the evidence, the notes were the property of the bank, and remained so in D's hands, and therefore the plaintiff was entitled to recover on behalf of the bank.

In the Court below a decree was passed in favour of the plaintiff, with costs on scale No. 3. On appeal the decree as to costs was altered, it being ordered that each party should pay his own costs. 6 B. L. R. 581, 582.

TRUST.

1294. A trustee, who, having accepted a trust, remains passive and takes no steps to see the trust carried into execution, is liable for losses arising from the breach of trust of his co-trustee. 9 B. H. R. 333.

1295. Suit brought to recover possession of a *talook* upon the alleged ground that the monies with which the purchase was made were not the monies of the person in whose name the property was bought, but of a lady with whom he was living as her husband, and that there was a resulting trust in her favor. The Privy Council considered that the very principle of a resulting trust was that the property had been purchased with money belonging to another, with an implied trust that it should belong to that other person to whom the money also belonged; but that if it was the intention of the person to whom the money belonged that there should be no such trust, no such implied trust could arise by implication, and the presumption would then be met by the facts, considering also that the suit was brought to set aside a purchase which had been made 11 years before and had remained unimpeached from the time when it was first made until the institution of this suit, and that the suit was brought after the death of all the parties who knew the transaction and could have explained it. Their Lordships were of opinion that every Court would be bound to look with very great jealousy at the evidence which was brought forward to support such a case. 17 W. R. P. C. 259.

TRUST-DEED.

1296. The assignment in a trust-deed, by which a person assigns all his property to trustees for the benefit of his creditors, protects the assets so assigned from all creditors. 8 B. H. R. A. J. 245.

Where a usage was established, by which it appeared that interest was paid upon wager contracts: Held further; that according to such usage, interest ought to have been allowed upon the principal sum recovered in an action, and the judgment of the Supreme Court at Calcutta refusing interest, reversed on that ground.

In respect to evidence of mercantile usage; to support such a ground there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these grounds, 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 be reasonably presumed to have been an ingredient imported by the parties into their contract. 7 M. I. A. 263; 4 W. R. P. C. 8.

USURY.

1298. Money was advanced by A to B and others. The repayment by instalments extending over a period of eleven years, of the principal and interest at 12 per cent. per annum, calculated up to a certain date, was secured by three instruments, consisting of a *Dye Shooder Ijarah* (usufructuary lease), a *Dur Ijarah Kuboolat* (under-lease agreement), and a security-bond. A balance being found due on the expiration of the stipulated time for payment, the securities were put in suit, when it was pleaded in defence that the lease and under-lease were a fraudulent contrivance to cover illegal interest, and, therefore, void by sections 8 & 9 of *Ben. Reg. XV.* of 1793. Held in the circumstances, and from the accounts, that the transaction was not a device, or evasion of the law of usury, within that Regulation. 8 M. I. A. 358.

1299. Suit to recover principal and interest on a *Tumasook*, or Bond, dismissed under *Ben. Reg. XV* of 1793, section 9 on the ground of usury.

A granted a bond to B to secure an advance of money, C acted as B's Agent. A lease was afterwards granted by A to D, a servant of C, at a colorable rent, and, subsequently, an under-lease was made by D to E, a relative of A, the consideration for which was also colorable, and made with a view to elude the usury laws. Held, that the bond, lease and the under lease, formed one entire transaction, which was tainted with usury, and, therefore, void under *Ben. Reg. XV* of 1793, sections 8 and 9. 12 M. I. A. 477; 2 B. L. R. P. C. 69.

1300. In a suit under the Bills of exchange Act, to recover 1200 rupees on a promissory note, the Court gave a decree for 700 rupees only, that being shown to have been the full consideration received for the note.

There is nothing illegal in the true holder of a promissory note endorsing it to another person, with the express object of allowing him to sue upon it. Held, by Peacock, C. J., that the suit being between two Hindus, must be decided by Hindu law.

By Hindu law, a promissory note does not import consideration, and therefore where it was proved that the defendant actually received only 700 rupees, that sum was all the plaintiff was allowed to recover.

Act XXVIII of 1855 did not repeal the Hindu laws as to the rate of interest. Such rate is governed by the strict rules of Hindu law as laid down by *Manu* and other law givers. 8 B. L. R. O. J.

1301. Held (by Markby, J., whose opinion prevailed) that since the passing of Act XXVIII of 1855 there is no legal restriction on the rate of interest, and that parties may legally adopt any rate which they may think fit.

Held by Birch, J., (*per contra*) that the repeal of the usury laws would not prevent Courts constituted as the Courts of this country from setting aside an unconscionable agreement made with a necessitous man, on the ground of inequality as being an unreasonable advantage made of his necessitous situation and as being oppressive and unjust.

Held (by Markby, J.) that a party to a contract cannot get rid of it by such suggestions as that it was unconscionable, oppressive, extortionate, made at the last stage of the case after all the evidence has been closed, where no such allegations were made in the written statements, nor any such question raised in the Courts below nor in the grounds of appeal.

Held (by Markby, J.) that it is not the high rate of interest which constitutes a penalty; but what constitutes a penalty is a stipulation for a higher rate if the contract is broken. 20. W. R. 317.

V.

VARIANCE.

1302. The plaintiff alleged a contract to deliver on the 2nd March, and the evidence showed an extension of the time to the 31st March, but the pleadings alleged that the breach was on the 2nd March: Held that this objection was not tenable, the defendant having been perfectly aware of the case he had to meet on this point. 7 M. H. R. 364.

VENDOR AND PURCHASER.

1303. Purchasers of property have a good right of suit where their vendors had been in peaceable possession, but were disturbed and dispossessed within the period of limitation. 23 W. R. 163.

1304. Where land was sold on a condition of re-purchase and no time was mentioned in the instrument of sale. Held, that the sale had

not become absolute, and that the plaintiff, having bought the original vendor's rights, was entitled to maintain a suit for recovery of the land. 2 M. H. R. 450.

1305. A bought land from B in 1848, entered into possession, and in 1852 went abroad. In 1853 C bought the same land from B, the land being then registered in B's name, and C not having notice of A's purchase: Held in a suit brought in 1859 that A could not eject C. 1 M. H. R. 62. (*over-ruled by 3 M. H. R. 38*).

1306. Plaintiff purchased from the 1st defendant, who purchased from the person admitted to be the owner in 1856. The resisting defendants claimed under a subsequent sale by the same person. Held, reversing the decree of the Lower Court, that on the simple principle that after the conveyance to the 1st defendant the owner of the land had nothing whatever to convey, the resisting defendants took nothing and the plaintiff was entitled to recover. 3 M. H. R. 38; (1 M. H. R. 62.) *over-ruled*.

1307. It is a rule of universal equity, and not one peculiar to English Courts, that, in order to enable the real owner of property to recover from a purchaser for value from a person allowed by the real owner to hold himself out as the owner, he must prove either direct or constructive notice of the real title or that there existed circumstances which ought to have put the purchaser on an enquiry that if prosecuted, would have led to a discovery of the real title. 11 B. L. R. P. C. 46.

1308. Where A sold land to B reserving a right to re-purchase by payment of a certain sum at a specified time, and before such time had arrived, B resold to C for valuable consideration without notice, and A failed to make the payment, and forfeited his right to repurchase:—Held, that he had no title unless relieved against the forfeiture, and that such relief could not be given as against C. 2 M. H. R. 14.

1309. The plaintiff agreed to purchase land and paid down the purchase-money taking from the vendor an agreement that if he did not register the conveyance, he would return the purchase-money. The plaintiff entered into possession; but the vendor failing to register the conveyance, he sued to recover back his purchase-money. Held that he was entitled to a refund of the purchase-money. The purchaser who had obtained possession might or might not, according to the particular circumstances of the case, be liable to pay the vendor a reasonable amount for the occupation of the land; but when no set off is pleaded, the vendor could only claim such amount by a separate action. 3 B. L. R. A. J. 353.

1310. A vendor legally conveying all his title cannot be sued for money had and received although the title prove defective.

Accordingly where the plaintiff brought two *kanam* claims and sued upon them unsuccessfully: Held, that he could not recover the purchase-money from his vendor's representatives on the ground that the consideration for the payment had failed. 1 M. H. R. 390.

1311. When it is provided by conditions of sale of land that the vendor shall not be bound to show any title prior to an instrument of a certain date, the purchaser may insist upon a defect of title appearing *aliunde* and before that date, and, if it be proved to exist, may rescind the contract and recover back earnest-money, interest, and expenses. 1 B. H. R. 77.

1312. Where a sale was set aside on the suit of the preferential heir, and both vendor and vendees appealed, but separately, the Judge, on the appeal of the vendees, in which the vendor was not made a respondent, ordered the latter to refund the purchase-money to the vendees:

Held that the decision was illegal and that the vendees should have been referred to a separate suit. 20 W. R. 149.

1313. Where a vendor contracts to deliver goods within a reasonable time, and payment is to be made on delivery, if before the reasonable time, and payment is to be made on delivery, if before the lapse of that time he merely expresses an intention not to perform the contract, the purchaser cannot at once bring his action, unless he exercise his option to treat the contract as rescinded. 1 M. H. R. 162.

1314. The plaintiff let to D a Piano on hire on the following terms:— at Rs. 30 per month ; if duly paid for and kept three years, shall then become the property of 'hirer', these terms were embodied in a voucher which was signed by D, the monthly hire was not regularly paid, and the plaintiff sued for and obtained a decree for a portion of the hire up to May 1873. Subsequently, in that month, D sold the Piano to the defendant, who obtained delivery of it in June. In a suit by the plaintiff in trover for conversion of the Piano, the Judge found that the defendant acted in good faith.

Held, that the possession acquired by D was not possession by consent of the owner within the meaning of section 108 of Act IX of 1872 exception 1, and that he did not by sale to the defendant transfer the ownership in the Piano to him. Exception 1 of section 108 does not apply where there is only a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose. 12 B. L. R. 42.

1315. When the *uralans* of a *devasvam* were four *tarawads*:—Held, that a sale of the *urayama* right by one *tarawad* without the consent of the others was altogether invalid and that the vendee could not redeem a *kanam* mortgage of the *devasvam* land though the mortgagor was *karavanan* of the *tarawad* which assumed to sell the *urayama* right. 1 M. H. R. 262.

VOLUNTEER.

1316. A volunteer, who acts as manager, cannot claim remuneration from his co-sharers without showing a previous consent on their part to pay him. 4 B.H.R.A.J. 55.

W

WAGES (Forfeiture of).

1317. Where a servant, who was engaged by the month, served from the 1st November to the 3rd December 1872 and left his master's service on the 4th December, without giving notice. Held that the servant was entitled to be paid his wages up to the end of November but forfeited the wages payable to him in respect of his December services. 10 B. H. R. 57.

WAGES (Of Dismissed Servant).

1318. A dismissed servant is entitled to wages for any broken period during which he may have served, at the rate he was earning when dismissed. 16 W. R. 60.

WAGES (Of Employe).

1319. A finding of fact that an employe is entitled to his wages notwithstanding subsequent misconduct, is not wrong in law. 21 W. R. 405.

WAGES (Of Master of Ship).

1320. The *Persia*, on a return voyage from Jeddah to Singapore was driven into Bombay harbour through stress of weather.

The owner, resident at Singapore, though frequently applied to, omitted to furnish funds to repair her, or to pay the wages of the mariners, and, the master being unable to raise funds for these purposes on the credit of the ship or owner, on the application of the mariners, the ship was, in order to levy their wages, sold by the Magistrate under the provisions of sections 55 and 56 of Act 1 of 1859.

The master, who had been engaged at Singapore, then brought a suit on the Admiralty side of the High Court, to recover out of the surplus proceeds of the ship his wages up to the time when he could return to Singapore, and his passage-money to that part.

Held, that he was entitled to recover such wages and passage-money. 6 B. H. R. O. J. 138.

WARRANTY.

1321.* Defendants agreed to purchase from plaintiffs 2,000 maunds of Indigo seed "guaranteed growth of the season 1870-71." Defendant's Agent took delivery of 865 maunds after he had full opportunity of examining them. Held that the defendants must be considered to have accepted the 865 maunds as being in accordance with the contract, although they were not really so; and that, though the acceptance was such as to conclude the defendants from objecting that that portion did not comply with the warranty in the contract, yet the plaintiffs, not having delivered the whole quantity contracted for, could not recover for the 865 maunds according to the rate mentioned in the contract, but as upon

a new contract according to their value at the time when they were accepted. 17 W. R. 244.

WARRANTY (Breach of).

1322. A buyer may at once sue on a warranty of title if he can show that the seller has not a good title in accordance with his undertaking and that he has sustained loss in consequence.

Semble.—It does not follow as a matter of course that, on proof of breach of warranty, the buyer is entitled to receive back the whole of the consideration-money; or that on its being ascertained that the seller had no title, the conditional sale is nullified. 7 W. R. 196.

1323. In a suit for compensation for breach of warranty, where the dispute was, whether the goods tendered (shellac) were according to the contract, it appeared that a sample had been taken by plaintiff's sircar and referred to the selling broker to decide whether the goods from which it had been taken ought to be accepted, and he decided that they should be taken at one rupee per maund less than the contract rate, which award the parties agreed to abide by. The sircar then went to the godown of the defendants, thoroughly examined the undelivered shellac, and removed it to the godown of the plaintiffs :

Held, that after this the parties could not be allowed to raise the question whether there had been a breach of that contract, and to ask for damages by reason of the goods not being of the quality contracted for. 23 W. R. 136.

WINDING UP [Of Company].

1324. On 25th October 1870, a petition for the winding up of the B. T. E. Company of Assam was presented to the Court of Chancery in England, by one of the shareholders of the Company; and a provisional liquidator was appointed. On 5th November, at an extraordinary meeting of the Company, it was resolved that the Company should be wound up, and liquidators were appointed. On 12th November, the petition for winding up came on for hearing, and an order was made that the voluntary winding up should continue subject to the supervision of the Court. On 18th November, by deed under hands and seals of the liquidators, M was appointed their attorney in India. On 27th October, certain immoveable properties in Assam belonging to the Company were attached in execution of decrees in certain suits in the Court of the Moonsiff of Debroghur. On 9th December, the properties were put up for sale, and purchased at prices which it was alleged were considerably under their value. Applications were made in the Moonsiff's Court at Debroghur by the purchasers for confirmation of the sales which applications were opposed by M., and, pending the Moonsiff's decision, an application was made to the Deputy Commissioner of Lukhimpore for an order to stay all proceedings in the decree-suits on the ground of the order for winding up the Company of 12th November, which application was refused on 15th February 1871. On 16th February 1871, the Moonsiff made an order confirming the sales. M

thereupon petitioned the High Court for the removal of the suits from Assam to the High Court to be tried in its extraordinary original Civil Jurisdiction, on the ground that no appeal would lie against the order of 15th February, refusing to stay the proceedings in the suits; and that if an appeal should be preferred to the Deputy Commissioner from the order of the Moonsiff confirming the sales, his decision would be final. The application was opposed on behalf of the purchasers. Held, the Moonsiff not having had notice of the winding up order of 12th November, had power to sell the property on 9th December, and the sale having actually taken place, and there being nothing to show that there was any irregularity in the proceedings, the High Court would have no power if the cases were brought down to set aside the sale. This, therefore, was not a proper case for the exercise of the power which the High Court possesses under clause 13 of the Letters Patent. 7 B. L. R. 305. 306.

